

PENNSYLVANIA HUMAN RELATIONS COMMISSION
“HARASSMENT IN EDUCATIONAL SETTINGS”
GUIDANCE ON EVALUATING CLAIMS OF BULLYING AND HARASSMENT
UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT
2024

1. AUTHORITY

This Guidance is an exercise of the authority granted to the Pennsylvania Human Relations Commission (“Commission”) to formulate policies to effectuate the purposes of the Pennsylvania Human Relations Act (“PHRA”).¹ Further, it is an exercise of the Commission’s legislative mandate to construe the provisions of the PHRA liberally for the accomplishment of the purposes thereof.²

2. SCOPE

This Guidance shall apply to discrimination under the PHRA in the context of education which is based on the protected classes of “race, color, sex, religious creed, ancestry, national origin or handicap or disability, or to any person due to use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals” .³

The PHRA prohibits discrimination by public accommodations. An entity is public accommodation if “it is open to, accepts or solicits the patronage of the general public.” PHRA. 43 P.S. § 954 (l). In the educational context, this may include, but may not be limited to, “kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of th[e] Commonwealth.” Certain accommodations which are in their nature distinctly private are not covered by the PHRA. 43 P.S. § 954 (l). The Pennsylvania Human Relations Commission has a

¹ The Commission has the power and the duty “[t]o formulate policies to effectuate the purposes of [the Pennsylvania Human Relations Act] and make recommendations to agencies and officers of the Commonwealth or political subdivisions of government or board, department, commission or school district thereof to effectuate such policies.” 43 P.S. § 957(e).

This guidance applies equally to cases analyzed pursuant to the commercial property provisions of 43 P.S. § 955(h), where also applicable, and the Pennsylvania Fair Educational Opportunities Act, 24 P.S. § 5001, *et seq.*

² “The provisions of [the Pennsylvania Human Relations Act] shall be construed liberally for the accomplishment of the purposes thereof . . .” 43 P.S. § 962(a).

³ 43 P.S. § 955(i).

duty to construe the PHRA liberally for the accomplishment of its purposes and will evaluate this exception on a case-by-case basis. 43 P.S. § 962 (a).

In issuing this Guidance, the Commission reiterates its longstanding position that this Guidance is not intended to impose hard and fast rules that must be absolutely applied without regard to the specific facts involved. Nothing in this Guidance shall affect statutory or other regulatory requirements.

This Guidance may not be cited as binding legal authority for any Commission ruling, adjudication, or other legally binding action. The rationales set forth in this Guidance may be cited as the basis for Commission action only to the extent the Commission believes the rationale is valid in the context of a specific proceeding.

This Guidance is intended to demonstrate the way the Commission will exercise its administrative discretion in adjudicating cases unless it is convinced otherwise during a specific proceeding. The Commission, as in the past, remains committed to ensuring that its adjudicative determinations are made on a case-by-case basis after consideration of all evidence of record. To this end, this Guidance may be deviated from when the Commission believes that any statute or regulation requires it, or that it is otherwise appropriate to do so.

3. PURPOSE

The purpose of this Guidance is to provide clarity to all Pennsylvanians regarding how the Commission will evaluate harassment and bullying cases resulting from discrimination in the educational context pursuant to 43 P.S. § 959(h) and/or (i).

4. NECESSITY

The PHRA recognizes the grave injury to public health and welfare that discrimination causes. 43 P.S. § 952(a). Harassment and bullying disrupt the educational environment resulting in children not living up to their full potential and having a lasting negative impact on a child's life.

GUIDANCE

5. WHEN DOES HARASSMENT AND BULLYING CONSTITUTE UNLAWFUL DISCRIMINATION?

All students have the right to obtain an education in an environment that is free from unlawful discrimination which is based on a protected class.⁴ Discriminatory conduct in a school setting can be perpetrated by an individual or group of individuals that the school has control over. This may include, but is not limited to, students, teachers, administrators, staff, third party contractors, etc. Discrimination may be verbal or physical and need not be directed at a particular student to be unlawful.

Courts have articulated several tests to determine what behavior constitutes a hostile educational environment.

The Commission generally uses the following standard to determine whether harassment and/or bullying constitutes a hostile educational environment:

- a) the student is a member of a protected class; and
- b) the student suffered intentional harassment because of their protected class; and the harassment was severe **or** pervasive and regular; and
- c) the harassment detrimentally affected the student; and
- d) the harassment would detrimentally affect a reasonable student of the same protected class.⁵

In addition, there must be a method of establishing the educational institution's liability. See *e.g.*, paragraph 6 of this guidance.

6. WHEN IS THERE EDUCATIONAL INSTITUTION LIABILITY?

Educational providers have a duty to take immediate action to eliminate known discrimination occurring in its schools. To establish liability of an educational provider, the Commission generally evaluates whether the student can establish:

- a) the school had substantial control over the harassers; and
- b) the student can show discriminatory harassment (outlined above); and
- c) the educational institution had actual knowledge of the harassment; and
- d) the educational institution failed to correct the harassment.⁶

⁴ The protected classes are "race, color, sex, religious creed, ancestry, national origin or handicap or disability, or to any person due to use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals" 43 P.S. § 955(i).

⁵ See *for e.g.* Mandel v. M & Q Packaging Corp., 706 F.3d 157, 167 (3d Cir. 2013) (hostile environment in employment context).

⁶ See Williams v. Pennridge Sch. Dist., 782 F. App'x 120, 127 (3d Cir. 2019) (deliberate indifference liability).

The Commission will evaluate these practices on a case-by-case basis but offers the guidance below.

7. EDUCATIONAL BEST PRACTICES

The Commission finds the below approaches to constitute best practices.

