

(X) Required**() Local****(X) Notice****SEXUAL HARASSMENT OF EMPLOYEES**

NEW NOTE: Due to recent changes in state law aimed at sexual harassment in the workplace, we have split our sample policy 0110 (and regulation 0110-R) into two policies and regulations, one addressing sexual harassment of students (0110.1) and one addressing sexual harassment of employees (0110.2). Policy 0110 has been reconfigured as an introductory statement.

This policy focuses on sexual harassment of employees. In the interest of simplicity, we have not shown all of the deleted text from the original policy pertaining to students. However, we have noted where substantive changes were made. In some instances, we have retained language addressing students, where students play a role in employee sexual harassment.

The main change to the state Human Rights Law (Executive Law §296) was to the legal standard of what constitutes harassment in the workplace. Such conduct no longer need rise to the level of “severe or pervasive” in order to be considered prohibited harassment; instead, it must “rise above what a reasonable victim of discrimination with the same protected characteristics would consider petty slights or trivial inconveniences.” It specifically includes “inferior terms, conditions or privileges of employment” as a form of harassment. What this will look like in practice may not be known until it is tried in court.

Other changes in the law addressed providing this policy and required training in an employee’s primary language, for those languages where the NYS Department of Labor has provided a translation of their materials. Currently, those languages are: Spanish, Chinese, Korean, Russian, Italian, Polish, Bengali and Haitian-Creole. Additionally, any non-disclosure agreement must be provided to the complainant in their primary language, regardless of whether that language is one of those identified above.

Due to a changing understanding and usage of the word “shall,” to avoid confusion we have also changed all instances of “shall” to either “will” or “must” or other appropriate text to indicate that a particular action is required.

The Board of Education recognizes that harassment of employees (including all staff, applicants for employment, both paid and unpaid interns, exempt and non-exempt status, part-time, seasonal, and temporary workers, regardless of immigration status) and certain “non-employees” (which includes contractors, subcontractors, vendors, consultant and other persons providing services pursuant to a contract, or their employees) on the basis of sex, sexual orientation, and/or gender identity and expression is abusive and illegal behavior that harms targets and negatively impacts the school culture by creating an environment of fear, distrust, intimidation and intolerance. The Board further recognizes that preventing and remedying such harassment in the workplace is essential to ensure a healthy, nondiscriminatory environment in which employees and “non-employees” can work productively.

NEW NOTE: We have deleted “actual” in the definition of sexual harassment in the paragraph below (now it is “perceived or self-identified”) to better align with the definition in the DOL model policy (the phrase “actual or perceived” aligns with the definition in DASA for students).

Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law. For purposes of this policy, sexual harassment includes harassment on the basis of perceived or self-identified sex, sexual orientation, gender identity and expression, and transgender status.

NEW NOTE: We have added the following paragraph to reflect the provisions of state Human Rights Law (Executive Law §296(h)).

Sexual harassment is unlawful when it subjects an individual to inferior terms, conditions or privileges of employment. Such harassment need not be severe or pervasive to be unlawful, and can be any harassing conduct that consists of more than petty slights or trivial inconveniences.

Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex, sexual orientation, gender identity and expression, and transgender status, when:

- a. submission to that conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- b. submission to or rejection of such conduct is used as the basis for decisions affecting an individual's employment; or
- c. the conduct has the purpose or effect of unreasonably interfering with an employee's or “non-employee's” work or creating an intimidating, hostile or offensive work environment, even if the complaining individual is not the intended target of the sexual harassment;

NEW NOTE: We have retained the phrase “actual or perceived” in the paragraph below because it relates to stereotypes (it is not appropriate to use the phrase “perceived or self-identified” in this context).

Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, or verbal, nonverbal or physical aggression, intimidation or hostility that is based on actual or perceived gender and sexual stereotypes. Examples of sexual harassment can be found in the accompanying regulation (0110-R).

OLD NOTE: State Labor Law section 201-g mandates that the policy on sexual harassment for employees must clearly state that sexual harassment is a form of employee misconduct, that sanctions will be enforced against both those who commit sexual harassment, and against supervisory and managerial personnel who knowingly allow it to continue. Individual liability is

OLD NOTE (cont.):

also addressed in the DOL model policy. It is important to include that harassment can occur outside of the school building, and that this policy extends to school events, traveling on district business, and harassment by electronic means.

The Board is committed to providing a working environment that promotes respect, dignity and equality and that is free from all forms of sexual harassment. To this end, the Board condemns and strictly prohibits all forms of sexual harassment on school grounds, school buses and at all school-sponsored activities, programs and events, including those that take place at locations outside the district, or outside the work setting if the harassment impacts the individual's employment in a way that violates their legal rights, including when employees and "non-employees" travel on district business, or when harassment is done by electronic means (including on social media). For employees, sexual harassment is considered a form of employee misconduct. Sanctions will be enforced against all those who engage in sexual harassment or retaliation, and against supervisory and managerial personnel who knowingly allow such behavior to continue.

