"PROMPT AND EQUITABLE": THE IMPORTANCE OF STUDENT SEXUAL HARASSMENT POLICIES IN THE PUBLIC SCHOOLS

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This article is reprinted with permission from West Law. It first appeared in West's Education Law Reporter, November 28, 1996. INTRODUCTION Prior to 1992, school administrators and board members may have been unaware of a law called Title IX. Even though passed by Congress in 1972, to prohibit federally funded educational institutions from discriminating on the basis of sex, Title IX was rarely the focus of legal battles during the first 20 years of existence; it was invoked only on occasion to equalize opportunities for female athletes at the secondary and collegiate levels.[1] However, the landmark case of *Franklin v. Gwinnett County Public Schools*[2] brought Title IX to the forefront of public school civil rights litigation.

In *Franklin*, the Supreme Court unanimously ruled that public school students could obtain a damages remedy for an action brought to enforce Title IX. Because the plaintiff in the case, Christine Franklin, alleged that she had been denied equal educational opportunity due to the sexual advances of one of her male high school teachers, the Court's ruling meant that school districts suddenly faced monetary liability for the sexual harassment claims of both students and employees.[3]

Although only four years have passed since *Franklin*, lower federal courts have been active articulating the parameters of Title IX and the scope of the Franklin decision.[4] Two particularly significant decision are *Doe v. Petaluma City School District*[5] and *Davis v. Monroe County Board of Education.*[6] in which federal courts have held that public schools may be liable for money damages under Title IX for student-to-student sexual harassment.

Based on this growing body of case law, as well as the increasing vigilance of the U.S. Department of Education's Office for Civil Rights (OCR), school boards across the United States are beginning to realize the necessity of complying with Title IX. This article discusses the importance of public school student sexual harassment policies in meeting Title IX's mandate to achieve, "prompt and equitable" resolution of sexual discrimination complaints. The article also provides guidance to school boards and administrators as they draft policy applicable to local concerns.

Part I of the article analyzes the statutory language of Title IX and it's implications for policy. Part II explores legal principles of sexual harassment developed under Title VII and proposes that Title VII law provides a solid framework for school board policies on student sexual harassment. Specifically, Part II discusses the recent case of *Gary v. Long*[7] and the favorable precedent it sets for school districts with good policies. Part III outlines several essential elements of a board policy on student sexual harassment, and correlates the recommendations to a sample board policy. Finally, Part IV presents a model board policy on student sexual harassment that school boards and administrators can use as a tool in developing their own policies.

I. TITLE IX AND LEGAL IMPLICATIONS FOR POLICY

Title IX itself does not require educational institutions to have sexual harassment policies. The law states simply: "No person in the Unites States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[8]

Furthermore, U.S. Department of Education regulations implementing Title IX do not explicitly require sexual harassment policies; they require only that schools "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part (Title IX)."[9] Thus, school districts are technically left with complete discretion under Title IX as to whether or not to adopt a sexual harassment policy for students.[10]

However, a legal requirement for student sexual harassment policies may be inferred from court and OCR decisions interpreting Title IX and its regulations. Importantly, the *Franklin* Court expressly recognized that sexual harassment of public school students is a form of sexual discrimination prohibited by Title IX, noting:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate(s)' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.[11]

Likewise, the *Petaluma* court reasoned:

It would violate the Supreme Court's command to give Title IX a sweep as broad as its language to find that Title IX does not prohibit hostile environment sexual harassment. Surely one is "denied the benefits of, or subjected to discrimination under" an education program on the basis of sex when, as alleged here, she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program.[12]

If sexual harassment in public schools is prohibited by Title IX, then any grievance procedure developed in compliance with Title IX's regulations should at least include in its statement of grievable offenses, a reference to sexual harassment. Ideally, a proper Title IX grievance procedure will include much more; the grievance mechanism will be only one component of a comprehensive sexual harassment policy designed to educate students and minimize inappropriate and illegal behavior.

Interestingly, Christine Franklin alleged, among other things, that "though they became aware of and investigated Hill's (the teacher's) sexual harassment of Franklin and other female students, teachers and administrators *took no action to halt it* and discouraged Franklin from pressing charges against Hill."[13] While the Court did not specifically address the issue, it seems possible that administrators might have followed through more appropriately with Franklin's complaint had they been required to do so by policy. Schools failure to adopt policy may subject them to charges of intentional discrimination on the basis of sex; school officials cannot afford to be deliberately ignorant of the reasonable steps they must take to remedy complaints of sexual harassment.

II. TITLE VII: DEFINING THE STANDARD

A. The Most Appropriate Analogue

Although Title IX does not provide courts much guidance in determining the outcome of student sexual harassment complaints, Title VII law does. Consequently, scholars have suggested[14] and several courts have held[15] that Title VII case law should govern Title IX actions.[16]

While not explicit in its opinion, the *Franklin* Court implied that Title IX sexual harassment claims should be analyzed according to Title VII precedent by basing its ruling in large part on *Meritor Savings Bank v. Vinson,*[17] a landmark Title VII sexual harassment case. In addition, several lower federal courts have expressly held that Title VII standards should apply to Title IX claims.

For example, The Tenth Circuit Court of Appeals recently held that Title VII is "the most appropriate analogue when defining Title IX's substantive standards," including standards of discrimination.[18] Similarly, the Fourth Circuit Court of Appeals has stated that "Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."[19] Most persuasively, the Eleventh Circuit Court of Appeals recently held:

Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.[20]

B. Title VII's Guidance on Sexual Harassment Policies

Two aspects of Title VII are important to consider with respect to student sexual harassment policies developed pursuant to Title IX. First, EEOC regulations implanting Title VII clearly prohibit peer sexual harassment like the harassment at issue in *Petaluma*. The regulations state:

With respect to *conduct between fellow employees*, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.[21]

Therefore, every Title IX grievance procedure should arguably contain a provision listing student-to-student sexual harassment as conduct that may give rise to a complaint, and requiring prompt corrective action when school administrators become aware of, or should be aware of the conduct.

Precisely because the school environment is so different from the workplace, schools need to be even more forceful than employers in prohibiting peer sexual harassment and discrimination among students. As one author has noted:

The importance and function of the environment is different in academia than the workplace. …A nondiscriminatory environment is essential to maximize intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment

inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.[22]

Secondly, Title VII regulations point out that when it comes to sexual harassment, prevention is the best medicine. If Title VII regulations do, in fact, have some authoritative influence on how courts view Title IX regulations, the following EEOC regulation could be read to require schools to have much more than a simple Title IX grievance procedure:

Prevention is the best tool for the elimination of sexual harassment. An employer *should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions,* informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.[23]

Again, with students even more so than with employees, one of the best ways to "affirmatively raise the subject, express strong disapproval, and develop appropriate sanctions" is to have a clearly worded, well communicated policy on student sexual harassment that addresses substance as well as procedure.

C. Gary v. Long

In *Gary v. Long*,[24] Coramae Gary alleged that she was sexually harassed by her supervisor at the Washington Metropolitan Area Transit Authority ("WMATA"), James Long, for a period of nearly two years. Shortly after reporting the harassment to WMATA, Gary filed suit against both Long and WMATA, claiming that Long's harassment had created a hostile environment for her.

Responding to Gary's allegations, WMATA noted that at all relevant times, it has an "active and firm policy against sexual harassment." In ruling that WMATA was not liable for Long's harassment the court agreed and issued a statement about policy that could have far-reaching ramifications for schools desiring to avoid liability for sexual harassment of students under Title IX. The court reasoned in part:

(W)e hold that when, as here, an employer has taken energetic measures to discourage sexual harassment in the workplace and has established, advertised, and enforced effective procedures to deal with it when it does occur, *it must be absolved* of Title VII liability under a hostile work environment theory of sexual harassment. That defense depends, of course, on the ability of the employer to establish that its employees *could not reasonably have failed to know of those measures and that its grievance procedures were clearly "calculated to encourage victims of harassment to come forward."*

In this case, WMATA has pursued an active and firm policy against sexual harassment throughout the period of Gary's alleged mistreatment. WMATA had sponsored seminars on the subject, distributed staff notices to all employees informing them that sexual harassment would not be tolerated, publicized its Civil Rights policy statement, and made available to all employees the names and telephone numbers of the EEO Counselors to whom they could report acts of discrimination. WMATA also had a detailed grievance procedure for the formal and informal internal processing and review of discrimination complaints…

We find such a detailed and thorough grievance procedure to be "calculated to encourage victims of harassment to come forward."[25]

Title IX regulations require many of the things included in WMATA's sexual harassment policy that absolved it of Title VII liability. For example, schools must designate at least one employee to coordinate their compliance efforts with Title IX, i.e., school districts must publish the name and telephone number of this individual so that students and employees know how to report acts of sexual discrimination.[26] Schools are also required to adopt and publish grievance procedures "providing for prompt and equitable resolution" of student and employee complaints of sex discrimination.[27] Proper notification of school district's Title IX policies shall include publication in local newspapers, school newspapers or magazines, and memoranda or other written communication to students and employees of the district.[28]

Thus, a school board policy on student sexual harassment that includes these elements may prevent not only a lot of harm to students, but a lot of litigation as well. The critical question is whether school board policy on student sexual harassment is, like the policy at issue in Gary – "active," "firm," and "clearly calculated to encourage victims of harassment to come forward." In that vein, the following recommendations are offered for school boards, attorneys, and administrators interested in developing Title IX student sexual harassment policies.

