

Diversity, Equity and Inclusion (DEI) in Massachusetts Public Schools:

A Legal and Practical Guide for Implementing Principles
of Diversity, Equity and Inclusion in Public School
Settings



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I. DEI-HISTORY AND OVERVIEW

In 1954, America’s educational landscape was transformed by *Brown v. Board of Education*,¹ the U.S. Supreme Court decision that ended legal segregation in public schools, ruling that “separate but equal” violates the U.S. Constitution’s guarantee of Equal Protection. Following this landmark judgment, the federal government passed a series of sweeping anti-discrimination laws such as the Civil Rights Act of 1964²—which includes a prohibition on discrimination based on race, ethnicity or national origin in public accommodations and federally-funded programs—and Title IX of the Education Amendments of 1972³—which bars sex-based discrimination in educational programs. Subsequent court decisions have extended the reach of these laws to prohibit discrimination based on sexual orientation and identity as well.

Employers, schools, and businesses have recognized that the best way to comply with these anti-discrimination mandates is by being proactive—ensuring that everyone is included and has equal access. Today, those proactive initiatives are often referred to as “DEI,” which stands for diversity, equity and inclusion.

Diversity is the practice of including people from a broad range of different racial, social and ethnic backgrounds in all aspects of American life—from schools to the workplace to elected bodies. **Equity** is the practice of providing what is needed to ensure equal access to opportunity. **Inclusion** is the practice of providing equal access to opportunities and resources for all, including members of the community who might otherwise be marginalized.

Although these principles are based on fairness and common sense, those who dislike DEI policies sometimes challenge them by raising legal issues, with the goal of intimidating supporters into straying from their values. This guide aims to set the record straight on the law. It is designed to give those who support DEI in the public school setting—school officials, parents, students, and allies—the information and tools they need to stay true to the principles they believe in and ensure equality for all of our students.

II. IMPORTANCE OF DEI INITIATIVES IN SCHOOLS

In the K-12 setting, DEI initiatives help ensure that all students have equal opportunity to learn and participate in classes and extracurricular activities; they help guide the development of inclusive curricula; and they inform professional development training.

DEI programs improve learning outcomes and provide social advantages for all students, regardless of racial or ethnic background.⁴ These policies can also support students who identify as LGBTQ+ when politicians and media are attacking their rights or invalidating their identity.⁵

All students, regardless of race, socioeconomic status, ethnic background, immigration status, sexual identity, or sexual orientation, have a right to a safe learning space where they feel included and supported. Staff and administration must remain informed and vigilant in promoting a culturally responsive school setting that promotes and utilizes DEI in curriculum, professional development and extracurricular activities. Not only do

¹ *Brown v. Board of Education*, 347 U.S. 483 (1953).

² 42 U.S.C. §2000d et seq.

³ 20 U.S.C. §1681-§1688.

⁴ Genevieve Siegel-Hawley, *Research Brief: How Non-Minority Students Also Benefit from Racially Diverse Schools*, THE NATIONAL COALITION ON SCHOOL DIVERSITY, Research Brief No. 8., 1-3 (Oct. 2012), available at <https://files.eric.ed.gov/fulltext/ED571621.pdf>.

⁵ See Jaelyn Diaz, *Florida's Governor Signs Controversial Law Opponents dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022), available at <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis>.

these programs benefit students and make them feel seen and heard, but they are also critical for ensuring compliance with federal and state law.

III. DEI IN MASSACHUSETTS SCHOOLS: A LEGAL FRAMEWORK

Several important federal and state civil rights laws provide the legal underpinning for DEI programs in Massachusetts public schools.

To receive federal funding assistance, schools must follow the federal Civil Rights Act of 1964, which prohibits any discrimination on the basis of race, color, national origin, religion or sex. In addition to prohibiting discrimination, educational programs have an affirmative legal obligation to create environments where students are not subject to discrimination. Schools must also ensure that students are not subjected to a “racially hostile environment,” which can occur when there is severe, pervasive, or persistent conduct that interferes with a student’s ability to benefit from the school’s services.

The U.S. Department of Education enforces the Civil Rights Act to ensure there is no discrimination in connection with admissions, recruitment, academic programs, student treatment and services, and recreation. Students and families who believe that a school has created or is responsible for a racially hostile educational environment can bring lawsuits under the law as well.

