



## Association for the Study of Higher Education

### Glossary of Ethics Key Terms

Approved by the ASHE Board of Directors on June 17, 2021

**Sexual harassment** is a type of discrimination on the basis of sex, and includes one or more of the following:

- **Sexual coercion or *quid pro quo* sexual harassment:** when threats or rewards respecting educational or employment benefits, support, or status are conditioned on sexual favors.<sup>1</sup>
  
- **Hostile environment sexual harassment:** exposure in work- or education-related settings or activities to gratuitous (i.e., non-work related/unnecessary for the work) (a) sexual images, gestures, or remarks, (b) sexual insults, (c) non-sexual gender harassment (see below), or (d) unwelcome sexual attention—of such pervasiveness or severity as to interfere with a “reasonable person’s” ability to learn or work. (See reasonable person standard.)<sup>2</sup>
  - **Gender harassment:** is a form of sexual harassment that includes sexism, or other non-sexual behaviors (including remarks and conduct) that demean, denigrate, devalue, and disrespect individuals on the basis of sex.<sup>3</sup>

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<sup>1</sup> This behavior violates federal nondiscrimination law covering educational programs and employment. Title IX applies to **all** educational programs and supporting administrative and other functions of **any** non-federal entity that receives federal funding for **any**—broadly defined—educational program. It protects students, faculty, staff, participants in, and applicants to educational programs. Title VII protects employees and applicants for employment. This behavior also violates some states’ laws and, for public institutions, the U.S. Constitution’s Fourteenth Amendment’s Equal Protection Clause.

<sup>2</sup> These acts also violate federal and some states’ laws and, for public institutions, the U.S. Constitution’s Fourteenth Amendment’s Equal Protection Clause.

<sup>3</sup> *Academies Report*, pp. 42, 25-27, 72 (noting research indicating that gender harassment is more pervasive than, and can cause harm equivalent to, sexual coercion and unwelcome sexual attention). The full breadth of gender harassment covered by this policy can be, but is not always, currently recognized by law as hostile environment sexual harassment. The law applies a reasonable person standard (influenced by societal norms) to determine whether that kind of

- **Sexual assault and battery**, including but not limited to rape (which are crimes).

**On the basis of sex**: means on the basis of sex, gender identity, gender expression, failure to act according to gender stereotypes, and sexual orientation.<sup>4</sup>

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sexual harassment has occurred. The law on discrimination against people who, based on their gender identity or expression, fail to act according to gender stereotypes, is developing in the courts, particularly as relates to transgender students (see footnote 10). However, the Court has long been clear that harassment based on male and female gender, even if not sexual, and gender-based stereotyping, can serve as the basis for a discrimination claim. See *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 650 (1999) (describing actionable harassment under Title IX to include male students threatening their female peers to prevent the female students use of a school resource); *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 81 (1998) (holding that same sex harassment can be actionable, noting that harassing conduct need not be motivated by sexual desire, and can be motivated by a “general hostility to the presence of women in the workplace”); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993) (allegations sufficient under Title VII included gender-based insults such as “you’re a woman, what do you know,” and “we need a man as a rental manager”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (allegations actionable under Title VII were that consideration for holding off female plaintiff’s partnership included that plaintiff should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,” and that she was “macho,” and “overcompensated for being a woman,” and that objections to her use of profanity were only “because it’s a lady using foul language.”). The United States Department of Education has also long stated that gender harassment, which may include acts of verbal, or physical aggression, intimidation, or hostility based on sex or sex stereotyping, but not involving conduct of a sexual nature, can be a form of sexual discrimination under Title IX. See *USED OCR’s Revised Sexual Harassment Guidance* (January 2001).

