

Onteora Central School District

DASA, Title IX, Sexual Harassment, and Legal Updates

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Topics

- New Legislation/Regulations Affecting School Districts
- Repeal of Religious Exemption for Immunization
- Expansion of DHR Jurisdiction over Public Student Discrimination Claims
- FERPA
- Substance Abuse Designee
- “Red Flag” Law
- Title IX
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- Sexual Harassment Update

Repeal of Religious Exemption from Immunization

- Public Health Law § 2164 requires students to be vaccinated in order to be admitted to school, and provides the school principal with the authority to prevent an unvaccinated student from attending school, except in certain circumstances.
 - Medical Exemptions – requires physician to certify immunization detrimental to student's health
 - Certification must contain sufficient information to identify the medical contraindication and the length of time for which the immunization is medically contraindicated
 - Must be re-issued annually [10 NYCRR 66-1.3(c)].

Repeal of Religious Exemption from Immunization

- Religious Exemptions
 - Public Health Law § 2164(7) formerly provided an exception to the vaccination requirement for those with “sincere and genuine religious beliefs” that prohibited immunization.
 - The religious exemption was eliminated by the Legislature on June 13, 2019.

Repeal of Religious Exemption (cont.)

- Joint DOH, SED and OCFS FAQ guidance documents issued 6/18/19 and 7/19/19
 - Informed schools there may be civil penalties imposed if they don't comply with the new law.
 - Advised schools that the new law applies regardless of where enrolled students receive educational services.
 - Clarified that new law does not apply to secondary school students at least 18 years of age.

August 16, 2019 Supplemental Guidance Regarding Vaccinations

- On August 16, 2019, SED, DOH, and OFCS issued supplemental guidance (in the form of FAQ's) on vaccination exemptions (see, handout).
- The FAQ's stated (among other things) that:

- the vaccination requirement applies to students receiving “home and hospital” instruction (as opposed to students who are “home schooled”).
- for students participating in interscholastic athletics in August 2019, schools can consider the beginning of the school year to be the start of the 14-day time period for being immunized.

- parents of students who choose against vaccination (and who do not have a valid medical exemption) must comply with the compulsory education requirement through “homeschooling” if the students are of compulsory school age.
- unvaccinated homeschooled students cannot take tests at the public schools and cannot receive school district transportation.

- According to the Guidance, unimmunized school students of compulsory school age must receive homeschooling, and would be eligible for special ed services under an IESP.

- It is not (according to the FAQ's) "a change in placement" when a student with a disability becomes homeschooled because they no longer meet the vaccination requirements under § 2164.

- According to the Guidance, the IESP services may be provided in the child's home, or at another location (such as a therapy provider's office), but not at a public or private school.

Legal Challenges to Repeal of Religious Exemption

- In F.F. o/b/o Y.F., et al., v. State of New York, Sup. Ct., Albany Co., Index # 4108-19, a purported “class action” lawsuit was brought against the State of New York, Governor Cuomo and the New York State Attorney General, challenging the constitutionality of New York State’s decision to repeal the religious exemption to the vaccination requirement of Public Health Law § 2164.
 - Petitioners argued the repeal of the religious exemption violated the students’ free exercise rights by forcing them to give up their religious beliefs in order to comply with the statute.
 - Petitioners also argued that no compelling state interest exists to selectively eliminate the religious exemption, rather than the medical exemption, and burden the petitioners’ free exercise of their religious beliefs.

Legal Challenges to Repeal of Religious Exemption (cont.)

- Quoting remarks made by State legislators, the Petitioners described the repeal as State action motivated by active hostility toward religion.
- Petitioners additionally argued that the repeal requires the plaintiffs to either engage in compelled speech by receiving vaccinations, or violate a state law that requires them to send their children to a school.
- The Petitioners further argued that State had no basis to conclude that the means, measures, and methods already authorized by the State were inadequate or insufficient to combat the spread of the contagious disease without eliminating the religious exemption.

Legal Challenges to Repeal of Religious Exemption (cont.)

