

Sexual Harassment in the School Setting

Michael L. Brungo, Esquire

Falco A. Muscante, Esquire

Christina L. Lane, Esquire

PASA-PSBA **School
Leadership
conference**



October 16-18, 2019 | HERSHEY, PA



Who in the School Setting is Affected?

*Students, Parents,
Employees,
Administrators and
Third Parties*

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Primary Learning Objectives

- What constitutes sexual harassment generally, and within the context of various relationships which occur in a school setting?
- What are the most effective means of preventing such improper conduct and providing a positive learning experience for students, teachers, staff, and volunteers alike?
- In the event that such conduct occurs, how can a District Administration and Board of School Directors adequately take steps to remedy the situation and protect children and staff from further improper conduct, and protect the District from civil liability?

AGENDA

- Sexual Harassment: A Definition
- School as an Educational Institution
- School as a Workplace
- Handling Unwanted Attention
- Strategies for Prevention
- Where Are We Now?

SEXUAL HARASSMENT: A DEFINITION

Who can be a perpetrator in the School environment?

- Administrators (Central Administration or Building Supervisors)
- Employees (teachers, custodians, cafeteria, clerical, support staff, etc.)
- Third parties (independent contractors, visitors, volunteers, parents)
- Students

Who can be a victim in the School environment?

- Students
- Employees
- Administrators
- Third Parties

Our Focus Today?

- Student-on-Student Sexual Harassment
- Employee-on-Student Sexual Harassment
- Employee-on-Employee Sexual Harassment

TYPES OF SEXUAL HARASSMENT

- Quid Pro Quo
- Hostile Environment

Types of Sexual Harassment

Quid Pro Quo

- **Sexual favors in exchange for beneficial treatment.**
- School employee “explicitly or implicitly conditions a student’s participation in an education program or activity, or bases an educational decision, on the student’s submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.” (1997 Education Department Guidance)

Types of Sexual Harassment

Hostile Environment

- Conduct of a sexual nature or because of an individual's sex which is unwelcome and unreasonably interferes with the individual's ability to perform or creates an intimidating, hostile or offensive environment.

Types of Sexual Harassment

Hostile Environment

- **Lewd, obscene or vulgar language (including other forms of communication)**
- **Sexual advances and propositions**
- **Sexual or offensive touching**
- A hostile environment exists when sexually harassing conduct by a school's employee, another student, or a third party "is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment." (1997 Education Department Guidance)

Types of Sexual Harassment

- 1997 Education Department Guidance.
 - Office of Civil Rights (OCR) issued guidance stating that sexual harassment of students by school employees, other students, or third parties is a form of sex discrimination prohibited by Title IX.



SCHOOL AS AN EDUCATIONAL INSTITUTION



Students as victims.

- There are various ways in which students can be the target of sexual harassment.
 - “Stop Sexual Assault in Schools” is a non-profit organization created to address the impact of sexual harassment and violence on students.



SSAIS. "Sexual Harassment is Happening in My School?!" *YouTube*, YouTube, 25 Apr. 2018,
https://www.youtube.com/watch?time_continue=6&v=gVXov2w8sZU

Scenarios to Consider #1

Bobbie, a seventh grade female student, identifies as a male and dresses and behaves as one of the boys in class. Girls in the class often comment about how crazy Bobbie is, and how “she” won’t ever have kids because he is so unattractive to both boys and girls.



Scenarios to Consider

#1



The boys in class often times approach Bobbie to talk and hang out, but end up wrestling with him and grabbing him around the chest. One of the older girls in the school reported this activity to the Principal who jokingly said, “Bobbie has to learn that boys will be boys.”

Scenarios to Consider

#1

Shortly thereafter, two of the boys in Bobbie's class grab him at a local playground and force him into a dugout at the baseball field where they strip him of his clothes and sexually assault him. In response to a claim against the District, the School Board and Superintendent argue that they had no responsibility for this incident because it occurred off School Property outside of the school day.

Harassment of Students

- Title IX – Education Amendments of 1972
 - Federal Statute which prohibits discrimination and/or harassment on the basis of sex in those schools which receive federal funds.

Harassment of Students

- Title IX is violated when sex-based harassment of a student by another student is so severe it effectively denies the harassed student the ability to participate in or benefit from the school or school activities, and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees or officials.

