

Five steps to combating sex offenses

By the New York State
Association of School Attorneys

The #metoo movement has helped raise awareness of sexual harassment and sexual misconduct. In an effort to eradicate the problem and assist victims, New York State has:

- Mandated employers to conduct annual sexual harassment prevention training.
- Resurrected time-barred sexual misconduct claims through the Child Victims Act and Adult Survivors Act.
- Dropped a requirement that plaintiffs in sexual harassment lawsuits prove that conduct was severe and pervasive.
- Created a sexual harassment victim hotline.

Despite these measures, school districts continue to receive allegations of sex-based offenses directed at students, teachers and other staff. Since it does not appear the problem is going away, school districts need to take proactive steps to eliminate future incidents and deal aggressively with those that arise.

Here are five important actions for school districts:

1. Train employees annually.

Employers in New York are required to conduct annual sexual harassment prevention training on an annual basis. Training must be done with fidelity and an earnest desire to inspire people to make better workplaces and create a positive school culture. Victims must be encouraged to come forward at the earliest opportunity, but they will not do so unless they believe they will be free from reprisal. Training should be used to reassure employees and students that they need not tolerate unwelcome behavior and should promptly report issues and incidents to the individuals designated to receive such complaints. The sooner they come forward, the sooner the unwanted behavior should stop.

Cell phones and social media have expanded the workplace well beyond school property, and employees should be aware that they can be held accountable for after hours, off-campus behaviors that interfere with an individual's ability to do their job or function normally in school.

2. Contact your insurer. At the earliest indication that the allegations could lead to a civil lawsuit, the district's insurance carrier should be notified, in writing, to satisfy the typical terms of an insurance policy. Policies often require notice within a fixed number of days of when the district knew or should have known of the potential claim. Failure to do so may result in the insurance company disclaiming coverage.

The written notification should include a specific request for defense and indemnification. Upon receipt of that notice, the insurance company will make a determination as to whether the allegations are covered by the insurance policy and, if they are, counsel will be assigned to defend the district. Some insurance companies will designate



district general or labor counsel to handle the matter if the district's law firm has experience with that type of litigation. Consideration should be given to making a request of that kind.

Typically, insurance policies obligate the district to cooperate with assigned counsel and districts must make it a priority to preserve documents, photographs, videos, or other evidence that may be pertinent to the investigation and defense of the district's position.

3. Investigate promptly and thoroughly. A sexual harassment investigation must be promptly initiated. Districts are advised to carefully review existing sexual harassment and Title IX policies as those documents will be the guideposts for the investigation. A district that follows its policies, and does so in an expeditious fashion, will be in a better position to defend itself if civil lawsuits arise in the future. The ability to demonstrate that the district acted promptly to eradicate offensive behavior and mitigate damages will increase the likelihood of successfully defending claims.

While the standard for sexual harassment under federal law is establishing conduct that is "severe and pervasive," New York law considers sexual harassment to be acts that are more than petty slights and offenses. That means bad behavior is more likely sexual harassment in New York and the failure to investigate questionable conduct may perpetuate the behavior and can be fatal to the defense of a claim. Victims frequently ask for confidentiality when making a complaint and profess a desire to avoid a confrontation with the accused. Confidentiality should never be promised,

but should be honored to the extent it can be maintained within the context of a thorough investigation. That will almost certainly mean that the accused will know, so the victim's fears should be assuaged with a district commitment to guard against retaliation of any kind.

4. Take appropriate action in response. A school district's response to allegations will vary depending upon the seriousness of the complaint, and a well-drafted policy should serve as a guide. Mediation can be useful if the offensive behavior is not severe and has not gone on for too long, and both sides are willing to engage in it. Having an outside facilitator might add to the comfort level of the participants if they are employees or students of the district.

Discipline should be considered for students and staff when the conduct is beyond what might be addressed in mediation. Aggressive pursuit of disciplinary sanctions will help to curb future incidents. The victim's preference as to the outcome should be ascertained, but care should be taken to avoid making promises in this regard since there are times when the imposition of discipline is beyond the district's control. Principles of due process may require presentation of employee disciplinary sanctions to an independent hearing officer who will make a final decision. Similarly, certain forms of student discipline require a hearing and the most severe penalty, expulsion, will only be upheld by the commissioner of education in the most egregious cases.

A superintendent must report to the State Education Department those certificated staff members for whom a

reasonable question exists as to moral character. This obligation is embedded in Part 83 of the Commissioner's Regulations. Not every lapse in judgment raises questions of moral character, but superintendents should err on the side of reporting. Failure to do so could call the superintendent's certification into question. Never make the Part 83 filing an item to be negotiated.

Consideration must be given to contacting law enforcement authorities for conduct of a criminal nature, such as sexual assault. If the behavior occurred on school grounds, the Code of Conduct likely requires a referral to law enforcement. Referral needs to be measured against the right to privacy, so guidance from legal counsel should be sought.

5. Consider settlement. A settlement agreement can be an effective way of removing a perpetrator from the school environment while avoiding the burden and costs associated with a disciplinary proceeding and civil suit. New York law prohibits silent resignations so the settlement agreement should never reflect a commitment to refrain from a Part 83 or criminal referral.

Confidentiality clauses customary in settlement agreements should be carefully crafted with the assistance of the school attorney to ensure compliance with the law and to allow the school to provide a copy of the agreement in response to an appropriate subpoena, request under the state's Freedom of Information Law or an inquiry from the State Education Department in connection with a Part 83 filing. If the accused will remain employed by the district, any confidentiality agreement should authorize the district to disclose the agreement should a future disciplinary proceeding be necessary.

Finally, the district should obtain a comprehensive release from the accused of any and all claims arising out of or in connection with employment, except those which might otherwise be covered under a district's policy of insurance.

The goal of every school district is to create an environment in which learning can take place. Sexual misconduct and sexual harassment are barriers to that and the entire community suffers. School district leaders must commit to a comprehensive plan for dealing with predators by educating people about individual rights, supporting those who depend upon them for protection, and acting swiftly and aggressively with those that interfere with that objective. Keeping these five key areas at the center of that plan will go a long way to creating a better school environment.



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