

# Sexual Harassment:

1

## WHAT ALL SCHOOL DISTRICT EMPLOYEES NEED TO KNOW ABOUT SEXUAL HARASSMENT AND THE 2020 FEDERAL TITLE IX REGULATIONS

© 2020 Wisconsin Association of School Boards, Inc and Boardman & Clark LLP

1

## Overview

2

**Part I** of this training module addresses sexual harassment in the big picture of different state and federal laws and local school district policies.

**Part II** of this training module looks at sexual harassment through the lens of Title IX, a federal law that prohibits sex discrimination (including sexual harassment) in a school district's education programs, activities, and operations.

If you have questions about this training, please refer the questions to the district's Title IX Coordinator.

2

## Overview

3

At the end of this training, you should have a better understanding of how different laws and school district policies address sexual harassment in schools, be able to identify examples of conduct that could constitute sexual harassment, and be able to answer the following questions about sexual harassment under Title IX:

- ▶ How does Title IX uniquely define sexual harassment?
- ▶ What is the role of the district's Title IX Coordinator(s)?
- ▶ When does a school district have "actual knowledge" of Title IX sexual harassment?
- ▶ What obligations does the district have to respond to actual knowledge of Title IX sexual harassment?
- ▶ What should you do if you see sexual harassment, receive a report of alleged sexual harassment, or have other actual knowledge of conduct that might constitute sexual harassment?
- ▶ What steps should you take if you are sexually harassed in connection with your district employment?

3

## Part I:

### SEXUAL HARASSMENT IN THE BIG PICTURE

4

4

## The big picture: A harassment-free environment

5

- ▶ The school board's goal and intent is to provide an educational and workplace environment, across all aspects of the school district's operations, that is free of all forms of unlawful harassment.
- ▶ The school district's leadership team is committed to:
  - ▶ Responding to reports, complaints, and questions about prohibited harassment in a timely and effective manner.
  - ▶ Providing employees with information about their rights and responsibilities related to anti-harassment laws and the school district's anti-harassment policies.

5

## Harassment is a form of unlawful discrimination

6

- ▶ Various state and federal laws protect school district employees, students, and others from discrimination that is based on one or more legally-protected statuses or classifications. For both students and employees, the following are examples of some of the statuses that are protected by the anti-discrimination laws:
  - ▶ Race, color, and national origin
  - ▶ Sex and sexual orientation
  - ▶ Disability
  - ▶ Religion
- ▶ **Unlawful harassment that is based on a legally-protected status is a form of unlawful discrimination.**
- ▶ This training module focuses specifically on **sexual harassment**. However, the school district is equally concerned with preventing and addressing **all forms of harassment** that are prohibited under state or federal law and/or under any school district policy.

6

## Sexual harassment and school district policies

7

- ▶ All school districts have local policies that prohibit unlawful harassment (including sexual harassment) and that provide procedures for reporting and responding to allegations of prohibited harassment.
- ▶ School districts also establish conduct expectations for employees, students, and others that regulate conduct connected to sex, gender, or sexual orientation that, even if not “unlawful” by itself, either:
  - ▶ Is considered inappropriate for the workplace setting or for the educational environment; or
  - ▶ Could contribute to a finding of sexual harassment if the conduct were combined with other related conduct or circumstances.
- ▶ School district employees need to be aware of all applicable conduct expectations, whether established by law or by school district policies, rules, or codes of conduct.

7

## What is sexual harassment?

8

- ▶ The question is not always easy to answer.
- ▶ Different laws establish different legal definitions and standards for sexual harassment.
  - ▶ Sometimes, a particular law applies only to specific circumstances (e.g., only to student matters or only to employment matters).
  - ▶ Sometimes, more than one anti-discrimination law and legal standard can apply to the same incident/situation.
  - ▶ It can often be helpful to identify some of the key concepts and commonalities among the different standards. It can also be helpful to identify specific examples of problematic conduct.
- ▶ In addition, as mentioned, employees should keep in mind that school district policies and rules generally regulate certain inappropriate conduct before it reaches the point of becoming “unlawful.”

