

Client Advisory | *May 2010***The New Massachusetts Anti-Bullying Law:  
What it Means for Private Schools**

On May 3, 2010, Governor Deval Patrick signed into law a comprehensive new statute relating to bullying in Massachusetts schools. This memorandum summarizes the requirements of the new law that apply to private schools.



*Daryl J. Lapp, Partner*

These requirements include:

- Developing by December 31, 2010, a plan to address bullying prevention and intervention
- Developing the procedures and policies described in the plan, which must include, among other things:
  - Procedures for students and staff to report bullying
  - Procedures for responding to reports of bullying
  - Policies relating to disciplinary actions against perpetrators of bullying
  - Procedures for reporting to local law enforcement incidents of bullying that may constitute a violation of criminal law
- Providing annual training for all faculty and staff on the school's bullying plan
- Publishing information about the plan to students and families, and on the school's website

As an initial matter, it is important to note that the new law imposes different requirements on different types of schools. The broadest requirements apply to public school districts; charter schools; "approved private day or residential schools" (schools that, through agreement with a school committee, accept a child requiring special education pursuant to Massachusetts General Laws, Chapter 71B, § 10); and "collaborative schools" (schools operated by an educational collaborative established pursuant to Chapter 40, § 4E). Less rigorous requirements apply to "non-public schools," a term the new law uses to distinguish private schools that do not fall within any of the

categories listed just above. This advisory summarizes only the requirements that are applicable to "non-public schools."

**What constitutes "bullying"**

The new law defines "bullying" in very broad terms. "Bullying" is:

the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim[,] that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.

The law does not define what constitutes the creation of a "hostile environment," or an infringement of the "rights of the victim at school." However, a useful guideline may be found in the law of sexual harassment, which prohibits conduct that is sufficiently severe or pervasive that it materially interferes with a student's opportunity to fully participate in the educational opportunities provided by the school.

The law goes on to provide that “bullying” includes “cyber-bullying,” which has its own extensive definition. “Cyber-bullying” is:

bullying through the use of technology or any electronic communication, ... including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.

“Cyber-bullying” also includes:

(i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) 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 clauses (i) to (v), inclusive, of the definition of bullying.

“Cyber-bullying also includes:

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 enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

### **Prohibition against bullying**

The law broadly prohibits bullying on or near school grounds; in connection with any school-related activity; at a school bus stop or on a school bus or other vehicle owned or used by a school; or through the use of technology or an electronic device owned, leased or used by a school.

The law also prohibits bullying that does not meet any of the above criteria, but that nonetheless 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.

### **Prohibition against retaliation**

In addition to prohibiting bullying, the law also prohibits retaliation against any person who reports bullying, who provides information during an investigation of bullying, or who witnesses or has reliable information about bullying.

### **Bullying prevention and intervention plan**

All schools in Massachusetts must “develop, adhere to and update a plan to address bullying prevention and intervention.” The head of school (or person holding a comparable position) is responsible for implementation and oversight of the plan. Non-public schools must establish a plan that is in compliance with the new law by no later than December 31, 2010.

#### *Developing the plan*

The school must develop its bullying prevention and intervention plan in consultation with teachers, school staff, professional support personnel, school volunteers, community representatives, local law enforcement agencies, students, parents and guardians. For non-public schools, the consultation with parents and guardians must include a notice and comment period.

#### *Updating the plan*

The plan must be updated at least biennially.

#### *What the plan must include*

The school’s bullying prevention and intervention plan must include at least the following elements:

- a description of what constitutes bullying;
- clear procedures for students, staff, parents and others to report bullying or retaliation;
- a provision that reports of bullying or retaliation may be made anonymously;
- clear procedures for responding to and investigating reports of bullying or retaliation;
- the range of disciplinary actions that may be taken against a perpetrator of bullying or retaliation, which must take into account these specific provisions: “the disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior,” and “no disciplinary action shall be taken against a student solely on the basis of an anonymous report”;
- clear procedures for “restoring a sense of safety for a victim and assessing that victim’s needs for protection”;

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*All schools in Massachusetts must establish a bullying prevention and intervention plan by December 31, 2010.*