III. TITLE IX STUDENT SEXUAL HARASSMENT POLICY RECOMMENDATIONS

Given the compelling legal and education arguments for student sexual harassment policies in public schools, it is imperative that schools develop a policy that will comply with Title IX and provide a solid foundation for resolving student complaints of harassment. Based on state and federal sexual harassment case findings in schools, Title VII regulations, policy guidance in current literature, and the authors' experience, the following components are offered as a template for sound policy.

A. Substantive Components of Policy

1. Establish a separate policy. One of the first questions a school district must resolve is "whether to adopt procedures uniquely suited to complaints concerning sexual harassment or to utilize the institution's other Title IX procedures or internal disciplinary methods to process and resolve these complaints."[29] Considering the sheer volume of most school district policy manuals, it may be tempting to condense and combine, weaving a sexual harassment policy into already existing civil rights or discipline policies. However, it is preferable to have a separate student sexual harassment policy. As one commentator has noted:

Establishing a separate procedure for sexual harassment claims enables the person or persons responsible for hearing and resolving the complaints to develop the sensitivity and expertise that will encourage victims of sexual harassment to come forward. Consequently, the establishment of a separate procedural apparatus also may be a better deterrent to such illegal behavior.[30]

2. Open with a strong philosophy statement. The policy should strongly state the district's prohibition on sexual harassment and commitment to provide a safe and healthy environment for all students that encourages respect, dignity, and equality. (See Policy § 1.1)

3. *Include a legal definition of sexual harassment.* Because neither Title IX nor its regulations mention sexual harassment, Title VII regulations on sexual harassment[31] provides the best source from which to derive an accurate legal description of unlawful conduct. At a minimum, the definition should cover both *quid pro quo* (conditional) sexual harassment and hostile environment sexual harassment. At the same time, legal jargon should be avoided as much as possible. The definitional language should be relatively simple so that it can be understood by students, parents, and staff. (See Policy § 5).

4. *Describe who is covered by the policy.* The policy should clearly state that it protects all students and staff from all forms of sexual harassment. Specifically, the policy should clarify that sexual harassment may occur student-to-student, student-to-staff, staff-to-student, male to female, female to male and male to male or female to female.[32] Moreover, the policy should plainly apply to parents, vendors, visitors, contractors, and other third parties who interact with students at school and during school sponsored activities. (See Policy § 4.3).

5. *State clearly that the policy prohibits sexual harassment both on and off school grounds.* All sexual harassment that occurs at school-sponsored activities, programs, internships and trips should be prohibited. Depending on state law, the policy may also prohibit individuals from sexually harassing anyone affiliated with the schools, whether or not the conduct occurs on school gounds.[33]

6. *Provide a list of specific behaviors that MAY constitute sexual harassment.* The Supreme Court has ruled that it will look at the "totality of the circumstances" in determining whether particular conduct constitutes unlawful sexual harassment.[34] In the Title VII context, conduct "that is not severe or pervasive enough to create an objectively hostile or abusive work environment – *an environment that a reasonable person would find hostile or abusive"* is not a civil rights violation.[35] Thus, not every student complaint of sexual harassment will constitute a violation of Title IX.

However, students and staff should be put on notice that certain behaviors may constitute sexual harassment depending on their pervasiveness and severity. Unfortunately, many students and staff do not recognize sexual harassment when it occurs. Therefore, a list of specific behaviors can be invaluable in changing beliefs and attitudes at the root of sexual harassment. (See Policy § 6).

Any list of behaviors should contain examples and be reviewed carefully for potential violations of student and staff First Amendment rights. Policy language that is overly restrictive of the rights of freedom of speech, expression and association can create separate civil rights liability and detract from the main purpose of the policy.[36]

7. *Provide guidelines to assist staff in determining whether the misconduct is sexual harassment.* School officials should be instructed to consider all the circumstances when investigating and evaluating claims of sexual harassment. (See Policy § 6.1) The supreme Court, in *Harris v. Forklift Systems, Inc.,*[37] held that "all the circumstances" may include "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."[38]

8. *Provide a list of potential sanctions and penalties for the harasser and state that the sanctions apply to all students, even those with disabilities.* A school district's legal obligation is to take immediate and appropriate corrective action to end sexual harassment that is brought to its attention. Therefore, all

students and staff should be put on notice that they will face disciplinary action for violating the policy, up to and including suspension, expulsion, probation, or termination, in addition to prosecution for criminal sexual behavior. The policy should also give administrators several other options because the harassment may not be severe enough to warrant such severe discipline. Furthermore, utilizing measures such as letters of apology and written assignments on the topic of sexual harassment may help to educate the harasser so that his or her attitudes and behavior will change. (See Policy § 13).

While school officials must follow appropriate procedures when disciplining students with disabilities who engage in misconduct (See Policy § 13.5), the policy should stipulate that students with disabilities are not exempt from discipline if they perpetrate sexual harassment. (See Policy § 13.1) Both OCR and federal courts have ruled that students with disabilities are not shielded from consequences for sexually harassing other students.[39]

9. State the potential consequences for school administrators and staff who receive complaints of sexual harassment and fail to act promptly and appropriately. Most of the reported cases involving student sexual harassment claims have centered on the issue of whether school administrators and staff took timely, appropriate action to investigate and resolve the complaint. As one court has noted, "Once a school district becomes aware of sexual harassment, it must promptly take remedial action which is reasonably calculated to end the harassment."[40]

Therefore, the policy should stipulate that school administrators and staff who fail to report, investigate, or take appropriate action with sexual harassment complaints may face disciplinary action, up to and including suspension, probation, and termination. (See Policy § 7.7).

10. Provide a written statement about confidentiality. As a way of encouraging victims of sexual harassment to file complaints, the policy should indicate the school district's commitment to respect, as much as possible, the privacy and anonymity of both victims and accused harassers. At the same time, absolute confidentiality should not be guaranteed given the various competing rights that may be involved in sexual harassment investigations, including the district's right to conduct a thorough review of the facts and the alleged harasser's right to confront his accusers. (See Policy § 8)

11. Indicate the support services available to student victims of sexual harassment. Because sexual harassment is often an emotional and traumatic experience for victims, particularly student victims, the policy should require school staff responsible for complaint intake and resolution to inform students about available support services. For example, depending on local resources, students might be referred to school social workers or psychologists, crisis team managers, or outside government sources such as mental health and sexual abuse counseling programs. (See Policy 9.2.1)

12. Provide a statement prohibiting retaliation. Together with the statement on confidentiality, a strong statement prohibiting all forms of retaliation is essential to encourage victims of harassment to file complaints. Because students and faculty may not completely understand what retaliation means, the statement should include several examples of specific conduct that may be considered retaliation (See Policy § 12). A strong prohibition on retaliation protects not only individuals, it also may protect the district from liability. In addition to Title IX liability, schools that fail to protect a student complainant from retaliation may face Section 1983 Civil Rights Liability under the First Amendment.[41]

13. Identify how school employees, students, parents, and community members will be notified about the policy. Federal regulations implementing Title IX state in part:

Each recipient (of federal funds) shall implement specific and continuing steps to notify… students and parents of elementary and secondary school students, employees, … and all unions or professional organizations holding professional agreements with the recipient, that it does not discriminate on the basis of sex in the education programs or activities which it operates, and that it is required by Title IX… not to discriminate in such a manner.[42]

As part of the required notification, the regulations state that school districts shall publish their Title IX policies in:

(i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for, or in connection with, such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.[43]

Finally, the regulations provide:

Each recipient shall prominently include a statement of the (Title IX) policy… in each announcement, bulletin, catalog, or application form which it makes available to (students, parents, employees, unions, and professional organizations) or which is otherwise used in connection with the recruitment of students or employees.[44]

Consequently, it is imperative that the policy spell out the methods by which employees, students, parents, and community members will be apprised of the district's Title IX sexual harassment policy. (See Policy § 17)

14. Provide a statement regarding the training of school staff. All school employees in service should receive, at least once a year, training on the district's sexual harassment policy and procedure, as well as other issues surrounding sexual harassment. In addition, school administrators responsible for conducting sexual harassment investigations should receive in-depth training annually on the legal and technical aspects of investigations. When investigations are performed only by those trained in the art and science of investigation, investigations will be more reliable and school district liability is reduced. (See Policy § 15).