8

## What is sexual harassment? Some key concepts

9

As a starting point, a necessary element of sexual harassment is that the conduct has to be based on sex. For school district purposes, this means that the conduct has to have an identifiable connection to a person's sex or to the related concepts of gender, sexual orientation, or sex-based or gender-based stereotypes.

The conduct also has to have a sufficient connection to district employment or to school district programs, activities, or services.

Then, the next step involves looking at the specific context and the effects of the conduct. For example, the conduct can constitute sexual harassment if any of the following apply:

1. In the **employment** context, the conduct is unwelcome and is sufficiently frequent or severe such that it does either of the following:
  - ▶ Creates an **intimidating, hostile, or offensive** work environment.
  - ▶ Unreasonably **interferes with an employee's ability to perform their job** (or an applicant's opportunity to access employment).

9

## What is sexual harassment? Some key concepts (cont.)

10

2. In the **student** context, the conduct is sufficiently frequent or serious such that it does either of the following:
  - ▶ Creates an **intimidating, hostile, or offensive environment** for a student's education or the student's participation in school activities.
  - ▶ Substantially **interferes with a student's school performance** or the student's opportunity to access school programs or activities.
3. Submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment/educational decisions or for granting (or withholding) a benefit or service. This is sometimes referred to as **quid pro quo sexual harassment**.
4. The conduct involves criminal activity such as sexual assault, sexual abuse of a student/child, stalking, or domestic abuse.
5. Any type of purported "romantic" relationship or sexual communications between an adult employee/agent of the school district and any student is highly likely to qualify as sexual harassment and to also violate other laws and/or district conduct expectations.

10

## What are some examples of conduct that can constitute or contribute to a finding of sexual harassment?

11

- ▶ Unwelcome verbal, written, or physical conduct of a sexual nature, such as unwelcome (1) sexual or romantic advances; (2) requests for sexual favors; (3) lewd or sexually-suggestive comments (e.g., sexual innuendo); or (4) physical contact/touching that occurs "because of sex."
- ▶ Verbal or written comments that insult, degrade, or stereotype a person or group of people because of sex (including because of a person's gender or lack of conformity to sex/gender stereotypes). This might include the use of slurs, epithets, name calling, ridicule, mockery, insults, or offensive jokes.
- ▶ The display or distribution of sexually-explicit content that lacks a sufficiently legitimate purpose.
- ▶ Offensive comments about women in general or men in general.
- ▶ Intimidation that occurs because of a person's sex.

11

## What are some other important facts to know about sexual harassment?

12

- ▶ Both the victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.
- ▶ A person who is affected by the offensive conduct can sometimes be considered a victim of sexual harassment even if that person is not the person who is being directly harassed.
- ▶ The harassing conduct does not always have to be of a sexual nature. A hostile environment can be created by conduct that occurs on the basis of sex—such as hostile or offensive behaviors that are directed only at women or only at men.
- ▶ Prohibited sexual harassment can occur through social media and other online communication, including through personal accounts when there is a sufficient connection, as applicable, to the workplace or to a school program or activity.

12

## What are some other important facts to know about sexual harassment?

13

- ▶ Employees can be sexually harassed by their own supervisor, a supervisor in another area, a co-worker, or another person who interacts with the employee in the work environment (e.g., a school volunteer, a parent of a student, etc.).
- ▶ Students can be sexually harassed by other students, school district employees, or another person who interacts with the student in the school's programs or activities.
- ▶ The circumstances matter. Flirtatious conduct as an indication of romantic interest between two high school students may be acceptable behavior, but the same conduct could be sexual harassment (and, at a minimum, would be a violation of district conduct expectations) if a school employee were to direct similar flirtatious comments/conduct toward a student.

13

## What conduct will not lead to a finding of unlawful sexual harassment?

14

- ▶ Offhand comments or isolated incidents that are neither frequent nor very serious/severe generally do not constitute unlawful sexual harassment, particularly in student-to-student or employee-to-employee interactions.
- ▶ Comments or actions that someone may characterize as rude, unkind, or personally offensive, or that are rooted in an interpersonal conflict, but that do not occur because of or on the basis of sex, will not constitute unlawful sexual harassment.
- ▶ However, school districts retain discretion to address and set expectations regarding conduct that, although not "unlawful," is considered inappropriate for the workplace or for the learning/school environment.

14

## What does the school district expect employees to do if they know or suspect that a student, employee, or other person connected to the school district is being sexually harassed?

15

- ▶ **Report it.**
  - ▶ Usually, the appropriate person to contact for reporting conduct that could be sexual harassment is the district's **Title IX Coordinator**.
  - ▶ Local policies and procedures may identify other persons to whom reports can be made. If you are ever uncertain, you can start by contacting the Title IX coordinator, a principal, or the District Administrator to discuss your questions and/or situation.
- ▶ **Be as clear as possible** when making a report. It is best to use the specific term "sexual harassment" and to clearly indicate that you believe the school district needs to look into the matter.
- ▶ The law and school district policies prohibit retaliation against persons who submit good-faith reports or complaints of sexual harassment (as well as other forms of unlawful discrimination).

15

## Sexual harassment incidents can overlap with other important issues and responsibilities

16

Examples:

- ▶ Some sexual harassment scenarios involving students who are minors can also constitute **child abuse** (or suspected child abuse) that is subject to mandatory reporting to appropriate authorities.
- ▶ Some sexual harassment scenarios can involve a **threat of school violence** that is subject to mandatory reporting to law enforcement.
- ▶ Some sexual harassment scenarios may involve a need to consider whether an administrator needs to make a **report of educator misconduct** to DPI (i.e., for purpose of a licensing-related investigation).
- ▶ Administrators will need to harmonize Title IX obligations and nondiscrimination policies with student bullying policies, codes of conduct, extracurricular codes, employee conduct policies, etc.

16



## What should you do if you believe you have been, or are currently being sexually harassed in connection with your district employment?

17

- ▶ **Report it.** Various laws and district policies require an appropriate response to a properly submitted report or complaint. **Any person** may report a concern or allegation regarding prohibited sexual harassment to the district. Such reports may be made:

- ▶ To a district Title IX Coordinator, either in person, by U.S. mail, by telephone, or by electronic mail, using the coordinator's district-provided contact information.
- ▶ By any other means that results in a Title IX Coordinator actually receiving your verbal or written report.

As an alleged victim, you may also consider documenting and submitting a "formal complaint" of sexual harassment under Title IX, as further detailed in the school district's policies and/or Title IX notice.

- ▶ **Know your rights.** Review applicable district policies, employee handbook provisions, and workplace notices and posters.
- ▶ **Ask questions.** Refer questions and concerns about your situation to the school district's Title IX Coordinator, to a state or federal anti-discrimination agency, or to your own legal representative.

17

## Part II:

### SEXUAL HARASSMENT THROUGH THE LENS OF TITLE IX

18

18

## What is Title IX?

19

- ▶ Title IX is a federal law that prohibits the school district from unlawfully discriminating against any person on the basis of sex in any education program or activity that the district operates—including in district employment.
- ▶ Title IX extends to protect students, employees, applicants for employment, and other persons from prohibited **sex discrimination**, including **sexual harassment**.
- ▶ With respect to sexual harassment, a school district has numerous obligations, including the obligation to intervene and respond when the district has knowledge of conduct that could constitute sexual harassment under Title IX.
- ▶ Title IX applies to the school district because the district is a recipient of federal funding.

19

## Why did Title IX start to receive renewed attention in 2020?

20

- ▶ The U.S. Department of Education, which is responsible for the administration and enforcement of Title IX, issued new regulations under Title IX that took effect on August 14, 2020. The Title IX regulations have the force of law.
- ▶ Examples of some of the significant changes made by the 2020 amendments to the Title IX regulations include the following:
  - ▶ The new regulations create a **definition of sexual harassment** that is unique to Title IX.
  - ▶ The new regulations change the way that **school districts are required to respond to alleged Title IX sexual harassment**, including changing the procedures that school districts will use to investigate and make decisions about such allegations.
  - ▶ The new regulations are intended to promote **equitable treatment** and to protect the rights of **both** alleged victims of Title IX sexual harassment, as well as alleged perpetrators of Title IX sexual harassment.



20

## What is a Title IX Coordinator?

21

- ▶ Every school district must designate at least one employee to coordinate the district's efforts to comply with its responsibilities under Title IX and the Title IX regulations. The employee must be referred to as the "Title IX Coordinator."
- ▶ A Title IX Coordinator's responsibilities include:
  - ▶ Addressing questions that students, parents, employees, and others may have about the application of Title IX to the school district.
  - ▶ Receiving reports and complaints of possible sex discrimination, including reports and formal complaints of sexual harassment.
  - ▶ Playing an active and important role in the district's response to reports, complaints, or other notices of Title IX sexual harassment.
- ▶ An employee who is a designated Title IX Coordinator often has a different primary job title. Some districts designate more than one Title IX Coordinator.

21

## How does Title IX define sexual harassment?

22

Under Title IX, sexual harassment means conduct on the basis of sex that occurs in any education program or activity of the school district and that also satisfies **one or more** of the following:

1. An employee of the district has conditioned the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the district's education program or activity; **OR**
3. The conduct is any of the following:
  - a. "sexual assault," as defined in [20 U.S.C. 1092\(f\)\(6\)\(A\)\(v\)](#);
  - b. "stalking," as defined in [34 U.S.C. 12291\(a\)\(30\)](#);
  - c. "dating violence," as defined in [34 U.S.C. 12291\(a\)\(10\)](#); **or**
  - d. "domestic violence," as defined in [34 U.S.C. 12291\(a\)\(8\)](#).

22

## What is the significance of Title IX's unique definition of sexual harassment?

23

- ▶ District employees and students generally do not need to know the specific differences among the various legal definitions of "sexual harassment" to make decisions about their own conduct. Employees and students are expected to avoid engaging in inappropriate conduct no matter whether the conduct is prohibited by one law, by multiple laws, or only by the policies, rules, and expectations that have established by the school district.
- ▶ School district employees are expected to report known or suspected incidents of prohibited harassment that could violate any nondiscrimination law. In making an initial referral or report, employees do not have to determine which specific law(s) may have been violated. The Title IX Coordinator and other administrators are responsible for making those determinations once they are aware of the allegations.
- ▶ To the extent an employee is a victim of sexual harassment, or is accused of alleged sexual harassment, it is important to know that special rights and procedures apply when the allegations assert a possible violation of Title IX.

23

## What is the significance of Title IX's unique definition of sexual harassment?

24

- ▶ Particularly with respect to allegations that someone's conduct has created an unlawful "hostile environment," the Title IX definition of sexual harassment generally requires conduct that is somewhat more serious/substantial than is required under other legal standards. In other words, it can sometimes be harder to allege and prove a "hostile environment" claim under Title IX than under other legal standards.
- ▶ A school district is only required to implement a full Title IX response to allegations of sexual harassment when the allegations reflect conduct that, if proven, could constitute a violation of Title IX's definition of sexual harassment.
- ▶ Title IX's focus on relatively more serious conduct means that some reports of sexual harassment will not be processed and assessed under the district's Title IX procedures. However, the district may still assess the conduct and process the report under other legal standards and/or under the district's own policies or rules.

