

Preventing and Responding to Harassment and Bullying



Littleton Public Schools  
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The Data

Massachusetts Youth Risk Behavior Survey, 2017

➤ High School Students reporting that they've been bullied in the last year:

- 14.6% of all students (2015 15.6%; 2013 17%);
- 13.6% report being cyber-bullied (2015 13.0; 2013 14%);
- 17.8% of female students (2015 18.7%);
- 10.6% of female students report being cyber-bullied (2015 17.4%; 2013 19%);
- Gay, lesbian and bisexual students (2015 34.3%); no data for 2017.

➤ Middle School Students:

- 34% of all students report being bullied (2015 32.9%; 2013 36%);
- 14% report being cyber-bullied (2015 15.2%; 2013 14%);
- 37.8% of female students (2015 61.6%);
- 28.1% of African-American students (2015 65%).

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Headlines

- *Newburyport School Failed to Protect Victim, 15, from Sex Assaults*  
◦ U.S. News and World Report, August 26, 2017
- *NAACP Calls for Removal of Boston Latin's Headmaster*  
◦ Boston Globe, February 2016
- *Newton Principal Failed to Report Anti-Semitic Graffiti*  
- Boston Globe, March 2, 2016
- *AG: Easthampton district ignored 'serious' warnings of racism, tension last school year*  
- Daily Hampshire Gazette, August 26, 2017
- *At the high-ranked Mystic Valley Regional Charter School, a troubling pattern on issues of race*  
- Boston Globe, July 7, 2020
- *Study finds Black girls in Massachusetts 4x more likely to be disciplined at school than white classmates* - Boston Herald, September 7, 2020

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The Massachusetts Bullying Prevention and Intervention Act: Definitions

- M.G.L. c. 71, § 37O, Bullying is defined as:
  - the repeated use by one or more students or by a member of a school staff including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that:
    - causes physical or emotional harm to the victim or damage to the victim’s property;
    - places the victim in reasonable fear of harm to himself or of damage to his property;
    - creates a hostile environment at school for the victim;
    - infringes on the rights of the victim at school; or
    - materially and substantially disrupts the education process or the orderly operation of a school.



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The Massachusetts Bullying Prevention and Intervention Act: Definitions



Cyber-bullying:

- bullying through the use of technology or any electronic communication, including any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Also includes:
  - the creation of a web page or blog in which the creator assumes the identity of another person.
  - the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in the definition of bullying.
  - the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions in the definition of bullying.

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Initial Response to a Harassment or Bullying Complaint



Upon receipt of a complaint of bullying the Principal must initiate an investigation.

- Preliminary determinations when commencing an investigation of bullying:
  - Is there a basis for immediate notification of law enforcement authorities?
  - Is there a need to notify another school district or school principal?
  - Are any immediate interventions necessary to ensure the safety of the victim and/or witnesses?
  - Could the conduct complained of constitute harassment based on the victim’s membership in a protected class (“Discriminatory Harassment”) in violation of federal or state civil rights laws?

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## Forms of Discrimination

- Different treatment
  - Limitation – participation in sports, field trips, etc.
  - Exclusion (from school or a dance)
  - Suspension
- Harassment
- Disparate Impact????



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Title IX

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.*

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## Title IX Sexual Harassment is Separate Process

- The new Title IX regulations were finalized on May 6, 2020.
- The regulations go into effect on August 14, 2020.
- The regulations imposed an extremely prescriptive grievance process and have created a much more detailed and resource-intensive investigative process.
- The single-investigator model is now eliminated. Multiple personnel will need to be involved in the investigative process.
- Formal complaint is required to initiate investigation.
- Districts will need new Title IX Grievance Procedures to meet the requirements.



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## New Definition of Sexual Harassment

- (1) Any instance of quid pro quo harassment by a employee; or
- (2) Unwelcome conduct on the basis of sex, including unwelcome conduct based on sex stereotyping or on the basis of traditional notions of masculinity and femininity, that is sufficiently severe and pervasive and objectively offensive conduct, effectively denying a person equal educational access; or
- (3) Any instance of sexual assault, dating violence, domestic violence, or stalking as defined by the Clery Act and the Violence Against Women Act.

## TITLE IX

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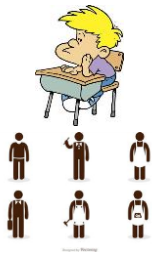
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## Students and Employees Protected

ALL THREE TYPES OF SEXUAL HARASSMENT APPLY TO BOTH STUDENT VICTIMS AND EMPLOYEE VICTIMS.

