

Board Office Use: Legislative File Info.	
File ID Number	17-1062
Introduction Date	5/24/17
Enactment Number	17-0763
Enactment Date	6/14/17



OAKLAND UNIFIED
SCHOOL DISTRICT

Community Schools, Thriving Students

Memo

To Board of Education

From Marion McWilliams, General Counsel
Andrea Epps, Staff Attorney

Board Meeting Date May 24, 2017

Subject **Sexual Harassment Policy**

Action Requested Approval of revisions to Board Policy 5145.7 Sexual Harassment.

Background On September 27, 2016, Alliance for Girls (AFG) released a report entitled, "Valuing Girls Voices: The Lived Experiences Of Girls Of Color In Oakland Unified School District." The District and AFG have partnered to leverage the key findings of the report to fortify the school district's existing efforts, as well as create new efforts, to improve equity for our students. These efforts include crafting a modified sexual harassment policy and implementation plan, training District staff in the findings of AFG's report and effective approaches to addressing the unique needs of students within the District.

District representatives, AFG, the OUSD Initiative for African American Girls and Young Women Achievement, and other committed stakeholders have worked collaboratively through the Title IX Collaborative Working Group to craft a modified sexual harassment policy that is designed to lift this issue to the forefront and strongly affirm the Governing Board's commitment to maintain a safe school environment that is free from harassment and discrimination. The Board remains committed to eliminating sexual harassment and repairing the harm it causes to students and school communities through appropriate preventative, restorative, and responsive strategies.

Discussion The District's Sexual Harassment Board Policy was last updated in March 2015. The modifications before the Board reflect:

- A holistic approach to student well-being at OUSD rather than a "no tolerance" policy.
- Inclusion of the use of restorative processes to eliminate harassment, prevent recurrence, and repair the negative impacts of sexual harassment on site culture and climate, when appropriate.
- Inclusion of the definition of sexual harassment in the Board Policy.



- Recognition that sexual harassment can be a school-wide issue that may require school-wide solutions.
- A detailed and transparent outline of the investigatory process, that guarantees students a prompt and equitable response, and provides all stakeholders with clear expectations and guidance on the reporting and investigatory process.
- Inclusion of a school site designee.
- Disclosures, resources, and age-appropriate education on these and related topics that will be provided to OUSD students.
- Compliance with the most up-to-date iterations of state and federal law as well as recognized best practices for k-12 schools addressing sexual harassment, sexual violence, and school culture to provide environments of sexual and gender equity for all students.

Additionally, an amended implementing Administrative Regulation 5145.7 was developed simultaneously to provide clear guidance and procedures by which Board Policy 5145.7 shall be implemented.

Recommendation

Approval by the Board of Education of the recommended changes in the Sexual Harassment Board Policy.

Fiscal Impact

N/A

Attachments

- Board Policy 5145.7 Redline
- Board Policy 5145.7 Clean
- Amended Administrative Regulation 5145.7

OAKLAND UNIFIED SCHOOL DISTRICT

Board Policy

Students

BP 5145.7

Sexual Harassment

The Governing Board is committed to maintaining a safe school environment that is free from harassment and discrimination. The Board acknowledges that complex societal and historical factors may contribute to inequity within the district and that sexual harassment devalues all students, undermines students' physical safety, impedes students' ability to learn, and reinforces social inequality.- The Board is committed to eliminating sexual harassment and repairing the harm it causes. The Board prohibits sexual harassment of students at school or at school-sponsored or school-related activities. The Board also prohibits retaliatory behavior or action against any person who reports, files a complaint or testifies about, or otherwise supports a complainant in alleging sexual harassment.

The district strongly encourages any student who feels that he/she is being or has been sexually harassed on school grounds or at a school-sponsored or school-related activity by another student or an adult to immediately contact his/her teacher, the principal, or any other available school employee. The district will take immediate steps to stop harassment and protect the safety and well-being of reported victims of sexual harassment, including interim measures during the investigation as appropriate.—Any employee who receives a report or observes an incident of sexual harassment shall notify the principal or a district compliance officer.