24

## Every employee plays a critical role in the district's Title IX compliance ... Here's why

25

- ▶ Title IX requires a **district response** any time the school district has **actual knowledge** of sexual harassment or allegations of sexual harassment that could constitute a violation of Title IX.
- ▶ Actual knowledge includes **notice** of sexual harassment or allegations of sexual harassment to **any school district employee** (not including the alleged perpetrator of the harassment, if also an employee).
- ▶ An employee has **notice** of the sexual harassment if, for example:
  - ▶ The employee witnesses the harassment.
  - ▶ Another person (including a student or parent) reports an incident or allegation of sexual harassment to the employee.
- ▶ **Q:** How can the Title IX Coordinator initiate an appropriate district response to sexual harassment if the only employee who has notice of the conduct/allegations is (for example) an individual teacher?  
**A: The employee needs to further report the relevant information.**

25

## How is the district required to respond to "actual knowledge" of sexual harassment under Title IX?

26

- ▶ The legal standard is that the district must respond to Title IX sexual harassment promptly and in a manner that is not "clearly unreasonable in light of the known circumstances."
- ▶ Although the basic standard suggests substantial discretion, the Title IX regulations establish some minimum requirements. Several of those requirements relate to the concept of "**supportive measures**."
- ▶ "**Supportive measures**" are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent, before or after the filing of a formal complaint or where no formal complaint has been filed. The purpose of supportive measures is to restore or preserve equal access to the district's education program or activity without unreasonably burdening the other party. Two possible examples are (1) modifications to work or class schedules, and (2) issuing a "no contact" directive.

26

## How is the district required to respond to “actual knowledge” of sexual harassment under Title IX?

27

- ▶ For any individual who is alleged to be the **victim** of conduct that could constitute sexual harassment under Title IX (i.e., a Title IX “**complainant**”), the district is required to take steps such as the following:
  - ▶ The Title IX Coordinator must promptly contact the complainant to discuss the availability of “supportive measures.”
  - ▶ The Title IX Coordinator must inform the complainant of the option of filing a formal complaint and explain the process for filing a **formal complaint**. (A formal complaint needs to take the form of a document or electronic submission and must meet other requirements.)
  - ▶ The district must offer appropriate “supportive measures” regardless of whether the complainant files a formal complaint.
  - ▶ If the complainant files a **formal complaint** of Title IX sexual harassment, then the school district must investigate the allegations using its written Title IX “**grievance process**.”

27

## How is the district required to respond to “actual knowledge” of sexual harassment under Title IX?

28

- ▶ For any individual who has been **reported to be the perpetrator** of conduct that could constitute sexual harassment under Title IX (i.e., a Title IX “**respondent**”), the district’s obligations include the following:
  - ▶ The district must ensure that any “supportive measures” do not unreasonably burden any party.
  - ▶ Before the district imposes any disciplinary sanctions against a respondent, the district must follow the district’s formal Title IX grievance process and make a determination of responsibility.
  - ▶ The district must apply a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- ▶ The Title IX regulations make limited allowances for certain “emergency removals” of a respondent and for the use of administrative leave for a respondent who is an employee.

28

## One more time for emphasis: Employee reporting of possible sexual harassment is critical

29

- ▶ As a district employee, **your knowledge** of conduct that could constitute sexual harassment under Title IX **triggers the district's obligation to respond** to the situation promptly and in a manner that otherwise complies with Title IX.
- ▶ In many cases, the only way that the Title IX Coordinator (and other employees who are responsible for responding to harassment on behalf of the district) will be able to comply with Title IX is for the employee who has knowledge/notice of the situation to **report the relevant information to the Title IX Coordinator** (or as otherwise provided under the district's local procedures).
- ▶ If an employee fails to further report known or reasonably suspected unlawful harassment, the employee compromises the district's ability to meet its legal obligations and exposes himself/herself to possible consequences.