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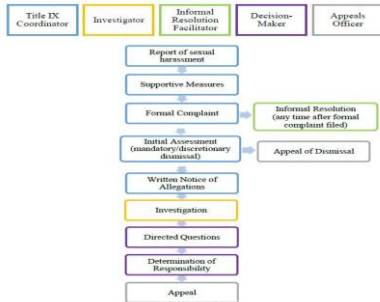
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Title IX Process Overview Flowchart



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### All Non-Title IX Sexual Harassment Claims are Processed Under Our Civil Rights Grievance Procedures

- ♦ **Race, Color, National Origin**
  - Title VI of the Civil Rights Act of 1964, M.G.L. c. 76, § 5
- ♦ **Religion**
  - M.G.L. c. 76, §5, and Title VI of the Civil Rights Act of 1964
- ♦ **Disability**
  - Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act
- ♦ **Sexual Orientation and Gender Identity**
  - M.G.L. c. 76, § 5; Title IX of the Education Amendments of 1972 (maybe)
- ♦ **Gender Discrimination**
  - M.G.L. c. 151C
  - Title IX of the Education Amendments of 1972
- ♦ **Age**
  - The Age Act

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### Gender Identity

No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such a public school on account of... gender identity.

M.G.L. c. 4, § 7: Gender Identity – a person’s gender-related identity, appearance or behavior, whether or not that gender identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth....

“Gender identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person’s core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.”

♦ *Guidance for Massachusetts Public Schools, January 2013, available at: <http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html>*

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### Civil Rights Discrimination and Harassment

- This presentation focuses on claims that do not allege Title IX sexual harassment.
- Wakefield has separate procedures to address Title IX Sexual Harassment.

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### Hostile Environment

- A hostile environment is created when
  - The harassing conduct is sufficiently:
    - severe,
    - pervasive, or
    - persistent
  - such that it denies or limits the ability of an individual to participate in, or benefit from, the services, activities or privileges provided by the school.




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### Hostile Environment - Factors to Consider

- |                                    |                                                                                   |
|------------------------------------|-----------------------------------------------------------------------------------|
| •Context                           | •Identity, number and relationships of persons involved                           |
| •Nature (e.g., physical or verbal) | •Particularized characteristics                                                   |
| •Scope                             | •Incidents outside of the complaint                                               |
| •Frequency                         | •Generally, the more severe the conduct, the less need to show repeated incidents |
| •Duration                          |                                                                                   |
| •Location of incidents             |                                                                                   |

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### When Must the District Respond?

- Bullying and Harassment - Notice to the District is established when members of school staff *have witnessed or become aware of* the conduct. This includes, but is not limited to:
  - Teachers, administrators, school nurses, cafeteria workers.
  - Custodians, bus drivers, athletic coaches, advisors to school sponsored extra-curricular activities.
- Title IX – actual notice - Such staff members must immediately report the conduct to the principal or the appropriate designee.




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### The Nature of the Conduct Defines the Response, Not the Label Used to Describe it

- The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond.
- Rather, the nature of the conduct itself must be assessed for civil rights implications.
- So, for example, if the abusive behavior is on the basis of race, color or national origin or another protected class, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations.



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### One Investigation

If the District is aware of allegations that could potentially constitute bullying (under state law) and a potential civil rights violation (e.g., race-based harassment), then:

The District should conduct one comprehensive investigation that addresses both the bullying allegations and civil rights allegations.

- Principal or designee must conduct bullying investigation.
- Civil Rights Coordinator (e.g., Title VI) or person knowledgeable about the civil rights laws.
- Have the principal designate the Civil Rights Coordinator to conduct the investigation.

Policies:

1. Have sound grievance procedures (see above); and
2. Follow your policies!!!!
  - Following policies ensures prompt and equitable response as well as transparency and consistency in the process.

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### Prompt and Equitable Investigation is Required



- Legally sound grievance procedures.
- Following those grievance procedures.
- No fixed timeframe for completion of investigation. OCR will evaluate a school's "good faith effort" to conduct a fair and impartial investigation.
- What is equitable?
  - Trained investigator.
  - Burden is on the school, not the parties, to prove the allegation (i.e., hostile environment).
  - Consider exculpatory and inculpatory evidence.
  - Any rights made available to one party must be made available to the other (e.g., parent, advocate or lawyer participation).
  - "Gag orders" applied to parties likely inequitable.
  - Provide written notice of the outcome.

