

Sample Language and Definitions of Prohibited Conduct for a School's Sexual Misconduct Policy

Under Title IX of the Education Amendments of 1972, any educational institution receiving Federal financial assistance must notify the school community of its nondiscrimination policy and the name and contact information for its Title IX Coordinator, and adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints. The institution should also ensure that the school community has a clear understanding of what constitutes sexual misconduct, when such conduct creates a hostile environment, the potential consequences for such conduct, and how the school processes complaints.

The Task Force to Protect Students from Sexual Assault (“Task Force”) provides the following guide with sample language and definitions of key terms for schools to consider when developing its sexual misconduct policy, and definitions for prohibited conduct under that policy. This guide is not meant to be simply cut and pasted into a policy. Among other things, a school must determine how these definitions fit into a larger sexual misconduct policy. The Task Force suggests engaging in the comprehensive drafting process recommended in the [Checklist for Campus Sexual Misconduct Policies](#).

This sample language is neither exhaustive nor exclusive, and the sections of every school's policy must reflect its own character and circumstances. Policies will vary in detail, specificity and components, reflecting differences in state or local legal requirements and each school's students, size, administrative structure, and what it has learned from past experiences.

The sample language and definitions do not constitute legal advice or create new legal obligations. Institutions that use the sample language and definitions in their sexual misconduct policies, in part or in whole, may still be found to be in violation of federal law(s).

Prohibited Conduct

The two forms of prohibited conduct below cover both sex-based harassment, including but not limited to sexual harassment, sexual assault, and sexual exploitation, as well as harassment based on gender identity, gender expression, and nonconformity with gender stereotypes. Sample definitions for *italicized* terms in the two provisions are offered in the next section. In addition, in the sample definitions, terms that are further defined are also *italicized*.

1. No person may engage in *sex-based harassment* that creates a *hostile environment* in or under any program or activity of this School.
2. No person who is an employee or agent of this School (including a student employee) may condition a decision or benefit on a student's submission to *sex-based harassment*

(regardless of whether the student resists and suffers the threatened harm or submits and avoids the threatened harm).

Note that these two provisions do not address many other forms of sex discrimination that are prohibited by state, federal, and local laws and that should also be addressed in a school's sexual misconduct policy. Schools should consult with their legal counsel to ensure that their policies are consistent with all applicable laws. Further, as noted in the [Checklist for Campus Sexual Misconduct Policies](#), in order for such a policy to be clear it must identify the scope of the policy, including the persons, locations (including off campus), programs, activities, and relationships that it covers. And for the policy to be effective, it must be integrated into a broader policy addressing assistance for victims, confidentiality, reporting, investigations, adjudication, prevent and education, and training.

Definitions

A. Sex-Based Harassment

"Sex-based harassment" includes *sexual harassment* and *gender-based harassment*.

B. Sexual Harassment

"Sexual harassment" is *unwelcome conduct* of a sexual nature, including but not limited to unwelcome sexual advances; requests for sexual favors; or other verbal or nonverbal conduct of a sexual nature, including *rape*, *sexual assault*, and *sexual exploitation*. In addition, depending on the facts, dating violence, domestic violence, and stalking may also be forms of sexual harassment.

C. Gender-Based Harassment

"Gender-based harassment" is *unwelcome conduct* of a nonsexual nature based on a student's actual or perceived sex, including conduct based on gender identity, gender expression, and nonconformity with gender stereotypes.

D. Unwelcome Conduct

Conduct is considered "unwelcome" if the student did not request or invite it and considered the conduct to be undesirable or offensive.

Unwelcome conduct may take various forms, including, name-calling, graphic or written statements (including the use of cell phones or the Internet), or other conduct that may be physically threatening, harmful, or humiliating. Unwelcome conduct does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Unwelcome conduct can involve persons of the same or opposite sex.

Participation in the conduct or the failure to complain does not always mean that the conduct was welcome. The fact that a student may have welcomed some conduct does not necessarily mean that a student welcomed other conduct. Also, the fact that a student requested or invited conduct on one occasion does not mean that the conduct is welcome on a subsequent occasion.

E. Hostile Environment

A “hostile environment” exists when *sex-based harassment* is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the School’s programs or activities.

A hostile environment can be created by anyone involved in a School’s program or activity (*e.g.*, administrators, faculty members, students, and campus visitors).

In determining whether *sex-based harassment* has created a hostile environment, the School considers the conduct in question from both a subjective and objective perspective. It will be necessary, but not enough, that the conduct was *unwelcome* to the student who was harassed. But the School will also need to find that a reasonable person in the student’s position would have perceived the conduct as undesirable or offensive in order for that conduct to create or contribute to a hostile environment.

To make the ultimate determination of whether a hostile environment exists for a student or students, the School considers a variety of factors related to the severity, persistence, or pervasiveness of the *sex-based harassment*, including: (1) the type, frequency, and duration of the conduct; (2) the identity and relationships of persons involved; (3) the number of individuals involved; (4) the location of the conduct and the context in which it occurred; and, (5) the degree to which the conduct affected one or more student’s education.

The more severe the *sex-based harassment*, the less need there is to show a repetitive series of incidents to find a hostile environment. Indeed, a single instance of *sexual assault* may be sufficient to create a hostile environment. Likewise, a series of incidents may be sufficient even if the *sex-based harassment* is not particularly severe.

First Amendment Considerations

This policy does not impair the exercise of rights protected under the First Amendment. The School’s sexual misconduct policy prohibits only sex-based harassment that creates a hostile environment. In this and other ways, the School applies and enforces this policy in a manner that respects the First Amendment rights of students, faculty, and others.

F. Sexual Assault

“Sexual assault” is actual or attempted sexual contact with another person without that person’s *consent*. Sexual assault includes, but is not limited to:

- Intentional touching of another person’s intimate parts without that person’s *consent*;
or
- Other intentional sexual contact with another person without that person’s *consent*; or
- Coercing, forcing, or attempting to coerce or force a person to touch another person’s intimate parts without that person’s *consent*; or

- *Rape*, which is penetration, no matter how slight, of (1) the vagina or anus of a person by any body part of another person or by an object, or (2) the mouth of a person by a sex organ of another person, without that person's consent.

G. Consent

"Consent" must be informed, voluntary, and mutual, and can be withdrawn at any time. There is no consent when there is force, expressed or implied, or when coercion, intimidation, threats, or duress is used. Whether a person has taken advantage of a position of influence over another person may be a factor in determining consent. Silence or absence of resistance does not imply consent. Past consent to sexual activity with another person does not imply ongoing future consent with that person or consent to that same sexual activity with another person.

If a person is mentally or physically incapacitated or impaired so that such person cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes impairment or incapacitation due to alcohol or drug consumption that meets this standard, or being asleep or unconscious.

H. Sexual Exploitation

"Sexual exploitation" occurs when a person takes sexual advantage of another person for the benefit of anyone other than that person without that person's *consent*. Examples of behavior that could rise to the level of sexual exploitation include:

- Prostituting another person;
- Recording images (*e.g.*, video, photograph) or audio of another person's sexual activity, intimate body parts, or nakedness without that person's *consent*;
- Distributing images (*e.g.*, video, photograph) or audio of another person's sexual activity, intimate body parts, or nakedness, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not *consent* to such disclosure and objects to such disclosure; and,
- Viewing another person's sexual activity, intimate body parts, or nakedness in a place where that person would have a reasonable expectation of privacy, without that person's *consent*, and for the purpose of arousing or gratifying sexual desire.