At the state level, the Massachusetts Department of Elementary and Secondary Education also prohibits discrimination on the basis of race, color, sex, gender identity and gender-related identity, religion, national origin, or sexual orientation.⁶ The Department requires schools within the Commonwealth to provide equal rights of access and enjoyment of the opportunities, advantages and privileges provided by the schools.⁷ To that end, the Commonwealth mandates that schools establish policies and procedures and implement monitoring and evaluation practices to ensure that students have equal access to education regardless of race, color, sex, gender and gender-related identity, religion, national origin, limited English-speaking ability or sexual orientation and requires that all obstacles to ensuring equal access be removed.⁸

IV. PRACTICAL GUIDANCE ON DEI FOR MASSACHUSETTS SCHOOLS

Some laws **require** action. Tax laws, for example, require the payment of taxes. Other laws **prohibit** conduct—such as criminal statutes that outlaw shoplifting or reckless driving. Finally, there is a large middle ground, where the law doesn’t require or prohibit action, but **allows** it. People aren’t required to use public parks, for example, but they aren’t prohibited from doing so either.

It can be useful to think about DEI activities in those three categories. What is required under the law? What is prohibited? And finally, what is allowed? The following lists some of the main conduct, specific to K-12 public education, that falls into each category.

A. What does the law require?

Access

- ▶ Schools must admit students without regard to race, color, sex, gender identity, religion, national origin, or sexual orientation.⁹

⁶ 603 CMR 26.01(1), 603 CMR 26.01(3).

⁷ 603 CMR 26.01(1).

⁸ 603 CMR 26.07(1).

⁹ See 603 CMR 26.02(1).

- ▶ Schools must establish and implement policies and procedures to monitor and evaluate practices to ensure equal access to, and remove obstacles of, education, programs activities, including an annual evaluation to ensure all students are given an opportunity to participate in all offered programs and activities.¹⁰
- ▶ Schools must provide equal rights of access and equal enjoyment of all opportunities, advantages, privileges and courses of study at such schools regardless of race, color, sex, gender identity, religion, national origin or sexual orientation.¹¹

Discrimination and Harassment

- ▶ Schools must “strive to prevent harassment or discrimination based upon students’ race, color, sex, gender identity, religion, national origin or sexual orientation, and ... respond promptly to such discrimination or harassment when they have knowledge of its occurrence.”¹²
- ▶ Schools must provide annual in-service training for all school personnel regarding the prevention of discrimination and harassment.¹³
- ▶ Schools must ensure all school handbooks and codes of conduct affirmatively state and explain the school’s obligations under state law, including (a) a nondiscriminatory policy, (b) affirmation of non-tolerance for harassment or discrimination, (c) the school’s procedure for accepting, investigating and resolving complaints of alleged discrimination or harassment, and (d) disciplinary measures the school may impose for harassment or discrimination.¹⁴

Language

- ▶ Schools must offer language assistance services to all students with limited English proficiency.¹⁵
- ▶ Schools must communicate information about enrollment, classes, and other educational programs and activities in a language that all parents, guardians, and sponsors can understand.¹⁶

Gender Identity and Expression

- ▶ Schools must maintain confidentiality regarding information about a student’s assigned sex at birth, name change for gender identity purposes, gender transition, medical or mental health treatment related to gender identity, or any other information of similar nature that is contained in a student’s student record.¹⁷

¹⁰ 603 CMR 26.07(1).

¹¹ See 603 CMR 26.01(1).

¹² 603 CMR 26.07(2).

¹³ 603 CMR 26.07(3).

¹⁴ See 603 CMR 26.08(1).

¹⁵ See 603 CMR 26.07(8).

¹⁶ See 603 CMR 26.07(1). See also 603 CMR § 26.07(8).

¹⁷ See 603 CMR 23.04. See also 603 CMR 26.02 (3). See also *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (Oct. 28, 2021), available at

[https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html#:~:text=Under%20state%20law%2C%20information%20about,the%20individual%27s%20student%20record%20\(see.](https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html#:~:text=Under%20state%20law%2C%20information%20about,the%20individual%27s%20student%20record%20(see.)

B. What does the law prohibit?

Access

- ▶ Schools may not deny educational access on the basis of immigration status.¹⁸
- ▶ Schools may not discourage in any express or implied manner, applicants for admission due to race, color, sex, gender identity, religion, national origin or sexual orientation.¹⁹
- ▶ Schools may not restrict participation in affinity groups or extracurricular activities on the basis of sex, race, gender identity, religion, or national origin.²⁰
- ▶ Schools may not schedule students into courses or units of study on the basis of race, color, sex, gender identity, religion, national origin or sexual orientation.²¹

Discrimination and Harassment

- ▶ Schools may not refuse to take action in response to discrimination or harassment on the basis of race, color, sex, gender identity, religion, national origin or sexual orientation.²²

Language

- ▶ Schools may not deny language assistance to students or families with limited English proficiency.²³
- ▶ Schools may not deny an interpreter for students or parents for a disciplinary meeting.²⁴

C. What does the law allow?

This leaves many activities that K-12 schools are **allowed** to do. Schools have an affirmative duty to prevent the creation of a racially hostile environment and to guard against discrimination. When School Committees and school administrators decide if certain activities are beneficial, they should keep this affirmative duty at the forefront. Many of these allowed activities, while not specifically mandated, may be necessary to make sure the affirmative duty is met.

