



Harassment and Bullying Policies in Public Schools

Employee Harassment

Q. Is it necessary for a school district to have an employee harassment policy?

- A. Yes. Harassment policies are vitally important for managing risk and liability. The U.S. Supreme Court has held that an employer is liable for a hostile environment created by a supervisor unless: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the employee unreasonably failed to avail themselves of any preventive or corrective opportunities. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). To show that the district has exercised reasonable care, it generally is necessary to establish, publicize, and enforce anti-harassment policies and complaint procedures. U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, www.eeoc.gov/policy/docs/harassment.html.

Q. What forms of harassment should the policy address?

- A. The policy should address harassment on the basis of any protected characteristic. While the *Faragher* and *Ellerth* cases involved sexual harassment, the U.S. Equal Employment Opportunity Commission (EEOC) takes the position that the same standards apply to all types of prohibited harassment, including harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (*i.e.*, opposition to prohibited discrimination or participation in the statutory complaint process). See TASB Policy DIA(LOCAL).

Q. How should the district communicate the policy to employees?

- A. The district should use every reasonable means to communicate the policy to employees. The burden is on the district to show that it exercised reasonable care and that the employee unreasonably failed to make use of the complaint procedures. The best way to demonstrate reasonable care is by taking steps to ensure that every employee is informed of the existence of the policy. If the policy is not communicated to employees, then it is not unreasonable for employees to fail to use it.

On this point, the EEOC suggests that an employer provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks.

Q. What should the policy include?

- A. An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:
- a clear explanation of prohibited conduct, including examples;
 - assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
 - a clearly described complaint process that provides accessible avenues of complaint;
 - assurance that the district will protect the confidentiality of harassment complaints to the extent possible;
 - a complaint process that provides a prompt, thorough, and impartial investigation; and
 - assurance that the district will take immediate and appropriate corrective action when it determines that harassment has occurred.

The policy should encourage employees to report harassment *before* it becomes severe or pervasive. While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the district must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.

Student Harassment

Q. Must the district have a policy that addresses employee-to-student and student-to-student harassment?

- A. Yes. Harassment of students based on the student's sex, race, color, national origin, disability, and religion is prohibited by both federal and state law, whether committed by employees or by other students. U.S. Const. Amend XIV; 20 U.S.C. §§ 1681 - 1688 (Title IX); 29 U.S.C. § 794 (Section 504); 42 U.S.C. §§ 12131 - 12134 (Americans with Disabilities Act); 42 U.S.C. §§ 2000d - 2000d-7 (Title VI); Tex. Const. art. I, § 3a (Texas Equal Rights Amendment); Tex. Civ. Prac. & Rem. Code ch. 106. A harassment policy provides important safeguards to protect students from prohibited behavior.

Additionally, several of the federal laws have associated regulations that expressly require a policy that includes procedures for addressing discrimination complaints. *E.g.*, 34 C.F.R. §§ 106.8-9 (Title IX regulations addressing sexual harassment complaints); 34 C.F.R. § 104.7(b) (Section 504 regulations addressing complaints of harassment based on disability); 28 C.F.R. § 35.107(b) (Americans with Disabilities Act regulations addressing complaints of harassment based on disability).

In some cases, having a policy may also protect the district from liability. For example, in the context of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 - 1688, a student who has been sexually harassed by a school district employee can seek damages from the school district if an official with authority to address the alleged discrimination and institute corrective measures on the school's behalf had actual knowledge of the discrimination and failed to respond or responded with deliberate indifference to the discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). Likewise, the U.S. Supreme Court has determined that a school district may be liable under Title IX for student-to-student harassment if: (1) its deliberate indifference causes students to undergo harassment or makes them vulnerable to it, and (2) the harassment takes place in a context subject to the school district's control. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

Districts may also be subject to an investigation and possible sanction issued by the U.S. Department of Education Office for Civil Rights (OCR) based on complaints of sexual, racial, and other harassment in violation of one of the federal laws that prohibit discrimination in programs and activities receiving federal funds. See OCR, *Know Your Rights*, www.ed.gov/about/offices/list/ocr/know.html.

