

# **CSBA Sample**

## **Board Policy**

### **Sexual Harassment**

# **CSBA Sample**

## **As Is**

BP 5145.7

### **Students**

\*\*\*Note: Education Code 231.5 mandates the district to have written policies on sexual harassment. The following policy addresses harassment by and/or of students; for policy addressing the sexual harassment by and/or of employees, see BP/AR 4119.11/4219.11/4319.11 - Sexual Harassment. \*\*\*

\*\*\*Note: Title IX of the Education Amendments of 1972 (20 USC 1681-1688) prohibits discrimination based on sex by recipients of federal financial assistance. School districts are responsible under Title IX and the regulations for the issuance of a policy against sex discrimination (34 CFR 106.8). Sexual harassment is a form of sex discrimination under Title IX and can deny or limit a student's ability to participate in or receive education benefits, services, or opportunities on the basis of that student's sex. \*\*\*

\*\*\*Note: A district can be held liable for civil damages for the sexual harassment of students pursuant to Title IX and/or Education Code 220, if the district is found to have been "deliberately indifferent" in its response to known sexual harassment. In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court held that a district would be deliberately indifferent if (1) the harasser and the context in which the sexual harassment occurred were within the district's control; (2) the harassment was so severe, pervasive, and objectively offensive that it deprived a student of access to educational opportunities or benefits provided by the district; (3) the district had actual knowledge of the harassment; and (4) the district's conduct was unreasonable considering the surrounding circumstances. This standard was applied by an appellate court in *Donovan v. Poway Unified School District* based on Education Code 220. \*\*\*

\*\*\*Note: In addition to filing a private civil lawsuit, an alleged victim of sexual harassment may file a complaint with the California Department of Education (CDE) and/or the U.S. Department of Education's Office for Civil Rights (OCR), the federal agency responsible for administrative enforcement of federal laws and regulations that prohibit discrimination in programs and activities that receive federal financial assistance from the U.S. Department of Education. OCR applies a different standard than the "deliberate indifference" standard when addressing complaints against a district. Under OCR's enforcement standards, a district may be held to be in violation when a student is subjected to harassing conduct by another student, an employee, or a third party, and (1) the district knows or should know about the harassment, (2) the harassment is sufficiently serious as to create a hostile educational environment for the student, and (3) the district failed to take appropriate responsive actions. In other words, while a district is not responsible for the conduct of the other student or the third party, it may be liable for failing to respond adequately once it has notice. However, if a student is sexually harassed by an employee who was acting in the context

of his/her job responsibilities, the district may be in violation of Title IX whether or not it has notice. See BP/AR 4119.11/4219.11/4319.11 - Sexual Harassment. \*\*\*

\*\*\*Note: In April 2011, OCR issued its Dear Colleague Letter: Sexual Violence to supplement its January 2001 Revised Sexual Harassment Guidance on federal Title IX requirements as they pertain to sexual harassment. In the letter, OCR clarifies that sexual violence, including rape, sexual assault, sexual battery, and sexual coercion, is a form of sexual harassment that must be addressed by districts using the same procedures used to address other forms of sexual harassment, such as unwelcome sexual advances. \*\*\*

\*\*\*Note: CSBA staff met with representatives from CDE and OCR to discuss this policy and the accompanying regulation as they relate to the uniform complaint procedure (UCP) requirements. As a result, the sample policy and regulation have been drafted to go beyond the minimal requirements under California's UCP laws and regulations in an attempt to address issues and concerns raised by CDE and OCR. While CDE and OCR have not approved or signed off on them, CSBA believes that the additional details provided herein may help school districts and county offices of education during any compliance check by CDE or in the event that a CDE or OCR investigation occurs. \*\*\*

The Governing Board is committed to maintaining a safe school environment that is free from harassment and discrimination. The Board prohibits sexual harassment of students at school or at school-sponsored or school-related activities. The Board also prohibits retaliatory behavior or action against any person who reports, files a complaint or testifies about, or otherwise supports a complainant in alleging sexual harassment.