Prohibited sexual harassment is unwelcome sexual conduct that may include, but is not limited to, sexual violence, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, when made on the basis of sex and under any of the following conditions: (Education Code 212.5; 5 CCR 4916)

1. Submission to the conduct is explicitly or implicitly made a term or condition of a student's academic status or progress.
2. Submission to or rejection of the conduct by a student is used as the basis for academic decisions affecting the student.
3. The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment.

4. Submission to or rejection of the conduct by the student is used as the basis for any decision affecting the student regarding benefits and services, honors, programs, or activities available at or through any district program or activity.

Examples of types of conduct which are prohibited in the district and which may constitute sexual harassment include, but are not limited to:

1. Unwelcome leering, sexual flirtations, or propositions
2. Unwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments, or sexually degrading descriptions
3. Graphic verbal comments about an individual's body, unwanted sexual comments or questions, or overly personal conversation
4. Sexual jokes, derogatory posters, notes, stories, cartoons, drawings, pictures, obscene gestures, or computer-generated images of a sexual nature
5. Spreading sexual rumors
6. Teasing or sexual remarks about students enrolled in a predominantly single-sex class or activity
7. Massaging, grabbing, fondling, stroking, or brushing the body
8. Touching an individual's body or clothes in a sexual way
9. Impeding or blocking an individual's movements or any physical interference with school activities when directed at an individual on the basis of sex or gender expression
10. Displaying sexually suggestive objects
11. Sexual assault, sexual battery, or sexual coercion
12. Sexual violence which is the perpetration of a sexual act on a person without their affirmative consent
13. Electronic communications containing comments, words, or images described above.

Sexual harassment is prohibited on all campuses and at all school-sponsored programs and activities. Any prohibited conduct that occurs off campus or outside of school-related or school-sponsored programs or activities will be regarded as sexual harassment in violation of district policy if it has a continuing effect on or creates a hostile school environment for the complainant or victim of the conduct.

(cf. 0410 - Nondiscrimination in District Programs and Activities)

(cf. 1312.1 - Complaints Concerning District Employees)
(cf. 5131 - Conduct)
(cf. 5131.2 - Bullying)
(cf. 5137 - Positive School Climate)
(cf. 5141.4 - Child Abuse Prevention and Reporting)
(cf. 5145.3 - Nondiscrimination/Harassment)
(cf. 6142.1 - Sexual Health and HIV/AIDS Prevention Instruction)

Complaints regarding sexual harassment shall be investigated and resolved in accordance with law and district procedures specified in AR 1312.3 - Uniform Complaint Procedures. Principals are responsible for notifying students and parents/guardians that complaints of sexual harassment can be filed under AR 1312.3 and where to obtain a copy of the procedures.

(cf. 1312.3 - Uniform Complaint Procedures)

The Superintendent or designee shall take appropriate actions to reinforce the district's sexual harassment policy.

Instruction/Information

The Superintendent or designee shall ensure that all district students receive age-appropriate information on sexual harassment. Such instruction and information shall include:

1. What acts and behavior constitute sexual harassment, including the fact that sexual harassment could occur between people of the same sex and could involve sexual violence
2. A clear message that students do not have to endure sexual harassment under any circumstance
3. Encouragement to report observed incidents of sexual harassment even where the alleged victim of the harassment has not complained
4. A clear message that student safety is the district's primary concern, and that any separate rule violation involving an alleged victim or any other person reporting a sexual harassment incident will be addressed separately and will not affect the manner in which the sexual harassment complaint will be received, investigated, or resolved
5. A clear message that, regardless of a complainant's noncompliance with the writing, timeline, or other formal filing requirements, every sexual harassment allegation that involves a student, whether as the complainant, respondent, or victim of the harassment, of which school employees become aware of through any means, shall be investigated and prompt action shall be taken to stop any harassment, prevent recurrence, and address any continuing effects on students
6. Information about the district's procedure for investigating complaints and the person(s) to whom a report of sexual harassment should be made

