

# Reporting and Investigating Allegations of Discrimination

Jason Ballum  
Jballum@sandsanderson.com  
(804) 783-7281

LaRana Owens  
Lowens@sandsanderson.com  
(804) 783-7250



# Agenda

1. Recognition
2. Investigation
3. Documentation/Response
4. Examples

# Recognition

# School Board Policies Prohibit Discrimination and Harassment

- For many school divisions these policies are identified as policy JB and policy JFHA.
- Prohibit, discrimination, harassment, and bullying of any kind, including harassment or bullying on the basis of a person's:
  - sex, sexual orientation, race, creed, color, national origin, gender, gender identity, ethnicity, religion, disability, ancestry, marital or parental status, or any other unlawful basis
  - Race
  - Color
  - Creed
  - National Origin
  - Religion
  - Sex
  - Age
  - Disability
  - Gender
  - Gender identity
  - Ethnicity
  - Sexual Orientation
  - Ancestry
  - Marital Status
  - Parental status
  - Or any other characteristic protected by law:

# From where do the School Board Policies Originate?

- There are several federal, civil rights laws that prohibit discrimination and harassment, including:
  - **Title VI of the Civil Rights Act of 1964** – prohibits discrimination on the basis of race, color, or national origin;
  - **Title IX of the Education Amendments of 1972** – prohibits discrimination on the basis of sex;
    - *We are not dealing with Title IX investigations today.*
  - **Section 504 of the Rehabilitation Act of 1973 & Title II of the Americans with Disabilities Act** - prohibits discrimination on the basis of disability;
  - **Americans with Disabilities Act of 1990.**
- All public-school divisions are required to comply with the mandates of these federal, civil rights laws.

# What constitutes prohibited discrimination?

- The federal regulations implementing Section 504 at 34 C.F.R. § 104.4, which provides:
  - 104.4 Discrimination prohibited.
    - *(a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.*

# What constitutes prohibited discrimination?

- Actions that could constitute discrimination in the treatment of students may include, but are not limited to, the following:
  - *Student denied equitable admission in a course or program;*
  - *Student denied equitable treatment in terms of course requirements and methods of meeting those requirements ;*
  - *Student disciplined on the basis of a protected characteristic rather than the nature of the offense;*
  - *Student denied the right to pursue studies free of harassment from students, employees, or others in the school environment;*
  - *Student denied the right of consideration for access to programs and facilities.*

# What constitutes prohibited harassment?

- Harassment = Conduct that:
  - Creates an intimidating, hostile or offensive educational environment.
- Harassment creates a “hostile environment” when:
  - The conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.



# What constitutes prohibited harassment?

- Each situation must be looked at on a case-by-case basis, but examples of conduct which could constitute harassment include:
  - **Physical** - Acts of aggression against a person or his property because of that person's race, national origin, disability or religion
  - **Verbal** – Comments or statements, which can include name calling, jokes, rumors
  - **Written** - Graffiti or flyers containing racially offensive language
  - **Cyber** – Texting or social media postings
  - **Criminal Acts**
    - *Hostile acts which are based on another's race, national origin, religion or disability*
    - *Rape, Sexual Assault, Stalking*

# What constitutes prohibited harassment or discrimination?

- Conduct that constitutes harassment can occur:
  - On school grounds;
  - School buses;
  - School-sponsored activities, program, or events; or
  - Off school grounds and subsequently impacts the school environment.
    - *Charm Queen Case*

# What constitutes prohibited harassment or discrimination?

- The conduct does NOT have to be:
  - Motivated by an intent to harm;
  - Directed at a specific target; or
  - A series of repeated incidents.

## Obligation to report instances of harassment or discrimination:

- ALL school staff should report instances of discrimination/harassment that they personally observe or that are reported to them by a student, parent, or others.
  - Alleged perpetrator may be other student(s), school personnel, or third parties who are “participating in, observing or otherwise engaged in school sponsored activities.”
- The Allegation should be filed with a compliance officer or a building principal, who shall then forward the report to the compliance officer.
  - Any complaint that involves the compliance officer or principal should be reported to the Superintendent’s designee.