Having a policy that addresses harassment of students is the first step to demonstrating that your school district is not indifferent to sexual or other forms of harassment. See TASB Policy FFH(LOCAL).

Q. What should a policy addressing harassment of students include?

- A. To safeguard students and reduce the risk of liability, a policy addressing harassment of students should define prohibited conduct and encourage prompt reporting of any incidents of harassment.

Guidance from the U.S. Department of Education Office for Civil Rights (OCR) advises that a district's harassment policy should do the following:

- state the school's commitment to eliminating harassment;
- define the types of harassment covered by the policy, which may include harassment based on race, color, national origin, ethnicity, sex, disability, sexual orientation, and religion;
- include examples of the kinds of harassing behaviors covered by the policy;
- identify the kinds of activities and sites where prohibited conduct could occur;
- include standards for determining whether a hostile environment exists;
- identify the means the school will use to investigate incidents of harassment;
- specify that the school will take remedial action to stop the harassment and prevent recurrence;
- include specific procedures to address formal complaints of discrimination;

- state the name and position of the employee responsible for accepting and managing complaints of harassment and how to contact the individual;
- require staff to report harassment about which they become aware; and
- prohibit retaliation against persons who report harassment or participate in related proceedings.

OCR, *Protecting Students from Harassment and Hate Crime: A Guide for Schools*,
www.ed.gov/offices/OCR/archives/Harassment/harassment.pdf.

Bullying

Q. Should a district have a policy to address bullying on campus?

A. Although a bullying policy is not required, it is recommended. Like the reasoning behind adopting a harassment policy, a bullying policy is an important tool to help districts manage risk and liability. Such a policy shows that districts are taking steps to address bullying to create a safe and effective learning environment. Texas does not have a law explicitly requiring districts to adopt anti-bullying policies; however, adopting a policy would assist districts in applying state bullying prevention laws and serve as a best practice.

Q. How would a bullying policy facilitate a district's application of state bullying prevention laws?

A. The 79th Texas Legislature passed several laws in an attempt to address concerns related to bullying at schools. Of note, Texas Education Code section 37.001 requires districts to prohibit bullying as part of the district's student code of conduct and to ensure that employees enforce the prohibitions. Tex. Educ. Code § 37.001(a)(7). One way the district can show that it is enforcing the bullying prohibition is to have a policy in place specifically addressing bullying and what steps an employee must take when the employee suspects bullying has occurred.

In addition, Texas Education Code section 25.0342 requires a district board of trustees to transfer to another classroom or campus as appropriate a student on request of a parent or person with authority to act on behalf of a student who claims the student was the victim of bullying. Tex. Educ. Code § 25.0342(b). The statute requires that the board or the board's designee verify that the student was in fact a bullying victim prior to granting the transfer. Tex. Educ. Code § 25.0342(c). A bullying policy would guide the board or designee in making the determination as to whether bullying did occur.

Q. Why is a bullying policy the best practice?

- A. Appropriately addressing bullying as early as possible can lessen the negative impact such acts may have on the learning environment as well as the opportunity for an event to occur that may result in district liability. Several experts and authorities, such as the U.S. Department of Health and Human Services Health Resources and Services Administration, recommend that districts establish school rules and policies as a best practice to address bullying. U.S. Department of Health and Human Services Health Resources and Services Administration, *Best Practice in Bullying Prevention & Intervention*, www.stopbullyingnow.hrsa.gov/adult/indexAdult.asp?Area=bestpractices; Olweus Bullying Prevention Program, www.clemson.edu/olweus/content.html.

A bullying policy provides the district a method to address incidents consistently and gives staff direction on how to respond appropriately if they suspect bullying has occurred. In addition, a policy that encourages early reporting will allow the district to deal with situations before they escalate. Children in particular need to know their complaints will be taken seriously and that the complaints will be kept confidential to the extent possible to avoid retaliation by classmates; otherwise, they will not feel it is safe to make a report.

One effective way to structure a bullying policy would be to mirror the model set out in the U.S. Department of Education Office for Civil Rights Guidelines, described above, as the procedural and other concerns facing harassment complaints are similar to those found in the bullying context. See TASB Policy FFI(LOCAL).

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