76. Information about the rights of students and parents/guardians to file a civil or criminal complaint, as applicable

8. A clear message that, when needed, the district will take interim measures to ensure a safe school environment for a student who is the complainant or victim of sexual harassment and/or other students during an investigation and that, to the extent possible, when such interim measures are taken, they shall not disadvantage the complainant or victim of the alleged harassment

Disciplinary Actions

Upon investigation of a sexual harassment complaint, Any student who engages in sexual harassment or sexual violence at school or at a school-sponsored or school-related activity is in violation of this policy and shall be subject to disciplinary action. For students in grades 4-12, disciplinary action may include suspension and/or expulsion, provided that, in imposing such discipline, the entire circumstances of the incident(s) shall be taken into account.

(cf. 5144 - Discipline)

(cf. 5144.1 - Suspension and Expulsion/Due Process)

(cf. 5144.2 - Suspension and Expulsion/Due Process (Students with Disabilities))

Upon investigation of a sexual harassment complaint, Any staff member found to have engaged in sexual harassment or sexual violence toward any student shall be subject to discipline up to and including dismissal in accordance with applicable policies, laws, and/or collective bargaining agreements.

(cf. 4117.4 - Dismissal)

(cf. 4117.7 - Employment Status Report)

(cf. 4118 - Suspension/Disciplinary Action)

(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)

Record-Keeping

The Superintendent or designee shall maintain a record of all reported cases of sexual harassment to enable the district to monitor, address, and prevent repetitive harassing behavior in district schools.

(cf. 3580 - District Records)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

48900 Grounds for suspension or expulsion

48900.2 Additional grounds for suspension or expulsion; sexual harassment
48904 Liability of parent/guardian for willful student misconduct
48980 Notice at beginning of term

CIVIL CODE

51.9 Liability for sexual harassment; business, service and professional relationships
1714.1 Liability of parents/guardians for willful misconduct of minor

GOVERNMENT CODE

12950.1 Sexual harassment training

CODE OF REGULATIONS, TITLE 5

4600-4687 Uniform complaint procedures

4900-4965 Nondiscrimination in elementary and secondary education programs

UNITED STATES CODE, TITLE 20

1221 Application of laws

1232g Family Educational Rights and Privacy Act

1681-1688 Title IX, discrimination

UNITED STATES CODE, TITLE 42

1983 Civil action for deprivation of rights

2000d-2000d-7 Title VI, Civil Rights Act of 1964

2000e-2000e-17 Title VII, Civil Rights Act of 1964 as amended

CODE OF FEDERAL REGULATIONS, TITLE 34

99.1-99.67 Family Educational Rights and Privacy

106.1-106.71 Nondiscrimination on the basis of sex in education programs

COURT DECISIONS

Donovan v. Poway Unified School District, (2008) 167 Cal.App.4th 567

Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130

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Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:

CSBA PUBLICATIONS

Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014

Safe Schools: Strategies for Governing Boards to Ensure Student Success, 2011

U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS

[Dear Colleague Letter: Transgender Students, May 2016](#)

[Examples of Policies and Emerging Practices for Supporting Transgender Students, May 2016](#)

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WEB SITES

CSBA: <http://www.csba.org>

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| 8/25/04; 3/25/15A; 5/24/17A

OAKLAND UNIFIED SCHOOL DISTRICT

Board Policy

Students

BP 5145.7

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8/25/04; 3/25/15A; 5/24/17A

OAKLAND UNIFIED SCHOOL DISTRICT

Administrative Regulation

AR 5145.7

Students

Sexual Harassment

All students have the right to attend school free from sexual harassment. The district is committed to eliminating sexual harassment and repairing the harm it causes to individuals and to school communities through age-appropriate preventative and responsive strategies that empower victims of harassment, ensure school safety, and support positive behavioral change.

The district designates the following individuals as the responsible employee to coordinate efforts to comply with Title IX of the Education Amendments of 1972 and California Education Code 234.1, as well as to facilitate the investigation and resolution of sexual harassment complaints under AR 1312.3- Uniform Complaint Procedures.

