

## **Considerations for School District Sexual Misconduct Policies**

The Task Force to Protect Students from Sexual Assault (Task Force) is committed to supporting school districts (districts) in preventing sexual misconduct, encouraging reports of such misconduct, improving responses to reports of such misconduct, and complying with applicable federal laws.

This document highlights a number of issues that could be particularly helpful for districts to consider when drafting sexual misconduct policies as part of their overall response to sexual misconduct. The Task Force recommends using these factors as a guide for developing effective sexual misconduct policies. However, the Task Force cautions districts to engage in a comprehensive drafting process that considers the unique aspects of the district and its student body. The sexual misconduct policy of each district will vary in detail, specificity, and components, reflecting, for example, differences in state or local legal requirements and each district's student population. While this document focuses on reporting options and support services for victims and the victim's role in the grievance process, the Task Force recognizes that parental involvement at the K-12 level is critical and should be sought at all stages of the process for students who are minors.

The considerations outlined below are meant to prompt discussion and careful thought about sexual misconduct policies. They do not constitute new legal obligations or legal advice. Districts that address these elements in their sexual misconduct policy, in part or in whole, may still be found to be in violation of federal law (e.g., if the institution fails to effectively address a hostile education environment created by sexual misconduct). When drafting policies, districts should consult legal counsel to ensure their full compliance with applicable federal, state, and local laws.

### **Why Should a District Have a Separate Sexual Misconduct Policy?**

A separate sexual misconduct policy (policy) can provide a single, easily accessible, and userfriendly document for students, parents, employees, and others affected by sexual misconduct to find information regarding a district's rules and procedures, including the rights of students and the obligations of the district and its employees. These policies can be most effective when they explicitly cover every school, alternative setting, and other work site within the district, as well as when students are involved in a school-sponsored or school-recognized activity off school grounds like a field trip or athletic event. The policy should make clear that the district will consider the effects of other sexual misconduct, such as misconduct that occurs off-site, in assessing whether a student has been subjected to a sex-based hostile environment at school. The Task Force recognizes that many districts have a comprehensive policy that covers harassment and bullying or discrimination on multiple bases (e.g., race, sex, disability). Districts that utilize such a policy should still consider developing a separate sexual misconduct policy or including a separate section dedicated to sexual misconduct to address the unique issues that arise in sexual misconduct cases.

## How Should a District Develop a Sexual Misconduct Policy?

The Task Force encourages each district to engage in a comprehensive policy drafting process.

### Who should participate?

To improve the quality, effectiveness, and perceived legitimacy of the policy, the Task Force encourages districts to:

- Identify key stakeholders— particularly students, parents, employees (teachers, Title IX coordinators, para-professional educators, special educators, administrators, coaches, and support staff), student groups (e.g., LGBT students, students with limited English proficiency, and students with disabilities), school resource officers, local law enforcement, survivors of sexual misconduct, providers of victim support services (e.g., school counselors, nurses, social workers, and psychologists as well as local rape crisis centers and child advocacy centers), and the local department of children and family services – whose expertise and input should be incorporated into the drafting process.
- Identify the office or personnel responsible for drafting the policy, but also engage a range of administrators to ensure the policy has broad institutional support and can be sustained.
- Consider seeking input from an individual with expertise in sexual misconduct policies to assist in reviewing and revising existing policies or drafting new ones. The Equity Assistance Centers funded by the Department of Education may be able to provide this expertise at no charge to school districts. Contact information for the Equity Assistance Centers is available here: <http://www2.ed.gov/programs/equitycenters/contacts.html>.
- Engage in a vetting period where key stakeholders have multiple opportunities to provide feedback on the proposed policy to assess its clarity, quality, and effectiveness.

### Is the policy clear and understandable to its target audience?

- Review the policy to ensure that it is set out in clear, logical sections that students and parents can understand. In determining whether the policy is user-friendly, age appropriate and appropriate in tone, policy drafters should review the material from the perspective of a student who has been affected by sexual misconduct.
- Ensure that the policy is published in a format or formats that make it readily available, including to students and parents with disabilities and limited English proficiency.

### What other documents should be considered during development of the policy?

- Review all applicable federal laws, including Title IX of the Education Amendments of 1972 (Title IX), Title IV of the Civil Rights Act of 1964 (Title IV), the Family Educational Rights and Privacy Act of 1974, Child Abuse and Treatment Act (CAPTA), and their implementing regulations and related guidance; review any applicable state and local laws (including any that mandate reporting to police or child protection agencies); and consult with legal counsel to ensure that the policy fully complies with all applicable federal, state, and local laws.

- Coordinate the policy with other district policies and procedures, including disciplinary codes and other nondiscrimination policies affecting students and employees.
- Other questions to consider include: What other resources, resource gaps, and barriers exist and are likely to affect implementation of the policies? What terminology is used most frequently in collaborating organizations and how are those terms defined?