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### Mandatory Elements of Grievance Procedures

OCR will evaluate the following elements in determining whether the procedures are "prompt and equitable:"

**MANDATORY!**

1. Notice of the procedure, including how to file a complaint, to student and parents;
2. Application of the procedures to complaints alleging discrimination and harassment carried out by employees, other students, or third parties;
3. Adequate, reliable and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
  - Considering assigning another investigator:
  - When the subject of the investigation is the investigator's supervisor; or
  - Other circumstances arise in which the investigator cannot be impartial.

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### Mandatory Elements of Grievance Procedures

4. Designated and reasonably prompt timeframes for the major stages of the complaint process;
5. Notice to the parties of the outcome of the complaint; and
6. An assurance that the school district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

\*\*Please note that the new Title IX regulation (effective August 14, 2020) have separate and additional requirements for grievance procedures).

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### Investigating Both Discrimination and Discriminatory Harassment



Two Tasks:

1. Determine the facts.
  - Did the investigation corroborate by a preponderance of the evidence the allegations?
    - "He said/she said" often not enough to meet this standard.
2. Apply the legal standard to the established facts.
  - Does the conduct constitute discrimination (e.g., different treatment) or harassment (hostile environment) in violation of other applicable state and/or federal law(s)?
3. Reach a conclusion based on the application of the legal standard to the established facts.

◦ Discriminatory Harassment: formal written notice of outcome is required to both the victim and accused regardless of the finding.

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## Best Practice – Communication



- Know the process.
- Keeping the parties informed regularly throughout the process.
- We want to be transparent and predictable throughout the process.
  - Again – follow the policy.....
- Transparency and predictability helps to build confidence in our capabilities and in the investigatory process.

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## Before you Investigate Consider Interim Measures

Should be determined on a case-by-case basis with the input of the victim and the parents depending on the age of the students involved, the severity of the allegations, and any continuing effects on the complainant.

Generally, should try to minimize the burden on the complainant.  
◦ Designed to ensure the safety and well-being of the complainant and the school community while the investigation is pending.



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## Interim Measures

What are interim measures and when is a school required to provide such measures?

- "Interim measures are individualized services offered as appropriate to either both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while the investigation is pending."
- "Interim measures include:
  - counseling,
  - extensions of time or other course-related adjustments,
  - modifications of work or class schedules,
  - campus escort services, restrictions on contact between the parties...
  - leaves of absence,
  - increased security and monitoring of certain areas of campus,
  - and other similar accommodations."



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## Gathering Evidence

Obtain all relevant documentation and physical evidence.

- Copies of Facebook posts, texts, notes, photographs of injuries, health records.

Request a Written Statement

Interview alleged aggressor and all identified witnesses.

- All investigative interviews should be conducted privately and individually.
- Avoid divulging information about the specifics of the complaint.
- Document all interviews of, and information provided by, the target, perpetrator and witnesses.



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## Witness Interviews

⊙ Be specific:

- Your entire goal is to determine whether there is enough evidence to substantiate the complaint through a thorough investigation –
  - He said/she said is usually not enough to meet this standard
    - Look for evidence or information that tends to corroborate or dispel the allegations
- Start with general questions,
  - E.g., have you observed any harassment in your classroom
  - Then move on to more specific questions as the interview progresses
- For every allegation, you need to be asking:
  - The date and time;
  - Names of other witnesses present; and
  - Any other evidence (notes, emails about this)
  - Who? What? When? Where? Why?



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## Potential Pitfalls in Investigation



- Failure to investigate each allegation alleged;
- Investigating the singular allegation without inquiry as to whether other incidents occurred;
- Failure to follow up on other allegations learned during the course of the investigation;
- Failure to interview all of the witnesses;
- Failure to establish what actually occurred (e.g., what statements were made).

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### Written Notice of Outcome – Discriminatory Harassment

- Whether or not a different treatment, hostile environment or disparate impact is established?
  - The Investigator must notify the victim/parents in writing of the outcome of the investigation regardless of whether the allegations were substantiated; and
  - Any appeal rights available under the District’s procedures.
- Note well: Bullying Prevention and Intervention Act only required notice when the bullying is substantiated.

