

“Me Too” --- Competently Responding to Sexual Harassment in the School Environment

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Today's National Climate Regarding Sexual Harassment

- ▶ Hollywood: Harvey Weinstein, Louis CK, Kevin Spacey, Garrison Keillor
- ▶ News: Bill O'Reilly, Matt Lauer, Charlie Rose.
- ▶ Politics: President Donald Trump, (Senate candidate) Roy Moore (minors), Senator Al Franken, Representative John Conyers, President George H.W. Bush
- ▶ Business: John Lasseter (Pixar President); Roger Ailes (Fox)

What has changed?

- ▶ Heightened social awareness
 - ▶ “Me Too” social media movement
 - ▶ News coverage of high profile cases
- ▶ Increased understanding of the legal remedies and of conduct that is improper.
- ▶ Willingness to report
- ▶ Social pressure for prompt, thorough review and when necessary, severe repercussions

What does this mean for schools?

- ▶ Increased reporting,
 - ▶ May include over-identification of conflicts as forms of sexual harassment
- ▶ Increased exposure
- ▶ Need for proactive training
- ▶ Need for clear policy
- ▶ Need for competent investigation
- ▶ Hopefully, more awareness by staff

Sexual Harassment?

- ▶ **Six-year-old v. Brockton, Massachusetts School District**
- ▶ in 2006, a first-grader was accused of sexually harassing a classmate. The principal told the boy's mother that during class, her son placed two fingers inside the girl's clothing and touched her skin. He was sitting on the carpet behind the girl.
- ▶ The principal suspended the boy from school for three days for violating the sexual harassment policy.
- ▶ In addition, the principal contacted the police, the Department of Social Services, and the District Attorney. No charges were brought, but in 2007, the boy's family sued the city of Brockton. After this incident, the school revised its sexual harassment policy. The mayor personally apologized to the parents of the boy and the city entered into a six-figure monetary settlement of the case.

Overview

I – Sexual Harassment Between Staff Members

II – Sexual Harassment Between Teachers and Students

III – Sexual Harassment Between Students

APPLICABLE LAW

I- Title VII of the Civil Rights Act of 1964 (“Title VII”)

II. New Mexico Human Rights Act (NMSA 1978, § 28-1-1 et seq.

III- Title IX of the Education Amendments of 1972 (“Title IX”)

The Legal Standards of Proof

- ▶ The elements of a hostile work environment claim against an employer have generally been stated as: (1) the employee was subjected to **unwelcome** sexual harassment; (2) the harassment occurred because of the employee's sex; (3) the harassment was **sufficiently severe or pervasive** to create an abusive work environment affecting a term, condition, or privilege of employment, and; (4) the employer **knew, or should have known, of the harassment and failed to take remedial action**.
- ▶ Quid pro quo harassment: "something in exchange for something"

SEXUAL MISCONDUCT BETWEEN STAFF MEMBERS

APPLICABLE SCHOOL DISTRICT POLICIES

- ❑ Sexual Harassment (prohibiting sexual harassment)
- ❑ District compliance with Title IX; prohibition against sexual harassment

Examples of Sexual Harassment

- ▶ Unwelcome sexual advances or flirting
- ▶ Unwelcome requests for sexual favors
- ▶ Unwelcome conduct of a sexual nature
- ▶ Unwelcome conduct not sexual in nature but is gender-related
- ▶ Offensive language of a sexual nature
- ▶ Offensive comments about a person's appearance

SEXUAL HARASSMENT BETWEEN STAFF MEMBERS

HYPOTHETICAL SCENARIOS

- I. There are allegations that the Superintendent of your School District has been making sexual comments to, and hugging, one of his staff members.
 - Harassment claim exposure?

- II. There are allegations that a director is allowing a “locker room” environment in his department.
 - Harassment claim exposure?
 - What if the women are participating?