15. Provide a statement regarding the training of students and parents. The policy should also describe how students and parents will be trained on the sexual harassment policy's contents and application. Depending on the size of the district, this training might be accomplished through parent assemblies, classroom presentations, training of student body officers, and PTA/community meetings. (See Policy § 15).

16. Identify a plan of policy review, evaluation, and improvement. Due to the constantly changing state of the law regarding school district liability under Title IX and Title VII for sexual harassment, perhaps the most important substantive piece of the policy involves a plan for evaluation and modification. The policy should specify how often the policy will be formally reviewed, the criteria that will be used to conduct the evaluation, and who will participate in the review. In addition, the policy should identify a district employee by name and title who is responsible for monitoring and

assessing the effectiveness of the district's policy and programs on sexual harassment (See Policy §§ 3, 17).

B. Procedural Components of Policy

1. Provide a philosophy statement concerning the district's commitment to prompt and equitable resolution and the rights and responsibilities of the parties to a complaint. Title IX regulations plainly state that public schools receiving federal funds *"shall adopt* and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" under Title IX.[45] Therefore, the policy should state strongly the district's commitment to quickly investigate and fairly resolve sexual harassment complaints. The policy should also briefly outline the basic rights and responsibilities of all parties to a complaint.

Among other things, for example, the policy might state that parties are responsible for being thorough in documenting their complaint and responding to it, refraining from retaliation, and cooperating with investigators' requests to examine records and conduct interviews. At the same time, parties should be put on notice that they are entitled to such things as the right to a prompt and thorough investigation, the right to have representation, and the right to receive timely notification of the complaint's outcome. (See Policy § 7).

2. Outline a clear and simple grievance procedure. Perhaps the most important component of a sexual harassment policy is the grievance procedure. Effective complaint procedures are easily understood by students, parents and employees, and serve as a valuable roadmap for school administrators responsible for resolving complaints.

3. Encourage victims to put their complaints in writing. Although written complaints probably should not be required, they should at least be strongly encouraged. Written complaints tend to be more detailed and often provide much better information for the investigator. In addition, students who are encouraged to provide a written statement often will describe conduct they are embarrassed or fearful to describe verbally to an adult investigator. Interestingly, representatives of the EEOC have stated that employers can and should require written notice in other civil rights contexts, such as when employees request accommodations under the Americans with Disabilities Act.[46]

It is also important, however, to provide alternative methods of filing complaints, particularly for the disabled and young children who may be incapable of writing a complaint. The policy should describe the availability of tape recorders, scribes, and the like for victims who need such assistance. (See Policy § 7.9).

4. Place timelines on the filing of complaints. Victims should be encouraged, although not required, to file complaints within a specified time period (such as 90 days following the harassment). All parties need to understand that the sooner harassment is reported, the better equipped school officials are to resolve it promptly and equitably.

5. Identify the district's obligation to report criminal activity and child abuse to law enforcement authorities. The policy needs to stipulate that upon receiving complaints of rape, sexual assault (including the touching of another's genitals or breasts), child sexual abuse, or other crimes, school officials will immediately contact appropriate law enforcement authorities. Again, the policy may also include a

provision requiring discipline for those employees who fail to request police investigation or suspected criminal acts. (See Policy § 7.7).

6. Distinguish between informal and formal complaint procedures. While interpretations may vary, the authors generally define informal complaint procedures as those that take place at the school level and involve resolution steps short of a full-blown investigation and/or a formal hearing. For example, in attempting to resolve a complaint informally, a school principal may interview the alleged harasser, inform the alleged harasser of the complaint, question the harasser about the alleged incidents, review the district's sexual harassment policy with the harasser, and inform the alleged harasser that he or she must immediately stop any harassment that is ongoing or face swift disciplinary action.

On the other hand, a school principal or district administrator may need to invoke more formal steps to equitably resolve a complaint. Formal complaint resolution procedures include conducting a thorough investigation that results in a formal written report of the investigator's Findings of Fact, Conclusions of Law, and Recommended Action to resolve the complaint. In this type of procedure, not only are the parties to the complaint interviewed, but witnesses and other third parties are also interviewed. Moreover, formal hearings and disciplinary action may be initiated.

Because informal measures taken at the school level are usually the most expedient way to resolve a sexual harassment complaint, such measures should be encouraged in every appropriate situation. (See Policy § 9.2.7). Yet, informal methods of resolution are inappropriate for some complaints, particularly those involving adult to student harassment or criminal behavior. The policy should mandate that all complaints of egregious misconduct be formally investigated by trained district personnel and, if criminal, referred to an outside agency such as child protection or law enforcement authorities. (See Policy § 9.5).

In addition to being required by law under child abuse reporting statutes, referral of severe adult to student complaints to an outside agency ensures that an unbiased investigation occurs. An independent investigation protects the accused, the district, and the victim. Given the unique role of principals and superintendents, they may feel divided loyalties toward students and teachers and therefore may have difficulty performing an adequate investigation. This is particularly true when the teacher who abuses is popular with students, parents, and staff.

School officials should keep in mind, however, that even if the outside agency's findings are inconclusive, regarding criminal conduct, the district may still need to take action with the employee to avoid Title IX liability. Faculty may engage in sexual misconduct (i.e., comments, touching, leering) that does not warrant criminal charges, yet that still warrants disciplinary measures such as suspension, termination, or referral to state agencies for revocation of licensure. Whether or not sexual harassment rises to a criminal violation, it is always a violation of civil law (Title IX), particularly if not treated seriously by school officials.

7. Provide specific time frames in which school personnel are required to commence and complete investigations. Given Title IX's requirement that schools obtain prompt and equitable resolution of complaints, the policy should obligate school officials to begin and report the findings of investigations within reasonably short time frames. (See Policy §§ 9.2, 10.2).

To Some extent, the size of the school and administrative burden will govern how timelines are set. For instance, many junior high schools in Utah with 1500 students or more have only two paid administrators, a principal and an assistant principal. Such an arrangement makes it difficult, if not impossible, for the administrators to respond immediately to any complaint, especially if multiple crises occur at the same time. On the other hand, schools in districts with comparatively abundant administrative support may be better positioned to act quickly with complaints.

As a general rule, districts should consider requiring school officials to begin investigations no later than three working days following receipt of the complaint and to report the findings of investigations no later than thirty days following receipt of the complaint. At the same time, if victims are not held to absolute timelines for filing complaints, the policy should also allow some latitude for school officials responsible for investigations, particularly if the investigation process is complex or if extenuating circumstances arise. One method of allowing for flexibility in the investigation timelines is simply to require a status report from the investigator if he or she has a need to extend the timeline. (See Policy § 10.5).

8. Identify the names and titles of school officials responsible for conducting investigations, and inform victims of their right to have either a male or female investigator. Title IX regulations state:

Designation of a responsible employee: Each recipient shall designate *at least one employee* to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient *shall notify all students and employees of the name, office address and telephone number of the employee or employees appointed* pursuant to this paragraph.[47]

Small school districts may be comfortable in having only one designated Title IX coordinator and investigator, although even in small districts, it is preferable to have at least one male and one female investigator. However, bigger districts may want to appoint several district-level Title IX coordinators/investigators as well as a Title IX coordinator/investigator at each school. It should be noted that while non-administrators such as teachers or counselors might, in limited circumstances, be designated as school Title IX coordinators and complaint managers, good practice suggests that investigation and resolution of complaints should always be handled by administrators, independent outside investigators, or attorneys.[48]

In addition, given the power dynamics and embarrassing conduct that often surround harassment complaints, victims are often reluctant to have their concerns addressed by an investigator of the opposite sex. Therefore, the complaint procedure will be more accessible and fair to victims if they are given the option of requesting an investigator of their same gender. (See Policy § 7.2).

9. Require school officials to provide a written report of the investigation findings and action taken to resolve the complaint. Once an investigation is completed, school officials should send a prompt written report to the alleged harasser and the victim, notifying both parties of the findings and the specific action that will be taken to ensure the complaint's equitable resolution (See Policy §§ 9.2.10, 10.5). Especially given the trauma sexual harassment can have on a student, student victims and their parents will demand to know what school officials have done to address the complaint. If school

officials do not take the time to document their actions in writing, students and parents will often presume that school officials have done nothing.