The U.S. Department of Education's Office of Civil Rights (OCR) has guidance discussing what is allowed by school districts to prevent the creation of a hostile environment.²⁵ The following are some activities that school districts are allowed to perform:

- ▶ Conduct diversity, equity and inclusion training.

¹⁸ *Attorney General Advisory: Equal Access to Public Education for All Students Irrespective of Immigration Status*, MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL (Mar. 2, 2017), available at https://www.mass.gov/files/documents/2018/11/13/ag-advisory-on-equal-access-to-education-3-2-17_0.pdf.

¹⁹ See 603 CMR 26.02(1).

²⁰ See 603 CMR 26.07 (1).

²¹ 603 CMR 26.03.

²² 603 CMR 26.07 (2).

²³ See 603 CMR 26.07 (8).

²⁴ 603 CMR 53.06 (2)(f).

²⁵ *Fact Sheet: Diversity & Inclusion Activities Under Title VI*, U.S. DEPARTMENT OF EDUCATION-OFFICE OF CIVIL RIGHTS (Jan. 2023), available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf>.

- ▶ Facilitate opportunities for students to find support with peers, teachers, faculty, and staff, such as student-led organizations, identifying safe spaces on campus.
- ▶ Provide instruction in, or training on, the impact of systemic racism.
- ▶ Provide cultural competency training and other non-discrimination training.
- ▶ Provide professional development opportunities for educators on equitable and supportive treatment of historically underserved students, and take steps to promote increased diversity among educators.
- ▶ Hold student assemblies or training focused on anti-harassment and anti-bullying.
- ▶ Use words such as discrimination, equity, inclusion, diversity, and systemic racism in school policies, programs, or activities.
- ▶ Use welcoming and inclusive language in mission statements, such as a commitment to ensure a safe and supportive campus, free from discrimination and harassment for all.
- ▶ Adopt policies or model plans to guide school staff on how to support students and communicate with families, such as developmentally appropriate protocols to support students in any transition process.
- ▶ Circulate climate surveys to evaluate perception of faculty fairness.
- ▶ Collect and analyze data to determine objectivity of disciplinary action.
- ▶ Accurately record a student’s chosen name and pronouns.
- ▶ Restrict participation in affinity groups based on conduct that violates the groups’ bylaws or other rules, including those that pertain to discrimination and harassment.

V. ANTI-DEI EFFORTS

In recent years, some organizations—often working with politicians seeking to advance their own interests—have adopted a national strategy to oppose DEI efforts. Because these organizations are typically funded through "dark money" channels, it is often difficult to discern who is behind these efforts. What is clear, however, is the anti-DEI campaign is coordinated and national in scope.

Several strategies are used by anti-DEI groups, making heightened awareness by parents, students, teachers, administrators, and school boards crucial:

- ▶ Petitions – National non-profit organizations may recruit local residents to sign petitions requesting the creation of advisory boards to review school curriculum and eliminate lessons on race and/or sexual orientation. Petitions often use intentionally vague language that sounds positive (like advocating for “human-centered” curricula or a ban on “divisive concepts”), which is then used to oppose DEI initiatives.
- ▶ Administrative Complaints – Some of these organizations also file complaints with state and federal civil rights agencies, challenging student affinity groups or programs designed to assist specific student populations.

- ▶ **Lawsuits** – Occasionally, these groups may file lawsuits claiming DEI efforts violate federal or state laws.

Anti-DEI efforts often rely on misinformation and intimidation. They mischaracterize the law and threaten legal action, hoping that schools will simply back down. They use vague language to have a sweeping, detrimental impact on what teachers include in their lessons. As this Guidance demonstrates, however, school administrators, families, and their allies can combat these efforts with knowledge of the law.

VI. FREQUENTLY ASKED QUESTIONS (FAQ)

A. *If students of color want a safe space to talk about current events, can we allow that? (i.e. affinity groups for LGBTQ+ students, Latinx students, Asian students, Black students)*

Affinity groups are permitted and encouraged. In most cases, affinity groups should not restrict participation on the basis of identity.²⁶ For example, an LGBTQ+ affinity group should be open to students who do not identify as LGBTQ+. Similarly, an affinity group for Black students should be open to white students. Affinity groups can, however, restrict participation based on conduct that violates the groups bylaws or rules, such as harassment or discrimination. For example, participation may be restricted when a student attends to harass, bully or intimidate affinity group members.