### **What should happen when the policy is complete?**

- Develop a plan for implementing and widely publicizing the policy to students as appropriate, parents, and employees, as well as key stakeholders and key community partners.
- Provide training on the new policy for all employees, school board members, students (in an age-appropriate manner) and local law enforcement representatives.
- Establish procedures for regularly reviewing, evaluating, and updating the policy. Review the desired outcome for each stakeholder to determine how success is defined and measured. By identifying outcomes that can be monitored jointly, there can be a clear way of demonstrating progress.
- Create user-friendly materials, including for students and parents with disabilities and limited English proficiency to explain the policy and how victims can get help, and provide these materials online and through other strategies appropriate for the district.

### **What Should a District Consider Including in Its Sexual Misconduct Policy?**

The following information highlights elements that may be particularly helpful for districts to consider when drafting sexual misconduct policies:

1. Introduction
  - a. Include a clear statement of district’s prohibition against sex discrimination, which includes sexual misconduct. For sample definitions of sexual misconduct, see the Task Force’s sample language at <https://www.notalone.gov/assets/definitions-of-prohibited-conduct.pdf>. These definitions were designed for institutions of higher education, but many of the general principles are applicable to the K-12 level as well. As with all aspects of designing a sexual misconduct policy, districts should adapt definitions as appropriate to reflect the unique aspects of the district and student body.
  - b. Include a statement of the district’s commitment to address sexual misconduct.
2. Scope of the Policy
  - a. Identify the persons, conduct, locations, programs, activities, and relationships covered by the district’s sexual misconduct policy.
  - b. Make clear the district’s prohibition against sexual misconduct covers sexual misconduct by students, employees, and third parties.

- c. Clearly state the policy protects all students and employees, regardless of sexual orientation or gender identity. The policy should make clear that the school district will consider the effects of other sexual misconduct, such as misconduct that occurs off-site, in assessing whether a student has been subjected to a sex-based hostile environment at school.

3. Title IX Coordinator:

- a. Identify the school's and/or school district's Title IX coordinator and briefly explain the Title IX coordinator's role in the school's overall response to sexual misconduct and provide references to sections of the policy that provide greater details regarding the Title IX coordinator's duties.<sup>1</sup>

4. Options for Assistance Following an Incident of Sexual Misconduct

a. Immediate Assistance

- i. Identify and provide contact information for the trained resources (both district employees and resources in the community) who can provide an immediate response in a crisis situation (e.g., obtain needed resources, explain reporting options, and help navigate the reporting process). These resources may include school psychologists, counselors, nurses, or social workers as well as local mental health counselors or rape crisis centers.
- ii. Clearly explain any state or local mandatory reporting obligations these individuals have, including any that may impact their ability to maintain the student's or employee's complete confidentiality.
- iii. Provide emergency numbers for school resource officers, local law enforcement, the Title IX coordinator, and any other first responders, including the local child advocacy center, child protection agency, and when appropriate, child abuse reporting hotlines.
- iv. Identify health care options, including options available in the local community.
  1. Ensure students and parents are aware of the options to seek treatment for injuries, preventive treatment for sexually transmitted diseases, and other health services.
  2. Discuss the option of seeking medical treatment to preserve evidence.
  3. Identify where/how to get a sexual assault medical forensic examination, which may be through a Sexual Assault Nurse Examiner (SANE), Sexual Assault Forensic Examiner (SAFE), or child advocacy center.
  4. List locations, including contact information, for an advocate (e.g., a local rape crisis center) who can accompany a victim to the hospital or health provider.

b. Ongoing Assistance

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<sup>1</sup> Additional information about the role of the Title IX coordinator is available here: <https://www.notalone.gov/assets/role-of-title-ix-coordinator.pdf>.

- i. Counseling, Advocacy, and Support (available in the district and the local community)
  - 1. Identify counseling, advocacy, health, mental health and other support for victims of sexual misconduct, whether or not a victim chooses to make an official report or participate in the district’s grievance process or the criminal process.
  - 2. Identify those who can provide ongoing support during the district’s investigatory and/or disciplinary process or the criminal process.
- ii. Clearly explain any state or local mandatory reporting obligations that the individuals identified in 4.b.i.1-2 above have, including any that may impact their ability to maintain the student’s or employee’s complete confidentiality.
- iii. Academic Accommodations and Interim Measures
  - 1. Describe the immediate steps and interim measures that the district can provide to ensure the safety and well-being of the victim, such as altering academic or bus schedules for either the victim or the alleged perpetrator, changing locker locations, changing cafeteria or recess schedules, allowing the victim to withdraw from/retake a class without penalty, providing an escort to ensure that the victim can move safely between classes or other activities, and providing academic support (e.g., tutoring). See Section 7.k below about interim measures.