\*\*\*Note: OCR's January 2001 Revised Sexual Harassment Guidance and 2011 Dear Colleague Letter: Sexual Violence note that, regardless of whether a harassed student, his/her parent/guardian, or a third party files a complaint under the district procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly take action to determine what occurred and then take appropriate steps to resolve the situation. Even where a parent/guardian or student does not wish to disclose the student's identity, there are steps a school can take to limit the effects of alleged harassment and prevent its recurrence without initiating formal action. Such steps may include limited investigative activities and actions to protect the complainant and the school community and prevent recurrence while keeping the identity of the complainant confidential. These actions may include providing services to the complainant, such as counseling services; providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; or changing and publicizing the school's policies on sexual violence. OCR has indicated that the principles in its Revised Sexual Harassment Guidance also apply to harassment based on race, color, national origin, disability, or age. \*\*\*

\*\*\*Note: It is also important to note that a referral to law enforcement does not relieve a school district of its responsibility to investigate the complaint as a matter of sex discrimination. \*\*\*

The district strongly encourages any student who feels that he/she is being or has been sexually harassed on school grounds or at a school-sponsored or school-related activity by another student or an adult to immediately contact his/her teacher, the principal, or any other available school employee. Any employee who receives a report or observes an incident of sexual harassment shall notify the principal or a district compliance officer.

(cf. 0410 - Nondiscrimination in District Programs and Activities)  
 (cf. 1312.1 - Complaints Concerning District Employees)  
 (cf. 5131 - Conduct)  
 (cf. 5131.2 - Bullying)  
 (cf. 5137 - Positive School Climate)  
 (cf. 5141.4 - Child Abuse Prevention and Reporting)  
 (cf. 5145.3 - Nondiscrimination/Harassment)  
 (cf. 6142.1 - Sexual Health and HIV/AIDS Prevention Instruction)

\*\*\*Note: Pursuant to Education Code 231.5, the district's policy must contain information on where to obtain a specific procedure for reporting incidents of sexual harassment and pursuing available remedies. In addition, 34 CFR 106.8 requires a district to adopt and publish a complaint procedure providing for a prompt and equitable resolution of student complaints alleging sexual harassment. To avoid confusion that may arise from having a multiplicity of complaint processes for resolving a variety of student complaints, it is recommended that districts use the UCP to investigate and resolve sexual harassment complaints involving students. See AR 1312.3 - Uniform Complaint Procedures for details of these procedures. \*\*\*

Complaints regarding sexual harassment shall be investigated and resolved in accordance with law and district procedures specified in AR 1312.3 - Uniform Complaint Procedures. Principals are responsible for notifying students and parents/guardians that complaints of sexual harassment can be filed under AR 1312.3 and where to obtain a copy of the procedures.

(cf. 1312.3 - Uniform Complaint Procedures)

\*\*\*Note: Government Code 12950.1 requires any district with 50 or more employees to provide two hours of sexual harassment training and education to supervisory employees once every two years. See AR 4119.11/4219.11/4319.11 - Sexual Harassment. In addition, in its April 2011 Dear Colleague Letter: Sexual Violence, OCR underlies the importance of training in preventing and responding to sexual harassment and encourages districts to provide training to all segments of the school community. \*\*\*

The Superintendent or designee shall take appropriate actions to reinforce the district's sexual harassment policy.

#### Instruction/Information

The Superintendent or designee shall ensure that all district students receive age-appropriate information on sexual harassment. Such instruction and information shall include:

1. What acts and behavior constitute sexual harassment, including the fact that sexual harassment could occur between people of the same sex and could involve sexual violence

2. A clear message that students do not have to endure sexual harassment under any circumstance

\*\*\*Note: In its April 2011 Dear Colleague Letter: Sexual Violence, OCR acknowledges that, where sexual harassment or violence occurs in the context of other possible rule violations, students may be reluctant to report sexual harassment or violence. For example, a student who is sexually harassed while he/she is away from school without permission may be reluctant to file a complaint if he/she believes that he/she may be disciplined for the violation. As such, item #4 below clarifies that any other rule violation will be addressed separately from the sexual harassment complaint in order to encourage students to report the harassment. \*\*\*

3. Encouragement to report observed incidents of sexual harassment even where the alleged victim of the harassment has not complained

4. A clear message that student safety is the district's primary concern, and that any separate rule violation involving an alleged victim or any other person reporting a sexual harassment incident will be addressed separately and will not affect the manner in which the sexual harassment complaint will be received, investigated, or resolved

5. Information about the district's procedure for investigating complaints and the person(s) to whom a report of sexual harassment should be made

\*\*\*Note: In its April 2011 Dear Colleague Letter: Sexual Violence, OCR restates the requirement that a district's procedure for investigating sexual harassment complaints must be widely disseminated and be written in language appropriate to the age of the school's students. Examples include having copies of the procedure available throughout the school, publishing the procedure in the student handbook, and identifying individuals who can explain the procedure. \*\*\*