Sexual harassment may subject the district to liability for harm done to targets. Harassers may also be individually subject to civil liability if sued in a court of law or criminal liability if prosecuted.

OLD NOTE: Section 201-g of the New York State Labor Law requires certain elements to be included in the mandatory sexual harassment policy. One such requirement is to include information concerning the federal and state legal protections against sexual harassment, and a statement that there may be applicable local laws.

The reference to the Code of Conduct below is intended to address appropriate and inappropriate behavior, including sexual harassment, for all persons on school property, regardless of whether specific legal protections apply.

Under various state and federal laws, students, employees and "non-employees" have legal protections against sexual harassment in the school environment as described above. Those laws are listed in the references section. Additionally, local laws (e.g., county, city, town, village) may apply to the district. The district's Code of Conduct also addresses appropriate behavior in the school environment. Sexual harassment can occur between persons of all ages and genders.

NEW NOTE: The paragraph below is unchanged, and was intended to create an environment where targets and witnesses feel comfortable reporting incidents of sexual harassment. However, under the amended State Human Rights Law §296(1)(h), employers are not automatically immune from liability where employees have not reported harassment to the employer. This was previously part of a defense against liability after the Faragher and Ellerth Supreme Court cases. It remains to be seen how courts will interpret this provision, and therefore how proactive districts should be to address harassment in the workplace. Districts should consult with their attorneys to see if additional practices would be prudent.

In order for the Board to effectively enforce this policy and to take prompt corrective measures, it is essential that all targets of sexual harassment and persons with knowledge of sexual harassment report the harassment immediately. The district will promptly investigate all complaints of sexual harassment, either formal or informal, verbal or written. To the extent possible, all complaints will be treated in a confidential manner. Limited disclosure may be necessary to complete a thorough investigation. If the complainant reports that they feel unsafe at work due to the nature of the complaint, the district will determine if accommodations need to be made until the issue is resolved.

NEW NOTE: We have simplified the paragraph below by using “person” instead of “student, employee, non-employee, or third party”. We have also removed the sentence pertaining to mandatory arbitration clauses. While such clauses are still prohibited, we felt it did not benefit this policy, and shifted the focus away from sexual harassment prevention and intervention.

If, after appropriate investigation, the district finds that a person has violated this policy, prompt corrective action will be taken in accordance with the applicable collective bargaining agreement, contract, district policy and state law. Individual nondisclosure agreements may only be used as permitted by law, described in the accompanying regulation.

All complainants and those who participate in sexual harassment complaints or the investigation of a complaint of sexual harassment have the right to be free from retaliation of any kind, when they do so with a good faith belief that sexual harassment has occurred. Such prohibited retaliation can include, but is not limited to, discipline, discrimination, demotion, denial of privileges, or any action that would keep a person from coming forward to make or support a sexual harassment claim. Such actions need not be job-related, or occur in the workplace, to constitute unlawful retaliation.

NEW NOTE: We have retained mention of student training in the paragraph below. While this policy addresses harassment of employees, it is possible that harassment could occur from student to employee. It is important that students understand the behavior that is expected of them.

The Superintendent of Schools is directed to develop and implement regulations for reporting, investigating and remedying allegations of sexual harassment. These regulations are to be attached to this policy. In addition, the Board directs that training programs be established for students, and annually for employees, to raise awareness of the issues surrounding sexual harassment and to implement preventative measures to help reduce incidents of sexual harassment. Age-appropriate instructional materials will be incorporated into the curriculum to educate students so that they can recognize and reduce the incidence of sexual harassment.

NEW NOTE: We have added text to the paragraph below to allow a simplified version of this policy to be publicized throughout the district.

This policy, or a simplified version, will be posted in a prominent place in each district facility, on the district's website, and shall also be published in employee handbooks, and other appropriate school publications.

OLD NOTE: The Board is not required to include the following statement in the policy. However, some language should be included that addresses periodic review of the district's sexual harassment policy and procedures.

A committee of administrators, teachers, parents, students and the school attorney will be convened annually to review this policy's effectiveness and compliance with applicable state and federal law, and to recommend revisions to Board.

NEW NOTE: We have retained only those legal citations that impact sexual harassment of employees.

Ref:

Education Amendments of 1972, Title IX, 20 U.S.C. §1681 *et seq.*; 34 CFR 106 *et seq.*

Title VII of Civil Rights Act (1964), 42 U.S.C. §2000-e; 34 CFR §100 *et seq.*

Executive Law §296-d (prohibition of sexual harassment of employees and non-employees)

Labor Law §201-g (required workplace sexual harassment policy and training)

Civil Practice Law and Rules §§5003-b (nondisclosure agreements optional); 7515 (mandatory arbitration prohibited)

General Obligations Law §5-336 (nondisclosure agreements optional)

Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

Burlington Industries v. Ellerth, 524 U.S. 742 (1998)

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)

Adoption date: