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**Sexual Harassment
in Schools**

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New Hampshire School
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800.727.1941 | dwmlaw.com Sexual Harassment in Schools
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Objectives

- ▣ Sexual Harassment of Employees
 - Sexual Harassment in the Workplace
 - Employers' Obligations and Potential Liability under Title VII and State Law
- ▣ Sexual Harassment of Students
 - Sexual Harassment/Sexual Violence under Title IX
 - District's Obligations and Potential Liability under Title IX
 - Interplay with State Laws
- ▣ Best Practices
 - Drafting Effective Policies
 - Supervisor Training
 - Effective Investigation Techniques

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**Sexual Harassment in the
Workplace**

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Sexual Harassment in the Workplace

- ☐ Title VII of the Civil Rights Act of 1964
 - Prohibits employers from discriminating against any individual with respect to employment opportunity, compensation, terms, conditions, or privileges of employment, because of individual's sex and other protected categories
- ☐ NH Protective Legislation - RSA 354-A:7
 - Prohibits discrimination in hiring and terms and conditions of employment based on sex, pregnancy, and/or sexual orientation, and other protected categories
 - Prohibits aiding/abetting discriminatory conduct

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Sexual Harassment in the Workplace

Sexual Harassment under RSA 354-A includes:

- ☐ Unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal, or physical conduct of a sexual nature when:
 - (a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 - (b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

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Forms of Workplace Sexual Harassment

- ☐ Quid Pro Quo Sexual Harassment
 - Where treatment of employee related to terms/conditions of employment (benefits, evaluations, promotions, etc.) is linked to employee's willingness to comply with supervisor's unwelcome verbal or physical conduct of a sexual nature
- ☐ Hostile Work Environment Sexual Harassment
 - Unwelcome conduct that related to employee's gender that has a detrimental effect on employee's ability to do their job and which is either severe or pervasive

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Retaliation

Both state and federal law prohibit retaliation against employees who:

- complain in good faith about conduct they believe constitutes unlawful harassment; or,
- participate in a subsequent investigation related to such a complaint.

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Employer Liability for Harassment

Conduct of Supervisors

- When harassment results in a “tangible employment action” (i.e., demotion, transfer, termination), employer will be held *strictly liable*
 - i.e., liable regardless of actual knowledge of discrimination
- If no TEA, employer will be held responsible where:
 - Employee can show hostile working environment and
 - Employer cannot establish affirmative defense
 - Affirmative Defense: (a) employer took reasonable care to prevent and correct behavior and (b) employee unreasonably failed to take advantage of employer’s corrective / preventative measures

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Employer Liability for Harassment

Conduct of Co-Workers / Third Parties

- Employer can be held liable if:
 - Employer knew or should have known of conduct and
 - Employer failed to take prompt corrective action to stop and address the conduct

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Employer Liability for Harassment

Potential Recoverable Damages

- Title VII: lost wages and benefits, compensatory damages, punitive damages, costs, and attorneys' fees
- RSA 354-A: lost wages and benefits, compensatory damages, enhanced compensatory damages, and attorneys' fees

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Individual Liability for Harassment

- ☐ No individual liability under Title VII
- ☐ Potential individual liability under RSA 354-A for:
 - Aiding and abetting harassment/discrimination; or
 - Retaliation against an individual who reports or participates in an investigation related to an alleged violation of RSA 354-A

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Immunity

- ☐ RSA 31:104 - Superintendents/Board members may be immune from individual liability claims under if:
 - Complained of conduct is within the scope of their responsibilities and
 - Their actions/inaction was made in good faith
- ☐ RSA 31:105 - Other school employees can be indemnified by the Board if:
 - Complained of conduct is within the scope of their responsibilities;
 - Not intentional; and,
 - Board votes to indemnify

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Drafting Effective Policies

- ☐ Effective policies must be:
 - Clear
 - Simple
 - Legally compliant
 - Fair
 - Protect the District
- ☐ Traps for the Unwary:
 - Illegal policies
 - Fragmented/inconsistent policies
 - Policies that are too rigid / too flexible
 - Boilerplate policies
 - Failure to get supervisory buy-in

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Supervisor Training

Supervisors' Responsibilities:

- a) Review and understand District policies
- b) Set an example for employees
- c) Be a presence in the workplace
 - a) Manage by walking around and identifying problem areas
- d) Intervene
 - a) Stop inappropriate behavior immediately and firmly, even if no one complains.
- e) Be a line of communication
 - a) Once they become aware of harassment or a complaint of harassment, they must report the incident in accordance with harassment reporting procedure
- f) Take complaints seriously
 - a) Should not let any complaint die on their desk. Treat all complainants with respect
- g) Enforce non-retaliation policies

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Steps of an Effective Investigation

- (1) Assess Complaint
- (2) Safety First
- (3) Review applicable policies/contracts
- (4) Consider Interim Remedial Measures
- (5) Plan Investigation
- (6) Conduct the Investigation
- (7) Prepare Investigation Report

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Sexual Harassment of Students

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Sexual Harassment of Students

- Title IX of the Education Amendments of 1972
 - Prohibits discrimination based on sex in school programs and activities (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”)

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Sexual Harassment of Students

- Title IX Definitions:
 - Sexual Harassment – unwelcome conduct of a sexual nature; and
 - Sexual Violence – physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent

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Sexual Harassment of Students

- ▣ Encompasses many of the same concepts as in the workplace:
 - *Quid Pro Quo / Hostile Environment **
 - *Investigations*
 - *Retaliation*
 - *Employer/Individual Liability*
 - *Policies*
 - *Training (Supervisor & Employee!)*

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Title IX Enforcement

- ▣ U.S. Department of Education, Office for Civil Rights (OCR) through an enforcement action and possible removal of federal funding

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NH State Law Considerations

- ▣ New Hampshire Safe School Zones Act; RSA 193-D (Felony Sexual Assault)
- ▣ Pupil Safety and Violence Prevention Act; RSA 193-F (Bullying/Cyberbullying)
- ▣ Hazing Reporting Obligation; RSA 631:7

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Reporting of Abuse Under State Law

- ▣ New Hampshire Child Protection Act (RSA 169-C)

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Title IX Covers . . .



Students

Employees

Third Parties

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Things to Keep in Mind

According to the OCR, "sexual conduct" and "sexual acts" are broader than you may think.

- ▣ In addition to traditional male/female and same sex interactions, harassment based on gender identity or nonconformity with gender stereotypes are prohibited under Title IX
- ▣ In addition to sexual assault, sexual violence includes any physical sexual act perpetrated against a person's will
- ▣ Gender stereo-typing is also a form of sexual discrimination

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The School's Obligation

*Notice of possible
SH/SA/SV*

➔

Investigate

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When is a school “on notice”?

- ▣ *Formal grievance*
- ▣ *Direct observation**
- ▣ *Indirect report (including social media)**

*[*Responsible employee knows or reasonably should know]*

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Who is a “responsible employee”?

- ▣ *Anyone. . .*
 - *With the authority to act; or*
 - *Been given the duty to report; or*
 - *Is **reasonably** believed to have either!*

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This means...

- ☐ All adults in the district's schools must understand the importance of:
 - Reporting (instances of sexual harassment and sexual violence that the adult sees, as well as instances that are reported)
 - Intervening immediately if instances of sexual harassment or sexual violence are witnessed
 - Modeling appropriate behavior

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If a "responsible employee" receives a report of sexual violence . . .

- ☐ Take every report seriously.
- ☐ Report to school's Title IX Coordinator.
- ☐ Include all relevant details.

Special consideration given to . . .

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Requests for Confidentiality

A balancing of interests . . .

*Student's request
&
School safety*



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Exception for Counselors and Advocates

Protecting the counselor-client relationship . . .

- *Pastoral and professional counselors*
- *Non-professional counselors and advocates*

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What must be reported

A report of sexual harassment or sexual violence should include the following information:

- *Name of complainant*
- *Name of alleged perpetrator*
- *Brief description of what occurred*
- *Whether complainant has requested confidentiality*

A lack of full information is never an excuse not to report.

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As employees, you need to know...

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graph TD
    SH[SH/SA/SV] --- RO[Rights/Obligations]
    SH --- PP[Policies/Procedures]
    RO --- TIC[Title IX Coordinator]
    TIC --- RP[Reporting Practices]
    PP --- RP
  
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INVESTIGATION

Investigations must be . . .

adequate

reliable

impartial

prompt

equitable



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Interim Measures

- ❑ *No contact*
- ❑ *Counseling*
- ❑ *Schedule changes*
- ❑ *Academic support*

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The School's Obligation

If find a hostile environment



*Eliminate it;
Prevent recurrence;
Remedy effects.*

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Remedies

3 prongs (when find a hostile environment) . . .

