

# Title IX Sexual Harassment and Other Unlawful Harassment

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# OVERVIEW

# Sexual Harassment and Other Discrimination

- Federal, state and local laws prohibit discrimination on the basis of an individual's legally protected characteristics and/or activities.
- Harassment is a form of unlawful discrimination in that it is characteristic-based treatment that adversely affects the workplace.
- The District has a legal duty to take steps reasonably calculated to prevent and stop harassment, including having an anti-harassment policy, providing training to employees, and addressing complaints.

# Today's Training

- After today's training, you should have an understanding of:
  - Harassment and, more specifically, Title IX Sexual Harassment;
  - Your duty to report potential harassment, including Title IX Sexual Harassment; and
  - Applicable procedures to make a report.

# TITLE IX OVERVIEW

# Title IX – the Law

Title IX of the Education Amendments of 1972 provides the following:

- No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. §1681(a).

# Title and Content

- Title IX requires school districts to publish and implement a policy prohibiting discrimination on the basis of “sex.” “Sexual harassment” is a form of sex discrimination.

# NESD Policy 103

## Discrimination/Title IX Sexual Harassment Affecting Students

- The Board declares it to be the policy of this district to provide an equal opportunity for all students to achieve their maximum potential through the programs and activities offered in the schools without discrimination on the basis of race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy or handicap/disability.
- The Board also declares it to be the policy of this district to comply with federal law and regulations under Title IX prohibiting sexual harassment, which is a form of unlawful discrimination on the basis of sex. Such discrimination shall be referred to throughout this policy as Title IX sexual harassment.



# NESD Policy 104

## Discrimination/Title IX Sexual Harassment Affecting Employees

- The Board declares it to be the policy of this district to provide to all persons equal access to all categories of employment in this district, regardless of race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, genetic information, pregnancy or handicap/disability. The district shall make reasonable accommodations for identified physical and mental impairments that constitute disabilities, consistent with the requirements of federal and state laws and regulations.
- The Board also declares it to be the policy of this district to comply with federal law and regulations under Title IX prohibiting sexual harassment, which is a form of unlawful discrimination on the basis of sex. Such discrimination shall be referred to throughout this policy as Title IX sexual harassment.

# Other Unlawful Harassment

- NOTE: Title IX governs “Title IX sexual harassment” in the educational setting. However, harassment on the basis of other protected characteristics, such as race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, genetic information, pregnancy or handicap/disability is prohibited under other federal, state, and/or local laws. All forms of harassment should be reported under the procedures reviewed here today.

# WHY TITLE IX TRAINING?

# Title IX Violations

- A school district violates Title IX if it is “deliberately indifferent” to “actual knowledge of sexual harassment.” 34 CFR §106.44.
  - “Deliberately indifferent” – responding in a “clearly unreasonable” manner.
  - A school district has “actual knowledge” when *any* school district employee has “actual knowledge.

# Actual Knowledge

- Title IX defines “actual knowledge” as “notice of sexual harassment or allegations of sexual harassment” to the Title IX Coordinator or to *any* employee.
- Examples of “notice” or “actual knowledge” include:
  - Observing or witnessing sexual harassment;
  - Receiving an oral report from the victim or any 3<sup>rd</sup> party;
  - Receiving a voicemail, email, or other message alleging sexual harassment has occurred;

# Actual Knowledge

- Examples of “notice” or “actual knowledge” continued:
  - Receiving multiple reports of a different nature which, together, suggest the existence of “sexual harassment”;
  - Receiving an anonymous report; or
  - Receipt of a formal complaint or report under Policy 103 or 104.

# Actual Knowledge

The school district does not have “actual knowledge” if the only official of the school district with actual knowledge of the sexual harassment is the Respondent (the alleged perpetrator).

# Title IX Training

- All school employees must be trained on their obligation to:
  - Identify potential Title IX sexual harassment; and
  - Make a prompt report to the Title IX Coordinator.
- Failure to train employees to meet these obligations may result in a finding that the *school district* has been “deliberately indifferent” to actual knowledge of sexual harassment.



# SEXUAL HARASSMENT

# What is “Sex”?

- Title IX does not define “sex.”
- Bostock v. Clayton County, Georgia (July 15, 2020)
  - The Supreme Court ruled that the prohibition against employment discrimination “because of... sex” under **Title VII** included discrimination on the basis of gender identity and sexual orientation.
- President Biden’s “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.” (January 20, 2021)
  - “Under Bostock’s reasoning, laws that prohibit sexual discrimination – including Title IX... prohibit discrimination on the basis of gender identity or sexual orientation.”

# What is “Sex”?

- DOE “Notice of Interpretation” (June 2021)
  - DOE intends to enforce Title IX’s prohibition on discrimination on the basis of “sex” to include discrimination on the basis of sexual orientation and discrimination on the basis of sexual orientation and discrimination based on gender identity.
- For purposes of Title IX “sexual harassment”, sex includes all of the following:
  - Biological sex
  - Gender identity
  - Gender expression
  - Sex-based stereotyping
  - Sexual orientation

# What is “Harassment”?

- Harassment is a form of unlawful discrimination in that it is characteristic-based treatment that adversely affects the workplace.
- School districts have a legal duty to take steps reasonably calculated to prevent and stop harassment, including having anti-harassment policies, providing training to employees, and addressing complaints.
- Any acceptance or perceived tolerance of harassment presents significant risk to school districts under state and federal laws, including Title IX.