## *Kauhako ex rel. Doe v. State of Hawaii Bd. of Educ.*, 60 IDELR 105, 115 LRP 42651 (D. Haw. Sept. 9, 2015).

- Denied the school division's motion for summary judgment on a Title IX claim because of a factual dispute re: whether a campus rape resulted from the school's "deliberate indifference" toward a prior report of sexual misconduct.
  - Parent maintained she told the IEP team about a prior incident where a classmate allegedly pressed up against the student.
  - IEP team members maintained that the parent did not mention sexual touching, only that the student was mocked by peers.

## Responsibilities of School Board employees:

1. Read and be familiar with applicable school board policies;
2. Know the identities of the Compliance Officers;
3. Know how to recognize possible incidents of harassment/discrimination; and
4. Report known AND suspected harassment/discrimination to your direct supervisor/building principal or the Compliance Officer.

# Investigation

# Intake of Complaint

- Upon receipt of a written complaint:
  - Immediately forward the complaint to the building principal or compliance officer.
  - The principal is responsible for forwarding it to the compliance officer.
    - *(If not handled through an informal resolution);*
  - Delays are a common source of procedural non-compliance.



# Intake of Complaint

- Upon receipt of a verbal complaint:
  - Document the allegations, including at the minimum:
    - *Date of report;*
    - *Names of complainant and respondent;*
    - *Date(s) of alleged incident;*
    - *Nature of the alleged incident;*
    - *Duration of the alleged incident (one time or ongoing);*
    - *Location of the alleged incident; and*
    - *Name(s) of potential witnesses.*

# Intake of Complaint

- **Vague Complaints?**

- Sometimes school staff will receive a complaint alleging that “harassment” has taken place, but without identifying specific details about the incident.
  - *Example: Parent asserts that their child was harassed on the basis of his/her disability, but does not identify who allegedly perpetrated the harassment, when the harassment occurred, what the alleged conduct was, etc.*
- In these instances, send a letter to the parents and/or student providing a copy of School Board Policy/Regulation and ask for further information about the allegation(s).
  - *Be sure to identify the compliance officer who the parent or student can submit questions or information.*

## Intake of Complaint – Allegations of Child Abuse

- If the alleged harassment may also constitute child abuse, then it must be reported to the Department of Social Services in accordance with state law.

## Beginning the Investigation - Timeline

- Develop a plan.
- The investigation must begin when the school “knows or reasonably should know” about the alleged harassment.
- The goal is to conduct an “adequate, reliable, impartial, and prompt” investigation.

## Beginning the Investigation - Timeline

- The school division cannot wait for a **discipline, criminal, or CPS investigation to conclude** in order to initiate its own investigation.
  - Law enforcement may request that a school suspend its investigation during a police investigation. In these cases, the parents should be notified that interim measures will be put in place and that the school's investigation will resume upon authorization from law enforcement.
- Many policies provides for 14 school days to complete investigation.
  - **Extensions are permissible in many circumstances.**

# Beginning the Investigation – Timeliness of Complaint

- School board policy may state that complaints should generally be filed within 15 or 30 school days of the occurrence of alleged harassment.
- In many cases, a school may benefit from completing an investigation filed outside of the School Board policy timeframe.
  - *When considering whether to investigate a case filed outside of the normal policy timeframe, consider factors such as: (1) when the complainant became aware of the possible harassment; (2) if the incident is part of a pattern of behavior; (3) whether the allegations involve school division employees.*
  - *A parent/student may file a complaint with the U.S. Department of Education's Office for Civil Rights up to 180 days after the alleged incident.*

## Beginning the Investigation – Interim Measures

- The investigator must decide at the beginning of the investigation whether to implement “interim measures” during the course of the investigation.
- Interim measures may include, but are not limited to:
  - Restricting contact between the complainant and the respondent;
  - Physically separating the complainant and respondent; and/or
  - Arranging alternative transportation.
- Efforts should be made to avoid penalizing the complainant when implementing interim measures.

## Beginning the Investigation – Notice to Parties

- Upon receiving the complaint, the Compliance Officer must send a letter to both the complainant and the respondent acknowledging receipt of the complaint.
  - Reference the applicable school board policy;
  - The name and contact information of the investigator (either the Compliance Officer or a designee);
  - The date on which the complaint was received and a short summary of the allegation (unless a summary would violate confidentiality);
  - Any interim measures that will be implemented during the investigation;
  - The date on which the investigation will conclude; and
  - Notice that retaliation against others for filing a complaint or participating in an investigation is prohibited.



