

SEXUAL HARASSMENT AT SCHOOL AND IN THE WORKPLACE

CAITLIN LEACH MULROONEY, ESQUIRE

MURPHY, LAMERE & MURPHY, P. C.

2

LAWS PROHIBITING SEXUAL HARASSMENT



3

TITLE VII AND TITLE IX

FEDERAL PROHIBITION OF DISCRIMINATION BASED ON SEX

4 TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Provides that it shall be unlawful employment practice for an employer ---

...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

5 TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

- Prohibits discrimination based on sex in education programs and activities at all levels.
- Title IX protects students and employees from all forms of sex discrimination, including discrimination based on gender identity.
- Essence of the Law: You cannot exclude, separate, deny benefits to, or otherwise treat differently any person on the basis of sex (unless expressly authorized by the regulations – exceptions to the general rule).

6 MASSACHUSETTS STATE LAWS

Article I 14 of the Amendments to the Massachusetts Constitution

- Prohibits discrimination, exclusion from participation, and denial of benefits on the basis of disability in any program or activity in the Commonwealth.

Massachusetts Civil Rights Act

- Protects citizens' civil rights, including right to attend public school

M.G.L. Chapter 151B – makes sexual harassment in workplace unlawful

7 SEXUAL HARASSMENT

Sexual Harassment is unwelcome conduct of a sexual nature, such as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.

- TWO TYPES:
 - Quid Pro Quo Sexual Harassment
 - Hostile Environment

Sexual Violence is a form of sexual harassment and refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent.

8

EXAMPLES OF SEXUAL CONDUCT FROM U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC, WASHINGTON, D.C., 2008

- Making sexual propositions or pressuring students/staff for sexual favors;
- Touching of a sexual nature;
- Writing graffiti of sexual nature – including sexual violence or rape;
- Displaying or distributing sexually explicit drawing, pictures, or writing materials;
- Performing sexual gestures or touching oneself sexually in front of others;
- Telling sexual or dirty jokes;
- Spreading sexual rumors or rating students/staff as to sexual activity or performance; or
- Circulating or showing e-mails or websites of a sexual nature

9 SEXUAL HARASSMENT - HOSTILITY

Examples include:

- Offensive or derogatory language directed at another person based on a protected characteristic;
- Threatening, intimidating, or humiliating conduct;
- Offensive jokes, name calling, slurs or rumors;
- Physical aggression or assault;
- Display of graffiti or printed material promoting stereotypes of protected characteristics; and
- Aggressive conduct such as theft or damage to property.

10 WORDS CAN BE AN INDICATOR OR SIGN

Incidents in which degrading or gender-specific words are used, including:

- “bitch”
- “faggot”
- “gay”
- “pussy”
- “slut”
- “whore”

II SEXUAL HARASSMENT – DESIRE-BASED ACTIONS

- Unwelcome sexual advances;
- Sexually motivated physical, verbal or non-verbal conduct;
- Requests for sexual favors;
- Intimate touching or coercing physical contact that is sexual in nature; or
- Conversations or jokes of a sexual nature.

12 SEXUAL CONDUCT MUST BE UNWELCOME

The sexual conduct at issue must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.

When presented with conflicting evidence as to welcomeness, look at the record as a whole and the totality of the circumstances, analyzing on a case-by-case basis.

While complaint or protest by the victim is helpful in establishing that the conduct was unwelcome, it is not essential – many victims may not speak up for fear of repercussions.



13 QUID PRO QUO SEXUAL HARASSMENT

- Includes sexual advances and requests for sexual favors to which the submission or rejection becomes the basis for employment decisions or a term or condition of employment.
- Examples would include the recent accusations against Harvey Weinstein in which aspiring actresses allege that the producer promised them stardom contingent upon satisfying his sexual demands, and denied advancement in retaliation for rejecting his requests.

14 HOSTILE ENVIRONMENT

Hostile Environment

- Conduct must be severe and pervasive
- Sufficiently serious to limit a student's ability to participate or benefit from the education program or activities
- Conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment
 - Factors for consideration include:
 - Whether the conduct is verbal or physical or both;
 - How frequently was the conduct repeated;
 - Whether the conduct was hostile and patently offensive;
 - Whether the alleged harasser is a co-worker or supervisor;
 - Whether the others joined in perpetrating the harassment; and
 - Whether the harassment was directed at more than one individual.
- For example, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment

15 “REASONABLE PERSON” STANDARD

- In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a “reasonable person.”
- This standard should also be applied to determine whether the conduct was of a sexual nature.
- Consideration should be given to the context in which the alleged harassment took place – reasonable person’s reaction in similar environment/under similar circumstances.
- Should consider the victim’s perspective and not stereotyped notions of acceptable behavior.