- On August 23, 2019 Judge Denise Hartman denied the parents application for a preliminary injunction enjoining the repeal of the religious exemption from immunization.
- Judge Hartman found that there exists no likelihood of success on the merits of their claims, given the long line of cases allowing states to mandate vaccinations for health and safety reasons.

Legal Challenges to Repeal of Religious Exemption (cont'd.)

- In *V.D. o/b/o J.M.D. v. State of New York*, EDNY, #2:19-cv-4306, parents of five disabled students brought suit in federal district court seeking to enjoin the State from implementing the religious exemption repeal as it applies to disabled students with IEPs. (A copy of the complaint can be found at: <https://childrenshealthdefense.org/wp-content/uploads/07-26-19-Filed-Complaint-VD-v-State-of-New-York.pdf>).
- The parents assert that the repeal violates the Supremacy Clause as well as IDEA, in that summarily excluding these disabled students from attending school is a violation of IDEA's pendency, notice, and due process protection.
- The parents have requested preliminary and permanent injunctive relief as to the application of the repeal to classified students.

Legal Challenges to Repeal of Religious Exemption (cont'd.)

- Preliminary injunction was denied
- the Court found that the parent-plaintiffs had failed to demonstrate the likelihood of success on their claims, as:
 - the State's immunization requirement, which "imposes an obligation on all parents," was a valid exercise of the State's police powers and not inconsistent with any specific provision of the Individuals with Disabilities Education Act (IDEA); and
 - the exclusion from school of previously-exempt students with disabilities did not invoke the IDEA's "stay put" provisions, as it was the parents' "affirmative decision not to comply" with the new requirement that led to an alteration in services.

Legal Challenges to Repeal of Religious Exemption (cont'd.)

Judge Ross found that :

1. IDEA does not “preempt” the immunization statute (§2164 of the Public Health Law), as there exists no conflict between federal requirements for providing special education to disabled students and a neutral state law mandating compliance with immunization requirements for all students.; and

Legal Challenges to Repeal of Religious Exemption (cont'd.)

2. Plaintiffs are not entitled to a “stay-put” order under the IDEA, because their failure to comply with §2164-a unilateral action taken by the parents of children with disabilities – does not constitute a change in placement sufficient to trigger stay-put relief.

Division of Human Rights Jurisdiction Over Student Claims of Discrimination

- A 2012 New York Court of Appeals decision determined that the Division of Human Rights (“DHR”) only had jurisdiction to investigate claims brought by employees against school districts.
- On July 25, 2019, the Governor signed into law legislation which extends the DHR’s jurisdiction to receive and investigate complaints of discrimination and harassment by students in public schools.

Division of Human Rights Jurisdiction... (cont'd.)

- Districts should revise their nondiscrimination policies to inform students of their right to file a complaint with the DHR, as well as with the Office of Civil Rights (“OCR”).
- Unlike OCR, the DHR also has the right to award monetary damages to the victim, in an appropriate case.
- Districts may wish to check with their District’s insurance carrier to determine if a DHR claim would be a covered risk under their policy.

Implications of School Bullying on Districts

- In *Motta v. Eldred Central School District*, a jury in Sullivan County found the District negligent in supervision by failing to take appropriate steps to remedy and stop the bullying of a middle school student. The jury awarded the student, and his parents, \$970,000 for past and future pain and suffering as well as psychological injury.
- On May 9, 2019, a New York State appellate court remanded the case for a new trial after a finding that the jury failed to follow the jury instructions.
- The appellate court's decision, however, should not be viewed as a determination that the jury verdict was substantively flawed as to either its finding or its imposition of damages against the District.

Implications of School Bullying (cont'd.)

- In bullying cases, the District is judged based on the actions it takes once it is provided notice of the alleged bullying.
- One of the biggest challenges in bullying cases is often a District's inability to produce contemporaneous records, confirming how they addressed the parent's or student's complaints at the outset, in a way reasonably designated to prevent a recurrence of the bullying behaviors.
- Administrators should ensure they memorialize all actions taken after receiving a complaint, including completing the District's DASA forms.

“HATE SYMBOL” INSTRUCTION

- On August 9, 2019, a bill (56448) was introduced in the State Senate to require instruction (in grades six through twelve) “... On the meaning of the swastika as the emblem of Nazi Germany, as well as the noose as a symbol of racism and intimidation.”