## 5. Definitions

- a. Clearly define (and, as appropriate, provide examples of) all conduct covered by the policy, such as:
  - i. Sexual harassment
  - ii. Hostile environment caused by sexual harassment
  - iii. Sexual assault
  - iv. Dating violence
  - v. Sexual exploitation and human trafficking
  - vi. Stalking
  - vii. Retaliation
  - viii. Intimidation ix. Child sexual abuse
- b. Define “consent”
  - i. The input of students, parents, and sexual misconduct experts can be helpful in developing a clear way to explain the definition of consent.
  - ii. Make clear that, as appropriate, the district will consider the age of the student (including the legal age of consent in the state, as applicable), the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to consent to the sexual conduct. Make clear that a student’s participation in or acceptance of the conduct does not mean that he or she consented to the conduct. For example, a student may decide not to resist the sexual advances of another student out of fear.
  - iii. Make clear that some students may lack the ability to consent, due, for example, to their age,

intellectual or other disability, or incapacitation from the use of drugs or alcohol.

- iv. Under Title IX, with respect to sexual activity between an employee and a student, state that the district will always view as unwelcome and nonconsensual any sexual activity between an adult school employee and any student below the legal age of consent in the state. In addition, there will be a strong presumption that sexual activity between an adult school employee and a student who meets the legal age of consent in the state is unwelcome and nonconsensual.
- v. Recognize that:
  - consent is a voluntary agreement to engage in sexual activity;
  - someone who is incapacitated cannot consent;
  - past consent does not imply future consent;
  - silence or an absence of resistance does not imply consent;
  - consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
  - consent can be withdrawn at any time; and
  - coercion, force, or threat of either invalidates consent.

## 6. Reporting Policies and Protocols

- a. Identify formal reporting options – e.g., criminal complaint, complaint with the district, and report to an employee whom the school or district has designated as a “responsible employee,” including the Title IX coordinator. Explain how each option works and include contact information for the people to whom one can make a report. Explain any state or local requirements and mandates to report incidents to law enforcement or child protection agencies.
- b. Identify alternatives to formal reporting – e.g., privileged or confidential resources.
  - i. Note that individuals who may keep disclosures privileged or confidential may still be required to report incidents under state or local mandatory reporting laws and this may trigger a criminal investigation. This is true even though sharing information with such individuals would not trigger the district’s obligations to respond or investigate under Title IX or Title IV.
- c. Describe policies governing confidentiality
  - i. Specify those employees to whom a student or parent can disclose in confidence and those “responsible employees” who must report incidents (including personally identifying details) to the Title IX Coordinator.
    1. Explain that a responsible employee is any employee who has the authority to take action to redress sexual misconduct, who has been given the duty of reporting sexual or other misconduct by students

to school officials, or whom a student could reasonably believe has this authority.<sup>2</sup>

2. Consider particularly how the district will ensure that a student or parent understands an employee's reporting obligation before he or she reveals any information to that employee.
  - ii. Describe what information will be kept confidential and what information may be disclosed, to whom it will be disclosed, and why.<sup>3</sup> Explain the implications of state and local mandatory reporting laws on the district's ability to maintain a student's or employee's confidentiality.
  - iii. Explain when the district may not be able to honor a request that a student's or employee's name not be disclosed to the alleged perpetrator or that no investigatory or disciplinary action be taken. Identify the employee responsible for evaluating such requests for confidentiality or no action.
- d. Explain the process for third-party and anonymous reporting.
- e. Ensure that the policy prohibits retaliation against those who file a complaint including third parties, or otherwise participate in the investigatory and/or disciplinary process (e.g., as a witness), and explain that the school will take strong responsive action if retaliation occurs.
- f. Explain the process for reporting harassment by the alleged perpetrator or other individuals against those who file a complaint and explain that the school will take strong responsive action if such harassment occurs.
- g. Describe when the school will grant amnesty for a violation of other discipline or student conduct policies, related to reporting and/or investigation of sexual misconduct.

## 7. Grievance Process

- a. Identify the Title IX Coordinator(s) and explain roles and responsibilities.
- b. Identify the trained and impartial individual(s) who conduct(s) the investigation and decide(s) the outcome of the complaint and describe the process by which either party may raise issues related to potential conflicts of interest of such individual(s).
- c. Explain that any investigation conducted by the district will be impartial and describe what an investigation might entail, including any investigative protocols that will be followed if the incident involves students with intellectual or other disabilities.
- d. Explain that mediation is never appropriate in sexual assault cases and do not include any requirements that a complainant work out an issue directly with the perpetrator.

