

CSBA Sample

Board Policy

Sexual Harassment

USE CSBA SAMPLE AS IS

BP 4119.11 4219.11,4319.11

Personnel

Note: Education Code 231.5 mandates the district to have a written policy on sexual harassment. As part of this mandate, the district also should adopt a sexual harassment policy related to students; see BP/AR 5145.7 - Sexual Harassment.

Note: Generally, courts recognize two types of conduct as constituting sexual harassment. "Quid Pro Quo" ("this for that") sexual harassment is considered to have occurred when a person in a position of authority makes another individual's educational or employment benefits conditional upon that other person's willingness to engage in unwanted sexual behavior (e.g., promising a promotion for sex). "Hostile environment" sexual harassment, on the other hand, is conduct by the perpetrator that is so severe, persistent, or pervasive that it creates a hostile, intimidating, or abusive educational or professional environment for another. Sexual harassment also covers retaliatory behavior against a complainant, witness, or other participant in the complaint process.

Note: Sexual harassment may be a violation of Title VII of the Civil Rights Act of 1964 (42 USC 2000e-2000e-17) and/or Title IX of the Education Amendments of 1972 (42 USC 2000h-2-2000h-6), as well as the California Fair Employment and Housing Act, Government Code 12900-12996.

Note: Government Code 12940 and 34 CFR 106.9 extend protection against sexual harassment to job applicants. In addition, pursuant to Government Code 12940, employers may be held liable for sexual harassment committed against their workers by clients, customers, or other third parties if they knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment.

The Governing Board prohibits sexual harassment of district employees and job applicants. The Board also prohibits retaliatory behavior or action against district employees or other persons who complain, testify or otherwise participate in the complaint process established pursuant to this policy and administrative regulation.

(cf. 0410 - Nondiscrimination in District Programs and Activities)

(cf. 4030 - Nondiscrimination in Employment)

***Note: Federal and state courts have provided guidance that may help employers avoid liability or mitigate damages in sexual harassment cases. In *Department of Health Service v. Superior Court (McGinnis)*, the California Supreme Court outlined ways in which employers may be able to

reduce damages including establishing anti-harassment policies, communicating those policies to employees, consistently enforcing their policies, preserving the confidentiality of employees who report harassment, and preventing retaliation against reporting employees. The United States Supreme Court has held, in *Burlington Industries v. Ellerth*, that, for certain claims under federal law, an employer may defend against sexual harassment claims by proving that: (1) reasonable care was exercised to prevent and promptly correct any sexually harassing behavior, and (2) the employee (victim) failed to take advantage of the preventive and corrective opportunities provided by the employer. ***

***Note: Pursuant to Government Code 12950.1, as added by AB 1825 (Ch. 933, Statutes of 2004), employers with 50 or more employees are required to provide two hours of sexual harassment training to supervisory employees. See the accompanying administrative regulation for timelines and training requirements. ***

Note: Items #1-4 below reflect the courts' guidance and Government Code 12950.1 and should be modified to reflect district practice.

The Superintendent or designee shall take all actions necessary to ensure the prevention, investigation, and correction of sexual harassment, including but not limited to:

1. Providing training to employees in accordance with law and administrative regulation
2. Publicizing and disseminating the district's sexual harassment policy to staff

(cf. 4112.9/4212.9/4312.9 - Employee Notifications)

3. Ensuring prompt, thorough, and fair investigation of complaints
4. Taking timely and appropriate corrective/remedial action(s), which may require interim separation of the complainant and the alleged harasser and subsequent monitoring of developments

All complaints and allegations of sexual harassment shall be kept confidential to the extent necessary to carry out the investigation or to take other subsequent necessary actions. (5 CCR 4964)

***Note: Because an employee's (especially a supervisor's) knowledge or notice of sexual harassment may subject the district to liability, it is recommended that the district require its employees with knowledge or notice of sexual harassment to report the harassment to the appropriate authorities. ***

Any district employee or job applicant who feels that he/she has been sexually harassed or who has knowledge of any incident of sexual harassment by or against another employee, a job applicant or a student, shall immediately report the incident to his/her supervisor, the principal, district administrator or Superintendent.

A supervisor, principal or other district administrator who receives a harassment complaint shall promptly notify the Superintendent or designee.

***Note: In *Faragher v. City of Boca Raton*, one of the factors relied on by the court in finding liability for harassment by a supervisor was the failure of the policy to provide an assurance to its employees that harassing supervisors may be bypassed in registering complaints. ***

Complaints of sexual harassment shall be filed in accordance with AR 4030-Nondiscrimination in Employment. An employee may bypass his/her supervisor in filing a complaint where the supervisor is the subject of the complaint.^[DF1]

Any district employee who engages or participates in sexual harassment or who aids, abets, incites, compels, or coerces another to commit sexual harassment against a district employee, job applicant, or student is in violation of this policy and is subject to disciplinary action, up to and including dismissal.

(cf. 4118 - Dismissal/Suspension/Disciplinary Action)

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

Note: In addition to district sanction against employees who engage in sexual harassment, Government Code 12940 provides that such employees may be held personally liable in a court of law for any damage to the victim(s).

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

GOVERNMENT CODE

12900-12996 Fair Employment and Housing Act, especially:

12940 Prohibited discrimination

12950.1 Sexual harassment training

LABOR CODE

1101 Political activities of employees

1102.1 Discrimination: sexual orientation

CODE OF REGULATIONS, TITLE 2

7287.8 Retaliation

7288.0 Sexual harassment training and education

CODE OF REGULATIONS, TITLE 5

4900-4965 Nondiscrimination in elementary and secondary education programs receiving state financial assistance

UNITED STATES CODE, TITLE 42

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

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

2000h-2-2000h-6 Title IX, 1972 Education Act Amendments

CODE OF FEDERAL REGULATIONS, TITLE 34

106.9 Dissemination of policy

COURT DECISIONS

Department of Health Services v. Superior Court of California, (2003) 31 Cal.4th 1026

Faragher v. City of Boca Raton, (1998) 118 S.Ct. 2275

Burlington Industries v. Ellreth, (1998) 118 S.Ct. 2257

Gebser v. Lago Vista Independent School District, (1998) 118 S.Ct. 1989

Oncale v. Sundowner Offshore Serv. Inc., (1998) 118 S.Ct. 998

Meritor Savings Bank, FSB v. Vinson et al., (1986) 447 U.S. 57

Management Resources:

OFFICE OF CIVIL RIGHTS AND NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Protecting Students from Harassment and Hate Crime, January, 1999

WEB SITES

California Department of Fair Employment and Housing: <http://www.dfeh.ca.gov>

Equal Employment Opportunity Commission: <http://www.eeoc.gov>

U.S. Department of Education, Office for Civil Rights:

<http://www.ed.gov/about/offices/list/ocr/index.html>

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