Ombudsperson

Office of the Ombudsperson

1000 Broadway, 1st Floor, Suite 150

Oakland, California 94607

PHONE (510) 879-4281

FAX (510) 879-3678

Prohibited sexual harassment is unwelcome sexual conduct that may include, but is not limited to, sexual violence, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, when made on the basis of sex and under any of the following conditions: (Education Code 212.5; 5 CCR 4916)

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5. Spreading sexual rumors
6. Teasing or sexual remarks about students enrolled in a predominantly single-sex class or activity
7. Massaging, grabbing, fondling, stroking, or brushing the body
8. Touching an individual's body or clothes in a sexual way
9. Impeding or blocking an individual's movements or any physical interference with school activities when directed at an individual on the basis of sex or gender expression
10. Displaying sexually suggestive objects
11. Sexual assault, sexual battery, or sexual coercion
12. Sexual violence which is the perpetration of a sexual act on a person without their affirmative consent
13. Electronic communications containing comments, words, or images described above

Sexual violence is the most extreme form of sexual harassment. Sexual violence is the perpetration of a sexual action on a person without their affirmative consent. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence

mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a relationship between persons involved, or past sexual relations between them, should never by itself be an indicator of consent.

Sexual harassment is prohibited on all campuses and at all school-sponsored programs and activities. Any prohibited conduct that occurs off campus or outside of school-related or school-sponsored programs or activities will be regarded as sexual harassment in violation of district policy if it has a continuing effect on or creates a hostile school environment for the complainant or victim of the conduct.

Reporting Process and Complaint Investigation and Resolution

Any student who believes that they have been subjected to sexual harassment by another student, an employee, or third party who has witnessed sexual harassment is strongly encouraged to report the incident to a teacher, the principal, or other available school employee. Upon receipt of such a report, within one day of receiving a report of harassment, the school employee shall forward the report to the principal and the district's compliance officer. Each site shall identify a person responsible for addressing sexual harassment complaints. This person may be the site principal or their designee and shall receive training. In addition, any school employee who observes an incident of sexual harassment involving a student shall report their observation to the principal and district compliance officer. The employee shall take these actions, whether or not the alleged victim files a complaint.

When a report or complaint of sexual harassment involves off-campus conduct, the principal or their school site designee shall assess whether the conduct may or has create(d) or contribute(d) to the creation of a hostile school environment. If the principal or their designee determines that a hostile environment may be or has been created, the complaint shall be investigated and resolved in the same manner as if the prohibited conduct occurred on campus.

When a verbal or informal report of sexual harassment is submitted, the principal shall inform the student or parent/guardian of the right to file a formal written complaint in accordance with the district's uniform complaint procedures. Formal written complaints filed under the district's uniform complaint procedures will be resolved consistent with AR 1312.3.

Regardless of whether a formal complaint is filed, the principal or their school site designee shall take steps to investigate allegations and, if sexual harassment is found, shall take prompt action to stop it, prevent recurrence, and address any continuing effects.

If a complaint of sexual harassment is initially submitted to the principal, the principal shall forward the report to the district's compliance officer. The principal or their site designee shall initiate investigation of the complaint.

In any case of sexual harassment involving the principal, compliance officer, or any other person to whom the incident would ordinarily be reported or filed, the report may instead be submitted to the Superintendent or designee who shall determine who will investigate the complaint.

Intake Meeting

Within one day of receiving a report of harassment or otherwise becoming aware of harassment, employees must inform the designated school site staff member and the district compliance officer. Upon receiving a report of harassment or becoming aware of harassment, the designated school site officer or their designee shall immediately schedule an intake meeting with the student(s) reportedly harassed. If requested by the student(s) or required by law, the designated school site officer shall inform their parent(s) or guardian(s) of the report and invite them to attend the scheduled intake meeting. In all cases, the student(s) shall be informed that they may bring a support person of their choice with them to the meeting. If a student requests that another student act as their support person, that student shall be excused from class or required activities to enable them to attend the intake meeting. A student may request to reschedule the intake meeting to a later date to enable their support person to attend.