B. *Can students organize a Black Lives Matter (BLM) group? What about an All Lives Matter group?*

Students may organize either a BLM group or an All Lives Matter group, as school policies must be viewpoint neutral. Both organizations should be open to all members of the school body who abide by the group’s bylaws and rules.

C. *Can we put on a play that includes depictions of slavery? What about a play about the Civil War or the Civil Rights Movement of the 1960s?*

Yes. Just because a play, or other extracurricular activity, touches on themes of racism or discrimination is not problematic. Although any such activity should be handled sensitively, both federal and state law guidance make clear that such topics are not off-limits—and in fact may be useful tools for fostering a more positive and inclusive school climate.

On a federal level, the OCR lists “student assemblies or programs focused on antiharassment or antibullying” and the “use of specific words in school policies, programs, or activities, such as equity, discrimination, inclusion, diversity, and systemic racism” as activities that are not generally or categorically prohibited.²⁷ State law expands on this principle by requiring schools “through their curricula [to], encourage respect for the human and civil rights of all individuals regardless of race, color, sex, gender identity, religion, national origin or sexual orientation.”²⁸

²⁶ 603 CMR 26.06 (2) (“No student shall be denied the opportunity in any implied or explicit manner to participate in an extra-curricular activity because of the race, color, sex, gender identity, religion, national origin or sexual orientation of the student...”). See also M.G.L.c. 76, §5.

²⁷ *Fact Sheet: Diversity & Inclusion Activities Under Title VI*, U.S. DEPARTMENT OF EDUCATION-OFFICE OF CIVIL RIGHTS (Jan. 2023), available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf>.

²⁸ 603 CMR 26.05.

D. Can we ban certain words (e.g., the “n-word” or “queer”)? What about if students of color or LGBTQ+ students want to use those terms themselves?

Yes. The U.S. Supreme Court has stated that schools are permitted to prohibit “vulgar and offensive terms.” Determinations as to what constitutes “vulgar and offensive” speech is generally left to the discretion of the school board.²⁹ However, any and all policies should prohibit use of such language regardless of the user. In other words, bans must be “viewpoint neutral.”

E. What's the line between free speech and hate speech?

There is no well-defined line between free speech and hate speech, but language that is “vulgar” or “plainly offensive,” or language that causes “substantial and material disruption” of a school’s operation can be prohibited.³⁰

F. Can we teach about civil rights? What about white supremacy?

Massachusetts regulations require that the curricula of all public school systems encourage respect for human and civil rights of all individuals.³¹ These regulations also require that teachers review all educational and instructional materials to ensure the information does not reflect “simplistic and demeaning generalizations, lacking intellectual merit, on the basis of race, color, sex, gender identity, religion, national origin, and sexual orientation.”³² These regulations are further expanded upon in the exemplary frameworks Massachusetts provides, which are available online. The frameworks include a “History and Social Science Framework” that discusses civil rights extensively and also references discussions of “the organized perpetuation of white supremacist beliefs and the threat of violence from extra-legal groups such as the Ku Klux Klan.” However, these frameworks are only exemplary, and the final decision on school curricula is generally determined on a local (and not state) level.

G. Does the recent Supreme Court affirmative action decision impact my local school district?

No. The recent Supreme Court decision in *Students for Fair Admissions v. Presidents and Fellows of Harvard College* is limited to the consideration of race in admissions practices in colleges and universities.

²⁹ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986) (“It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the school, and the determination of what manner of speech is inappropriate properly rests with the school board.”). See also *Pyle By and Through Pyle v. South Hadley School Committee*, 861 F.Supp. 157, 159 (D.Mass 1994).

³⁰ See *Pyle*, 861 F.Supp. at 166 (“First, ‘vulgar’ or plainly offensive speech ... may be prohibited without showing a showing of disruption or substantial interference with the school's work. Second, school-sponsored speech ... may be restricted when the limitation is reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor school-sponsored ... may only be prohibited if it causes a substantial and material disruption of the school's operation.”).

³¹ 603 CMR 26.05(1) (“All public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of race, color, sex, gender identity, religion, national origin or sexual orientation.”). See also M.G.L.c. 76, §5.

³² 603 CMR 26.05(2). See also M.G.L.c. 76, §5.

RESOURCES

U.S. Department of Education, Office for Civil Rights,
Fact Sheet: Diversity & Inclusion Activities Under Title VI

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<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf>

Congressional Research Services

Race Discrimination at School: Title VI and the Department of Education's Office for Civil Rights

Published July 21, 2023

<https://crsreports.congress.gov/product/pdf/IF/IF12455>

U.S. Department of Justice, Civil Rights Division

Educational Opportunities Section

<https://www.justice.gov/crt/educational-opportunities-section>

Massachusetts Department of Elementary and Secondary Education

Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment

<https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html>

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