6. Information about the rights of students and parents/guardians to file a civil or criminal complaint, as applicable

#### Disciplinary Actions

\*\*\*Note: Pursuant to Education Code 48900.2, a student in grades 4-12 may be suspended and/or expelled from school for sexual harassment. Education Code 48900.2 also requires the sexual harassment, when considered from the perspective of a reasonable person of the same gender as the alleged victim, to be sufficiently severe or pervasive as to have a negative impact upon the alleged victim's academic performance or to create an intimidating, hostile, or offensive educational environment for the alleged victim. Under OCR's 2001 Revised Sexual Harassment Guidance interpreting Title IX, a hostile environment is created when the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's

program based on sex. OCR considers the conduct from both the subjective perspective of the individual who was harassed and from the perspective of a reasonable person with the same characteristics as the alleged victim. Districts should also note that Education Code 48915(c) requires the Superintendent or designee to recommend expulsion for any student, irrespective of grade, who commits sexual assault or battery as defined in the Penal Code. See AR 5144.1 - Suspension and Expulsion/Due Process. \*\*\*

Any student who engages in sexual harassment or sexual violence at school or at a school-sponsored or school-related activity is in violation of this policy and shall be subject to disciplinary action. For students in grades 4-12, disciplinary action may include suspension and/or expulsion, provided that, in imposing such discipline, the entire circumstances of the incident(s) shall be taken into account.

(cf. 5144 - Discipline)

(cf. 5144.1 - Suspension and Expulsion/Due Process)

(cf. 5144.2 - Suspension and Expulsion/Due Process (Students with Disabilities))

Any staff member found to have engaged in sexual harassment or sexual violence toward any student shall be subject to discipline up to and including dismissal in accordance with applicable policies, laws, and/or collective bargaining agreements.

(cf. 4117.4 - Dismissal)

(cf. 4117.7 - Employment Status Report)

(cf. 4118 - Suspension/Disciplinary Action)

(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)

### Record-Keeping

The Superintendent or designee shall maintain a record of all reported cases of sexual harassment to enable the district to monitor, address, and prevent repetitive harassing behavior in district schools.

(cf. 3580 - District Records)

### Legal Reference:

#### EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

48900 Grounds for suspension or expulsion

48900.2 Additional grounds for suspension or expulsion; sexual harassment

48904 Liability of parent/guardian for willful student misconduct

48980 Notice at beginning of term

#### CIVIL CODE

51.9 Liability for sexual harassment; business, service and professional relationships

1714.1 Liability of parents/guardians for willful misconduct of minor

GOVERNMENT CODE

12950.1 Sexual harassment training

CODE OF REGULATIONS, TITLE 5

4600-4687 Uniform complaint procedures

4900-4965 Nondiscrimination in elementary and secondary education programs

UNITED STATES CODE, TITLE 20

1221 Application of laws

1232g Family Educational Rights and Privacy Act

1681-1688 Title IX, discrimination

UNITED STATES CODE, TITLE 42

1983 Civil action for deprivation of rights

2000d-2000d-7 Title VI, Civil Rights Act of 1964

2000e-2000e-17 Title VII, Civil Rights Act of 1964 as amended

CODE OF FEDERAL REGULATIONS, TITLE 34

99.1-99.67 Family Educational Rights and Privacy

106.1-106.71 Nondiscrimination on the basis of sex in education programs

COURT DECISIONS

Donovan v. Poway Unified School District, (2008) 167 Cal.App.4th 567

Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130

Reese v. Jefferson School District, (2001, 9th Cir.) 208 F.3d 736

Davis v. Monroe County Board of Education, (1999) 526 U.S. 629

Gebser v. Lago Vista Independent School District, (1998) 524 U.S. 274

Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473

Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:

CSBA PUBLICATIONS

Providing a Safe, Nondiscriminatory School Environment for Transgender and

Gender-Nonconforming Students, Policy Brief, February 2014

Safe Schools: Strategies for Governing Boards to Ensure Student Success, 2011

U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS

Questions and Answers on Title IX and Sexual Violence, April 2014

Dear Colleague Letter: Sexual Violence, April 4, 2011

Sexual Harassment: It's Not Academic, September 2008

Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001

WEB SITES

CSBA: <http://www.csba.org>

California Department of Education: <http://www.cde.ca.gov>

U.S. Department of Education, Office for Civil Rights: <http://www.ed.gov/about/offices/list/ocr>

(3/09 3/12) 10/14