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- strategies for protecting from bullying or retaliation a person who reports bullying, who provides information during an investigation of bullying, or who witnesses or has reliable information about an act of bullying;
- procedures consistent with state and federal law for promptly notifying the parents or guardians of both victims and perpetrators of incidents of bullying or retaliation, and for notifying the parents or guardians of a victim of actions taken to prevent further acts of bullying or retaliation;
- a provision that a student who knowingly makes a false accusation of bullying or retaliation shall be subject to disciplinary action;
- a strategy for providing counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of such students; and
- procedures for immediate notification by the head of school (or person holding a comparable position) of local law enforcement “when criminal charges may be pursued against the perpetrator.”

*Required reporting to law enforcement “when criminal charges may be pursued”:*

The statute amends several Massachusetts criminal laws to include bullying or bullying-related behavior. Depending on the nature of the conduct and how egregious it is, bullying behavior can involve the crimes of stalking; making threats; harassment; or making harassing, annoying or molesting electronic communications. In addition, retaliating or threatening to retaliate against a victim of bullying or a witness or other person with knowledge about bullying behavior can constitute the crime of witness intimidation. If the head of school has reason to believe that one or more of these crimes has occurred, the incident must be reported to local law enforcement.

*Training in connection with the plan*

The school must provide annual training on the plan for its faculty and staff.

*Notification about the plan*

The school must provide annual, written notice of the relevant student-related sections of the plan to students and parents or guardians. It must do so in age-appropriate terms and in the languages that are most prevalent among the students, parents or guardians. The plan also must be posted on the school website.

*Guidance from DESE*

The statute requires the Department of Elementary and Secondary Education to “publish a model plan for ... schools to consider when creating their plans,” and “compile a list of bullying prevention and intervention resources, evidence-based curricula, best practices and academic-based research that shall be made available to schools.” The Department will post the model plan and resource materials on its website and will update them biennially.

**Reporting and responding to reports of bullying or retaliation**

The statute imposes a broad reporting requirement that applies to any member of a school staff, including but not limited to teachers, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities or paraprofessionals.

Any such person must immediately report any instance of bullying or retaliation that the person has witnessed or otherwise “become aware of” to the head of school or to the school official who has been designated in the school’s bullying prevention and intervention plan as being responsible for receiving such reports, or to both of them.

Upon receiving the report, the head of school or the head’s designee must promptly conduct an investigation.

If the head of school or designee determines that bullying or retaliation has occurred, the head or designee must take the following actions:

- notify the local law enforcement agency if the head or designee believes that criminal charges may be pursued against a perpetrator;

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*The statute broadly requires all school administrators, teachers and staff immediately to report any bullying that they witness or otherwise “become aware of.”*

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- take appropriate disciplinary action;
- notify the parents or guardians of a perpetrator; and
- notify the parents or guardians of the victim and, to the extent consistent with state and federal law, notify them of the action taken to prevent any further acts of bullying or retaliation.

The phrase “consistent with state and federal law” apparently is a reference to federal and state laws that might prohibit disclosure of student information, including the federal Family Educational Rights and Privacy Act, which applies to all public schools and other schools that directly or indirectly receive federal funds.

If an incident of bullying or retaliation involves students from more than one school, the school that was first informed of the bullying or retaliation must, consistent with state and federal law, promptly notify the appropriate administrator of the other school so that both may take appropriate action.

If an incident of bullying or retaliation occurs on school grounds and involves a former student under the age of 21 who is no longer enrolled in a school, the school is required to contact law enforcement if it believes that criminal charges may be pursued.

### Students with special needs

The new law contains two provisions pertaining to students with Individualized Education Programs (IEPs) under Chapter 71B. First, whenever the evaluation of the IEP team indicates that the child has a disability that affects social skills development or that the child is vulnerable to bullying, harassing or teasing because of the child’s disability, the IEP must address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing. Second, for any child on an IEP who has a disability on the autism spectrum, the IEP must address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing.

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*The school must provide annual notice of its bullying prevention and intervention plan to students and families, and must post the plan on the school’s website.*

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