Harassment of Students

- Title IX protections apply to all students regardless of gender.
- Legal action may be brought against the school district by the victim of the alleged sexual harassment seeking a remedy to the conduct and also damages resulting from the harassment.

Student-on-Student Sexual Harassment

- Sexual Assault
- Harassment based on failure to conform to sex stereotypes
 - Name calling
 - Ridicule
 - Bullying

Legal Ramifications

- In the landmark case, ***Davis v. Monroe County Board of Education***, the Supreme Court identified the criteria in which a school district can be held liable for student-on-student sexual harassment under Title IX. The Supreme Court's criterion is presented in the form of a three-prong test, and all prongs must be satisfied for liability to exist.

Legal Ramifications

- **PRONG #1:** Whether or not the harassment was so severe, pervasive, and objectively offensive that the victim was denied access to an educational opportunity.
- **PRONG #2:** Whether an official who had the authority to stop the harassment had actual notice or knowledge of the harassment.
- **PRONG #3:** Whether an official who did have both the authority to stop the harassment and actual notice remained deliberately indifferent.

Scenarios to Consider #2



Johnny is a 17 year old high school senior who has a quiet personality and few friends. His English teacher, an attractive 32 year old female, has developed a personal relationship with Johnny to the extent they spend time together during the school day during study halls and other non-instructional time.

Scenarios to Consider #2

They also spend time on the phone, face-book, texting and e-mailing about their favorite experiences involving Harry Potter movies and events. While Johnny is still a student, the two of them begin meeting each other at a local coffee shop to talk about J.K. Rowling and the “Wizards World”.



Scenarios to Consider

#2

Shortly before graduation the teacher invites Johnny to a Harry Potter Marathon party organized by a number of the teacher's adult friends. Johnny consumes a fair amount of alcohol and engages in behavior toward his teacher as if they were on a date. The teacher tells Johnny, "Not yet, my love. Let's wait until after graduation." Shortly after graduation, while Johnny is still 17, his teacher invites him to her home where the two engage in sexual conduct.

Teacher-on-Student Harassment

- U.S. Supreme Court decision in Franklin v. Gwinnett, 503 U.S. 60 (1992)
 - “Unquestionably, Title IX places on the Gwinnett County Public 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 discriminates on the basis of sex.”

Teacher-on-Student Harassment

- U.S. Supreme Court decision in Franklin v. Gwinnett, 503 U.S. 60 (1992)
 - “We believe the same rule should apply when a teacher sexually harasses and abuses a student.”
 - As a result, money damages are an appropriate remedy.

Third Party-on-Student Harassment

- Can school districts be held responsible for sexual harassment of students by third parties (e.g. non-employees)?
- Yes. In ***Davis v. Monroe Cty. Bd. of Ed.*** the Court determined how to apply the “deliberately indifferent” standard.

Third Party-on-Student Harassment

- Liability is not the result of the harassment imposed by the third party (in that instance, a fellow student), but rather from the school district's own decision to remain deliberately indifferent to the student-on-student harassment of which it had actual knowledge.

Third Party-on-Student Harassment

- Deliberate indifference to the conduct which has been reported amounts to an intentional violation of Title IX. Because the district had substantial oversight and control of the student causing the harassment and the ability to take remedial action (discipline), it could be held accountable.

2011 OCR Dear Colleague Letter

- Schools will sometimes have an obligation to respond to incidents of sexual harassment that occur “off school grounds, outside a school’s education program or activity.”
- And regardless of where the conduct occurred, if a student files a complaint, “the school must process the complaint in accordance with its established procedures.”

2011 OCR Dear Colleague Letter

- Because students can experience the effects of off-campus sexual harassment at school, “schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.”
- With respect to investigations of sexual harassment allegations, the standards for liability in the criminal context are distinct from Title IX, and therefore a criminal investigation into allegations of sexual violence does not relieve a school of its duty to conduct a Title IX investigation.

2011 OCR Dear Colleague Letter

- Schools should not wait until the conclusion of a criminal investigation or proceeding to begin their own investigation under Title IX and, if appropriate, take immediate steps to protect students while a criminal investigation occurs.

SCHOOL AS A WORKPLACE





New York Magazine. "Women Share Their Experiences With Sexual Assault and Harassment." *YouTube*, YouTube, 17 Oct. 2017, www.youtube.com/watch?v=7_Fxvf-9Ev8.