- Support for victim
- Consequences for perpetrator
- Steps to ensure safe school

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Investigations (continued)

- ▣ More to be aware of, including. . .
 - Concurrent criminal investigation
 - State Law safety and reporting obligations


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Off School Grounds

According to OCR, a school must process all complaints regardless of where the conduct occurred to determine whether it occurred in context of school program/activity or has continuing effects on a student's ability to access education.

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Notice of Outcome



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OCR SEXUAL ASSAULT INVESTIGATIONS


School-wide

Policy/procedures

Case Reviews

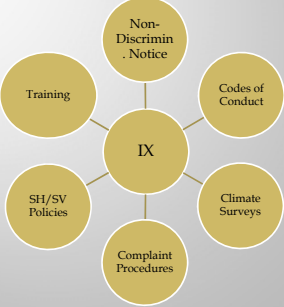
Climate Assessment

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Other Considerations (from OCR)



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AND ...

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TITLE IX COORDINATOR



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TAKEAWAYS

- ▣ SCOPE OF RESPONSIBILITIES
- ▣ INFORMATION, AWARENESS & TRAINING
- ▣ REPORTING, REFERRAL, & FOLLOW-THROUGH!!

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Case Scenarios

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What would you do?

Rick is a new employee in the High School. He recently complained that the Assistant Principal, Sara, is harassing him. Rick reports that Sara frequently hugs him and that it makes him uncomfortable. Although he has seen her hug other employees (both male and female), he says that Sara "lingers" when she hugs him and puts her face too close to his. Rick states that he doesn't want Sara's hugs, but he is worried about saying anything to her because he doesn't want to offend her, especially since she may perform his evaluation. He also mentions that Sara has asked him to have lunch together and has also asked him out to dinner. So far, he has not gone out with her, but he is afraid that, at some point, he will have to or she will be mad at him. Finally, he says that Sara talks a lot about her personal life, including that she is not dating anyone and is lonely.

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Upon investigation . . .

During her interview, Sara admits that she sometimes gives Rick hugs but states that she hugs all of the employees in the Accounting Office because they are "like family." She doesn't feel that she hugs Rick differently than she hugs any other employee. Similarly, she explains that, while she has asked Rick to have lunch, she generally asks whoever is around at lunchtime if they want to eat together. Thus far, Rick has not taken her up on the offer, but she had simply assumed he prefers to work through lunch. She also admits to asking Rick out to dinner but says that she was only trying to be friendly and get to know him better. Finally, she states that she isn't seeing anyone, that she sometimes feels lonely, and that she has discussed her lack of a romantic life and her loneliness with her co-workers, including Rick. She firmly states that she "doesn't mean anything" by the hugs and that she never intended to "hit on" Rick or make him uncomfortable.

What would you do?

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What would you do?

A Parent calls the High School band conductor and relays a story one of her daughter's friends – Jenna, a freshman who is in the band – shared with her. Jenna told the parent that the band has an informal initiation rite where freshman female band members are expected to play "7 Minutes in Heaven" with senior male band members. During a mid-band practice break a few weeks ago, Jenna was pressured by her fellow bandmates to go under the bleachers with Chris, a senior male band member, for her turn at the game. While under the bleachers, Jenna told Chris that she did not want to play, but did not physically resist when Chris kissed her and fondled her. Jenna had asked the parent not to tell anyone at the school, as she was afraid of angering her friends in the band and getting anyone in trouble.

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Another scenario

On Monday morning, Katie meets with the school social worker and shares a text exchange she had with her 7th grade classmate, Aubrey and Aubrey's friends over the weekend. Katie first texted Aubrey Friday night, stating that she really liked Aubrey and hoped they could go to the movies together on Sunday. Aubrey responded by texting Katie that she was not interested in girls. According to Katie, Aubrey also told some of her friends that Katie had asked her to go on a date and that she wanted to have sex with her. Over the weekend, Katie received several texts from Aubrey's friends calling her a "dyke," telling her to stay away from Aubrey, and (in at least one instance) including a picture of two naked women embracing.

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Thank you!

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