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<sup>2</sup> At the elementary and secondary school level, this could include school administrators, school law enforcement personnel, and teachers and may also include bus drivers, cafeteria staff, and other employees depending on the district's practices and procedures.

<sup>3</sup> It may be helpful to consult the Sample Language for Reporting and Confidentially Disclosing Sexual Violence issued by the White House Task Force to Protect Students from Sexual Assault located at <https://notalone.gov/assets/reporting-confidentiality-policy.pdf>. Note that this policy was intended for institutions of higher education and therefore may require revisions to adapt it to K-12 school districts and minor children.

- e. Specify reasonably prompt timeframes for the major stages of the process, including the timeframe for conducting the investigation and issuing the notice of the outcome, as well as the process for extending the timeframes.
- f. Explain the processes for preserving evidence.
- g. Provide the parties with equitable rights during the investigative process, including an equal opportunity for both parties to present witnesses and other evidence.
- h. Explain the standard (e.g., preponderance of the evidence) that will be used in any Title IX fact-finding investigations and related proceedings.
- i. Explain the right to proceed with a school district investigation while a criminal or child protection investigation is proceeding.
- j. Set forth parameters and clarify what information may and may not be shared between school officials and law enforcement when there is a parallel criminal or child protection investigation (e.g., via a Memorandum of Understanding (MOU) with local law enforcement or child protection agency).<sup>4</sup>
- k. Explain that, where necessary, the district will take immediate steps to protect complainants pending the final outcome of an investigation, including academic accommodations and other interim measures.<sup>5</sup> These measures may include altering academic or bus schedules for either the complainant or the alleged perpetrator, changing locker locations, allowing the complainant to withdraw from/retake a class without penalty, providing an escort to ensure that the complainant can move safely between classes or other activities, and providing academic support (e.g., tutoring).
- l. Explain the district's response if a complainant's request for confidentiality limits the district's ability to investigate a particular matter, and any legal requirements to report sexual misconduct to law enforcement or child protection agencies. A district may take steps to limit the effects of the alleged sexual misconduct and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include: providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; revising and publicizing the district's policies on sexual misconduct; and conducting student, parent, and employee climate surveys regarding sexual misconduct.
- m. Explain the possible results of the grievance process, including:
  - i. sanctions;
  - ii. remedies/accommodations for the complainant;
  - iii. rehabilitation treatment/counseling for the perpetrator; and iv. additional remedies for the school community.
- n. Outline how the parties will be informed of the notice of the outcome, including:

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<sup>4</sup> It may be helpful to consult the Sample MOU prepared for institutions of higher education and local law enforcement by the White House Task Force to Protect Students from Sexual Assault. *See* [https://www.whitehouse.gov/sites/default/files/docs/white\\_house\\_task\\_force\\_law\\_enforcement\\_mou.pdf](https://www.whitehouse.gov/sites/default/files/docs/white_house_task_force_law_enforcement_mou.pdf).

<sup>5</sup> It may be helpful to consult the Sample Interim Measures Policy prepared for institutions of higher education that issued by the White House Task Force to Protect Students from Sexual Assault. *See* <https://www.notalone.gov/assets/interim-and-supportive-measures.pdf>.



- i. Written notice to both parties of the outcome of the complaint and the option to appeal, if applicable.
  - ii. How the district will inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the district has taken to eliminate the hostile environment, and prevent recurrence.
- n. If appeals are permitted, describe the appellate procedures, including grounds for appeal, standards of review, the person/entity that will decide appeals, and the applicable reasonably prompt time frames.

## 8. Prevention and Education

- a. Outline the district's approach to prevention and education, including type and frequency of prevention programming and educational/outreach activities. This may include:
  - i. a discussion of the district's efforts to educate students and parents about the district's sexual misconduct policies, grievance procedures and mandated reporting laws.
  - ii. information regarding the district's programs to provide age-appropriate education to students, including students with intellectual or other disabilities and with limited English proficiency, about, as appropriate, social and relationship boundaries and how to recognize and report sexual misconduct.
  - iii. a discussion of school climate measurements, which involves a comprehensive assessment of student engagement, school safety, and the learning environment. By including sexual misconduct as a component of the measurement, educators will have access to the necessary data to identify school needs, set goals, and track progress toward improvement.<sup>6</sup>

## 9. Training

- a. Outline how employees are trained on the district's sexual misconduct policy, grievance procedures for students and employees, and related issues.
- b. Explain how the Title IX coordinator, school resource officers, responsible employees, and anyone else who is involved in responding to, investigating, or adjudicating sexual misconduct will receive adequate training.

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<sup>6</sup> For more information on school climate measurements from the Department of Education, visit <https://safesupportivelearning.ed.gov/topic-research/school-climate-measurement>.