

Title IX in K12 Schools: Discerning Harassment and Discrimination from Cultural and Age Appropriate Behaviors

Definitions

EquiLearn Virtual Roundtable

Dr. Hollie Mackey, MAP Center Equity Fellow – Oklahoma

TITLE IX DEFINITIONS

Sexual Violence: A type of sexual harassment. “Physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent” (Dear Colleague Letter, 2011, p. 3). Includes rape, sexual assault, sexual battery, and sexual coercion. It is important to remember that **any** student can be a victim of sexual assault and **any** student can sexually assault another student.

- A number of different acts fall into the category of sexual violence, including sexual misconduct, stalking, dating violence, and domestic violence.
- Rape – “The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” UCR SRS, Jan. 6, 2012

Gender-based Harassment: Acts of verbal, non-verbal or physical aggression, intimidation or hostility based on sex or sex-stereotyping even if those acts do not involve conduct of a sexual nature. *DCL fn.9, 2001 Guidance, 2010 DCL Harassment & Bullying*

- Title IX does not expressly prohibit sexual orientation discrimination, but it does prohibit use of stereotypes that are based on the sex or sexual stereotyping of the victim.

Consent: The affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter. Sexual violence is against a person’s will or when a person is unable to give consent.

Effective Consent is: informed; freely and actively given; mutually understandable words or actions; and willingness to participate in mutually agreed upon sexual activity.

Further: Initiators of sexual activity are responsible for obtaining effective consent. Silence or passivity is not effective consent. The use of intimidation, coercion, threats, force or violence negates any consent obtained. Consent is not considered effective if obtained from an individual who is incapable of giving consent due to the following: mental, developmental, or physical disability; or s/he is under the legal age to give consent; or s/he is incapacitated by alcohol, beer or under the influence of drugs. Individuals who commit acts of sexual misconduct assume responsibility for their behavior and must understand that the use of alcohol or other drugs does not reduce accountability for their actions. Many schools use “affirmative consent” as the standard language for policy.

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Coercion: The act of pressuring another person into doing something against his or her will without physical force, whether through manipulation, intimidation, or the use of alcohol and drugs to make someone more vulnerable

Sexual Harassment: Conduct of a sexual nature, including sexual violence. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. A school violates Title IX when sexual harassment is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by its employees.

- Creates a hostile learning environment or limits a student's ability to participate in or benefit from the educational program.

Sexual harassment should be reported even if it doesn't reach the point of creating a hostile environment. A hostile environment is defined as subjectively and objectively offensive and sufficiently severe or pervasive to alter the conditions of the victim's educational environment. Sexual harassment could occur **off-school grounds** and still have an effect on an individual's educational environment as well as create a hostile environment. A one-time non-consensual contact could also create a hostile environment.

Examples of behavior that could be sexual harassment: Unwelcomed sexual flirtation, advances or propositions of sexual activities. Asking about someone else's personal, social or sexual life or about their sexual fantasies, preferences or history. Discussing your own personal sexual fantasies, preferences or history. Repeatedly asking for a date from a person who is not interested. Whistles, cat calls or insulting sounds. Sexually suggestive jokes, innuendoes or turning discussions into sexual topics. Sexually offensive or degrading language used to describe an individual or remarks of a sexual nature to describe a person's body or clothing. Calling a person a "hunk," "doll," "babe," "sugar," "honey," or similar descriptive terms. Displaying sexually demeaning or offensive objects and pictures. Making sexual gestures with hands or body movements. Rating a person's sexuality. Unwelcomed touching of a person's body including massaging a person.

Sexual misconduct: Sexual misconduct is a broad term encompassing any non-consensual contact of a sexual nature. Sexual misconduct may vary in severity and consists of a range of behavior or attempted behavior including, but not limited to, the following examples of prohibited conduct:

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- *Unwelcome sexual touching/exposure:* The touch of an unwilling or non-consensual person's intimate parts (such as genitalia, groin, breast, buttocks, mouth or clothing covering same); touching an unwilling person with one's own intimate parts; or forcing an unwilling person to touch another's intimate parts. This also includes indecent exposure and voyeurism.
- *Non-consensual sexual assault:* Unwilling or non-consensual penetration of any bodily opening with an object or body part. This includes, but is not limited to, penetration of a bodily opening without effective consent through the use of coercion.
- *Forced sexual assault:* Unwilling or non-consensual penetration of any bodily opening with any object or body part that is committed either by force, threat, intimidation, or through exploitation of another's mental or physical condition (such as lack of consciousness, incapacitation due to drugs or alcohol, age, or disability) of which the assailant was aware or should have been aware.

Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to--fear for the person's safety or the safety of others; or suffer substantial emotional distress. For the purpose of this definition--course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device or means follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property. Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling. Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

Sexual Assault: Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the definition of sexual assault are sexual activities as forced sexual intercourse, forcible sodomy, child molestation, incest, fondling, and attempted rape.

Preponderance of Evidence Standard: The standard of proof that must be used in a school's Title IX proceedings, including fact finding and hearing procedures for resolving complaints of student-on-student sexual violence. The preponderance of the evidence standard requires proving it is *more likely than not* that sexual violence occurred.

Responsible Employee: A responsible employee includes any employee who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school official; or whom a student could reasonably

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believe has this authority or duty. A responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location.

Dr. Hollie Mackey is an Associate Professor of Women's and Gender Studies at the University of Oklahoma. Her research examines indigenous women in educational leadership, American Indian education policy, Title IX and disability law and ethics, and equity literacy through critical postcolonial and indigenous frameworks. She is the recipient of the 2009 Harold F. Martin Outstanding Teaching Award, the 2013 D. J. Willower Center for the Study of Leadership and Ethics Award for Excellence, and the 2014 Jack A. Culbertson Award for outstanding accomplishments as an assistant professor of educational leadership. She serves as the Associate Co-Director for the Barbara L. Jackson Scholars Network through the University Council for Educational Administration and the Oklahoma Equity Fellow for the Midwest and Plains Equity Center.

Dr. Mackey's publications can be found in Wiley, Information Age, Emerald, Rowman and Littlefield, Lawrence Erlbaum Associates, and Routledge Publishers and in the *International Journal for Qualitative Studies in Education*, *Mentoring and Tutoring*, the *Journal of Educational Administration*, the *Journal for Critical Thought and Praxis*, and the *eJournal for Education Policy*, the *International Journal of Education Policy and Leadership*, and *Teachers College Record*.