

LEGAL RIGHTS, RESPONSIBILITIES AND PROTECTIONS OF EDUCATION SUPPORT PROFESSIONALS

Jennifer MacDougall
MTA Staff Counsel
Massachusetts Teachers
Association
March 9, 2021

Basic Advice

- Know your rights and responsibilities
- Follow school policies and directives
- Keep your relationships with students and staff professional
- Contact your local association if a problem arises

Topics include:

- Physical Contact with Students
- Child Abuse Reporting Law (51A)
- OSHA and Unsafe Working Conditions
- Sexual Harassment
- Quasi-Medical Work

Physical Contact with Students



Our best advice:

**AVOID
PHYSICAL
CONTACT!**

Education Support Professionals

ENSURING
STUDENT
SCHOOL
SUCCESS

www.nea.org/esp



But it's not that easy...

Why make physical contact?

Physical contact may sometimes be unavoidable or necessary! Why?

- Communication
- Attending to medical, physical, and/or emotional needs
- Safety issues
- Discipline
- Emergency first aid / transportation (“Good Samaritan” law)

BUT ...



Physical Contact with Students

Getting “physical” with students can expose a school employee to:

- criminal charges
- civil liability
- a report of child abuse or neglect
- employment consequences

Call and Ask!

If you have to make physical contact with a student, it is in your interest to obtain administration authorization and guidance on discipline, attending to medical, physical, and emotional needs, interfering in student fights, etc.

How can you learn your employer's expectations?

- In-service programs
- School committee policies
- Written permission slips
- Forms
- Administrative directives/school policies

Bargaining!

Your employer must bargain these policies and directives!

Your local association can help clarify employer expectations regarding your responsibilities in:

- Breaking up fights
- Administering medications
- Transporting students (especially in your own vehicle)



If You are Accused...

Corporal Punishment = BAD



Reasonable Force = OK!

ESPs may use “such reasonable force as is necessary to protect pupils, other persons, and themselves from an assault by a pupil.”

Are Restraints OK?

Physical restraints may be used only in “emergency situations of last resort, after other lawful and less intrusive have failed or been deemed inappropriate, and with extreme caution.” (603 CMR 46.01(3))

DESE regulations are designed to “ensure that every student ... is free from the use of physical restraint that is inconsistent with [the regulations].” (603 CMR 46.00)

Your employer must institute procedures and staff training for implementing student restraints – your association is entitled to bargain this!

What If I am Accused?

51A

- If a student complains of abuse or neglect to a mandated reporter, the Department of Children and Families (DCF) must investigate
- DCF will investigate and could (if allegations substantiated) refer to police

Criminal

- Police can investigate allegations of battery
- Police or parents can bring a criminal complaint – show cause hearing before magistrate
- DA can prosecute (unlikely unless very serious)

Criminal/DCF Proceedings

- If you are contacted by police or DCF, immediately notify your local association – you are entitled to legal assistance under the MTA Legal Services Policy
 - You are entitled to legal representation during questioning by your employer, the police, and DCF investigators
- **DON'T TALK ABOUT IT** – attorney-client privilege ONLY applies to your conversations with your lawyer, NOT your school administrators, coworkers, etc.

Can I Be Sued?

- G.L. c. 258, § 2 protects public employees from personal liability for any injury or loss caused by negligent or wrongful acts or omissions “while acting within the scope of office or employment.”
- Employee must cooperate with the employer in investigating and defending any claims of negligence.
- Reckless and intentional torts – like assault and battery – are not protected!

Safety Guarantees

A school district must provide a safe working environment!

- Check your CBA!
- Under the law:
 - Federal law – expel student (at least 1 year) who bring firearm to school
 - Students who possess dangerous weapons or certain drugs and students who assault staff members may be subject to expulsion (G.L. c. 71, s. 37H)
 - Districts must publish student and employee conduct policies – including standards and procedures to assure building security and student and staff safety (s. 37H)
 - School personnel must report student possession or use of a dangerous weapon on school premises (s. 37L)
 - Students charged with a felony (whether or not school related) may be suspended and expelled upon conviction (s. 37H ½)

What If I am the Victim?

ESPs and other public employees can be physically assaulted at work – same assault and battery laws we discussed previously.

Assault and battery against school employees and other public employees engaged in the performance of their duties at the time of the offense carries a stricter penalty.

What should I do if I'm a victim?

If you suffer an assault and/or battery at work:

- Ask the police to bring charges against the assailant
- File charges on your own against the assailant

You are entitled to an MTA attorney at a “show cause” hearing!

Child Abuse Reporting Law

G.L. c. 119, § 51A requires employees to identify children at risk of abuse or neglect and to intervene when necessary.

You are mandatory reporters!