16 REASONABLE JUDGMENT AND COMMON SENSE

- It is the **totality of the circumstances** in which the behavior occurs that is critical in determining whether a hostile environment exists – consider both subjective and objective perspective.
- With regard to student issues, school personnel are advised to use common sense and to consider factors such as the age and maturity of the students.

17 OTHER FACTORS:

The conduct does not necessarily have to be repetitive

- If sufficiently severe, single or isolated incidents can create a hostile environment.
- The conduct does not have to be targeted at a specific complainant.
- Can create hostile environment for those that witness the conduct, not just the person at which the conduct was directed.

Example: A single instance of sexual assault can create a hostile environment.



18 GENDER-BASED HARASSMENT

- Gender-based harassment is another form of sex-based harassment and refers to unwelcome conduct based on an individual's actual or perceived sex, including harassment based on gender identity or nonconformity with sex stereotypes, and not necessarily involving conduct of a sexual nature.




19 MISCELLANEOUS

DISCIPLINE

- A district may not subject any person to separate or different rules of behavior, sanctions, or other treatment, such as discriminatory discipline, based on sex.

PREGNANT AND PARENTING STUDENTS/STAFF

- A district may not discriminate or exclude any student from its education program or activity, including any class or extracurricular activity based on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.
 - There are also laws that protect pregnant and breastfeeding staff and that relate to maternity leave.
- 

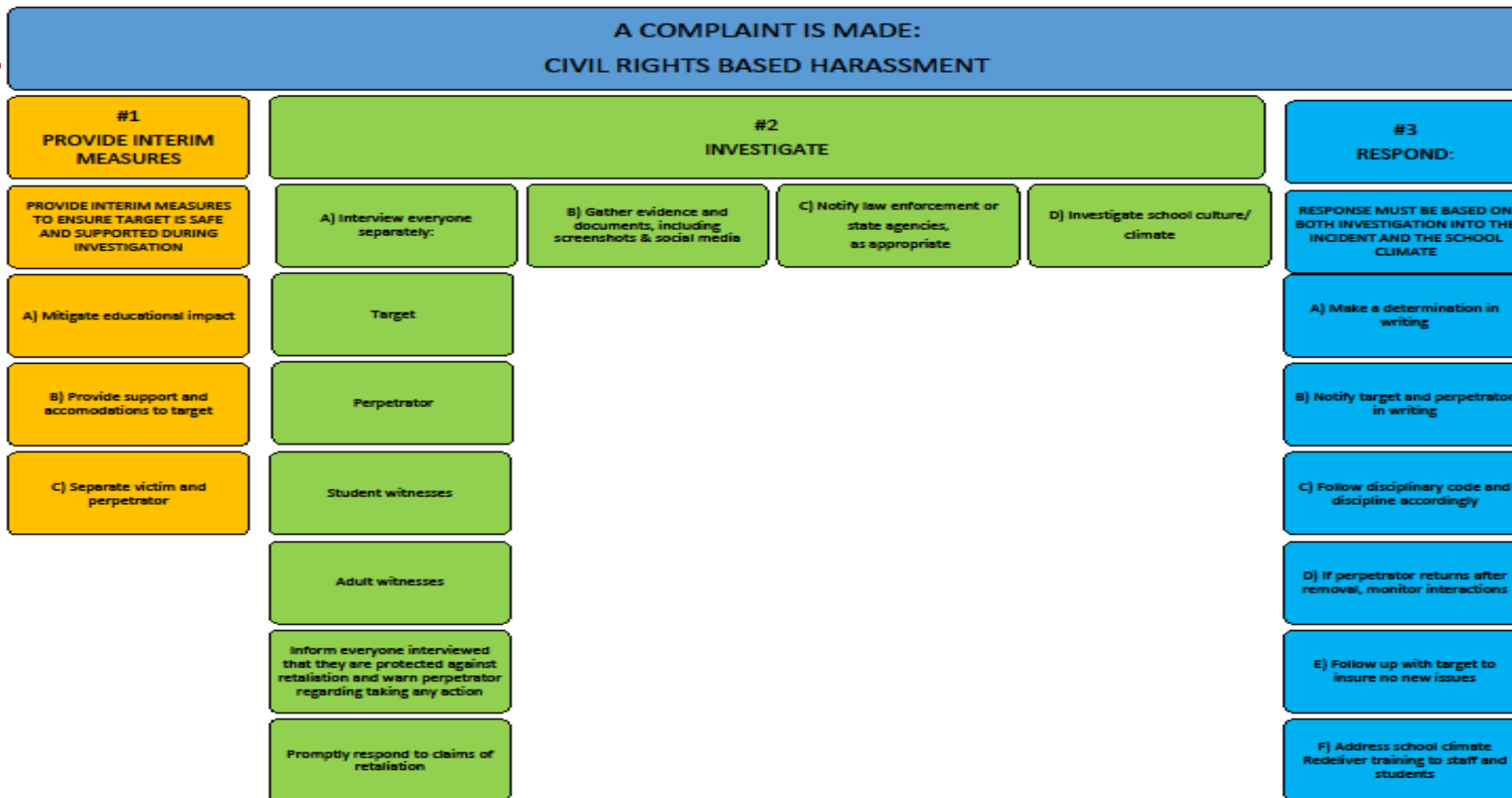
20 WHEN DO SCHOOLS BECOME RESPONSIBLE FOR ADDRESSING SEXUAL HARASSMENT?

- Schools are responsible for sexual harassment that they know about or should have known about (with certain exceptions).
- Schools are responsible for conduct that is severe, persistent and pervasive.
- Liability will attach when the school is found to act with “deliberate indifference.”

21 SCHOOL DISTRICT RESPONSE

- Provide necessary interim measures to protect target.
- Protect against retaliation during and after investigation.
- Investigate promptly.
- Notify law enforcement/DCF if potential crime.
- Keep the complainant informed about the outcome of the investigation.
- Take reasonable, prompt, age-appropriate and effective action to end the harassment and prevent it from recurring.
- Take remedial action to remedy effects of harassment/discrimination, if found.

22



23 PREVENTING RETALIATION

- Inform victim and witnesses about their protections against retaliation
- Inform perpetrator against taking any action that could be viewed as retaliatory - ie. through friends, social media
- Separate, when necessary and appropriate, the victim and alleged perpetrator
- Provide a point person for reporting any concerns regarding retaliation
- Promptly investigate and respond to allegations of retaliation

24 OTHER RESPONSIBILITIES OF THE SCHOOL

Every school must:

- Issue a written policy against sex discrimination/harassment;
- Adopt and publish grievance procedures; and
- Have a Title IX coordinator.

25

COMPLAINT INVESTIGATIONS



26 WHAT IS A COMPLAINT?

- Allegation in WHATEVER form
 - Students
 - Parents
 - Staff
 - Anonymous
- Don't worry about labels



27 WHAT IS THE RESPONSE?

- Reporting and
- Interim Measures – support and safety
- Investigation
- Determining Facts
- Taking Necessary Action

28 OUT-OF-SCHOOL/WORK CONDUCT

Discipline when conduct results

1. in a “substantial disruption” to the education process/workplace OR
2. when the conduct creates a hostile learning environment/workplace

Even if it does not warrant discipline, consider other types of response

29 STANDARD TO BE USED

Probable cause:

- “More Likely Than Not”

(Do not use a “beyond a reasonable doubt” standard)

30 MAKING THE REPORT

- Description of allegations
- Response of accused
- Names of witnesses, facts found, summary of witness statements
- Investigator's findings and conclusions
- Meet with complainant and accused (separately) to notify of completion and whether allegations substantiated and what responsive measures will be taken
- Consider the confidentiality concerns

3 | CONCLUDING THOUGHTS

- If you are experiencing or witness what you think may be sexual harassment, **REPORT IT TO AN ADMINISTRATOR.**
- This applies to issues involving both students and staff.
- Allow the administration to investigate your concerns and respond accordingly.
- Remember, just because something does not rise to the level of sexual harassment, does not mean it should not be addressed.
- Also, with regard to students, the differences between regular student discipline, bullying and harassment are very nuanced- let an administrator investigate any concerns and make that determination so that appropriate action can be taken.

32 FURTHER QUESTIONS?

Caitlin Leach Mulrooney, Esquire
Murphy, Lamere & Murphy, P.C.
50 Braintree Hill Office Park, Suite 202
Braintree, Massachusetts 02184

Phone: (781) 848-1850

Fax: (781) 849-0749