Scenarios to Consider

#3

- A female school employee brings a sexual harassment suit against the School District, the Board of School Directors and the Superintendent with a claim that the Building Principal where she works coerced her into a sexual relationship by threatening to rate her unsatisfactory for a second consecutive time and have her dismissed from her position.



Scenarios to Consider #3



- In addition, the petitioner stated that her boss (Principal) “fondled her in front of other employees,” “exposed himself to her” in his office, and “forcibly raped her on several occasions.”

Scenarios to Consider

#3

- The employee claims she did not utilize the employer's complaint procedure because her fear of her Principal prevented her from filing such a complaint and the fact the procedure required her to report the alleged problem to her Principal, the individual engaging in the harassment.

Sexual Harassment in the Workplace

- The Civil Rights Act of 1964 includes Title VII, a clause prohibiting employment discrimination based on race, sex, national origin, or religion.
- Title VII applies to both men and women.

Sexual Harassment in the Workplace

- Title VII was initially enacted in part as a way to protect women in the workplace.
- Enabled women who were suffering from sexual harassment at work to file law suits by providing a legal basis for their claims.

Sexual Harassment in the Workplace

- Quid pro quo harassment exists when submission to verbal or physical conduct of a sexual nature is an explicit term or condition of employment.
- It applies when a supervisor conditions a tangible benefit on sexual favors and punishes the subordinate who does not comply.

Sexual Harassment in the Workplace

- Hostile-environment harassment occurs when “supervisors and/or co-workers create an atmosphere that is ‘so infused with hostility toward members of one sex’ that it alters the working environment.”

Sexual Harassment in the Workplace

- U.S. Supreme Court in ***Meritor Savings Bank v. Vinson*** held that monetary loss or threat of loss of a monetary nature (under quid pro quo harassment) is not required for sexual harassment to occur.

Sexual Harassment in the Workplace

- Hostile-environment sexual harassment may occur as long as the level of harassment is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Sexual Harassment in the Workplace

Meritor Savings Bank v. Vinson

- A female bank employee brought a sexual harassment suit against the bank and her supervisor under Title VII, claiming that her supervisor coerced her into a sexual relationship by threatening her job. In addition, the petitioner claimed that her boss “fondled her in front of other employees,” “exposed himself to her” in the women's restroom, and “forcibly raped her on several occasions.”

Sexual Harassment in the Workplace

- The employee claimed she did not utilize the employer's complaint procedure because her fear of her supervisor prevented her from filing such a complaint. Also, the procedure required her to report the alleged problem to her supervisor, the individual engaging in the harassment.

Sexual Harassment in the Workplace

- In Meritor Savings Bank v. Vinson, the US Supreme Court ruled unanimously that sexual harassment which results in a hostile work environment is a violation of Title VII of the Civil Rights Act of 1964, which bans sex discrimination by employers. As such, sexual harassment is a form of sex discrimination. The court also established criteria for judging such claims.

HANDLING UNWANTED ATTENTION

HANDLING UNWANTED ATTENTION

- **Step 1: Act immediately**
 - Tell the individual that the behavior is unwelcome and to stop the behavior.
- **Step 2: Document the incident.**
 - Date, time, place of incident;
 - Specific unwelcome behavior;
 - Your response;
 - Names of witnesses; and
 - Copies of documentation (e.g. notes, e-mails, pictures, etc.)

HANDLING UNWANTED ATTENTION

- **Step 3: Report the behavior**
 - Immediately report the behavior to your supervisor or Superintendent's office.
- When Reporting Unwanted Behavior:
 - BE SPECIFIC:
 - Who?
 - What?
 - Where?
 - When?
 - Why?

HANDLING UNWANTED ATTENTION

- **Step 3: Report the behavior**

- BE SPECIFIC:

- How many times has this happened?
- Any witnesses?
- What were your feelings?
- Was your work affected?
- Did you document the incident?
- What remedy do you want?

- **Step 4: Report Retaliation**

- If you believe that you are the subject of retaliation, immediately report this to your supervisor.

STRATEGIES FOR PREVENTION



STRATEGIES FOR PREVENTION

- Know and follow District policy prohibiting sexual harassment.
- Act professionally and treat co-workers and students with respect.
- When in doubt about the appropriateness of particular behavior consider the following:
- Would I behave the same way if my significant other, mother or child were standing next to me?
- Would I want my behavior to be the subject of a report on the evening news?
- Would I want to describe my behavior in a legal proceeding in front of an arbitrator, judge or jury?

