Sexual Harassment....

Recognizing and Responding to Sexual Harassment in Higher Educational.
SEXUAL HARASSMENT OF STUDENTS

By school employees, other students or third parties
Title IX – It’s not just about sports!

• 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. Title IX of the Educational Act of 1972, 29 U.S.C. § 1681, et seq.

• Implemented by the Department of Education, Office of Civil Rights (“OCR”).
Title IX Prohibits

• Conduct based on sex;
• Can include gender and sexual stereotyping;
• Which denies or limits a student’s participation in or benefit from a program that receives federal funding;
• By faculty, staff, other students or third parties.
Federal Financial Assistance

• Award or grant of money or property.
• Federal funds for building/renovation/acquisition.
• Scholarships, loans, grants, wages provided to an educational facility for payment to students admitted to the facility.
• Provision of federal services or property to the educational facility.
• Any contract or agreement that has as one of its purposes the provision of assistance.
• Does not include contract of insurance or guaranty.
• Educational facility must have been receiving or utilizing federal assistance at the time of the alleged discrimination. United States Dep’t of Transp. V Paralyzed Veterans, 477 U.S. 597 (1986).
Types of Sexual Harassment:

- Hostile Educational Environment
- Quid Pro Quo
Hostile Educational Environment:

- Hostile environment occurs when unwelcome conduct of a sexual nature is so severe, persistent, or pervasive that it denies or limits a student’s ability to participate in or benefit from an educational program or activity, or creates an intimidating, threatening or abusive educational environment.

- Hostile environment can be created by school employee, another student/students, or third party visitor.

- Hostile environment can be experienced by targeted student and by others who witness harassment.
Factors used to evaluate hostile environment sexual harassment:

• Totality of the Circumstances:
  • Unwelcome; student did not request or invite conduct & regarded conduct as offensive or undesirable.
  • Degree to which conduct affected one or more students’ education.
  • Type, frequency and duration of the conduct/single incident v. pattern.
  • Identity of and relationship between parties.
  • Number of individuals involved/individual or group.
  • Age and sex of the parties.
  • Size of school, location and context of incidents/captive audience.
  • Other incidents or series of incidents.
Effects Participation in or Benefit of Educational Program:

- Fluctuation in student’s grades;
- Student’s withdrawal from class or school;
- Nonparticipation/avoidance of some aspects of program or educational experience;
- Change of major or program;
- Emotional distress, difficulty concentrating, and/or physical injuries;
Quid Pro Quo: “This for That”

Harassment:

• The receipt of an educational decision or benefit is conditioned on the student’s submission to unwelcome sexual conduct.

• Regardless of whether student resists or submits.

• Examples include a grade, admission into a class or program, processing of paperwork, receipt of financial aid or housing assignment.
EXAMPLES

• Female student enrolled in a program that traditionally attracts males, group of male students tell jokes daily of a sexual nature, and engage in conversation about their sexual experiences; student is not the target of their conversation, she has told them to stop and told them that others in the class do not want to hear their sexual jokes and all about their sex lives. They laugh and tell her to move to another seat if she does not want to hear.

• Student enrolled in the XYZ program, and not doing well in class, instructor has been very friendly with student since the beginning of the semester & engages in personal non-school discussions, student goes to instructor’s office to talk about grade; student surprised when instructor offers a passing grade if student would have sex with instructor.

• Student is participating in the Cooperative Education Program, and is working in a private business, each time student goes to business for co-op work one of business employees touches/pats student on the shoulders, waist, thigh and strokes student’s hair.
Title IX requires a recipient of federal funds to:

- Adopt and publish **grievance procedures** providing for prompt and equitable investigation resolution of sex discrimination complaints &
- Disseminate a **policy** prohibiting sex discrimination against students.
- Designate a Title IX Coordinator.
- Purpose: to prevent and eliminate sexual harassment.
School’s Responsibilities:

• Immediate action:
  – Upon notice of allegation;
  – Reasonably should have known.
  – Protect student from alleged harasser, other students, faculty.

• Prompt Investigation

• Prompt resolution

• No retaliation
VIOLATIONS OF TITLE IX

• Remedial action by Department of Education to correct situation, policy, procedures.

• Student can bring private cause of action under Title IX seeking monetary damages.
SEXUAL HARASSMENT IN THE WORKPLACE

• Is the conduct unwelcome and based upon the sex of the complainant?

• Note: Same sex sexual harassment is actionable.
Legal Definition:

- Two types of Sexual Harassment:
  1). Hostile Work Environment.
  2). “Quid Pro Quo”

(Title VII and ORC Chapter 4112.)
Hostile Work Environment:

- Most Common form of sexual harassment.
- Hostile work environment is one where the harassment is ongoing, severe or pervasive - which unreasonably interferes with the individuals work performance – or creates an offensive, “hostile”, or intimidating environment.
Hostile Work Environment:

• “Unreasonable”:
  – Hostile Work Environment: both subjective and objective:
    • Is the conduct unwelcome?
    • Does the person complaining find conduct offensive?
    • Is the complaining party the target of or participant in activity or a witness?
    • Would a “reasonable” person find the conduct offensive?
Hostile Work Environment: (in English, please....)

- Jokes/comments/innuendo of a sexual nature;
- Terms of endearment (sweetie, honey, etc);
- Verbal, printed, e-mailed material (cartoons, objects);
-Personally delivered or in plain view;
- Unwelcome advances/repeated solicitations for dates;
- Inappropriate touching;
- Stereotyping;
- Captive Audience.
Is it HOSTILE?

• EEOC: offensive jokes-of-the-day **circulated** to female employee & her co-workers + the Supervisor's praise, in a department meeting, of the co-worker circulating the jokes was sufficient to state a Title VII Claim; jokes were not directed at female employee and were not generally sexist or misogynist (hatred of women).

• N. J. Court: **one incident** of 11 pages worth of jokes forwarded by e-mail to the whole department to be "sexual harassment" creating an "offensive work environment"; the Court stated that “the 'jokes' degrade, shame, humiliate, defame and dishonor men and women based upon their gender, sexual preference, religion, skin pigmentation and national and ethnic origin" and were thus illegal.

• **“Blonde Jokes"** on the theory that they convey offensive attitudes towards women.
“Quid pro quo”

- Something for something...
  - Requiring employee to submitting or agreeing to X, as a term or condition of employment.
  - Employee does not have to ultimately submit or agree for harassment to occur.
  - Can be advancement, extra benefits, avoiding discipline, keeping job, etc.
Who can be a harasser?

- Males and females;
- Supervisor;
- Co-worker;
- Agent of employer;
- Other department supervisors or employees;
- Non-employee
Report, Respond, Be Vigilant:

• Direct report or reasonably know.
• Investigate: take immediate, appropriate remedial action. Balancing Act.
  – If discipline is warranted, discipline the appropriate person. Level of discipline depends on nature of complaint. Termination may be necessary depending on severity.
  – If less than termination – DO NOT FORGET-MONITOR PARTIES.
No Retaliation:

• Do not retaliate against employee who brings allegation.
• Do not retaliate against witness who provides information.
Employer’s duty to prevent or what will courts consider in assessing conduct?

• Sexual Harassment Policy;
• Effective Complaint Procedure;
• Protection from retaliation;
• Confidentiality (where appropriate);
• Effective investigatory process;
• Prompt and reasonable action.
When in doubt....

- Contact your EEO officer or Director of Human Resources.
- If necessary – they can and will contact legal counsel.