At the intake meeting, the student will be informed that:

- (1) the district will take immediate steps to protect the safety and emotional well-being of the reporting student(s);
- (2) Inform the student(s) that they may file a formal written complaint in accordance with the district's uniform complaint procedures, and the time limit for filing a uniform complaint;
- (3) Explain that complaints and allegations of sexual harassment will be kept confidential except as necessary to carry out the investigation or take other necessary action;
- (4) Explain the circumstances under which the school site officer would be required to make a report to the Department of Children's and Family Services and/or law enforcement;
- (5) Inform the student(s) that retaliation for making a report or participating in an investigation of sexual harassment is prohibited, and how to report any retaliation they experience;
- (6) Explain that after the complaint is investigated, the school site officer will make a recommendation regarding how to proceed and that, to the extent permitted by law and district policy, the student(s) may have input into that decision;
- (7) Ask the student to explain in their own words what occurred, how it has affected them, and what they need to feel safe at school;
- (8) Inform the student that they may present additional evidence, or information leading to evidence, at any time during the investigation.

If a student requests that their name be kept confidential from the alleged harasser, the school site officer shall explain that such a request may limit the District's ability to investigate the complaint and stop the harassment. The school site officer shall also explain that the District cannot keep the reporting student's name confidential from the

alleged harasser if doing so would undermine the district's ability to ensure a safe and nondiscriminatory environment for all students, including the reporting student.

Confidentiality

All complaints and allegations of sexual harassment shall be kept confidential except as necessary to carry out the investigation or take other subsequent necessary action.

When a complainant or victim of sexual harassment notifies the district of the harassment but requests confidentiality, the school site designee or compliance officer shall inform the complainant or victim that the request may limit the district's ability to investigate the harassment or take other necessary action. When honoring a request for confidentiality, the district will nevertheless take all reasonable steps to investigate and respond to the complaint consistent with the request.

When a complainant or victim of sexual harassment notifies the district of harassment but requests that the district not pursue an investigation, the district will determine whether or not it can honor such a request while providing a safe and nondiscriminatory environment for all students.

Response Pending Investigation/Interim Measures

When an incident of sexual harassment is reported, the principal or designee, in consultation with the compliance officer, shall determine whether interim measures are necessary pending the results of the investigation. The principal/designee or compliance officer shall take immediate measures necessary to stop harassment and protect students and/or ensure their access to the educational program. To the extent possible, such interim measures shall not disadvantage the complainant or victim of the alleged harassment. Interim measures may include placing the individuals involved in separate classes, transferring a student to a class taught by a different teacher, separation of reported victim/complainant and reported harasser, security measures, emotional and psychological support, or other academic accommodations, as appropriate, in accordance with law and Board policy. The school should notify the victim/complainant of their options to avoid contact with the alleged harasser and allow the victim/complainant to change academic arrangements, as appropriate, in accordance with law and Board policy. The school shall make the complainant/victim aware of resources and assistance that are available.

The district is responsible for determining how to resolve complaints. If it is determined that a violation of the district's sexual harassment policy has taken place, the district may utilize resolutions that target eliminating the harassment, prevent its recurrence, and repair the harm caused by the harassment. The district shall assess whether corrective and preventative action should be taken not only on an individual level, but on a schoolwide or districtwide level.

Prompt and Equitable Investigation Process

In determining whether a violation of the sexual harassment policy has taken place, the district shall apply a “preponderance of the evidence” standard. This standard is met if the allegation is more likely to be true than not.

In determining whether sexual conduct was welcome or unwelcome, the district shall use an “affirmative consent” standard, as defined above. The district shall not consider the past sexual history of the reported victim in making their determination except to the extent it relates to a prior relationship with the alleged harasser.

In conducting the investigation, the school site officer or their designee shall collect all available documents and review all available records, notes, or statements related to the complaint. The school site officer may visit any reasonable accessible location where the actions are alleged to have taken place. The school site officer shall interview all available witnesses, including the alleged harasser(s), with information relevant to the complaint. Interviews shall be conducted in a confidential matter. After interviewing the alleged harasser, the school site officer shall provide the reporting student with an additional opportunity to submit evidence or make a statement in response.