<sup>4</sup> The issue of gender identity and expression under Title IX is still developing in the courts. See *Whitaker et. al. v. Kenosha Unified School District No. 1*, 858 F.3d 1034, 47-52 (7<sup>th</sup> Cir. 2017) (upholding a preliminary injunction preventing a school district from enforcing its policy restricting a transgender boy from using school facilities aligned with his gender identity, which punishes transgender students for “fail[ing] to conform to the sex-based stereotypes associated with their assigned sex at birth”); *Grimm v. Gloucester Co. School Board*, 302 F.Supp.3d 730 (E.D. VA 2018); *C.f., Joel Doe, et al. v. Boyertown Area School District*, 897 F.3d 518 (3<sup>rd</sup> Cir. 2018) (petition for certiorari docketed in Supreme Court at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-658.html>) (denying a preliminary injunction that sought to stop the School District from applying its policy to allow students to use bathrooms aligned with their gender identities, noting established severe psychological and other harm when students are denied that ability and that Title IX allows but does not require the provision of separate bathroom facilities; and finding

**Reasonable person standard:** a threshold used in law to determine whether hostile environment sexual harassment has occurred. The facts are viewed through the eyes of a generic “reasonable person” in a similar circumstance, position, and relationship. Behavior (including comments, images, gestures, etc.) is evaluated to determine if it is gratuitous (i.e., not necessary for the work) and of such pervasiveness (frequency) or severity (even once) that it would interfere with a reasonable person’s ability to work or learn. What a reasonable person in similar circumstances would find harmful may change with societal norms and power/knowledge/positional differences among individuals involved.

**Credible question (of professional and ethical conduct):** when there is a question about whether or not a person’s conduct meets the ASHE’s high standards of professional and ethical conduct (e.g., whether the person sexually harassed others). The question may concern whether a person engaged in particular conduct—or whether particular conduct is unprofessional and unethical—or both. References to: questioned conduct; undetermined question; credible but undetermined question; determination of a question not yet made; and like phrases in the policy mean there is a credible question about any one or more of these concerns. A credible question is just that—it does not represent a judgment or conclusion about any person.

Whether a credible question exists, and whether standards of conduct are met, require ASHE to make judgments. Some considerations are addressed below, but these judgments must be guided by ASHE’s mission, standards and the specific factual situation:

- Typically, for a credible question to exist, there would be enough facts known to ASHE, the accused’s home institution, or a government agency or other involved entity to warrant at least one of them conducting an informal or formal review of the questioned conduct and whether the facts are true, accurate and complete.

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opponents to the policy did not show sufficient harm to find the policy creates a hostile environment on the basis of sexual harassment of them); *Compare, R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, No. WD 80005, 2017 WL 3026757 (Mo. Ct. App. July 18, 2017), reh’g and/or transfer denied (Sept. 5, 2017), transferred to Mo. S.Ct., No. SC 96683, 2019 WL 925511 (Mo. Feb. 26, 2019) (upholding the dismissal of a case alleging sex discrimination against a transgender male student who was denied access to the boys’ locker room and bathroom “based on my sex and gender identity,” because the student did not allege sex stereotyping and Missouri law does not protect against discrimination on the basis of “gender-related traits” and, in dicta, no Missouri court has extended the Missouri human rights statutes to sex stereotyping).

However, a determination of the facts and question, one way or the other, has not yet been made—at all or to ASHE’s satisfaction in its discretion.

- A credible question may arise from information provided by someone who is directly targeted or who is indirectly affected by the conduct at issue (e.g., a bystander, witness, or someone else who knows of the conduct). It may exist if the conduct at issue is sexual harassment, whether or not that label is used, or a formal complaint is filed. It may arise in a news report (followed by verifying key points for accuracy).
- If truth of an allegation is impossible—e.g., the accused was elsewhere and could not have been present—there is no credible question.
- Not all rumors raise credible questions. Conclusory, isolated rumors may not, if no salient facts are (even anonymously) provided and no affected people or witnesses come forward. Pervasive (even conclusory) rumors may create a credible question, though, particularly if persistent or if the subject of such rumors is prominent, and in a position of power, and there are reasons to believe those who may have the facts are fearful.<sup>5</sup>

A credible question may be resolved/determined by ASHE’s own review, an outside authority’s determination (e.g., home institution, court, government agency) made available to ASHE on which ASHE relies, or both. ASHE must be satisfied, in its discretion, that the question has been answered well enough to decide whether or not the person should hold the relevant Honor.

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<sup>5</sup> Providing safety to those with knowledge, and confidential informal means of exploring whether rumors raise a question that needs review, is an important focus for societies. So is regular communication about how and to whom a person may safely and confidentially provide information about sexual and intersecting bases of harassment, and when total confidentiality can’t be guaranteed (e.g., when safety of the community is threatened or Title IX requires an investigation). Whether Title IX regulations require an investigation may change if changes recently proposed by the U.S. Department of Education are implemented. Under current regulations, however, the need to investigate depends on whether the Society or home institution has actual knowledge, meaning certain representatives of the institution know (e.g., senior officials, supervisors, positions designated to receive complaints)—or whether the institution reasonably should have known, considering all facts and circumstances (e.g., rampant rumors, media reports, persistent red flags) had it made a diligent inquiry. If a society’s or institution’s employee sexually harasses a student while performing responsibilities for students, the society or institution is held responsible for remedying the effects of the harassment, whether or not it had notice. Having an ombuds function (with good training), whether full-time or as an assigned duty of someone whose other duties would not trigger a reporting requirement (so not a senior officer, supervisor, lawyer) can be helpful for maintaining confidentiality.



**Determined conduct or determined question of conduct:** after a credible question has been raised, there is a determination that a person’s conduct is or is not professional and ethical, meeting ASHE’s standards of conduct (or not). This determination may be based on ASHE’s own review, an outside authority’s determination made available to ASHE and on which ASHE relies, or both.

**Discretion (ASHE’s):** means ASHE’s decision, determination, judgment or application of criteria, is made in ASHE’s sole and absolute discretion in pursuit of its mission. Such discretion is still not arbitrary or exercised for an illegal purpose (e.g. to discriminate on the basis of sex or race).

**Restorative remedy:** means a remedy for gender harassment and some other forms of unprofessional and unethical conduct, where the individuals involved authentically consent to participate in a non-legal, informal process with aims of (a) elevating understanding of specific conduct-related harm (whether recognized by the “reasonable person standard” or particular to the individuals involved), (b) achieving confidence that the harmful conduct will not be repeated and the target will be safe; (c) restoring relationships and affirming a community that is inclusive and actively intolerant of harassment, and (d) potentially also offering the accused the opportunity to be a community member in good standing going forward. (The remedy may engage two people, together or separately, or a larger community, depending on the scope of those impacted and the circumstances.)

- It is not necessary for gender harassment or other misconduct to be proven to engage in a restorative remedy.
- At a high level, the accused must be willing to acknowledge that the target experienced harm from the accused’s conduct, but does not have to acknowledge all allegations (or, depending on the situation, legal culpability), as long as the accused is committed to understanding what conduct caused the harm and how to avoid repetition—and the target’s objective is to be safe from future harm, rather than to punish the accused.
- Restorative remedies are not adequate when regulations require other action (e.g., Title IX regulations require formal process when desired by a target, and proposed changes may require formal process when a formal complaint is filed unless both parties agree otherwise; and research fabrication, falsification or plagiarism and violation of human subjects research regulations trigger regulatory requirements for formal processes).



**Retaliation**: means punishing or otherwise engaging in differential adverse treatment of someone in response to that person raising a concern about, or otherwise asserting the right to be free from, discrimination including harassment.<sup>6</sup> Prohibited conduct includes activity that would discourage someone from resisting or complaining about future discrimination/harassment. Retaliation can include actions such as transfer to a less desirable position or assignment; verbal or physical abuse; increased scrutiny; spreading false rumors; or making the person's work more difficult.<sup>7</sup>

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<sup>6</sup> See [https://www.eeoc.gov/laws/types/retaliation\\_considerations.cfm](https://www.eeoc.gov/laws/types/retaliation_considerations.cfm) (EEOC's detailed discussion of the prevalence, determining factors and consequences of harassment).

<sup>7</sup> See *Academies Report* p. 81 (discussing research demonstrating the prevalence of and costs to targets from retaliation).