## Beginning the Investigation - Confidentiality

1. The complaint, and identities of the complainant and respondent, will be disclosed only to the extent necessary to fully investigate the complaint and only when such disclosure is required or permitted by law.
2. Additionally, a complainant who wishes to remain anonymous shall be advised that such confidentiality may limit the School Division's ability to fully respond to the complaint.

# Investigation - Evidence Collection

- Meet with complainant and respondent separately:
  - *Review school board policy and permit each to present relevant evidence, including submission of statements and providing a list of witnesses.*
  - *Interview the complainant first!*
- Other evidence:
  - *Conduct interviews of any other potential witnesses or individuals with knowledge of the alleged harassment or the circumstances giving rise to the complaint; review law enforcement investigation documents, if applicable; review student and/or personnel files; review any other documents or information relevant to the investigation; and gather and examine other relevant documents or evidence.*
- Facts from disciplinary process
  - *If a student discipline or employee discipline investigation has already been completed or commenced regarding the same situation, then the Coordinator may decide if the investigation process meets the 504/Title VI investigation requirements.*

# Investigation- Witness Interview Tips

- Allow witnesses to give a narrative in their own voice.
- Refrain from interrupting or from asking clarifying questions while witnesses are speaking. Go back and follow up to clarify details.
- Explore areas of inquiry that can be corroborated.
- Identify circumstances of disclosure and prompt complaint witnesses.
- Create a timeline.
- Photographs of physical injury, if any.
- Set stage for a follow-up interview.

# Investigation - Witness Interview Tips

- Always ask follow-up questions:
  - “And then what happened?”
  - “What happened next?”
- Always use active voice and provide sufficient details when taking notes:
  - COMPARE: Joe reported that on August 15, 2022, Jane repeatedly called him derogatory names, including “stupid,” “retard,” and “Rain man.” Joe verbally reported this incident to Ms. Smith, the gym teacher, the following day, on August 16, 2022 at 9:00 AM.
  - WITH: The complainant was called derogatory names. The incident was reported the following day to the gym teacher.

## Documentation/Response

# Investigation Analysis

- Must be a case-by-case determination based on all of the facts and circumstances.
- The investigator must use a “Preponderance of the Evidence Standard” when analyzing whether the conduct constitutes prohibited harassment/discrimination:
  - *Upon review of the evidence, is it more likely than not that the school board policy and/or Section 504 was violated?*

# Investigation Analysis

- The inquiry is subjective and objective and must be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances.
- The more severe the conduct, the less need there is to show a repetitive series of incidents to show hostile environment.
- A single incident may create a hostile environment.

# Investigation Analysis

- The investigator should consider the following factors:
  1. Surrounding circumstances;
  2. Nature of the behavior;
  3. Past incidents or past or continuing patterns of behavior;
  4. Relationship between the parties;
  5. How often the conduct occurred – remember, however, that one instance can be sufficient;
  6. Identity of the alleged perpetrator in relation to the alleged victim (i.e. whether the alleged perpetrator was in a position of power over the alleged victim);
  7. Location of the alleged harassment;
  8. Ages of the parties; and
  9. Context in which the alleged incidents occurred.



## Documentation – Written Report

- After analyzing all of the facts and circumstances after the completion of the investigation, the compliance officer must issue a written report to the Superintendent.
- The report should include:
  - Policy standard;
  - Standard of review;
  - Whether any interim measures were put into place;
  - Detail of investigation process;
  - Narrative of facts;
  - A determination of whether the allegations are substantiated;
  - Whether the policy/regulation/law was violated;
  - Recommendations for corrective action, if any; and
  - Prohibition of retaliation.

## Documentation - Written Report

- You do not have to find a violation of a federal statute in order to take disciplinary measures or remedial action.
- There may be violations of School Board policy or the Student Code of Conduct, but no violation of a federal statute.
- Was the conduct sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school?

## Response - Corrective Action

- If the determination is that it is more likely than not that prohibited harassment/discrimination occurred, the division must take prompt, appropriate action to address and remedy the violation as well as to prevent any recurrence of harassment/discrimination.
- Any corrective action should avoid penalizing the student who was harassed.
  - Example: If a classroom reassignment is required, the harasser should be moved over the victim.