# What is “Harassment”?

- Harassment can include actions, words, jokes, or comments based on or because of an individual’s protected characteristic(s).
- Harassment also can include passive acts, such as alienating someone through omission or withholding necessary information or assistance.

# What is “Title IX Sexual Harassment”?

“Title IX Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

1. A school employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (i.e. *quid pro quo* harassment); or
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking (as defined by the Clery Act and Violence Against Women Act)

34 C.F.R. §106.30 (Definitions)

# Title IX Sexual Harassment

## First Prong: Quid Pro Quo Harassment

- Applies whether the “bargain” was express or implied.
- Need not be “severe or pervasive”
  - “Abuse of authority in the form of even a single instance of *quid pro quo* harassment is inherently offensive and serious enough to jeopardize equal educational access.”

[OCR Final Rule, 85 FR 30026, 30148 \(5/19/2020\)](#)

# Title IX Sexual Harassment

## Second Prong: Hostile Environment

- “Hostile environment” claims are very familiar in the employment context
  - Title VII of the Civil Rights Act of 1964 (Title VII)  
Prohibits employment discrimination based on race, color, religion, sex, or national origin.
  - Title IX of the Education Amendments of 1972 (Title IX)  
Prohibits discrimination on the basis of sex, including sexual harassment, in education programs and activities. Applies to public and private education institutions that receive federal funds.



# Title IX Sexual Harassment

## Second Prong: Hostile Environment

- Title IX Standard: Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity

# Title IX Sexual Harassment

## Second Prong: Hostile Environment

- Denial of “equal access” to education does not require “that a person’s total or entire educational access has been denied.”
- “No concrete injury is required” to prove an effective denial of equal access.
- Complainants do not need to have “dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘breaking point’” or exhibited specific trauma symptoms to be effectively denied equal access.

U.S. Department of Education, *Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)*

# Title IX Sexual Harassment

## Third Prong: Sexual Assault, Etc.

### ■ Sexual Assault

- The Clery Act defines sexual assault as a forcible or nonforcible offense that meets the definition of rape, fondling, incest, or statutory rape as defined in the FBI’s Uniform Crime Reporting System
- Includes any sexual act “directed against another person without the consent of the victim, including instances where the victim is incapable of giving consent.”
- Includes statutory rape as a “nonforcible” sex offense.

# Title IX Sexual Harassment

## Third Prong: Sexual Assault, Etc.

### ■ Dating Violence

- Definition from the Violence Against Women Act (VAWA)
- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
  - The existence of a relationship is determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

# Sexual Assault, Dating Violence, Domestic Violence, or Stalking

## ■ Domestic Violence

- As defined by VAWA
- A felony or misdemeanor crime of violence committed by:
  - A current or former spouse or intimate partner of the victim;
  - A person with whom the victim shares a child;
  - A person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
  - A person similarly situated to a spouse of the victim; or
  - Any other person against an adult or youth victim who is protected from that person's acts under local domestic or family violence laws.

# Sexual Assault, Dating Violence, Domestic Violence, or Stalking

## ■ Stalking

- As defined by VAWA
- A course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others or suffer substantial emotional distress.
- Includes “cyber-stalking” – stalking that occurs online or through messaging platforms – when it occurs in the school’s education program or activity

# RETALIATION

# Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX ... or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [Title IX].

34 C.F.R. §106.71(a)



# Retaliation

- Retaliation based on the exercise of rights under Title IX is prohibited.
- Filing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination or sexual harassment for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sexual harassment.

**WHAT SHOULD  
YOU DO?**

# When To Report

- Every employee or agent of the school district who has notice of potential Title IX sexual harassment occurring in the school district's education program or activity must report that information to the school district's Title IX Coordinator

# How To Report

- Policy 103 / Policy 104 Attachment 1 – Report Form
- The Report Form will prompt you for the following information:
  - The names of the “Complainant” (i.e. the victim) and the “Respondent” (i.e. the accused);
  - The conduct at issue, including when and where it took place;
  - The names of witnesses or others with information or knowledge.

# Other Ways To Report

- Report Form is best practice. However, the absence of a Report Form is not an excuse to failure to inform the Title IX Coordinator of a potential violation. Employees must promptly inform the Title IX Coordinator of potential Title IX sexual harassment once they have notice / actual knowledge.
- If you cannot complete the form, you must inform the Title IX Coordinator, either in-person or by phone call or email.

# EMPLOYEE HARASSMENT

# What To Do If You Are Harassed

- Harassment of employees is prohibited under Title IX (“Title IX sexual harassment”) or other federal and state laws (Title VII, ADA, etc.).
- If you believe that you are being harassed or you believe one of your coworkers are being harassed, report the harassment using the same procedure under Policy 104.

# Thank You!

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