Substance Abuse Designee

- Education Law § 3038 was revised, effective March 5, 2019, to require superintendents to designate an employee to provide information regarding substance abuse related services to any student, parent or staff member who request assistance.
- The designated employee should be either a school social worker, school counselor, or any other health practitioner.

Substance Abuse Designee (cont'd.)

- The District must ensure the designated employee's identity is readily accessible to all students, parents, and staff by posting the information in an accessible location in each building. The District may also post the information on the District's website.
- The District's Substance Abuse policy should be amended to include the designated employee's information.

Confidentiality of the Substance Abuse Designee

- The statute requires that the information provided to the designated individual by a student seeking substance abuse services should be kept confidential and not be included in the student's file.
- The information cannot be used for any disciplinary purposes, and should be considered confidential to the same extent as information provided to a social worker.

Confidentiality of the Substance Abuse Designee (cont'd.)

- Further questions regarding confidentiality remain unclear, such as:
 - Can the designated employee share the information with a student's parent?
 - Can the information be used to refer a student for special education and section 504 services?
 - SED Office of Student Support Services has advised that the designee may not disclose information obtained under their position to refer the student for services.
 - Can the information be shared with law enforcement?
 - The designee still has the responsibility to report information when a legal duty to report exists.

Victims of Domestic Violence

- On August 20, 2019 Governor Cuomo signed Senate Bill 1040 (A5618) into law amending the New York State Human Rights Law to provide further protections for victims of Domestic Violence.
- Effective November 18, 2019
- Adds victims of domestic violence as a protected class under the NYSHRL.
- Employees are to give “reasonable advance notice” but may miss work without warning if there are justifiable circumstance.
- Amendment requires employers to reasonably accommodate victims of domestic violence who must be absent from work “for a reasonable amount of time” to:
 - Seek medical attention;
 - Access counseling, legal and victim’s services;
 - Appear in court; or
 - Participate in safety planning.

School Safety – “Red Flag” Law

- On February 25, 2019, the Governor signed into law legislation amending state law (and adding an Article 63-A to the CPLR) to allow certain individuals to petition a court to issue an “Extreme Risk Protection Order” (“ERPO”) prohibiting a person from purchasing, possessing or attempting to purchase or possess a firearm, rifle, or shotgun.
- A bill has also been signed into law prohibiting school districts from issuing written authorization permitting the possession of a rifle, shotgun or firearm in school buildings or grounds by teachers, administrators or other school employees not primarily employed at the school as an SRO, police officer, or security guard (with a special armed guard permit).

Who May Petition the Court for an Extreme Risk Protection Order?

The new law allows the following individuals to petition the court for an ERPO:

- A police officer or district attorney;
- A family or household member of the Respondent;
- A “school administrator” or a “school administrator’s designee” of the school in which the person against whom the order is sought is currently enrolled, or has been enrolled, in the six months preceding the filing of the petition.

Who Can Be A “School Administrator’s Designee” For The Purpose Of Issuance Of An ERPO?

- School Teacher;
- School Guidance Counselor;
- School Social Worker;
- School Nurse;
- Other school personnel required to hold a teacher’s or administrator’s license or certificate, and full-time or part-time compensated school employees required to hold a temporary coaching license or professional coaching certificate.

Process for Filing for an ERPO

- 1) Upon the filing of a petition for an ERPO, the court can issue a temporary ERPO, upon a finding:

“... That there is probable cause to believe the Respondent is likely to engage in conduct that would result in serious harm to himself, herself or others”

- 2) The application for the temporary ERPO must be determined by the court in writing on the same day the application is filed.

Factors Which May Be Considered By the Court in Deciding Whether To Issue An ERPO

- a) A threat of violence or use of violence directed towards self or others;
- b) A violation or alleged violation of an order of protection;
- c) Any previous charge or conviction for an offense involving the use of a weapon;
- d) The reckless use, discharge or brandishing of a firearm, rifle, or shotgun;

Factors Which May Be Considered By the Court in Deciding Whether To Issue An ERPO (continued)

- e) Any history of violation of an ERPO;
 - f) Evidence of recent or ongoing abuse of controlled substances or alcohol; and
 - g) Evidence of recent (within six months prior to the date of the petition) acquisition of a firearm, rifle, or shotgun.
-
- Courts shall consider the time which has elapsed since last occurrence, and age of the person at the time of the occurrence.

Procedure For ERPO

- If a temporary ERPO is granted, a hearing on the ERPO itself will occur within six business days of issuance of the temporary ERPO;
- If the temporary ERPO petition is dismissed, the hearing shall occur within ten business days. At the hearing, petitioner must demonstrate Respondent is likely to engage in behaviors resulting in serious harm to self or others; and
- In either event, the Respondent can request, and the court can grant, additional time to prepare for the hearing.

Procedure For ERPO (continued)

- If an ERPO is granted, State Police, other law enforcement, and DCJS are notified of the issuance of the ERPO, and weapons are taken into possession by law enforcement.

Red Flag Law – Roll Out

- RFL's already exist in several other states; New York's roll out of the law asserted that no other state currently affords administrators or teachers the right to petition a court for an ERPO.

Red Flag Law – Some Issues

- Issuance of an ERPO does not prevent other individuals in the household (e.g., parents or siblings of the Respondent) from owning or possessing weapons.
- RFL does not provide any interventions for the Respondent other than temporarily taking away guns.

Red Flag Law - Issues

- Under New York's "Safe Act" (Secure Ammunition and Firearms Enforcement Act), mental health providers are already required to report to authorities (i.e., the County, which will then report to DCJS) any patient who is likely to do harm to self or others. That information is crosschecked against a database of gun owners; the Respondent's gun license would then be suspended, and the gun confiscated.

Red Flag Law – Issues (continued)

- In the event of criminal behavior or a family offense, courts can consider whether to order surrender of weapons.
- 14 and 15 year olds cannot own or possess firearms (in New York State) unless they possess a hunting license.

Red Flag Law – Issues (continued)

FERPA

1. If there is “probable cause” that the student will hurt themselves or others, there may well have already been a “articulable and significant” threat, which is an exception to FERPA’s usual consent requirement for release of personally identifiable information to third parties.
2. Information regarding the threat may also be disclosed without consent if it does not come from personally identifiable information in student records (e.g., teacher or administrator observation).

DASA and Title IX

Title IX

- As with Title VI, 504 – cannot deny access to education solely on the basis of protected category
- Prohibits discrimination on the basis of sex (including sexual harassment) in federally assisted education programs and activities.
- Title IX protects students in connection with all academic, educational, extra-curricular, athletic, and other programs of the school whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

Federal Law

Title IX (20 U.S.C. Sections 1681-1688)

- 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 education program or activity receiving Federal financial assistance.

Title VII – 1964 law prohibits discrimination against employees “on the basis of sex.”

What does “on the basis of sex” mean under Title IX?

Biological ?

Sex
stereotyping ?

Gender
Nonconforming
?

Transgender ?

Sexual
Orientation ?

Gender ?

Gender Identity
?

New York State

- Human Rights Law § 296 prohibits discrimination against employees on the basis of sex or sexual orientation. (N.Y. Executive Law, Article 15)
 - Enforcement regulations: (9 NYCRR § 466.13)
 - The term “sex” when used in the Human Rights Law amended in October 2015 to includes gender identity, the status of being transgender, and “gender dysphoria”
 - discrimination on the basis of sex includes discrimination on the basis of gender identity or the status of being transgender; and
 - harassment based on a person’s gender identity or the status of being transgender is sexual harassment.

New York State, Continued

- Dignity for All Students Act (N.Y. Educ. L. Art 2)-2012 -- protects students from discrimination, bullying, and harassment on the basis of a person's actual or perceived gender (including gender identity and expression) and sexual orientation.
- NY Education Law § 3201-a- prohibits discrimination based on sex with respect to admission into or inclusion in courses of instruction and athletic teams in public schools.

New York State Guidance

NYSED Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students, July 2015.

- Emphasizes a flexible approach in working with each transgender student individually; and
- Offers a number of best practices, which reflect the primary goal of ensuring the health and safety of the students and confirming that privacy and confidentiality are maintained to protect students' safety.

The Dignity for All Students Act

- “Harassment” and “Bullying” are defined as the creation of a hostile environment by conduct or by verbal or non-verbal threats, intimidation or abuse, including cyberbullying, that:
 - (a) unreasonably and substantially interferes with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being; denial of access; or
 - (b) reasonably causes a student to fear for his or her physical safety; or
 - (c) reasonably causes physical injury or emotional harm to a student; or
 - (d) occurs off school property and reasonably and foreseeably creates a risk of substantial disruption within the school environment.

What Constitutes Sexual Harassment?

- Unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:
 - submission to such conduct explicitly or implicitly affects a term and condition of an individual's employment or education;
 - submission to such conduct is made the basis of employment or education decisions;
 - such conduct unreasonably interferes with an individual's work/education performance or participation, or creates an intimidating, hostile, or offensive work or educational environment.

Role of the Title IX Coordinator

- OCR April 24, 2015 “Dear Colleague” Letter on Title IX Coordinators
- “The recipient must *inform the Title IX coordinator of all reports and complaints raising Title IX issues*, even if the complaint was initially filed with another individual or office or the investigation will be conducted by another individual or office. The Title IX coordinator is responsible for coordinating the recipient’s responses to all complaints involving possible sex discrimination. This responsibility includes *monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate.*”

Title IX Coordinator—Areas of Responsibility

- EVERYTHING— “on the basis of sex”
 - Issues related to LGBT students, staff, visitors
 - Sexual Harassment
 - Sex Discrimination
 - Sexual Misconduct
 - Athletic Equity
 - Sex segregated Activities

Title IX Investigations

- Should the District conduct simultaneous Title IX and DASA investigations based on the same allegation of gender-based bullying/harassment?

Discipline is one remedial option

- If the accused is guilty, **recommend disciplinary action** and/or other follow-up and place a copy of the report in the accused's discipline file, if student, or personnel file, if staff member.
- Bring disciplinary charges under Education Law § 3214, if necessary.
- Consider Section 75 or Education Law §3020-a charges

2017 Guidance from OCR

- Interim measures are used as appropriate for either or both party, without an assumption of guilt on the accused student. (2017 Q & A, #3)
- Any disciplinary sanction should be proportionate to the violation. (2017 Q & A, #9) In addition schools should avoid conflicts of interest or bias in the process in order to avoid institutional interests from interfering with the impartiality of the adjudication during all phases of the procedure. (Id.)
- Both parties need to be notified of the outcome and the notification letters should be provided to the parents of students under the age of 18 and directly to the student if over the age of 18. In addition the letters may only differ slightly as required under FERPA. (2017 Q&A, #10)

2017 Guidance from OCR

- The 2017 Q & A does allow a school to choose to offer an appeal only to the responding party, however, most school already have a policy in place that allows an appeal by either party, which is still acceptable. (2017 Q & A, #11)
- Any existing resolution agreement between OCR and a School District remains binding on that School District, but do not bind other school districts. (2017 Q & A, #12)
- Title IX policies should protect students from sex discrimination, and not regulate the content of speech

REQUESTS FOR RECORDS

FERPA and Confidentiality Policies

- What if someone requests:
 - A copy of the report?
 - A copy of the interview notes?
 - A copy of witness statements?
 - To know how the staff member was disciplined?
 - To know how a student was disciplined?

When Will A School District Be Held Liable Under Title IX For The Harassment Of A Student?

- (1) The harassment is “**severe, pervasive and objectively offensive**”
- (2) District **knows** about the harassment and is **deliberately indifferent**

2017 Guidance from OCR

- A police investigation or report does not relieve a school of its duty to investigate under Title IX (2001 Guidance) Schools are still obligated after the investigation to determine whether the District's sexual harassment/discrimination policy was violated. (2017 Q &A, #8)

Sexual Harassment Training

Title VII and NYS Human Rights Law

- Prohibits, among other things, discrimination on the basis of sex (including sexual harassment) by employers in hiring, firing, disciplining, promoting, training, compensating or classifying employees and job applicants.
- Sexual harassment is a form of sex discrimination. It includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity, and the status of being transgender.