- III. There are allegations that a teacher at your school district was told that she would not be promoted to an Assistant Principal unless she agreed to a date with a current District administrator.
 - Harassment claim exposure?

SEXUAL HARASSMENT BETWEEN STAFF MEMBERS

BEST PRACTICES

I. GUARDING AGAINST SEXUAL HARASSMENT

- Background checks (as required by NMSA 1978, § 22-10A-5)
- Due diligence : check references prior to hiring any new employee
- Policies – ensure your District’s policies comprehensively cover sexual harassment and provide a thorough investigation process for all allegations. Policies should include social media considerations.
- Ensure policies and process for filing complaints are made available and communicated to employees frequently and in a variety of forms. (policy, handbooks, training, orientation)
- Board Role: Ensuring that policy is in place and that administration is addressing all training needs.

SEXUAL HARASSMENT BETWEEN STAFF MEMBERS

BEST PRACTICES (CONTINUED)

II. RESPONDING EFFECTIVELY WHEN IT HAPPENS

- Prompt and thorough investigation (superintendent v. staff)
 - Role of Counsel and Board, depends on employee
- Role of Administrative Leave or other mid-level responses (transfer?)
- Concerns where the complaining employee is historically a poor-performing employee
- Discipline should be prompt and proportionate to the severity of the infraction – discipline should always be consistent across the board
 - Role of progressive discipline and legal exposure
- Possibility of retaliation against an employee who reports harassment - take steps to ensure retaliation does not occur
- Board Role: updates from administration; public messaging; recognizing the need for confidentiality and possibility of a hearing

SEXUAL HARASSMENT BETWEEN TEACHERS AND STUDENTS

HYPOTHETICAL SCENARIOS

- I. There are allegations that a male teacher has nude pictures of women on his school-issued computer and that the students have seen these pictures.
 - Does the analysis change if the computer is the teacher's personal home computer which he brought to school?
 - Does the analysis change if the nude pictures are of individuals of the same sex?

- I. There are allegations that a teacher has improperly touched a student.
 - Grooming for sexual conduct

- II. There are allegations that a teacher is using inappropriate language with the students.

- III. Mother of student complains that a dispute between her daughter and a teacher is "sexual harassment."

SEXUAL HARASSMENT BETWEEN TEACHERS AND STUDENTS

APPLICABLE FEDERAL LAWS AND CASE LAW

I- FEDERAL LAW: Title IX of the Education Amendments of 1972
("Title IX")

II- FEDERAL LAW: SECTION 1983 CLAIMS

SEXUAL HARASSMENT BETWEEN TEACHERS AND STUDENTS

APPLICABLE STATE LAWS

I- NMSA 1978, § 22-10A-5 (Background checks, known convictions, alleged ethical misconduct, reporting)

II- NMSA 1978, § 30-9-11(F)(2) – criminal statute that makes it a fourth degree felony for an educator to have sex with a student.

III- NMSA 1978, § 32A-4-3 – Children’s Code – requires schools to report child abuse/neglect to law enforcement, CYFD.

IV- NMAC 6.90.9 – Code of Ethical Responsibility for Educators ---
“shall not have inappropriate contact with any student. No rides, lending of money, or gifts to students”

SEXUAL HARASSMENT BETWEEN TEACHERS AND STUDENTS

APPLICABLE SCHOOL DISTRICT POLICIES

- ❑ Sexual Harassment (prohibiting sexual harassment) --- A-0311 (NMSBA Policy Service)
- ❑ District compliance with Title IX; prohibition against sexual harassment –
- ❑ Code of Conduct (that follows the guidelines in NMAC 6.90.9) --- G-0761
- ❑ Staff Conduct with Students --- G-0900

SEXUAL MISCONDUCT BETWEEN TEACHERS AND STUDENTS

BEST PRACTICES

I. GUARDING AGAINST SEXUAL MISCONDUCT BETWEEN TEACHERS & STUDENTS

- Background checks (as required by NMSA 1978, § 22-10A-5)
- Due diligence and check references prior to hiring any new employee and prior to placement in classroom
- Policies – ensure your District’s policies comprehensively cover this matter and provide a thorough investigation process for all allegations. Policies should include social media considerations.
- Ensure policies and process for filing complaints are made available and communicated to employees and families frequently and in a variety of forms.