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### Notice of Outcome and Appeals

- OCR recommends that a school provide written notice of the outcome of discipline proceedings to the reporting and responding parties concurrently.
- This notification must include:
  - Any initial, interim or final decision by the institution;
  - Any sanctions imposed by the institution; and
  - The rationale for the result and the sanctions.
- For all elementary and secondary schools, the school should inform the reporting party:
  - Whether it found that the alleged conduct occurred;
  - Any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party; and
  - Other steps the school has taken to eliminate the hostile environment, if the school found one to exist.




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### Confidentiality

#### Discriminatory Harassment

- FERPA applies:
- E.g., harasser may have a right under FERPA to inspect and review portions of the complaint or investigative report that directly relate to him or her. In that case, the school must redact the complainant’s name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her.
- In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant’s confidentiality.
- Often use “Student A”, “Student B” and “Student C” in order to make this easier if you receive a request for records.

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## Safety Plans/Corrective Action

- If the District establishes that a hostile environment exists, then:
  - Must take steps reasonably calculated to end the harassment
  - Eliminate any hostile environment that has been created.
  - In some situations, remedy the effects of the harassment (e.g., tutoring, counseling, possible academic remedies, development of new policies or procedures, etc.).
- Prevent any further harassment.
- Prevent retaliatory actions.
  - Should be explicitly written into outcome letter and/or investigative report.
  - Disciplinary Actions – do not share with victim.
  - “Corrective and remedial action” has been taken.



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## Safety Plans

- When bullying and/or harassment is substantiated, they should be designed to achieve to main (2) goals:
  1. Impose conditions on the aggressor reasonably calculated to eliminate the harassment and remedy the effects of past harassment; and
  2. Provide voluntary opportunities to the victim to access services that will further his or her safety:
    - o The opportunities for the victim (e.g., counseling, etc.) should always be voluntary. We do not want to impose any conditions or restriction that would potentially have chilling effect on a victim's (or other victim's) willingness to come forward.
- The provisions in the safety plan should be individualized and catered to the individual circumstances presented.
- In cases in which the bullying and/or harassment is not substantiated it would only be appropriate to impose corrective or remedial action if:
  - a) there was another violation of school rules (other than harassment or bullying) on which the action is based; or
  - b) the parties voluntarily consent to such action(s) in writing.

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## Restraining Orders

- At times, a member of the school community will be made aware that a restraining order or harassment prevention order is in place restricting certain individuals from having access to a student in the district or between two students.
- A restraining order applies to the defendant. The school district is not a party or subject to the restraining order. The school district's role is to help facilitate compliance with it, if possible.
- The defendant is responsible to ensure that he or she adheres to the terms of the restraining order.
- Anyone notified of a restraining order or harassment prevention order should alert the building principal immediately both of the order and any specific conditions or safety plans that must be followed/put into place to ensure that the order is adhered to.
- In instances of student to student “stay away” or “no contact” orders, the building principal or designee will ensure that both students are aware of the terms of the restraining order and their responsibilities under the order.

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### Examples of Remedial and Corrective Actions

- Special training for staff on recognizing and effectively responding to complaints of discrimination;
- Adjustments to offender's class schedule;
- Access as needed to school guidance counselors, psychologist, etc.;
- Access as needed to Principal or building level civil rights coordinator;
- Reaffirming school's policy against discrimination;
- Publicizing means to report discrimination and harassment; Conducting follow up interview with target and reporters and witnesses to monitor effectiveness of interventions and claims of retaliatory treatment;
- Conducting outreach to involve parents in an effort to identify problems and improve school climate;
- Counseling perpetrators about the hurtful effects of their conduct;
- Additional supervision to prevent recurrence of bullying or harassment (e.g., hallways);
- Disciplinary action against the offender(s).
- Should not be punitive or impose involuntary conditions as to the victim (or alleged victim).

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### Record Keeping

- Take notes!
- Review notes immediately after interview:
  - Look for information missed.
  - Create chronology.
  - Compare information to that of other sources.
- Track outstanding information to ensure it is obtained.
- Immediately obtain any social media evidence (texts, Facebook posts, twitter exchanges, etc.).
- Ensure you document precise language of any alleged offensive statements that were made.