- “Abuse” means the
 - non-accidental commission of any act
 - by a caretaker (ESPs can be considered “caretakers”)
 - upon a child under age 18
 - which causes, or creates a substantial risk of, serious physical or serious emotional injury, or constitutes a sexual offense under the laws of the Commonwealth. [110 C.M.R. 2.00]

When and How Do I Report?

- Report immediately whenever there is “reasonable cause to believe that a child under 18 is suffering serious physical or emotional injury”
- Report to Department of Children and Families (“DCF”) or person in charge of school (usually Principal)
- No liability for making a charge in good faith
- Failure to report could result in a fine of not more than \$1,000, discipline by the school, and/or civil liability against the district

What if a 51A is filed against me?

- As discussed previously – a mandated reporter could observe an interaction between you and a student and report it to DCF as an allegation of “abuse” or “neglect”
- If you are contacted by DCF – notify your union, get an MTA attorney for the DCF investigation, and don’t discuss details with anyone other than your lawyer!
- If the allegation is “substantiated” – it could be referred to police if serious enough
- You have the right to appeal a 51A finding!

OSHA and Safe Working Conditions



What is OSHA?

- The Occupational Safety and Health Act created the federal Occupational Safety and Health Administration (“OSHA”) in 1970, to ensure safe and healthy working conditions by setting and enforcing standards for such working conditions.
- “General Duty” clause (29 U.S.C. 654(a)(1))– an employer “shall furnish to each of [its] employees employment and a place of employment which are *free from recognized hazards that are causing or likely to cause death or serious physical harm* to [its] employees”

State Law Health and Safety Protections

- OSHA did not apply to state or local government employees until 2019.
- G.L. c. 149, s. 6½(b) – “[p]ublic employers shall provide public employees at least the level of protection provided under the federal Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et. seq., including standards and provisions of the general duty clause contained in 29 U.S.C. 654.”

OSHA and Workplace Violence

- OSHA does not have a specific regulatory standard for workplace violence, but OSHA may and does cite employers for failure to protect employees from harm due to workplace violence under the “general duty” clause.
- Two key factors OSHA applies in determining whether an incident of workplace violence constitutes a breach of the employer’s general duty to provide a safe working environment:
 - 1) whether the incident of violence was reasonably foreseeable; and
 - 2) whether there was a feasible method to mitigate the hazard.
- When dealing with a student with a known propensity for violence, such hazard is reasonably foreseeable and informing staff who work with the student about that risk and steps taken to address it is a feasible step to mitigate that risk.

What is Sexual Harassment?



Sexual Harassment

Two kinds of sexual harassment:

- 1) Quid Pro Quo harassment – school employee explicitly or implicitly conditions a privilege, benefit, grade, evaluation, or other services upon another person's submission to sexual advances
- 2) Hostile environment – person is the victim of severe or pervasive physical or verbal acts of a sexual nature that impair his or her ability to work or learn

What is a “Hostile Environment”?

- Sexual insults and name calling
- Off-color jokes
- Intimidation by words or actions
- Offensive touching
- Pressure for sexual activity

A person who is NOT the target of the sexually offensive behavior can also be a victim of the hostile environment!

What happens next?

- Usually employer is sued in the context of sexual harassment
- Law (ch. 258) may indemnify individual employees unless it is a civil rights violation (no indemnity)
- Could also be a discrimination charge at the MA Commission Against Discrimination

CALL YOUR UNION!

Quasi-Medical Duties

Districts often have to have delegation policies in place to allow non-medical personnel to do things such as administer prescription medicine and epi-pen injections.

Your local association should bargain (or should have bargained) with the District about these policies and how they impact your union!

Special education and inclusion classroom ESPs may also have to toilet children, etc. – not illegal but subject to special education laws, collective bargaining laws, and must be bargained with the local association.

Scenario #1

You are a teacher in a school district, where the district is considering a change in policy regarding use of restraints on students.

What are your rights?

Scenario #2

A paraprofessional tells you that she overheard a student talking about a YouTube video that your one on one student made. You look it up and on the video the student, a troubled teenage boy says that he is going to “slice you up like dinner.” You go to your principal, upset and scared, and he says, “Oh, he isn’t serious.” You aren’t so sure.

What are your rights?

Scenario #3:

You get told by your supervisor that DCF wants to interview you about alleged abuse of a student.

What do you do?

Scenario #4:

You are a paraprofessional who just received a new 1-to-1 assignment with a very difficult middle school student. You are aware that the student has been violent with teachers and ESPs in the past.

What are your rights?

Scenario #5:

You work in the office of the High School and your principal tells you look “sexy as hell” in that outfit. You tell him you don’t appreciate his comments. But then 2 weeks later he does it again, and this time he massages your shoulders as he does it!

What are your rights?

QUESTIONS?