SEXUAL MISCONDUCT BETWEEN TEACHERS AND STUDENTS

BEST PRACTICES (CONTINUED)

I. RESPONDING EFFECTIVELY WHEN IT HAPPENS

- Prompt and thorough investigation of all allegations
- CYFD involvement
- PED reporting
- Law enforcement considerations
- Discipline should be prompt

SEXUAL HARASSMENT BETWEEN STUDENTS

HYPOTHETICAL SCENARIOS

- I. There are allegations that several 17-year old male high school students had consensual intercourse with a 14-year old female high school student, and that the sexual acts were live-videoed and publicized without the knowledge of the female student.
- II. There are allegations that a female high school student has taken nude “selfies” of herself and passed them around to several other students.
- III. There are allegations that a male student has exposed himself to a female student at school.
- IV. There are allegations that a female student has been using inappropriate sexual language with a male student.
- V. A parent complains that a verbal dispute between his/her daughter and a boy is sexual harassment.

SEXUAL HARASSMENT BETWEEN STUDENTS

APPLICABLE FEDERAL LAWS AND CASE LAW

I- Title IX of the Education Amendments of 1972 ("Title IX")

II- Section 1983

SEXUAL HARASSMENT BETWEEN STUDENTS

APPLICABLE STATE LAWS

I- STATE LAW: NMAC 6.11.2.9

- Prohibits sexual harassment between students.

II- STATE LAW: NMSA 1978, § 30-6a-3 (sexual exploitation of children)

- Criminal statute that makes it a fourth degree felony to possess, distribute, record, manufacture any obscene materials that depict a minor under 18 years of age.
- Unless, the person in possession of the material is also under 18, and the depicted child is between 14 and 18 and knowingly and voluntarily consented to possession of it, and consented to the creation of the material, or produced the material without coercion.

SEXUAL MISCONDUCT BETWEEN STUDENTS

APPLICABLE SCHOOL DISTRICT POLICIES

- ❑ District compliance with Title IX; prohibition against sexual harassment – J-0161
- ❑ Student Code of Conduct --- J-2350
- ❑ Student Harassment/Bullying/Cyberbullying prevention --- J-2550
- ❑ Student Concerns, Complaints & Grievances --- J-3611
- ❑ Social Media Policy
- ❑ Board Consideration: Work with administration to ensure that policies are up to date.
- ❑ Board and Administration Consideration: What is the right way to reach out to kids and parents about the increasing role of social media, sexuality, bullying, and harassment?

SEXUAL HARASSMENT BETWEEN STUDENTS

BEST PRACTICES

I. GUARDING AGAINST SEXUAL HARASSMENT BETWEEN STUDENTS

- Policies – ensure your District’s policies comprehensively cover this matter and provide a thorough investigation process for all allegations. Policies should include social media considerations.
- Ensure policies and process for filing complaints are made available and communicated to students and families frequently and in a variety of forms.
- Training for staff: hazing, bullying, student activities and travel, social media (understanding “nexus” issues)
- Student and Family Education: hazing, bullying, social media
- Consider student updates and assemblies

SEXUAL HARASSMENT BETWEEN STUDENTS

BEST PRACTICES (CONTINUED)

I. RESPONDING EFFECTIVELY WHEN IT HAPPENS

- Prompt and thorough investigation of all allegations
 - Coordination with your departments? Role of athletics? Use of short term discipline? Public messaging? Support for victim and continuing need? Addressing retaliation? Communication with family?
 - Board role? Mind your boundaries.
- Law enforcement considerations

QUESTIONS?

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