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### Record Keeping

- Track:
- Initial date of complaint/report
  - Individual receiving complaint
  - Complainant & respondent names
  - Witness names
  - Investigator name(s)
  - Nature of incident
  - Location of incident
  - Date & time of incident
  - Relationship between parties
  - Social organizations (if any)
  - Results of Investigation
  - Date investigation concluded
  - Response by school for complainant/victim
  - For respondent
    - Discipline, if any
  - Other remedial measures

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## Record Keeping

Location

- Accessible by administrators
- Not accessible by parties to investigation/students



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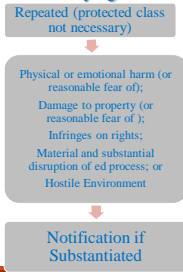
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### Harassment



### Bullying



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## What is different treatment?

When a student or employee is subject to different treatment because of his or her race, color, national origin, age, sexual orientation, gender, gender identity, or disability.

Most often arises in the context of:

- Discipline (suspension, expulsion)
- School/ Classroom assignment
- Grading
- Athletics
- Minority placement in special education
- Field trips
- No trespass orders

Applies to alleged actions/statements of discrimination by staff (in addition to hostile environment)

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### Different Treatment Analysis

Multi-step analysis:

- (1) whether the individual is a member of a protected class, (e.g., based on race);
- (2) if so, whether the individual was treated differently than similarly situated individuals outside the protected class (e.g., non-African-American students if alleged victim was African American).
  - These similarly situated persons are generally referred to as “comparators” because the investigator compares the treatment of the individuals outside of the protected class to the treatment received by the individual or group of individuals alleged to have been discriminated against.

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### Different Treatment Analysis

- 3) If the investigation determines that the staff treated a comparator or group of comparators differently than it treated the individual or group of individuals alleged to have been discriminated against, then
    - the next inquiry is whether there are non-discriminatory reasons or justifications for the different treatment.
  - 4) The District must then scrutinize these reasons or justifications to ensure that they are legitimate and not merely a pretext for discrimination.
- Note well: Direct evidence of different treatment may also provide evidence of bias by the individual against a student(s) based on race, color or national origin.
- E.g., statement evidencing specific race-based animus or prejudice.

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### U.S. v. Volusia County (Fla) (2021)

- DOJ’s investigation substantiated allegations that the District unnecessarily excluded disabled students by regularly requiring parents to pick up their children with disabilities from school or to keep them home.
- The investigation also found that:
  - The District excluded students with disabilities by disciplining them for behavior that resulted from their disabilities and engaged law enforcement to remove them from school while failing to implement the necessary behavior supports and provide training to staff on how to properly respond to disability-related behaviors.
- In response to investigation by DOJ under the Americans with Disabilities Act (ADA), the school district has agreed to address its “systemic and discriminatory practices to punish students with disabilities for their disability-related behavior and deny them equal access” to the districts programs.

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## Disparate Impact

- Policies, practices and procedures that appear neutral but have discriminatory effect on a group based on race, color or national origin.
1. Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races?
  2. Is the discipline policy necessary to meet an important educational goal?
  3. Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group or is the school's preferred justification a pretext for discrimination?
- See *OCR Dear Colleague Letter* regarding school discipline and disparate impact on January 8, 2014; however, the *Dear Colleague Letter* was revoked by the U.S. DOE on December 21, 2018. The revocation is available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>

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## Student Discipline Data

Reports to the DESE  
603 CMR 53.14

- School districts must collect and annually report data to the DESE regarding all In-School Suspensions, Short-Term Suspensions, Long-term Suspensions, Expulsions, and Emergency Removals, student accessing of alternative education services, and such other information as may be required by the Department.
- Principals **must periodically review discipline data** by selected student populations, including but not limited to, race and ethnicity, gender, socioeconomic status, English language learner status, and student with a disability status. The Principal must assess the impact of such disciplinary action on selected student populations.
- In the fall of each year, the DESE must publish an analysis and report of student discipline data disaggregated by district and school, and by selected student populations, included but not limited to race and ethnicity, gender, socioeconomic status, English language learner status, and student with a disability status.

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## Harassment Investigation Guidance

- Dear Colleague Letter, October 26, 2010  
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>
- Racial Incidents and Harassment Against Students,  
<http://www2.ed.gov/about/offices/list/ocr/docs/race394.html>
- Addressing the Root Causes of Disparities in School Discipline  
<https://safesupportivelearning.ed.gov/sites/default/files/15-1547%20NCSSLE%20Root%20Causes%20Guide%20FINAL02%20mb.pdf>
- Questions and Answers on Title IX Sexual Harassment, U.S. DOE, July 2021: <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

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Questions??

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