29

## What else is there to know about Title IX?

30

District employees who are aware of Title IX matters in connection with their job responsibilities are expected to adhere to the relevant **confidentiality requirements**, including the following:

- ▶ With limited exceptions (such as to the extent disclosure is necessary to comply with and carry out the purpose of Title IX and its regulations), Title IX requires the district to keep confidential the identity of any individual makes a report or complaint of sex discrimination, any alleged victim of sexual harassment, any person who has been reported to be the perpetrator of sex discrimination (including sexual harassment) and any witness.  
**Note:** This does **not** prevent **intra-district** disclosure of such information based on a legitimate educational or supervisory/managerial interests.
- ▶ The school district must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school district to provide the supportive measures.

30

## What else is there to know about Title IX?

31

Title IX (similar to several other anti-discrimination laws) prohibits **retaliation**.

- ▶ It is unlawful for either the school district or any other person to intimidate, threaten, coerce, or discriminate against any individual:
  - ▶ For the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, or
  - ▶ Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the Title IX regulations.
- ▶ The restrictions against retaliatory conduct extend to **any person**—not just to persons who are assigned to act on behalf of the district.
- ▶ The district will accept and process reports of Title IX retaliation using the grievance procedures that the district has established for general complaints of sex discrimination under Title IX.

31

## Check for Understanding #1

32

**Are the following statements TRUE or FALSE?**

1. Harassment based on a legally-protected status (such as sex, race, disability, etc.) is a form of unlawful discrimination.
2. There is more than one legal definition of “sexual harassment” in the different state and federal nondiscrimination laws that apply to school districts.
3. Sexual harassment can overlap with criminal conduct (e.g., the non-consensual groping of a person’s breasts or genitals).
4. A person who, acting in good faith, has made a report or complaint, or testified, assisted, or participated in an investigation or proceeding relating to prohibited sexual harassment has legal protections from retaliation.
5. Because employees have freedom of speech, the school district lacks authority to intervene in a non-supervisory employee’s use of sexual jokes or sexual innuendo in the workplace until the employee’s conduct constitutes unlawful sexual harassment.

32



## Check for Understanding #1

33

All of the statements **except** for statement #5 are true.

Statement #5 is false: *“Because employees have freedom of speech, the school district lacks authority to intervene in a non-supervisory employee’s use of sexual jokes or sexual innuendo in the workplace until the employee’s conduct constitutes unlawful sexual harassment.”*

As an employer and as the entity in charge of an educational institution, school districts retain discretion to address and set expectations regarding conduct that, although not always “unlawful,” is considered inappropriate for the workplace or for the learning/school environment.

For example, if four employees start mutually sharing sexually-explicit jokes or sexually-suggestive images via their school district email accounts, the fact that their participation was “voluntary” and not “unwelcome” would not excuse the conduct from the standpoint of the district’s expectations as an employer.

Similarly, to maintain role-appropriate communicative, physical, and social boundaries between district employees and students, school districts establish a number of limitations on conduct and communications between employees and students (some of which overlap with unlawful conduct, and some of which do not).

33

## Check for Understanding #2

34

**Are the following statements TRUE or FALSE?**

1. Title IX prohibits sex discrimination, including sexual harassment, in the district's programs and activities, and Title IX extends to cover both students and school district employees.
2. It can be somewhat harder to allege and prove sexual harassment based on the creation of a “hostile environment” under Title IX than under other laws.
3. Title IX requires school districts to treat both alleged victims and alleged perpetrators of Title IX sexual harassment in an equitable manner.
4. Title IX requires a school district response to reported sexual harassment only if the alleged victim has filed a written complaint directly with the district's Title IX Coordinator.
5. Alleged victims of Title IX sexual harassment may file a formal complaint of the allegations. If a formal complaint is filed, Title IX requires the school district to follow a detailed Title IX “grievance process” that includes a formal investigation and that provides various procedural rights and protections to the parties.
6. All district employees should focus on recognizing and reporting situations that could constitute prohibited sexual harassment. The Title IX Coordinator and other administrators can be expected to determine which specific legal or policy standards should be applied to the reported conduct.

34

## Check for Understanding #2

35

All of the statements **except** for statement #4 are true.

Statement #4 is false: "*Title IX requires a school district response to reported sexual harassment only if the alleged victim has filed a written complaint directly with the district's Title IX Coordinator.*"

School districts have obligations to respond to alleged or reported Title IX sexual harassment any time the school district has actual knowledge of the relevant conduct. Actual knowledge can be based not only on notice to the Title IX Coordinator, but also on notice to any school district employee. In addition, any person (not just the alleged victim) may report an allegation of sexual harassment. A report of sexual harassment also does not have to be in writing, nor does the report always have to be submitted directly to the Title IX Coordinator.

As indicated by Statement #5, alleged victims of Title IX sexual harassment do have the additional right to file a "formal complaint." The filing of a formal complaint of Title IX sexual harassment changes the extent of the district's obligations to respond.

35

## Check for Understanding #3

36

A staff member observes the following exchange as two boys pass two girls in the high school hallway:

- ▶ **Jason:** Here comes the hottest thing in this hallway. Looking good as always Lisa!
- ▶ **Lisa (smiling):** Shut up, Jason.
- ▶ **Jason (with a wink):** All right. But, just so you know, I'm a great kisser. Text me if you ever want to schedule some practice.
- ▶ **Lisa:** Don't be such a creep. We'll probably catch you guys at the game tonight if you go. *[Lisa rolls her eyes and goes back to talking with her friend.]*

The staff member has never observed any similar conduct by Jason in the past.

**Would this staff member be expected to make a report of sexual harassment based on Jason's comments?**

36

## Check for Understanding #3

37

The staff member in this scenario could reasonably determine that they have **not** observed conduct that needs to be reported as suspected sexual harassment.

- The situation appears to reflect a fairly isolated and fleeting incident—perhaps a poor attempt at teenage flirting—rather than an intimidating, hostile, or offensive school environment. *[Note: Consider how the context and analysis would change if an employee had made the same comments to a student.]*
- There is at least some ambiguity as to whether Lisa considered the comments “unwelcome.” However, it appears probable that Jason’s comments were intended (and probably understood in this case) to be somewhat tongue-in-cheek. Lisa had smiled and remarked about seeing Jason later.
- There is no indication that Jason’s comments interfered with Lisa’s education or her access to or ability to participate in school.

The staff member might reasonably have pulled Jason aside and reminded him of school expectations regarding respectful interactions among classmates, and also that his comments could be seen as demeaning and offensive, even if they were intended to be humorous or flirtatious. Because it is very hard to know how such comments will be received and who will hear them, they are best not made in school.

37

## Check for Understanding #4

38

A female employee who was recently disciplined by her male supervisor has gone to the HR director, who also serves as a Title IX Coordinator, to verbally report what the employee says is sexual harassment by the supervisor.

After a long discussion, the allegations come down to the following:

- She overheard the supervisor, on one occasion many months earlier, make an off-hand remark that “some days there is a little too much estrogen in the front office” where three other women share a workspace. The remark did not refer to the employee who is making the current report. However, when she heard the remark, she told the supervisor, “I don’t appreciate that comment; and, by the way, you can get into trouble for saying things like that.”
- When the supervisor recently met with this employee to discuss her performance problems and her difficulty getting along with one of her co-workers, the supervisor reacted to her getting very upset and crying during the meeting by saying, “I know women can be emotional, but you’ve got to address this calmly and professionally.”

**Based on the information above, should the Title IX Coordinator consider this a verbal report of Title IX sexual harassment such that the district starts the process of responding by having a discussion with the employee about “supportive measures”?**

38

## Check for Understanding #4

39

The employee appropriately reported her concerns to the Title IX Coordinator. It is the responsibility of Title IX Coordinator to assess the reported conduct in light of the school district's policies and the district's legal obligations.