STRATEGIES FOR PREVENTION

- Report harassing behavior immediately, even if it is not directed at you.

WHERE ARE WE NOW?

The bottom of the slide features two overlapping geometric shapes. On the left, there is a teal-colored shape that tapers to a point towards the center. On the right, there is a red-colored shape that tapers to a point towards the center, overlapping the teal shape.

Where?



Recently Approved and Implemented Legislation

EDUCATOR DISCIPLINE ACT

Revisions to the Professional Educator Discipline Act (Act) became **effective February 16, 2014**. The Act increases an educator's responsibility to report and expands the instances in which a report to the Pennsylvania Department of Education (PDE) is required.

EDUCATOR DISCIPLINE ACT

- **New Requirements:**

- The Act requires that Superintendents, IU and Vo-Tech Executive Directors, and chief administrators of charter, cyber-charter or private academic schools report the following to PDE:

EDUCATOR DISCIPLINE ACT

- Any educator alleged to have committed sexual abuse or exploitation or engaged in sexual misconduct with a child or student.
 - “Sexual misconduct” is defined as any act, including, but not limited to, any verbal, nonverbal, written or electronic communication or physical activity, directed toward or with a child or student regardless of their age that is designed to establish a romantic or sexual relationship with them.

EDUCATOR DISCIPLINE ACT

Prohibited acts include, but are not limited to:

- Sexual or romantic invitations;
- Dating or soliciting dates;
- Engaging in sexualized or romantic dialogue;
- Making sexually suggestive comments;
- Self-disclosure or physical exposure of a sexual, romantic or erotic nature; or
- Any sexual, indecent, romantic or erotic contact with the child or student.

EDUCATOR DISCIPLINE ACT

- When there is reasonable cause to suspect that an educator has caused physical injury to a child or student as a result of negligence or malice.
- Any educator who has resigned, retired or otherwise separated from employment after a school has received information of alleged misconduct under the Act. In effect, any resignation/separation in lieu of termination for cause must be reported. The report must be filed regardless of any confidentiality provision in a Separation Agreement.

EDUCATOR DISCIPLINE ACT

- Any educator who has been reported under the Child Protective Services Law.
- Any educator named as the perpetrator of an indicated or founded report of child abuse or named as an individual responsible for injury or abuse in an indicated or founded report for a school employe under the Child Protective Services Law.

Act 126 of 2012

- Effective date January 1, 2013
- Requires mandatory training on recognizing and reporting child abuse and sexual misconduct
- 3 hours of training every 5 years
 - Training for employees and independent contractors of school entities who have “direct contact with children”
 - “Possibility of care, supervision, guidance or control of children, or the routine interaction with children.”

Act 126 of 2012

- Act 126 updated the PA Child Protective Services Law and directly affects all school employees as school districts seek to protect students from child abuse and student abuse. As of December 31, 2014, the new law expands and further defines mandatory reporters, the reporting process, penalties for failure to report, and protections for those who report.

When Should a Mandated Reporter Report Abuse?

The mandated reporter must report when he or she has reasonable cause to suspect that a child is a victim of child abuse based upon the following:

- Coming into contact with the child in the course of employment, occupation, and practice of a profession or through a regularly scheduled program, activity or service;
- Having direct responsibility for the care, supervision, guidance, or training of the child, or being affiliated with an agency, institution, organization, or school that is directly responsible for the care, supervision, guidance, or training of the child;
- Receiving a specific disclosure from another person that an identifiable child is the victim of child abuse; or
- Receiving a specific disclosure from an individual fourteen (14) years of age or older that s/he has committed child abuse.

Constantly Changing Legal Requirements!

- Act 54 of 2018 Signed by Governor Wolf on June 28, 2018.
 - All public and nonpublic schools (K-12) shall publicly display at each school campus a poster which contains Statewide toll-free telephone numbers for reporting suspected child abuse or neglect and matters relating to school safety.

Act 168 of 2014

- Commonly known as the “Pass the Trash” law, which went into effect in late 2014, amends the Public School Code to require that extensive employment history checks be completed prior to an LEA hiring an individual in a position that involves direct contact with children.

Act 153 of 2014

- Amends the Child Protective Services Law, contains two separate provisions that impact LEAs. First, the law requires that volunteers having direct contact with children obtain child abuse clearances and PA State Police criminal history background checks. A volunteer must also provide Federal background checks prior to volunteering if they lived outside Pennsylvania within the last 10 years. Second, the law requires that school employees, independent contractors and volunteers who have direct contact with children update these 3 clearances every 60 months.