10. Insist that parents of both student victims and harassers be notified when allegations are serious or if misconduct is repeated. Because sexual harassment investigations often involve discussing explicit sexual matters and can seriously damage students' educational performance, parents of both student victims and harassers must be contacted. If the policy requires school officials to notify parents of the complaint and its outcome, additional complaints concerning the privacy rights of parents can be avoided[49] and parents can take an active role in the process of resolution.

11. Provide information about where and how long records should be kept. Principals, school Title IX coordinators, and district administrators responsible for sexual harassment complaints and investigations should have policy guidance regarding the storage of records. (See Policy § 16). Not only do records play a critical role if a harasser repeats the harassment, but they also may be the key piece of evidence in litigation over the response of school officials to harassment complaints.

12. Describe appeal procedures and provide information about alternative complaint options with other agencies. The options for appeal procedures are myriad. However, all effective appeal procedures have at least two things in common: 1) they are perceived by all parties as being impartial, and 2) they are simple to understand and follow.

One method of precluding the automatic charge of bias made by victims who are forced to appeal one school official's decision to another school official is to establish an appeals panel or committee composed, at least in part, of people who are not district employees. (See Policy § 10.6). However, whether panel members are chosen on a permanent, or on a case-by-base basis, they should be trained regarding the district's sexual harassment policy and their role as neutral hearing officers.[50]

In addition, the policy should provide addresses and phone numbers of relevant state and federal agencies in charge of enforcing sexual harassment and discrimination laws. (See Policy § 11). The policy should in no way discourage victims from pursuing complaints with these agencies or other legal redress.

13. Indicate that the grievance procedure does not supersede other grievance procedures contained in district policy or collective bargaining agreements. School districts may already have in place a single grievance procedure designed to address any form of discrimination and/or union grievance procedures available to district employees. Any grievance procedure specially tailored to the sexual harassment policy should be consistent with these other procedures and identified as *an* avenue of complaint, not the *only* avenue.

14. *Encourage informal processes, specifically mediation, at each stage of the grievance procedure.* While mediation may not be appropriate in every case of sexual harassment, such as when there has been sexual violence or severe intimidation, it can be a very effective tool for resolving a sexual harassment dispute at any stage of the grievance procedure.[51]

First, students who file sexual harassment complaints often want only to have the harassment stopped and to have the harasser accept responsibility for his or her wrongdoing. These goals in many cases are better obtainable through mediation than litigation because in mediation the parties

are not bound by the remedies available through the court systems.[52] Moreover, early mediation may result in reduced cost for the parties, speedier resolution, and less paperwork.[53]

Secondly, given the tremendous backlog of discrimination complaints in federal agencies and courts,[54] it behooves all parties to a sexual harassment complaint to consider constructive alternatives to litigation. As one author has noted:

Ultimately, a negotiated settlement is the most advantageous route to take for both employer and employee. Mediation can be a very useful tool in helping the parties come to an agreement. It avoids a costly lawsuit, which not only disrupts the lives of all the parties concerned, but allows them to conduct their daily activities in a normal way. A good, creative mediator can be invaluable in reaching these goals.[55]

CONCLUSION

It may take several years before there is a clear path for lawyers, educators and judges to follow with respect to the legal issues surrounding student sexual harassment. However, probably none of these constituencies would dispute that sexual harassment in school is a paramount educational concern because of the potentially devastating effect it can have on children.

In applying Title VII employment principles to Title IX sexual harassment claims by students, one federal court recently held that "a student should have the same protection in school that an employee has in the workplace."[56] Specifically, the court responded:

Indeed, where there are distinctions between the school environment and the workplace, they "serve only to emphasize the need for zealous protection against sex discrimination in the schools." The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, "(a) nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the education benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing their full intellectual potential and receiving the most from the academic program."[57]

Consequently, it is imperative for local boards of education to adopt and enforce strict policies prohibiting sexual harassment in school.[58] A strong policy may be the catalyst for a "sea change" in the community regarding attitudes and responses toward harassment. When thoughtfully developed, a school sexual harassment policy becomes the foundation on which a district can build its anti-sexual harassment platform. A district can use the policy specifically to improve the health, safety and welfare of students and staff, enhance school culture, and diminish the risk of liability.[59]

More importantly, a strong policy sends a message to the community, staff, students, and parents that the district is cognizant of sexual harassment and is taking positive steps to prevent it in the

schools. In a time of decreasing civility and manners in our society, [60] teaching students to consistently treat others with respect and decency may be the most important lesson we teach.

APPENDIX

SCHOOL DISTRICT POLICY AND PROCEDURES

Subject: Student Sexual harassment Policy

Index: Individual Rights and Responsibilities

1. PURPOSE AND PHILOSOPHY

    1.1 Sexual harassment is abusive and illegal behavior that harms victims and negatively impacts the school culture by creating an environment of fear, distrust and intolerance. Because the District is committed to provide a safe, healthy environment for all students that promotes respect, dignity and equality, it is the purpose of the policy to create and preserve an educational environment free from unlawful sexual harassment and discrimination on the basis of sex.

2. REFERENCES

    2.1 20 USC § 1681, Education Amendments of 1972, Title IX.

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

    2.2 34 C.F.R §§ 106.1-106.71, U.S. Department of Education Office for Civil Rights Regulations Implementing Title IX.

    Requires designation of Title IX Coordinator, grievance procedure, and public notice of Title IX policies and procedures.

    2.3 42 U.S.C. § 2000e, Civil Rights Act of 1964, Title VII.

    Prohibits employers from discriminating on the basis of sex.

    2.4 29 C.F.R. § 1064.11, Equal Employment Opportunity Commission

    (EEOC) Regulations Implementing Title VII.

    Provides guidelines on sexual harassment in the workplace.

3. MONITORING RESPONSIBILITY

The District Compliance Officer and Title IX/EEO Coordinator, as designated by the Superintendent of Schools, will be responsible for ensuring compliance with this policy. The Compliance Officer will, yearly, evaluate, among other things: The frequency and nature of complaints under this policy; staff and student compliance with the policy; the degree and success of parental involvement with the policy; staff, student, and parent perceptions of the policy's effectiveness. Results of the evaluation will be used to modify or update the policy as appropriate, with an emphasis on remedying deficiencies.

4. POLICY

4.1 In order to provide a safe and healthy environment that encourages respect, dignity and equality, it is District Policy to provide an educational environment free from sexual harassment and discrimination on the basis of sex. Under both Title VII of the Civil Rights Act of 1964, and Title IX of the Educational Amendments of 1972, the District considers sexual harassment to be unlawful discrimination on the basis of sex. In addition, the State Constitution prohibits discrimination on the basis of sex. Finally, sexual harassment/assault by any individual may constitute a sexual crime or child abuse under the State Criminal Code.

4.2 The District strictly prohibits all forms of sexual harassment on school grounds, school buses and at all school-sponsored activities, programs and events including those that take place at locations outside the District. The District also strictly prohibits all forms of sexual harassment against individuals associated with the school whether or not the harassment occurs on school grounds.

4.3 Because sexual harassment can occur adult to student, student to adult, student to student, male to female, female to male, male to male or female to female, it shall be a violation of this policy for any student, employee, or third party (school visitors, vendors, etc.) to sexually harass any student employee, or any other individual associated with the school (i.e., parents, contractors, maintenance workers, consultants, etc.).

4.4 The District encourages all victims of sexual harassment and persons with knowledge of sexual harassment to report the harassment immediately. All complainants have the right to be free from retaliation of any kind.

4.5 The District will promptly investigate all formal, informal, verbal and written complaints of sexual harassment, and take prompt corrective action to end the harassment.

5. DEFINITIONS

5.1 "Sexual Harassment" means unwelcome sexual advances, requests for sexual favors, other physical or verbal conduct or communication of a sexual nature, and any other

gender-based harassment, whether initiated by students, school employees, or third parties when:

5.1.1 Submission to the conduct is made explicitly or implicitly a term or condition of a student's education (including any aspect of the student's participation in school-sponsored activities, or any other aspect of the student's education);

5.1.2 Submission to or rejection of the conduct is used as the basis for decisions affecting a student's academic performance, participation in school-sponsored activities, or any other aspect of a student's education;

5.1.3 The conduct has the purpose or effect of unreasonably interfering with a student's academic performance or participation in school-sponsored activities, or creating an intimidating, hostile or offensive education environment.

6. UNACCCEPTABLE CONDUCT

6.1 Complaints received will be thoroughly investigated to determine whether the totality of the behavior and circumstances meet any of the elements of the definitions in 5.1 and should be treated as sexual harassment. Unacceptable conduct may or may not constitute sexual harassment. Normally, unacceptable behavior must be severe or pervasive to be considered sexual harassment.