What is Sexual Harassment?

- Unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:
 - submission to such conduct explicitly or implicitly affects a term and condition of an individual's employment;
 - submission to such conduct is made the basis of employment decisions;
 - such conduct unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Unwelcome Conduct

- Conduct is unwelcome if the individual did not request or invite it and “regarded the conduct as undesirable or offensive.”
- Acquiescence does not always mean that the conduct was welcome.

Conduct of a Sexual Nature

Board Policy 3421

- rape, attempted rape, sexual assault, attempted sexual assault, forcible sexual abuse, hazing, and other sexual and gender-based activity of a criminal nature as defined under the State Penal Law;
- unwelcome sexual advances or invitations or requests for sexual activity, including but not limited to those in exchange for grades, promotions,
- preferences, favors, selection for extracurricular activities or job assignments, homework, etc., or when accompanied by implied or overt threats concerning the target's work or school evaluations, other benefits or detriments;
- unwelcome or offensive public sexual display of affection, including kissing, hugging, making out, groping, fondling, petting, inappropriate touching of one's self or others (e.g., pinching, patting, grabbing, poking), sexually suggestive dancing, and massages;
- any unwelcome communication that is sexually suggestive, sexually degrading or derogatory or implies sexual motives or intentions, such as sexual remarks or innuendoes about an individual's clothing, appearance or activities; sexual jokes; sexual gestures; public conversations about sexual activities or exploits; sexual rumors and "ratings lists;" howling, catcalls, and whistles; sexually graphic computer files, messages or games, etc;

Conduct of a Sexual Nature

- unwelcome and offensive name calling or profanity that is sexually suggestive or explicit, sexually degrading or derogatory, implies sexual intentions, or that is based on sexual stereotypes or sexual orientation, gender identity or expression;
- unwelcome physical contact or closeness that is sexually suggestive, sexually degrading or derogatory, or sexually intimidating such as the unwelcome touching of another's body parts, cornering or blocking an individual, standing too close, spanking, pinching, following, stalking, frontal body hugs, etc.;
- unwelcome and sexually offensive physical pranks or touching of an individual's clothing, such as hazing and initiation, "streaking," "mooning," "snuggies" or "wedgies" (pulling underwear up at the waist so it goes in between the buttocks), bra-snapping, skirt "flip-ups," "spiking" (pulling down someone's pants or swimming suit); pinching; placing hands inside an individual's pants, shirt, blouse, or dress, etc
- unwelcome leers, stares, gestures, or slang that are sexually suggestive; sexually degrading or derogatory or imply sexual motives or intentions;
- clothing with sexually obscene or sexually explicit slogans or messages;
- unwelcome and offensive skits, assemblies, and productions that are sexually suggestive, sexually degrading or derogatory, or that imply sexual motives or intentions, or that are based on sexual stereotypes;

Conduct of a Sexual Nature

- other hostile actions taken against an individual because of that person's sex, sexual orientation, gender identity or transgender status, such as interfering with, destroying or damaging a person's work or school area or equipment; sabotaging that person's work or school activities; bullying, yelling, or name calling; or otherwise interfering with that person's ability to work or participate in school functions and activities; and
- other hostile actions taken against an individual because of that person's sex, sexual orientation, gender identity or transgender status, such as interfering with, destroying or damaging a person's work or school area or equipment; sabotaging that person's work or school activities; bullying, yelling, or name calling; or otherwise interfering with that person's ability to work or participate in school functions and activities; and
- any unwelcome behavior based on sexual stereotypes and attitudes that is offensive, degrading, derogatory, intimidating, or demeaning, including, but not limited to:
 - disparaging remarks, slurs, jokes about or aggression toward an individual because the person displays mannerisms or a style of dress inconsistent with stereotypical characteristics of the person's sex;
 - ostracizing or refusing to participate in group activities with an individual during class projects, physical education classes or field trips because of the individual's sex, gender expression or gender identity;
 - taunting or teasing an individual because they are participating in an activity not typically associated with the individual's sex or gender.