The school site officer shall investigate not only whether the conduct alleged occurred, but also its effect on the reporting student’s experience of school, including but not limited to any effect on their ability to concentrate in class, grades, participation in activities, and ability to move freely around campus.

In making their factual findings and determination, the school site officer may take into account the factors set forth in AR 1312.3, Uniform Complaint Procedures. These are:

- a. Statements made by any witnesses;
- b. The relative credibility of the individuals involved;
- c. How the complaining individual reacted to the incident;
- d. Any documentary or other evidence relating to the alleged conduct;
- e. Past instances of similar conduct by any alleged offenders;
- f. Past false allegations made by the complainant.

The school site officer shall inform the student of their decision as soon as practicable, and explain to the student the reasons for their decision.

The results of the investigation shall be included in a Final Written Decision. The Final Written Decision shall include the findings of fact based on the evidence gathered, the school site officer’s or designee’s conclusion as to whether a violation of the Sexual Harassment Policy took place, and if a uniform complaint has been filed. To determine whether a hostile educational environment, in violation of district policies, has been created, the school site officer shall consider the factors set forth in AR 1312.3(4)(a)-(f). The Recommended Final Decision shall also include the corrective action(s) to be imposed.

The school site officer's Recommended Final Written Decision shall be based on their independent assessment of all of the relevant circumstances, including but not limited to the age of both students, the severity of the harassment, the impact of the harassment on the victim, and whether any previous complaints have been made regarding the harassing student's behavior.

The Final Written Decision shall inform the victim of their right to appeal the Final Written Decision to the district's compliance officer within five calendar days of its receipt. An appeal taken to the district's compliance officer shall comply with the procedures set forth for Level II Appeals in AR 1312.3, Uniform Complaint Procedures, even if a uniform complaint has not been filed.

Enforcement of District Policy

The Superintendent or designee shall take appropriate actions to reinforce the district's sexual harassment policy. As needed, these actions may include any of the following:

1. Removing vulgar or offending graffiti

(cf. 5131.5 - Vandalism and Graffiti)

2. Providing training to students, staff, and parents/guardians about how to recognize harassment and how to respond

(cf. 4131 - Staff Development)

3. Use of restorative processes at the site level to eliminate harassment, prevent recurrence, and repair the negative impacts on site culture and climate, when appropriate.

4. Disseminating and/or summarizing the district's policy and regulation regarding sexual harassment

54. Consistent with the laws regarding the confidentiality of student and personnel records, communicating the school's response to parents/guardians and the community

(cf. 4119.23 - Unauthorized Release of Confidential/Privileged Information)

(cf. 5125 - Student Records)

65. Taking appropriate disciplinary action against harassers consistent with the law and Board policy

~~In addition, disciplinary measures may be taken against any person who is found to have made a complaint of sexual harassment which he/she knew was not true.~~

(cf. 4118 - Suspension/Disciplinary Action)

(cf. 4218 - Dismissal/Suspension/Disciplinary Action)
(cf. 5144.1 - Suspension and Expulsion/Due Process)
(cf. 5144.2 - Suspension and Expulsion/Due Process (Students with Disabilities))

Notifications

A copy of the district's sexual harassment policy and regulation shall:

1. Be included in the notifications that are sent to parents/guardians at the beginning of each school year (Education Code 48980; 5 CCR 4917)

(cf. 5145.6 - Parental Notifications)

2. Be displayed in a prominent location in the main administrative building or other area where notices of district rules, regulations, procedures, and standards of conduct are posted (Education Code 231.5) The identity of the site personnel responsible for investigating complaints of sexual harassment shall be posted in a prominent location at each site.

A copy shall be posted on the district's website along with the district board policies and administrative regulations.

3. Be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session (Education Code 231.5)

4. Appear in any school or district publication that sets forth the school's or district's comprehensive rules, regulations, procedures, and standards of conduct (Education Code 231.5)

8/25/04; 10/26/11A; 05/24/17A