In evaluating the totality of the circumstances and making a determination of whether conduct constitutes sexual harassment, faculty and staff who observe unacceptable behavior, as well as administrators conducting an investigation, should consider:

6.1.1 Is the conduct sexual in nature?;

6.1.2 Is the conduct derogatory toward one gender?;

6.1.3 Is the conduct unwelcome?;

6.1.4 Would the behavior be offensive to a reasonable person of the same gender as the victim?;

6.1.5 The nature, severity and scope of the incidents;

6.1.6 The number of students or staff involved directly or indirectly;

6.1.7 The ages of the parties involved;

6.1.8 The relationship of the parties involved (i.e., staff/student, fellow students, etc.), and whether there is equal power between the parties;

6.1.9 The past discipline history of the parties involved;

6.1.10 The frequency and duration of the behavior;

6.1.11 Whether there is a pattern of behavior;

6.1.12 Whether the conduct is verbal or physical. EXAMPLES: School-related conduct that the District considers unacceptable and often a part of sexual harassment includes, but is not limited to, the following:

6.1.13 Rape, attempted rape, sexual assault, attempted sexual assault, forcible sexual abuse, hazing and other sexual and gender-based activity of a criminal nature as defined under the State Criminal Code.

6.1.14 Unwelcome sexual invitations or requests for sexual activity in exchange for grades, promotions, preferences, favors, selection for extra-curricular activities or job assignments, homework, etc.;

6.1.15 Unwelcome and offensive public sexual displays of affection, including kissing, making out, groping, fondling, petting, inappropriate touching of one's self or others, sexually suggestive dancing, and massages;

6.1.16 Any unwelcome communication that is sexually suggestive, sexually degrading or implies sexual motives or intentions, such as sexual remarks or innuendoes about an individual's clothing, appearance or activities, sexual jokes, sexual gestures, public conversations about sexual activities or exploits; sexual rumors and "ratings lists", howling, catcalls and whistles; sexually graphic computer files, messages or games, etc.;

6.1.17 Unwelcome and offensive name calling or profanity that is sexually suggestive, sexually degrading, implies sexual intentions, or that is based on sexual stereotypes or sexual orientation;

6.1.18 Unwelcome physical contact or closeness that is sexually suggestive, sexually degrading, or sexually intimidating, such as the unwelcome touching of another's body parts, cornering or blocking an individual, standing too close, spanking, pinching, following, stalking, frontal-body hugs, etc.

6.1.19 Unwelcome and sexually offensive physical pranks or touching of an individual's clothing, such as hazing and initiation, "streaking", "mooning", "snuggies", or "wedgies" (pulling underwear up at the waist, so it goes in between the buttocks), bra-snapping, skirt "flip-ups", "spiking" (pulling down someone's pants or swimming suit); pinching; placing hands inside an individual's pants, shirt, blouse, or dress, etc.;

6.1.20 Unwelcome leers, stares, gestures, or slang that are sexually suggestive, sexually degrading or imply sexual motives or intentions;

6.1.21 Clothing with sexually obscene or sexually explicit slogans or messages;

6.1.22 Unwelcome and offensive skits, assemblies, and productions that are sexually suggestive, sexually degrading, or that imply sexual motives or intentions, or that are based on sexual stereotypes;

6.1.23 Unwelcome written or pictorial display or distribution of pornographic or other unwelcome gender-based behavior that is offensive, degrading, intimidating, demeaning, or that is based on sexual stereotypes and attitudes.

7. COMPLAINT PROCEDURES

7.1 In compliance with applicable federal and state law, it is the policy of the District to investigate promptly and resolve equitably all complaints of sexual harassment and discrimination on the basis of sex.

7.2 Victims of sexual harassment shall be afforded avenues for filing complaints which are free from bias, collusion, intimidation, or reprisal. Upon filing complaints, victims may request an investigator of their same gender and may be represented by any person of their choice.

7.3 Victims of sexual harassment should document the harassment as soon as it occurs. In order to assist investigators, victims should document the harassment with as much detail as possible, including: the nature of the harassment; dates, times, and places it has occurred; name of harasser(s); witnesses of the harassment; and the victim's response to the harassment.

7.4 To the extent they feel safe and comfortable doing so, victims are first encouraged to confront the harasser, verbally or in a letter and/or with an advocate present, and tell the harasser to stop the conduct because it is unwelcome. Victims should document the incident(s) of harassment, and any conversations they have with the harasser, noting such information as time, date, place, what was said or done, and other relevant circumstances surrounding the incident(s) and the effect/impact of the behavior on the victim.

7.5 If the victim's concerns are not resolved satisfactorily by communicating with the harasser, or if the victim feels he/she cannot discuss the concerns with the harasser, the victim should directly inform school staff of the complaint and should clearly indicate what action he/she wants taken to resolve the complaint.

7.6 Any school employee who receives a complaint of sexual harassment from a student shall inform the student of the employee's obligation to report the complaint to the school administration, and then shall immediately notify the principal and/or the school Title IX Coordinator.

7.7 Employees who fail to report student complaints of sexual harassment to appropriate administrators or law enforcement authorities may face disciplinary action, up to and including reprimand, probation, or termination.

7.8 School administrators, including principals, Title IX coordinators, or district officials who fail to report or investigate student complaints of sexual harassment may also face disciplinary action, including reprimand, probation, or termination.

7.9 Victims who contact school staff with a complaint are encouraged to submit the complaint in writing. However, complaints may be filed verbally. Alternate methods of filing complaints (such as tape recorders, scribes, etc.) shall be made available to individuals with disabilities or small children who need accommodation.

7.10 Complaints are encouraged to be reported as soon as possible, i.e., within ninety (90) days after the incident, in order to be effectively investigated and resolved.

7.11 Reports/Complaints to Law Enforcement Authorities

7.11.1 Consistent with the District Safe and Orderly Schools Policy, where a complaint contains evidence of violence or criminal activity, the principal and/or school Title IX Coordinator shall refer the complaint to the district and appropriate child protection and law enforcement authorities for investigation.

7.11.2 The District encourages any individual who has knowledge of sexual harassment of a violent or criminal nature to independently report the information to child protection and/or law enforcement authorities.

7.12 Child Abuse

Any sexual harassment complaint containing evidence of child abuse shall be immediately referred to State child protection authorities and/or local law enforcement authorities according to the reporting requirement of State law (e.g., mandatory reporting of physical or sexual abuse of students; mandatory reporting of child abuse). Nothing in this policy prohibits the District from taking immediate action to protect victims of alleged child abuse. The accused employee shall be placed on administrative leave pending the outcome of the investigation.

8. CONFIDENTIALITY

8.1 It is District policy to respect the privacy and anonymity of all parties and witnesses to complaints brought under this policy. However, because an individual's need for confidentiality must be balanced with the District's obligations to cooperate with police investigations or legal proceedings, to provide due process to the accused, to conduct a thorough investigation, or to take necessary action to resolve a complaint, the District retains the right to disclose the identity of parties and witnesses to complaints in appropriate circumstances to individuals with a need to know.

8.2 Where a complaint involves allegations of child abuse, the complaint shall be immediately reported to appropriate child protection and/or law enforcement

authorities and the anonymity of both the complainant and school officials involved in the investigation will be strictly protected as required by State law.

9. INITIAL (INFORMAL) INVESTIGATION AND RESOLTUION ROCEDURES

9.1 The principal and/or Title IX coordinator has the responsibility to conduct a preliminary review when they receive a verbal or written complaint of sexual harassment, or if they observe sexual harassment. Except in the case of severe or criminal conduct, the principal and/or Title IX coordinator should make all reasonable efforts to resolve complaints informally at the school level. The goal of informal investigation and resolution procedures is to end the harassment and obtain a prompt and equitable resolution to a complaint.

9.2 As soon as possible, but not later than three (3) working days following a receipt of a complaint, the principal and/or title IX coordinator should commence an investigation of the complaint according to the following steps:

9.2.1 Interview the victim and document the conversation. Instruct the victim to have no contact or communication regarding the complaint with the alleged harasser. Ask the victim specifically what action he/she wants taken in order to resolve the complaint. Refer the victim, as appropriate, to school social workers, school psychologists, crisis team managers, other school staff, or appropriate outside agencies for counseling services.

9.2.2 Review any written documentation of the harassment prepared by the victim. If the victim has not prepared written documentation, instruct the victim to do so, providing alternative formats for individuals with disabilities and small children who have difficulty writing and need accommodation. Students cannot be required to document.

9.2.3 Interview the alleged harasser regarding the complaint and inform the alleged harasser that if the objectionable conduct has occurred, it must cease immediately. Document the conversation. Provide the alleged harasser an opportunity to respond to the charges in writing.

9.2.4 Instruct the alleged harasser to have no contact or communication regarding the complaint with the victim and to not retaliate against the victim. Warn the alleged harasser that if he/she makes contact with or retaliates against the victim, he/she will be subject to immediate disciplinary action.

9.2.5 Interview any witnesses to the complaint. Where appropriate, obtain a written statement from each witness. Caution each witness to keep the complaint and his/her statement confidential.

9.2.6 Review all documentation and information relevant to the complaint.

9.2.7 Where appropriate, suggest mediation as a potential means of resolving the complaint. In addition to mediation, utilize appropriate informal methods to resolve the complaint, including but not limited to:

9.2.7.1 Discussion with the accused, informing him or her of the District's policies and indicating that the behavior must stop;

9.2.7.2 Suggesting counseling and/or sensitivity training;

9.2.7.3 Conducting training for the department or school in which the behavior occurred, calling attention to the consequences of engaging in such behavior;

9.2.7.4 Requesting a letter of apology to the complainant;

9.2.7.5 Writing letters of caution or reprimand;

9.2.7.6 Separating the parties.

9.2.8 Parent/Student/Employee Involvement and Notification

9.2.8.1 Parents of both victim and accused shall be notified within one school day of allegations that are serious or involve repeated conduct;

9.2.8.2 The parents or advocates of students who file complaints are welcome to participate at each stage of both informal and formal investigation and resolution procedures. Employees bringing complaints shall be informed of their right to be represented by union officials or other professional representatives.

9.2.8.3 If either the victim or the accused is a disabled student receiving special education services under an IEP, or 504/Americans with Disabilities Act accommodations, all members of the student's IEP or 504 team will be consulted to determine the degree to which the student's disability either caused or is affected by the discrimination or policy violation. In addition, due process procedures required for persons with disabilities under state and federal law shall be followed.

9.2.9 Submit a copy of all investigation and interview documentation to the District Compliance Officer/Title IX Coordinator, and to the Human Resources Department if the complaint involves a District employee.

9.2.10 Report back to both the victim and the accused, notifying them in writing, and also in person as appropriate regarding the outcome of the investigation and the action taken to resolve the complaint. Instruct the victim to report immediately if the objectionable behavior occurs again or if the alleged harasser retaliates against him/her.

9.2.11 Notify the victim that if he/she desires further investigation and action, he/she may request a District level investigation by contacting the district Title IX coordinator. Also, notify the victim of his/her right to contact the U.S. Department of Education's Office for Civil Rights, the State Human Rights/Civil Rights agencies, and/or a private attorney.

9.3 Whenever a sexual harassment complaint is made, school administrators must take action to investigate the complaint or to refer the complaint for investigation even if the student does not request any action or withdraws the complaint.

9.4 If the initial investigation results in a determination that sexual harassment did occur, and the harasser repeats the wrongful behavior or retaliates against the victim, the site administrator will take prompt disciplinary action and will notify the District Compliance Officer/Title IX Coordinator or the Director of Human Resources.

9.5 The principal and school Title IX coordinator must consider the severity or pervasiveness of the conduct and exercise discretion in determining whether a District level investigation is necessary. If a complaint contains evidence or allegations of serious or extreme harassment, such as adult to student harassment, criminal touching, quid pro quo (e.g., offering an academic reward or punishment as an inducement for sexual favors), or acts which shock the conscience of a reasonable person, the complaint shall be referred promptly to District administrators, i.e., the appropriate Area Director, Assistant Superintendent, Superintendent, Human Resources Director, or Compliance Officer/Title IX Coordinator. In addition, where the principal has reasonable suspicion that the alleged harassment involves criminal activity, he/she should immediately contact appropriate child protection and law enforcement authorities. Where criminal activity is alleged or suspected, the accused employee shall be placed on administrative leave pending the outcome of the investigation.

10. DISTRICT LEVEL INVESTIGATION

District administrators shall promptly investigate and resolve all sexual harassment complaints that are referred to the District by school principals and Title IX coordinators, as well as those appealed to the District by parties to the complaint.

Any party who is not satisfied with the outcome of the initial investigation may request a District level investigation by submitting a written complaint to the appropriate Area Director, Assistant Superintendent, Superintendent, Human Resources Director, or Compliance Officer/Title IX Coordinator.

10.1 Important male and female contact persons at the District are as follows:
John Doe
Compliance Officer and Title IX/EEO Coordinator
School District
Jane Doe

Director of Human Resources
School District

10.2 The District level investigation should commence as soon as possible but not later than three (3) working days following receipt of the complaint by the District administrator.

10.3 In conducting the District level investigation, the District will use investigators who have received formal training in sexual harassment investigation or that have previous experience investigating sexual harassment complaints.

10.4 If a District investigation results in a determination that sexual harassment did occur, prompt corrective action will be taken to end the harassment. Where appropriate, District investigators may suggest mediation as a means of exploring options of corrective action and informally resolving the complaint.

10.5 No later than thirty (30) days following receipt of the complaint, the District will notify the victim and alleged harasser, in writing, of the outcome of the investigation. If additional time is needed to complete the investigation or take appropriate action, the District will provide all parties with a written status report within thirty (30) days following receipt of the complaint.

10.6 Any victim or accused who still is not satisfied with the outcome of a District investigation, or who feels that his/her civil rights have been violated, may file a request for a review by a neutral panel by submitting a written appeal to the Superintendent of Schools within ten (10) working days following receipt of District findings

11. RIGHT TO REPRESENTATION AND OTHER LEGAL RIGHTS

The victim and the alleged harasser have the right to be represented by a person of their choice, at their own expense, during sexual harassment investigations and hearings. Students who file complaints may elect to be accompanied by another student of their choice at each stage of the complaint procedure. Victims also have the right to register sexual harassment complaints with the U.S. Department of Education's Office for Civil Rights (OCR).

Nothing in this policy shall be construed to limit the right of the complainant to

file a lawsuit in either state or federal court.

12. RETALIATION PROHIBITED

Any act of retaliation against any person who opposes sexually harassing behavior, or who has filed a complaint, is prohibited and illegal, and therefore subject to disciplinary action. Likewise, retaliation against any person who has testified, assisted, or participated in any manner in an

investigation, proceeding, or hearing of a sexual harassment complaint is prohibited. For purposes of this policy, retaliation includes, but is not limited to: verbal or physical threats, intimidation, ridicule, bribes, destruction of property, spreading rumors, stalking, harassing phone calls, and any other form of harassment. Any person who retaliates is subject to immediate disciplinary action, up to and including suspension, exclusion, probation or termination.

13. DISCIPLINE

13.1 Any individual, including an individual with disabilities, who violates this policy, will be subject to appropriate disciplinary action under applicable school discipline policies, District Human Resource policies, and the District Safe and Orderly Schools Policy. Disciplinary measures available to school authorities include, but are not limited to, the following:

13.1.1 verbal warnings/reprimands;

13.1.2 written warning/reprimand in employee or student files;

13.1.3 detention or in-school suspension;

13.1.4 behavior contracts;

13.1.5 requirement of verbal and/or written apology to victim;

13.1.6 mandatory education and training on sexual harassment by means of reading assignments, videos, classes, or other presentations;

13.1.7 requiring a written paper on the topic of sexual harassment;

13.1.8 referral for psychological assessment or treatment;

13.1.9 requiring parents to attend school with perpetrator;

13.1.10 involvement of police and other law enforcement authorities;

13.1.11 community service.

13.2 In addition, if the harassment is severe or persistent, any individual who violates this policy may be subject to alternate placement, suspension, exclusion, probation or termination. Moreover, students who violate this policy may lose the privilege of participating in extra-curricular activities such as athletics, music programs, student government, cheerleading, graduation ceremonies, etc. These penalties may be imposed even for first offenses, which are severe or extreme.

13.3 In determining what disciplinary or corrective action is appropriate, school officials shall consider the totality of the circumstances, including, but not limited to:

13.3.1 The number of victims and harassers involved;

13.3.2 The ages of the victims and harassers;

13.3.3 The prior disciplinary record of the harasser;

13.3.4 The disability status of the victim and/or harasser;

13.3.5 The threatened or actual harm caused by the harassment;

13.3.6 The frequency and/or severity of the harassment.

13.4 If school administrators have reasonable suspicion that the harassment involves sexual assault, rape, or any other activity of a criminal nature, they shall notify appropriate law enforcement authorities and immediately initiate appropriate due process proceedings to remove the accused party from the situation.

13.5 If the alleged harasser is a student with a disability whose education involves services under the Individuals with Disabilities Education Act (IDEA) or accommodations under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act, no suspension or expulsion longer than ten (10) school days or change of placement, or other steps shall be imposed until a District multi-disciplinary team meets to determine the extent to which the harassing behavior is or is not a manifestation of the student's disability.

14. FALSE COMPLAINTS

False or malicious complaints of sexual harassment may result in corrective or disciplinary action taken against the complainant.

15. TRAINING

15.1 All students shall be informed of this policy in student handbooks, folders and registration materials. A poster summarizing the policy shall also be posted in a prominent location at each school. All secondary school student-body officers shall receive district training about the policy at the beginning of each school year.

15.2 All new employees shall receive information about this policy at new employee orientation. All other employees shall be provided information at least once a year regarding this policy and the District's commitment to a harassment-free learning and working environment.

15.3 Principals, school Title IX coordinators, and other administrative employees who have specific responsibilities for investigating and resolving complaints of sexual harassment shall receive yearly training on this policy and related legal developments.

15.4 Principals in each school and program directors shall be responsible for informing students and staff on a yearly basis of the terms of this policy, including the procedures established for investigation and resolution of complaints, general issues surrounding sexual harassment, the rights and responsibilities of students and employees, and the impact of sexual harassment on the victim.

16. RECORDS

Separate, confidential records of all sexual harassment complaints and school-level investigations shall be maintained in the principal's office. Records of district investigations shall be maintained in the office of the Compliance Officer/Title IX Coordinator and/or the Department of Human Resources.

16.1 Records of school-level (informal) investigations and resolutions shall be retained for at least one (1) year.

16.2 Records of district investigations shall be retained for at least three (3) years.

16.3 Records of complaints and investigations of blatant violations involving criminal touching, quid pro quo, or other criminal acts, or acts which shock the conscience of a reasonable person shall be retained permanently.

17. POLICY DISSEMINATION AND REVIEW

17.1 A summary of this policy and related materials shall be posted in a prominent place in each District facility. The policy shall also be published in student registration materials, student, parent, and employee handbooks, and other appropriate school publications as directed by the District Compliance Officer/Title IX Coordinator. In addition, notification of this policy shall be sent annually to each local newspaper for publication.

17.2 A committee of administrators, teachers, parents, students, law enforcement authorities, and attorneys, shall be convened annually to review this policy's effectiveness and compliance with applicable state and federal law, and to update the policy accordingly.

END NOTES

1. *See, e.g., Leffel v. Wisconsin Interscholastic Athletic Association*, 444 F. Supp 1117 (E.D. Wis. 1978); *Horner v. Kentucky High Sch. Athletic Association*, 43 F.3d 265 [96 Ed. Law Rep. [389]] (6th Cir. 1994).

While most Title IX battles over athletics have been waged at the intercollegiate level, Title IX litigation involving sports programs at the high school level is increasing. *See* David Fitzgerald, *Playing Hardball,* Educ. Week, Sept. 4, 1996, at 38, 42.

2. 503 U.S. 60, 112 S. Ct. 1028, 117 L.Ed.2d 208 [72 Ed. Law Rep. [32]] (1992).

3. Equal Employment Opportunity Commission (EEOC) regulations implementing Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1604.11, prohibit sexual harassment in the workplace. For a discussion of how Title VII regulations and case law interfaces with Title IX, see Part II, *infra.*

4. *See, e.g.,* Thomas R. Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County,*109 Ed. Law Rep. (West) 519 (July 11, 1996); *Patricia H. v. Berkeley Unified Sch. Dist.,* 830 F.Supp. 1560 [85 Ed. Law Rep. [1169]] (N. D. Cal. 1993); *Floyd v. Waiters,* 831 F.Supp. 867 [86 Ed. Law Rep. [136]] (M.D. Ga. 1993); *R.L.R., v. Prague Pub. Sch. Dist.* I-103, 838 F.Supp. 1526 [87 Ed. Law Rep. [908]] (W.D. Okla. 1993); *Leija v. Canutillo Indep. Sch. Dist.* 887 F. Supp. 947 [101 Ed. Law Rep. [202]] (W.D. Rex. 1995); *Oona R.S. v. Sata Rosa City Schools,* 890 F.Supp. 1452 [102 Ed. Law Rep. [120]] (N.D. Cal. 1995); *Bolon v. Rolla Rub. Sch.,* 917 F.Supp. 1423 [108 Ed. Law Rep. [101]] (E.D. Mo. 1996); *Burrow v. Postville Comm. Sch. Dist.,* 929 F.Supp. 1193 [110 Ed. Law Rep. [1102]] (N.D. Iowa 1996); *Davis v. Monroe County Bd. Of Ed.,* 74 F.3d 1186 [106 Ed. Law Rep. [486]] (11th Cir.1996), *suggestion for rehearing en banc filed; Rowinski v. Bryan Indep. Sch. Dist.* 80 F.3d 1006 [108 Ed. Law Rep. [502]] (5th Cir.1996); *Seamons v. Snow,* 864 F.Supp. 1111 [95 Ed. Law Rep. [141]] (D. Utah 1994), *aff'd in part, rev'd in part* 84 F.3d 1226 [109 Ed. Law Rep. [1103]] (10th Cir. 1996).

5. 830 F. Supp. 1560 (N.D. Cal.1993); *rev'd on other grounds;* 54 F.3d 1447 [100 Ed Law Rep. [568]] (9th Cir. 1995).

6. 74 F.3d 1186 (11th Cir. 1996), *suggestion for rehearing en banc filed.*

7. 59 F.3d 1391 (D.C.Cir.1995).

8. 20 U.S.C. § 1681(a) (1995).

9. 34 C.F.R. § 106.8(b) (1995).

10. Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment,* 2 U.C.L.A. Women's L.J. 85, 111 (1992).

11. *Franklin,* 112 S.Ct. at 1037 (citation omitted).

12. *Petaluma*, 830 F.Supp. at 1575.

13. *Franklin,* 112 S.Ct. at 1031 (citation omitted).

14. *See, e.g.,* Monica L Sherer, *No Longer Just Child's Play; School Liability Under Title IX for Peer Sexual Harassment,* 141 U.Pa. L. Rev. 2119, 2155 (1993).

15. S*ee, e.g. Murray v. New York Univ. Colledge of Dentistry,* 57 F.3d 243 [101 Ed. Law Rep. [67]] (2d Cir. 1995); *Kadiki v. Virginia Commonwealth Univ.,* 892 F.Supp. 746 [102 Ed. Law Rep. [557]] (E.D. Va. 1995); *Hastings v. Hancock,* 842 F.Sup. 1315 [89 Ed. Law Rep. [140]] (D. Kan.1993); *Patricia H. v. Berkeley Unified Sch. Dist.,* 830 F.Supp. 1288 [85 Ed. Law Rep. [1154]] (N.D. Cal. 1993).

16. However, the Title VII standard has not been uniformly adopted in Title IX cases. In one recent case, the court noted:

> The standard of a school district's liability for sexual harassment by teachers against students under Title IX is not clear. Courts have adopted several different approaches, including the following: (1) the agency principles contained in the Restatement (Second) of Agency § 219(2)(b) (essentially a "negligent or reckless standard"); (2) knowledge or direct involvement by the school district; (3) the Title VII standards of employer liability in sexual harassment cases i.e., "knew or should have known" for hostile environment and strict liability for quid pro quo harassment); and (4) strict liability.
>
> *Bolon v. Rolla Pub. Sch.,* 917 F.Supp. 1423, 1427 [108 Ed. Law Rep. [101]] (E.D.Mo. 1996) (citations omitted).

17. 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

18. R*oberts v. Colorado State Bd of Agri.,* 998 F.2d 824 [84 Ed. Law Rep. [650]] (10th Cir.1993); *cert. Denied, Colorado State Bd. of Agric. v. Roberts,* 510 U.S. 1004, 114 S.Ct. 580, 126 L.Ed.2d 478 (1993).

19. *Preston v. Commonwealth of Virginia,* 31 F.3d 203, 207 [93 Ed. Law Rep. [511]] (4th Cir.1994).

20. *Davis v. Monroe County Bd. Of Educ.,* 74 F.3d 1186, 1193 [106 Ed. Law Rep. [486]] (11th Cir.1996) *(suggestion for rehearing en banc filed).*

21. 29 C.F.R. § 1604.11(d) (1995) (emphasis added).

22. Ronna Greff Schneider, *Sexual Harassment and Higher Education,* 65 Tex.L.Rev. 525, 551 (1987).

23. 29 C.F.R. § 1604.11(f) (1995) (emphasis added).

24. 59 F.3d 1391 (D.C. Cir. 1995).

25. *Id.* at 1398-99 (emphasis added).

26. 34 C.F.R. § 106.8(a) (1995).