Sex Stereotyping

- Occurs when conduct or personality traits are considered inappropriate because they do not conform to other's ideas/perceptions of how individuals of either sex should act or look

Circumstances of Sexual Harassment

- The victim as well as the harasser may be a woman or a man.
- The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.

Circumstances of Sexual Harassment

- NY Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracted to provide services to the District.

Circumstances of Sexual Harassment

- Harassment can occur whenever and wherever employees are fulfilling their work responsibilities
- Employee interactions during non-work hours, such as at a hotel while at a conference or at events after work, can have an impact in the workplace
- Harassment can occur through calls, texts, email and social media

Employee Quid Pro Quo

- Occurs where:
 - submission to a sexual act is a condition of an individual's employment, promotion, or any other job benefit; or refusal to engage in sexual acts results in adverse employment action.
- Occurs between an employee and someone with authority who has the ability to grant or withhold job benefits
- Where a victim neither submits to a supervisor's advances nor suffers a tangible job detriment as a result, a quid pro quo case cannot be established.

Employee Quid Pro Quo

- Examples
 - Offering better working conditions or opportunities in exchange for sexual relationship
 - Threatening adverse working conditions or denial of opportunities if a sexual relationship is refused
 - Using pressure, threats, or physical acts to force a sexual relationship

Quid Pro Quo Harassment

- An assistant principal alleged that the principal of another school in the District continually sexually harassed her by touching her, trying to kiss her, calling her about non-school matters, making suggestive comments, and inviting her to meet him at hotels.
- The assistant principal denied his advances and when he was promoted to superintendent of the District he yelled and belittled her, gave her poor performance reviews and eventually terminated her.
- Was this sexual harassment?
 - Yes - the assistant principal suffered a tangible employment action because she denied the sexual advances of her supervisor.

2012 WL 1098524 (S.D. Miss. 2012)

Hostile Work Environment Under Federal Law

- Unwelcome harassment of a sexual nature which is so severe, pervasive and objectively offensive that it can be said to alter the terms and conditions of employment.
- It depends upon the totality of the circumstances; for example, frequency, severity, whether the conduct is physically threatening or humiliating; the number of individuals involved.
- It is not necessary to prove economic loss or psychological injury.
- Can be committed by supervisors, administrators and/or co-workers and/or third parties (*e.g.* contractors)

Harassment Standard Under NY Law

- New York Executive Law was recently amended to provide that any sexual harassment will be unlawful “regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims.”
- Unlawful harassment will include any activity that “subjects an individual to inferior terms, conditions or privileges of employment because of the individual’s membership in one or more of these protected categories.”

Hostile Work Environment

- A secretary sued the employer under Title VII claiming that she was sexually harassed by her supervisor.
- The supervisor made sexually suggestive jokes and comments, showed the plaintiff and another co-worker pornographic material on his computer, wore a tie of a naked woman, referred to female employees as “love slaves,” and gave a staff member a pair of underwear that said “hooker.”
- Was this a hostile work environment?

Retaliation

- Retaliation occurs when a person engages in a protected activity (e.g., complaining of discrimination or harassment or participating in an investigation) and the District or one of its employees takes adverse action against the person on that basis.

Retaliation

- “Protected activities” include
 - Making a complaint about harassment
 - Making a report of suspected harassment even if you are not the target
 - Filing a formal complaint
 - Opposing discrimination
 - Assisting another employee who is complaining of harassment
 - Providing information during a workplace investigation or testifying in a government agency or in court

Supervisor's Responsibilities

- Supervisors and Managers are in a position of authority and are held to a high standard of behavior.
 - Required to report any harassment reported to them or they observe
 - Responsible for any harassment or discrimination that they should have known of with reasonable care and attention
 - If fail to report, could be subject to discipline
 - Expected to model appropriate workplace behavior

Sexual Harassment & Employee Responsibilities

- Familiarize yourself with your Employer's Policies on Sexual Harassment and Discrimination
- Pay attention to what goes on around you and the way in which co-workers respond to what you say and what you do.
- Refrain from making sexual innuendos, suggestive comments, jokes of a sexual nature, and sexual propositions.
- Refrain from asking questions about a person's sexual practices or sexual orientation.
- Refrain from hanging sexual or suggestive objects or pictures.
- Refrain from making suggestive or sexually insulting sounds, leering, whistling, obscene gestures.
- Refrain from unwanted physical contact with co-workers. This would include such things as touching, pinching, brushing the body, pulling at clothes, kissing or fondling.