A. Anti-Harassment & Bullying Policy Development & Distribution

Pennsylvania statute requires that all K-12 educational institutions have written policies specifically addressing bullying⁷. These policies are to be incorporated into the school entity's code of student conduct related to school rules⁸. It is the recommendation of this Commission that these policies clearly describe what behavior constitutes harassment and bullying and should be re-evaluated on an annual basis to ensure the educational institution is accounting for the ways in which bullying and harassment is evolving in the school environment.

The policies should be widely distributed to students, at a level that is understandable to them, parents/guardians, and to the faculty at least once per year using multiple communication methods (email, website, in-service training). Educational institutions should also evaluate whether this level of distribution is sufficient to properly communicate the educational institutions' expectations for students and faculty. It may be necessary to have annual in-person meetings for students and/or faculty. Records should be kept demonstrating these efforts. The goal of written policies and the distribution of said policies is to establish an environment that is not simply conducive to learning but ensures that each student has the same opportunity and access to experience the educational environment free from unlawful harassment.

B. Reporting of Harassment & Bullying

The use of the Safe2Say hotline as a means of reporting incidents of harassment and bullying is strongly encouraged. The Commission recommends that educational providers have multiple avenues to include forms, online, over the phone, in person to multiple members of the administration. Consistent with the Safe2Say hotline, the Commission recommends that reports are accepted by the institution anonymously.

C. Investigation of Complaints

Once an educational institution is aware of an allegation of harassment or bullying it must take prompt action to investigate the allegations. Investigators should be trained to investigate and remediate discrimination. The educational institution must take steps to protect the victim of

⁷ 24 P.S. § 13-1303.1 A.

⁸ 22 Pa Code § 12.3 (c).

harassment or bullying while this investigation is occurring. The victim of harassment must not be impacted by any transfer or change in status. The educational institution should keep copies of the investigation materials. The investigation must be broad enough to capture all the allegations raised by the student.

D. Corrective Action

If harassment or bullying is found, an educational provider is required to take reasonable steps to correct it. The Commission may look at the following factors to determine whether the corrective action was reasonable. This is not an exhaustive list:

- a) The overall regular steps the educational provider has taken to combat harassment and bullying generally (effective policies, procedures, anti-discrimination programs, other inclusive initiatives);
- b) The existence of immediate responses to harassment by teachers or administrators to provide protection for the student alleging harassment;
- c) The promptness and thoroughness of the investigation;
- d) The ability to identify the perpetrator or group of perpetrators;
- e) Whether counseling or disciplinary action was taken towards the perpetrator or group of perpetrators;
- f) Whether the steps were effective. It is not enough to implement policies and practices if they are not regularly evaluated for effectiveness and to continue to improve on how best to serve all students;
- g) The extent in which the educational provider monitors the school environment generally. Harassment and bullying often occur in areas where faculty are not present. There may be known harassment occurring in the environment even if the school has not received a student complaint. When a hostile educational environment is present and known, the educational provider must take reasonable steps to correct it; and
- h) whether remedial efforts were implemented to prevent future harassment and protect from retaliation.

8. HARASSMENT & BULLYING ONLINE

The government is constrained by First Amendment protections, which prohibit it from regulating speech. However, not all speech is protected by the First Amendment. The Commission can still prohibit discriminatory speech if it falls outside of the First Amendment's protections. Whether the First Amendment applies is extremely fact dependent. Educational institutions are encouraged to consult with its attorneys for legal advice.

A. General Rule for Evaluating Free Speech

Students do not “shed their rights at the schoolhouse gates.” However, speech that substantially disturbs school activities or infringes upon the rights of other students can be restricted. Likewise, schools can regulate speech that is reasonably forecasted to be disruptive. To be a substantial disruption, the student’s speech needs “a strong nexus” with the school, such that “the offending speech is shown to have been clearly targeted at a member of the school community or clearly pertained to school activities.”⁹

B. Cyberbullying

Discriminatory cyberbullying may fall within the purview of the general rule, in that it is reasonably forecasted to be disruptive, and interferes with the rights of other students. However, to be actionable under the PHRA, the speech would likely have to be made in school or clearly directed at or intended for an audience within the school community, as opposed to small, private friend groups outside of school grounds or off-campus school functions.¹⁰

C. Direct Threats

The First Amendment may not protect speech that is a direct threat to another individual. The subjective intent of the speaker is important in determining if speech is a direct threat. A court may consider the content of the speech, and then relevant contextual factors, like the language employed, whether the statement was “political hyperbole,” the presence of inexact and abusive language, if the threat was conditional, if it was communicated directly to the victim, if the victim believed the speaker had a propensity for violence, and the listener’s reaction.¹¹

9. Resources Available

The Commission offers trainings and education on discrimination and associated topics to educational entities who need assistance meeting its obligations under the law.

In addition, below is a list of state and federal agencies who have helpful resources to assist institutions in creating environments that are free from discrimination and harassment.

- A. Pennsylvania Department of Education, Office for Safe Schools
<https://www.education.pa.gov/Schools/safeschools/bullying/Pages/default.aspx>
- B. United States Department of Education, Office for Civil Rights

⁹ See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

¹⁰ See J.S. v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011).

¹¹ See J.S. by M.S. v. Manheim Township School District, 263 A.3d 295 (Pa. 2021).

<https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>

C. Safe 2 Say Program

<https://www.safe2saypa.org/>

D. Pennsylvania Office of Attorney General, Civil Rights Enforcement Section

<https://www.attorneygeneral.gov/protect-yourself/civil-rights/>

E. Pennsylvania Training and Assistance Network

<https://www.pattan.net/>

F. United States Department of Justice, Civil Rights Division

<https://www.justice.gov/crt>

To request assistance from the Commission, please call 717-787-4410.