NEW LEGISLATION YET TO BE FINALIZED

The bottom of the slide features two overlapping geometric shapes. On the left, there is a teal-colored shape that tapers to a point on the right. On the right, there is a red-colored shape that tapers to a point on the left. The two shapes meet in the center, creating a white triangular gap between them.

The *BE HEARD in the Workplace Act* (S. 1082) is Intended to Overhaul Workplace Harassment Laws

Bringing an
End to

Harassment by
Enhancing

Accountability and

Rejecting

Discrimination in the Workplace Act

The *BE HEARD in the Workplace Act.*

- Strengthens and expands the reach of our nation's antidiscrimination laws.
- Removes barriers that prevent individuals from accessing justice.
- Helps employers create harassment-free workplaces.

Some of the legislation's key provisions.

- **It extends civil rights protections to all.**
 - This law would extend to all employees regardless of business size, as well as to those who don't fall under the category of "employee," including independent contractors, volunteers, interns, fellows, and trainees. The bill also provides LGBTQ workers with protection from employment discrimination.

Some of the legislation's key provisions.

- **It gives survivors of sexual harassment a fair chance of success in litigation.**
 - Victims may no longer need to prove the harassment was “severe or pervasive” in order to prevail in court based upon a detailed listing for judges and employers to follow in identifying what conduct does and does not constitute unlawful harassment.

Some of the legislation's key provisions.

- **It limits secrecy and promotes transparency.**
 - Would prohibit employment agreements workers are forced to sign before taking a job that require discrimination claims to be decided in secret arbitration proceedings rather than in court.
 - The bill would also prohibit employers from demanding that workers sign blanket non-disclosure agreements upon accepting a job.

Some of the legislation's key provisions.

- **It restores protections for workers harassed by supervisors.**
 - An employee bringing a legal challenge against harassment by her supervisor would no longer have to meet a higher burden of proof in those instance when the supervisor could not fire, demote, promote, or transfer the employee.
 - If the supervisor has the power to control the employee's daily life at work, what duties the employee performs or the number of hours the employee is assigned, the burden of proof will remain the same.

Some of the legislation's key provisions.

- **It assists employers in creating harassment-free workplaces.**
 - The bill authorizes research and data collection on workplace harassment and provides employers with model policies and trainings, as well as best practices tailored to specific industries.

Department of Education Regulations

- On November 29, 2018, ED issued a notice of proposed rulemaking in the Federal Register. If adopted, the proposal would significantly alter the responsibilities of schools in responding to allegations of sexual harassment.

Department of Education Regulations

- Three changes to the Title IX Regulations proposed by Education Secretary DeVos are causing concern to various legislators and associations.

Department of Education Regulations

- The first is a change to a public school's responsibility. The proposed changes would make public schools and universities responsible only for incidents that happen on campus or school grounds, and also narrow the definition of sexual harassment.

Department of Education Regulations

- The second change is to the standard of evidence used for Title IX incidents. Currently, the standard is a preponderance of evidence — meaning, the outcome is based on whether the incident was more likely than not to have occurred.

Department of Education Regulations

- The application of cross-examinations in Title IX cases. Currently, both the accuser and accused are allowed to pose questions to each other in a disputed incident, but the investigator in their case is the one who asks them — there is no direct confrontation between the two.

Department of Education Regulations

- The proposed regulation would always require a hearing be conducted. A confrontational, adversarial type of situation could result where there would be questioning of each other, or potentially by attorneys. Question: who's more likely to have an attorney in that case? Most likely the accused. The question then becomes whether the complainant in such case would also need a lawyer?
- ***There could be a potentially detrimental impact on the complainant.***

*“Coming together is a beginning.
Keeping together is progress.
Working together is success.”*

- Henry Ford

**Recognize People. Engage People.
Treat People like Equals.**

QUESTIONS AND COMMENTS

Maiello Brungo & Maiello

424 South 27th St., #210

Pittsburgh, PA 15203

412.242.4400 | www.mbm-law.net

- Michael L. Brungo, Esq. – mlb@mbm-law.net
- Falco A. Muscante, Esq. – fam@mbm-law.net
- Christina L. Lane, Esq. – cll@mbm-law.net