27. 34 C.F.R. § 106.8(b)

28. 34 C.F.R. § 106.9(a) (2).

29. Schneider, *supra* note 22, at 575.

30. *Id.*

31. 29 C.F.R. § 1604.11

32. The federal courts are split on whether same sex sexual harassment in the workplace is unlawful under Title VII. *Compare Barnes v. Costle,* 561 F.2d 983 (D.C.Cir. 1977); *Bundy v. Jackson*, 641 F.2d 934 (D.C.Cir.1981); *Morgan v. Massachusetts Gen. Hosp.,* 901 F.2d 186 (1st Cir.1990); *Purrington v. University of Utah*, 996 F.2d 1025 [84 Ed. Law Rep. [81]] (10thCir.1993); *EEOC v. Walden Book Co.,* 885 F.Supp. 1100 (M.D.Tenn.1995); *Nogueras v. University of Puerto Rico,* 890 F.Supp. 60 [102 Ed. Law Rep. [90]] (D. Puerto Rico 1995); *Griffith v. Keystone Steel & Wire,* 887 F.Supp. 1133 (E.D.Ill.1995); *McCoy v. Johnson Controls World Servs., Inc.* 878 F.Supp.229 (S.D.Ga.1995); *Prescott v. Independent Life Ins.,* 878 F.Supp. 1545 (M.D. Ala.1995) (all holding or suggestions in dicta that same sex harassment constitutes a violation of Title VII) *with Ulane v. Eastern Airlines, Inc.* 742 F.2d 1081 (7th Cir. 1994); *Garcia v. Elf Atochem N. Am.,* 28 F.3d 446 (5th Cir., 1993); *Goluszek v. Smith*, 697 F.Supp. 1452 (N.D.Ill.1988); *Benekritis v. Johnson,* 882 F.Supp. 521 (D.S.C.1995); *Myers v. City of El Paso,* 874 F.Supp. 1546 (W.D.Tex.1995); *Hopkins v. Baltimore Gas & Elec. Co.,* 871 F.Supp.822 (D.Md.1994) (all holding or suggesting in dicta that Title VII does not cover same sex harassment).

    However, the EEOC has taken a strong position that Title VII protects employees from same sex harassment. *See* EEOC Compliance Manual 615.2(b)(3) (1981), stating that "The victim does not have to be of the opposite sex from the harasser." In addition, the OCR has sanctioned school districts under Title IX for failing to investigate or stop same sex harassment between public school students. *See* Letter of Finding by Thomas J. Hibino, Regional Civil Rights Director, Region 1 (Oct. 22, 1993), Docket No. 01-92-1327 (addressing female-to-female harassment).

33. *See, e.g.,* Utah Code Ann § 53A-11-904(1)(e) (1995) (stating that a student may be suspended or expelled from a public school for behavior which "threatens or does harm to the school or school property, to a person associated with the school or property associated with any such person, regardless of where it occurs.")

34. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993).

35. *Id.* at 370.

36. For a more extensive treatment of this issue, *see* Cynthia Lutz Kelly, *Harassment and the First Amendment: Can Schools Stop Verbal Victimization?*, Inquiry & Analysis, Jan. 1996, at 1.

37. 114 S.Ct. 367 (1993).

38. *Id.* at 371.

39. In a widely publicized decision involving the Eden Prairie School District in Minnesota, OCR ruled in part:

> Under Title IX standards, a recipient may not act any less effectively to combat sexual harassment by special education students which interferes, on the basis of sex, with other students' receipt of services offered by the recipient. The rights of students with disabilities can be respected through adherence to procedures required by federal law. There is no indication in the present case that the need to follow these procedures actually interfered with implementation of the district's sexual harassment policy. In any event, the rights of students with disabilities may not operate as a defense of behavior which singles out students, because of their sex, for adverse consequences.
>
> Letter of Findings by Kenneth A. Mines, Regional Civil Rights Director, Region V (April 27, 1993), Docket No. 05-92-1174, at 15.
>
> In *Clyde v. Puyallup Sch. Dist. No. 3,* 35 F.3d 1396 [94 Ed. Law Rep. [707]] (9th Cir. 1994), the Ninth Circuit rejected an argument by a disabled student that the school district discriminated against him by disciplining him for sexually harassing other students. The court reasoned in part: "given the extremely harmful effects (peer) harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools." *Id.* at 1401.

40. *Bosley v. Kearney R-I Sch. Dist.,* 904 F.Supp.1006, 1023 [105 Ed. Law Rep. [101]] (W.D.Mo.1995).

41. *See Seamons v. Snow,* 84 F.3d 1226, 1236-38 (10th Cir.1996) (holding that a student athlete stated a claim under the First Amendment for violation of his right to free speech by asserting that school officials discouraged him from making statements to the press about a locker-room assault and disciplined him by removing him from the team after he refused to apologize for informing authorities of the incident).

42. 34 C.F.R. § 106.9(a)(1) (1995).

43. 34 C.F.R. § 106.9(a)(2) (1995).

44. *Id.*

45. 34 C.F.R. § 106.8(b) (1995) (emphasis added).

46. *ADA Still Raises Compliance Questions,* Accommodating Disabilities Decisions Report Letter (CCH, Chicago, IL), May 24, 1996 at 5-6.

47. 34 C.F.R. § 106.8(a) (1995) (emplasis added).

48. For an excellent commentary on how to conduct investigations and who should do them, *see* Nancy L. Abell & Marcia Nelson Jackson, *Sexual Harassment Investigations – Cues, Clues and How-To's*, Lab. Law., Spring 1996, at 17.

49. *See Brown v. Hot, Sexy and Safer Prod., Inc.,* 68 F.3d 525, 532 [104 Ed. Law Rep. [106]] (1st Cir.1995) (upholding a district's decision to schedule a sexually explicit AIDS awareness assembly without prior parental consent, but noting that the district's "failure to provide opt-out procedures may have displayed a certain callousness towards the sensibilities of the minors.")

50. Schneider, *supra* note 22 at 577 (suggesting that if used, panel members should be chosen from a "pool of qualified persons sensitive to the often embarrassing nature of sexual harassment claims and the delicate issues of credibility involved in such disputes.").

51. Margaret J. Grover, *Mediation of Sexual Harassment Claims: The Benefits and Difficulties,* in *Sense and Sensibility – Mediation of Sexual Harassment Claims,* Report of the American Bar Association/Tort and Insurance Practice Section Annual Meting (Aug. 7, 1994), at 3 (noting that mediation "can be conducted at any stage of a proceeding, even before a lawsuit is filed.").

52. Fletcher Dal Handley, Jr., *What Plaintiffs' Lawyers Should Know Before They Mediate,* 25 The Brief 70 (summer, 1996).

53. *Id.*

54. The EEOC currently has a backlog of over 100,000 cases. *Coming Soon: An EEOC That's Leaner and Meaner,* Disability Compliance Bulletin (LRP Publications, Horsham, PA), June 22, 1995, at 1, 6.

    Sexual Harassment charges filed with the EEOC more than doubled between 1990 (about 7,000) and 1995 (15,961). Ellen Neuborne, C*omplaints High From Women in Blue Collar Jobs,* USA Today, May 3, 1996, at 1A.

55. Jon W. Green, *Mediating a Sexual Harassment Case: A Plaintiff's Perspective,* in *Sense and Sensibility – Mediation of Sexual Harassment Claims,* Annual Report of the American Bar Association/Tort and Insurance Practice Section (August 7, 1994), at 8.

56. *Davis v. Monroe County Bd. Of Educ.,* 74 F.3d 1186, 1192-93 (11th Cir.1996) (citation omitted).

57. *Id.* At 1193 (citations omitted).

58. *See, generally,* Susan Strauss, Sexual Harassment and Teens 23-30 (1992); NSBA Council of School Attorneys, Sexual Harassment in the Schools 57-70 (1993); John F. Lewis & Susan C. Hastings, Sexual Harassment in Education 38-40 (2d ed. 1994); Robert J. Shoop & Jack H. Hayghow, Jr., Sexual Harassment in our Schools 117-31 (1994).

59. In rejecting a university student's Title IX suit claiming that the university has not responded to her sexual harassment complaint appropriately, one federal court recently held:

> Iona College complied in full with its obligations under the law (Title IX) by providing a policy against sexual harassment and a complaint procedure, copies of which were properly provided to all students and faulty. The College responded adequately to the complaints, which as to Pallett, were somewhat late in arriving.

Pallett v. Palma, 914 F.Supp 1018, 1025 [107 Ed. Law Rep. [165]] (S.D.N.Y.1996).

60. S*ee* John Marks, *The American Uncivil Wars,* U.S. News & World Report, Apr. 22, 1996, at 66.

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