## Response - Corrective Action

- Corrective action can include (but is not limited to):
  - Disciplinary action, up to and including termination or suspension/expulsion;
  - Reassignment of work duties or location;
  - Classroom reassignment;
  - Restrictions on contact with complainant;
  - Access restrictions to school property and/or events; or
  - An alcohol/substance abuse assessment.
- Guests and other persons are also subject to corrective action, which may include removal from school property, ban from school grounds, and/or termination of contractual arrangements.

## Response - Corrective Action

- Even in instances where the Superintendent or his/her designee determines that prohibited harassment did not occur, the Superintendent or designee could still recommend school-wide or division-wide training regarding harassment or recommend counseling for the complainant and/or respondent.

# Examples

## S.B. v. Bd. of Educ. of Harford Cnty. 819 F.3d 69 (4<sup>th</sup> Cir. 2016).

- S.B., a high school student with disabilities, was subject to bullying and harassment by other students.
- The school investigated each reported incident and, in almost every case, took disciplinary action against the offenders.
- For a six-month period, the school assigned a paraprofessional to escort S.B. during the school day to monitor his safety and act as a witness.
- S.B. and his parents filed a lawsuit, asserting that the Board discriminated against S.B. on the basis of disability, by failing to prevent student-on-student bullying and harassment.

## SS.B. v. Bd. of Educ. of Harford Cnty. 819 F.3d 69 (4th Cir. 2016).

- The Fourth Circuit held that, in order to prevail, the plaintiff in a § 504 case of student-on-student harassment must show that:
  - He was an individual with a disability;
  - He was harassed by other students based on his disability;
  - The disability-based harassment was sufficiently severe, pervasive and objectively offensive that it effectively deprived him of access to educational benefits and opportunities at school; and
  - The school board knew about the harassment and was deliberately indifferent to it.



## SS.B. v. Bd. of Educ. of Harford Cnty. 819 F.3d 69 (4th Cir. 2016).

- The Court held that the Board did not react with deliberate indifference to the reports of harassment.
- The Court noted that the school investigated “every single incident of alleged harassment of which it was informed,” that it disciplined the offenders “in nearly every case.”
- The Court did recognize that not every “half-hearted investigation or remedial action will suffice to shield a school from liability.”
- Where a series of “verbal reprimands” is leaving student-on-student harassment unchecked, then a failure to do more may amount to deliberate indifference.

# OCR - Case Processing Manual (July 18, 2022).

OCR may decide to dismiss a complaint when the allegation has been investigated through the school division's internal grievance procedures.

OCR states:

- “Where the allegation(s) filed with OCR is currently pending ... through a recipient's internal grievance procedures, .... *and* OCR anticipates that the allegation(s) will be investigated, the remedy obtained will be the same as the remedy that would be obtained if OCR were to find a violation regarding the allegation(s), and that there will be a comparable resolution process under comparable legal standards. ...
- Generally, OCR will not conduct its own investigation; instead, OCR reviews the results of the other entity's determination and decides whether the other entity provided a comparable resolution process in which it applied comparable legal standards.”

# Students with Disabilities

## Child Find

- It is not uncommon for a student who is a victim of harassment to report that the harassment has resulted in anxiety, depression, school phobia, or other condition which may trigger the school division's child find obligations.
- School divisions should consider whether child find obligations are triggered where the alleged harasser also engages in other inappropriate behaviors which give rise to a suspicion of disability.

## IEP Team Considerations

- The IEP team should consider factors, such as, whether the student requires additional supports and/or services:
  - counseling or psychological services.
  - social skills training,
  - self-advocacy training, or
  - communication goals and objectives to ensure that the student knows how to identify and report any additional behavior.
- IEP team may need to consider whether compensatory services are owed to the student due to being victim of harassment.

# What if the alleged harasser is a student with a disability?

- School division can impose discipline in accordance with its disciplinary procedures and in accordance with the IDEA.
- Consider whether the student's IEP needs to be modified to address the bullying behavior.
- Determine whether to modify the student's IEP to include any environmental changes or additional services/supports to address the behavior.

# Questions?

Thank you for your time!



Jason Ballum  
[Jballum@sandsanderson.com](mailto:Jballum@sandsanderson.com)  
(804) 783-7281



LaRana Owens  
[LOwens@sandsanderson.com](mailto:LOwens@sandsanderson.com)  
(804) 783-7250