Sexual Harassment & Employee Responsibilities

- Ask yourself whether or not you would say it or do it in front of your spouse or parents, or whether you would feel comfortable if your parent, spouse or child were subjected to the same words or behavior?
- If you are truly concerned that your words or conduct may be offensive to a particular individual, ask them.
- If you feel you are being harassed, confront the harasser. Tell them that you find the behavior offensive and describe to them how the behavior negatively affects you. For example, tell them not to touch you, or not to comment on your looks.
- If necessary, file a complaint. Document dates, times, places, and witnesses of all incidents.
- **When in doubt – don't do it!**

Grievance Procedure

- Set forth in Regulation 3421R
- Any person who believes he/she has been target of sexual harassment by a student, district employee or third party should file a complaint, either in writing or verbally
- Compliance Officer is responsible for investigating complaints.
 - For Employee Complaints Compliance Officer is Jodi Delucia
- After Compliance Officer makes decision, complainant or accused may appeal finding to Superintendent
- After Superintendent makes decision, complainant or accused may appeal finding to Board of Education

Consequences

- If you are found to have violated the District's policy on sexual harassment, you may be subject to discipline, up to and including discharge.

External Agencies

Employees may choose to pursue outside legal remedies in court or with outside agencies

- New York State Division of Human Rights (DHR)
 - Can file a complaint within 3 years of the alleged sexual harassment
 - If do not file with DHR, may sue directly in state court within 3 years of the alleged sexual harassment

External Agencies

- U.S. Equal Employment Opportunity Commission (EEOC)
 - Can file complaint within 300 days of the alleged sexual harassment
 - Complaint must be filed with EEOC before someone can file suit in federal court
 - New York State Division of Human Rights

Is it Sexual Harassment in the Employment Setting?

- Sharon transfers to a new location with her employer. Her new supervisor, Paul, is friendly and helps her get familiar with her new job duties. After a few days, when no one else is around, Paul comes over to Sharon's work area to chat. Paul talks about what he did last night, which was to go to a strip club. Sharon is shocked that Paul would bring up such a topic in the workplace and says nothing in response. Paul continues talking and says that all the women in the office are so unattractive that he needs to get out and “see some hot chicks” once in a while. He tells Sharon he is glad she joined the staff because, unlike the others, she is “easy on the eyes.” Sharon feels very offended and demeaned that she and the other women in her workplace are being evaluated on their looks by their supervisor.

Is it Sexual Harassment in the Employment Setting?

- Leonard works as a clerk typist for a district. He likes to wear jewelry, and his attire frequently includes earrings and necklaces. His boss, Margaret, thinks it's “weird” that, as a man, Leonard wears jewelry and wants to be a clerical worker. She frequently makes sarcastic comments to him about his appearance and refers to him “jokingly” as her office boy. Leonard applies for an open promotional position that would involve working in a “front desk” area, where he would interact with the public. Margaret tells Leonard that if he wants that job, he had better look “more normal”.

Is it Sexual Harassment in the Employment Setting?

- Amy complains of harassment by her coworkers to her supervisor Jesse. Jesse does nothing about it. Amy subsequently files a sexual harassment complaint. An investigation is conducted and, as a result of the investigation, Jesse is suspended for one week. Upon his return, Jesse closely scrutinizes Amy's job performance.

Is it Sexual Harassment in the Employment Setting?

- Wilma is up for a promotion. During the interview for the position, her supervisor, Fred, tells her that she is qualified for the position, and that he will recommend her for the position. Fred then asks Wilma to go away for the weekend to celebrate the anticipated promotion. Is it sexual harassment if:
 - Wilma says no, but gets the promotion.
 - Wilma says no and does not get the promotion

QUESTIONS???