- The Title IX Coordinator should refer to Title IX's definition of sexual harassment based on the creation of a hostile environment and determine whether the conduct, even if proven exactly as reported, could be a violation of Title IX.
- In this situation, the Coordinator could reasonably assume that there were "unwelcome" comments based on sex, but that the comments were **not** "so severe, pervasive, **and** objectively offensive" that they effectively denied the employee access to the district's education program or activity (e.g., by unreasonably interfering with the employees ability to perform her job). Therefore, the Coordinator would **not** have to consider this to be a report of possible Title IX sexual harassment.
- District policy may require the Coordinator to accept the report as a complaint of possible non-Title IX sexual harassment and/or improper supervisory conduct under district policy. It is likely that a district receiving this kind of report should conduct at least some investigation before reaching a conclusion that there was no legal or policy violation. At a minimum, the district may wish to work with the supervisor to ensure that, in the future, the supervisor avoids making such comments.

39

## Check for Understanding #5

40

A female high school student arrives in the academic advisor's office and is clearly upset. She tells the advisor that she broke up with her ex-boyfriend about a month ago, and he has been giving her a hard time ever since—saying how he wants to get back together. When she passes by his locker on the way to class, he has muttered sexually-derogatory names on three or four occasions. She told him to stop, but he's done it at least twice after that.

Just a few minutes ago, he cornered her in an isolated stairwell of the school and said that he's been watching her all the time during and after school and he knows that she has been hanging out with another guy, and he's even seen them exchange hugs and holding hands.

He said he can't stand the thought of her dating someone else, and that if she doesn't stop hanging out with this new guy, someone is going to end up hurt. She asked what he meant by that, and he said, "I don't know. Maybe I'll hurt myself. Maybe I'll hurt him. Just someone." Then he said, "I'm sorry. I've been really messed up about this." Then, as he stepped away, he seemed to intentionally bump into her—hard enough that she dropped what she was carrying. The student says she's upset and scared and wants to reschedule her college advising appointment for another day.

**Based on the information above, should the advisor report possible sexual harassment to the Title IX Coordinator (or to another administrator/supervisor identified in local policy)?**

40

## Check for Understanding #5

41

This is clearly a situation that the advisor needs to further report.

- The student has clearly indicated that the conduct is unwelcome. The reported conduct also appears to be occurring relatively frequently and can also be characterized as severe. At least some of the reported conduct is clearly based on the female student's sex and the alleged perpetrator's ongoing (but no longer mutual) romantic interest. The female student also indicated that the conduct is interfering with her schooling. There is even an element of potential "stalking." The advisor does not need to try to determine which nondiscrimination laws or policies may have been violated; it is enough to recognize the situation and make the report.
- From a Title IX perspective, the information that the student shared with the advisor is notice of conduct that, if true, could constitute sexual harassment under Title IX. That means that the district has "actual knowledge" of the conduct and an obligation to respond as required under Title IX. However, the only way the Title IX Coordinator and other designated staff will know about the situation and be able to respond is if the advisor further reports the information.
- To complicate the matter, there is the threat about "hurting someone." The advisor should evaluate the information under the separate obligation that all school employees have to report threats of school violence to law enforcement. While there is some ambiguity whether the threat is "serious and imminent," it is likely reportable information. If the district has a school resource officer, the employee may wish to contact that officer.

41

© 2020 Wisconsin Association of School Boards, Inc and Boardman & Clark LLP

42

- ▶ This training addresses legal concepts and legal issues. However, **this training is not legal advice.**
- ▶ If you have individual concerns about any topic or issue related to this training and think you may be in need of personal legal advice, please contact a lawyer or an anti-discrimination agency. Examples of anti-discrimination agencies include the Office for Civil Rights in the U.S. Department of Education, the Equal Employment Opportunity Commission in the U.S. Department of Labor, and the Equal Rights Division of the Wisconsin Department of Workforce Development.

42