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 him or herself 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* (June 18, 1999), available at [www.eeoc.gov/policy/docs/harassment.html](http://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;
- an alternate reporting procedure for when an employee is reluctant or unable to report to an immediate supervisor;
- 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, or 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 or other issues that are best addressed in district policy, such as providing notice of nondiscrimination or appointing district employees to oversee the district’s compliance efforts. For example:
• Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, prohibits discrimination on the basis of sex and requires districts to: adopt and publish grievance procedures providing for prompt and equitable resolution of complaints by students and employees; designate a responsible employee to coordinate the district’s compliance efforts, including investigations of alleged violations; notify students, parents, and employees of nondiscrimination required by Title IX and the designated coordinator. 34 C.F.R. §§ 106.8-.9.

• Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794, and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, prohibit discrimination on the basis of disability and require districts that employ 15 or more employees to: adopt grievance procedures that incorporate appropriate due process standards and that provide for prompt and equitable resolution of complaints; designate a responsible employee to coordinate the district’s compliance efforts; notify students, employees, and others of nondiscrimination; and identify the designated coordinator in the notice of nondiscrimination. 34 C.F.R. § 104.7(b).

• Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d-2000d-7, prohibits discrimination on the basis of race, color, or national origin and requires districts to provide information to students and others, in a reasonable manner, regarding the protections of Title VI and its regulations. 34 C.F.R. § 100.6(d).

• The Age Discrimination Act of 1975 (the Act), 42 U.S.C. §§ 6101-6107, prohibits discrimination on the basis of age in a district’s programs or activities and requires districts to: adopt and publish grievance procedures providing for prompt and equitable resolution of complaints; designate a responsible employee to coordinate its compliance efforts, including investigations of alleged violations; notify students and others, in a continuing manner, of the Act’s protections; and identify the designated coordinator in the notice of nondiscrimination. 34 C.F.R. § 110.25.

The U.S. Department of Education Office for Civil Rights (OCR) encourages districts to use a combined notice of nondiscrimination to comply with the notice requirements in the statutes and regulations cited above. See OCR, Notice of Nondiscrimination (Aug. 2010), available at www2.ed.gov/about/offices/list/ocr/docs/nondisc.html.

In some cases, having a policy may also protect the district from liability. For example, in the context of Title IX, 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

1 In contrast to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-633a, the Act imposes a broader, but related, duty not to discriminate unlawfully on the basis of age in any of a district’s programs or activities. See Kamps v. Baylor Univ., 592 F. App’x 282 (5th Cir. 2014) (holding school’s use of GPA for admission was a reasonable non-age based factor so as to meet exception to liability under the Act).
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 Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). See, e.g., *Carmichael v. Galbraith*, 574 Fed.Appx. 286 (5th Cir. 2014) (per curiam) (reversing district court’s dismissal of student-on-student sexual harassment complaint, where a thirteen-year-old male student committed suicide after bullying by other male students, including being stripped nude and tied up in the boys’ locker room).

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* (last modified on Oct. 16, 2015), available at www.ed.gov/about/offices/list/ocr/know.html.

Having a policy that addresses harassment of students and notifies parents, students, and employees of nondiscrimination efforts in accordance with federal requirements 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 has also issued extensive policy guidance for districts regarding how to prevent, investigate, and address specific types of student harassment. These guidance documents are available on the OCR Website at www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html.

Bullying

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

A. Yes. Texas law requires all school districts to adopt a policy and procedures to address bullying on campus. See TASB Policy FFI(LOCAL). The definition of bullying includes both in-person bullying and bullying that may occur through electronic expression, commonly referred to as “cyberbullying.” Texas Education Code section 37.0832 provides the definition of bullying:

(a) “Bullying” means, subject to Subsection (b), engaging in written or verbal expression, expression through electronic means, or physical conduct that occurs on school property, at a school-sponsored or school-related activity, or in a vehicle operated by the district and that:

(1) has the effect or will have the effect of physically harming a student, damaging a student’s property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property; or

(2) is sufficiently severe, persistent, and pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student.

(b) Conduct described by Subsection (a) is considered bullying if that conduct:

(1) exploits an imbalance of power between the student perpetrator and the student victim through written or verbal expression or physical conduct; and

(2) interferes with a student’s education or substantially disrupts the operation of a school.

Q. What should a district’s bullying policy include?

A. The Texas Education Code requires that all school district bullying policies address certain issues. Specifically, the policy should:

- prohibit bullying;
- prohibit the retaliation against any person who reports or provides information of an incident of bullying;
- establish a procedure for providing notice to a parent or guardian about an incident of bullying;
- establish the actions a student should take to obtain assistance, and intervention;
- provides available counseling options for students;
- establishes procedures for reporting an incident of bullying, investigating and determining whether the conduct was bullying;
- prohibits the discipline of a student found to be a victim of bullying if the student engaged in self-defense in response to the bullying;
- requires that any discipline for bullying of a student with disabilities complies with applicable federal requirements and the Individuals with Disabilities Education Act (IDEA).


In order to comply with the district’s obligations under federal civil rights laws, a bullying policy should also require the administrator who conducts a bullying investigation to determine whether the allegations, if proven, would constitute prohibited conduct under the district’s harassment policy. If so, TASB Policy FFI(LOCAL) requires the investigation to proceed under FFH(LOCAL) and to include a determination as to each type of alleged conduct.

Q. What other administrative remedies should a district consider when addressing bullying?

A. Texas Education Code section 25.0342 requires a district board of trustees to transfer, to another classroom or campus, 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). Additionally, a board of trustees may transfer a student who engaged in bullying to another classroom or campus, in consultation with the student’s parent or guardian. Tex. Educ. Code § 25.0342(b-1). If a board of trustees transfers a student who engaged in bullying to another campus, the school district is not required to provide transportation services to that student. Tex. Educ. Code § 25.0342(f). The board or the board’s designee must verify that the student was in fact a bullying victim prior to granting the transfer. Tex. Educ. Code § 25.0342(c). The findings from the administrative investigation into the reported incident of bullying will provide the board or designee the determination of whether bullying in fact occurred.
These transfer provisions are found in the TASB Policy Manual at FDB(LEGAL).

**Q. How should the district communicate the bullying policy to employees, parents, and students?**

A. A district is required to provide notice of its bullying policy and procedures to parents, students and employees. The procedures for reporting incidents of bullying must be posted on the district’s website to the extent practicable. Tex. Educ. Code § 37.0832(e). Additionally, the policy and any procedures adopted by the board of trustees must be included in the district’s student and employee handbooks as well as the district improvement plan. Tex. Educ. Code § 37.0832(d). School districts are encouraged to provide training and staff development to all school district employees, including auxiliary staff, on the issues of bullying and preventing, identifying, responding to and reporting incidents of bullying. Tex. Educ. Code § 21.451(d).

**Q. Why is a bullying policy important?**

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.

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. Students and parents 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.

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*This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.*

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