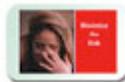




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Student Sexual Harassment The Winning Combination: Prevent and Investigate

By Mary Jo McGrath, Attorney at Law

Heads Up!

The U.S. Department of Education new civil rights chief has put school districts on notice that protecting students from sexual harassment will be a top priority. In one of her first acts as assistant secretary for civil rights, Stephanie Monroe recently informed school district leaders across the country that the department will launch a series of compliance reviews to evaluate how schools are dealing with sexual-harassment issues. School districts have direct liability for failure to educate, process complaints or investigate matters involving sexual harassment - whether student to student, adult to student, adult to adult or student to adult.

Growling's Not Enough

Some old habits die hard and one of them seems to be a belief by a number of administrators that if they "bark" loudly enough the problem will go away. I was recently told by a school principal that he didn't want to spend the time or money for an investigation. He intended to call the kid in, look him straight in the eye, and tell him he'd be "dead meat" if he ever did anything "like that" again. The school district and the principal were subsequently sued for several million dollars for failure to properly investigate.

Why the Old Ways Don't Work

The old ways don't work in the arena of sexual harassment for two reasons:

- 1) Statistics show that between 70 and 90 percent of harassers and abusers repeat their conduct. Near discovery threats of discipline are not a deterrent; and
- 2) The law says you have a duty to investigate even if the conduct has stopped or the alleged victim does not or consent to the investigation. It is your duty to perform a prompt, thorough and objective investigation no matter what the original parties say or do.

How to Shield Your District

The Supreme Court has emphasized that school districts are not liable for the original harassing conduct of one student to another or for adult to student sexual misconduct. They are liable for their own failure to take steps to prevent and to investigate. (*Gebser v. Lago Vista Independent School District* (1998)). Having a good policy in place, with detailed complaint procedures which are followed by all personnel, will diminish the likelihood of harm to students and liability to the school district.

More good news is that a proper investigation can shield the school district and its administrators in student sexual harassment cases. Under federal law a school district is not liable for hostile environment sexual harassment unless:

- 1) the school district knew the harassment was occurring;
- 2) the harassment was occurring in a context subject to the school district's control; and
- 3) the school district's deliberate indifference caused students to undergo harassment or made the students vulnerable to it, particularly by failing to take immediate and appropriate corrective action once it learned of the harassment.

This liability shield is available so long as the school district's response to the harassment is "not clearly

unreasonable in light of the known circumstances." (Davis v. Monroe). What is meant by "not clearly unreasonable" is near anyone's guess, but a lot of latitude will be given to the institution's decision making.

When to Investigate

A school district is obligated to investigate when an aggrieved party or a third person reports that inappropriate conduct is occurring, even if the term "harassment" is not used. The investigation obligation is also triggered by such warning signs as observation of inappropriate commentary or conduct, general knowledge of harassing behavior or a request that inappropriate conduct cease. Again, it does not matter what the alleged victim wants; the school district must investigate and take appropriate corrective action.

Ferretting out sexual harassment is not an easy task. Experts have stated that failure to report is a typical and reasonable response to harassment. In fact, over 95 percent of the victims of nonconsensual relationships (both sexual and social) do not complain or report the problem because of their fear of reprisal or loss of privacy. The burden is on the school district to be alert and pursue issues when they receive information through alternate sources, including rumors.

Prevent and Investigate

The first line of defense is to have a solid sexual harassment policy in place which addresses:

- 1) awareness of what constitutes illegal sexual harassment, and
- 2) what to do about it.

Every student, staff member, teacher and administrator should be trained in the policy through examples and dramatizations of the real life behaviors the policy is referring to; "legalese" is insufficient to give notice. Secondly, every department and school site should have an identified and trained complaint intake person. This person needs to know how to speak to the complainant in a way which doesn't taint the information. He or she also needs to know what to do with the information once received, and how to follow through to be sure the matter is investigated and remedied.

The site administrators and the designated investigators need to be highly knowledgeable in sexual harassment laws and know which questions are legal to ask and which are not. They must also be skillful in interviewing techniques that include an ability to establish rapport, to press for admissions, to understand interviewees, and to take detailed notes which can be transcribed and reviewed by the final decision maker.

The skills required to detect sexual harassment, properly intake the matter, and to perform either informal or formal investigations, are skills that are acquired through training and experience. It is unwise to assume that a person innately possesses these qualities. Instead, make sure that your district's students, staff and administrators receive the training necessary to protect your students and protect you and your school district from a costly lawsuit.

Editor's Note: This article is general in nature and is not intended to replace professional legal advice by a specialist in education law.

Next issue: SEXUAL HARASSMENT INVESTIGATION: VITAL TIPS AND TECHNIQUES FOR INTERVIEWING

McGrath Training Systems, Inc. has created the McGrath Sexual Harassment Intervention Programs to provide managers, supervisors and administrators in both work and school settings with legally sound tools and procedures that shield you and your organization from financial liability.

In addition, our program helps protect individuals by providing clear guidance on how they can identify and prevent sexual harassment in their work or school environments and what to do if they observe or are themselves subjected to sexual harassment. We train employees and/or students to discern between inappropriate and appropriate conduct and to understand the legal consequences of sexual harassment offenses and/or violating company or school district policy. Go to <http://www.mcgrathinc.com> for more

information on our comprehensive Sexual Harassment Identification, Intervention, and Investigation Programs available through online distant learning with the McGrath CyberSchool or personal on-site trainings.

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