

Educator responsibilities to respond to allegations of educator sexual misconduct with a current or former student

Definitions

- Sexual misconduct means engaging in grooming, sexual contact, or sexual misconduct with a student, regardless of the student's age, as further defined herein. Sexual misconduct may or may not constitute a criminal offense but in all cases between an adult school employee and a student sexual misconduct is an act of moral turpitude.
- Aiding and abetting: Providing assistance, in any form, that might support, encourage, assist, or incite another. Aiding and abetting a school employee from gaining further employment may include providing a letter of recommendation, giving a positive reference to a potential employer, making a phone call on an employee's behalf or any other action that would assist a school employee from finding employment. Does not included the routine transmission of administrative and personnel files.
- Grooming means building trust with a student and individuals close to the student in an effort to gain access to and time alone with the student, with the ultimate goal of engaging in sexual contact or sexual penetration with the student, regardless of when in the student's life the sexual contact or sexual penetration would take place. Neb. Rev. Stat. § 79-879.
- Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact also means the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact includes only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact also includes the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual abuse by a school employee under section 28-316.01 or sexual assault of a child under sections 28-319.01 and 28-320.01. Neb. Rev. Stat. § 28-318

- Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical, nonhealth, or nonlaw enforcement purposes. Sexual penetration shall not require emission of semen. Neb. Rev. Stat. § 28-318.
- Personal communication means any communication in any form that is unnecessary to conduct school business or unrelated to school, schoolwork, extracurricular school activities.
- Personal communication system means a device or software that provides for communication between two or more parties and is capable of receiving, displaying, or transmitting communication. Personal communication system includes, but is not limited to, a mobile or cellular telephone, an email service, or a social media platform. Neb. Rev. Stat. § 79-879.
- School employee means a person nineteen years of age or older who is employed by a public, private, denominations, or parochial school approved or accredited by the State Department of Education. Neb. Rev. Stat. § 28-720. School employee also includes any person who is contracted with, or otherwise paid by the district and who has access to or interaction with students including all student teachers or interns.
- Student teacher or intern has the same meaning as in section 79-875.
- Certificated educator means a school employee who is authorized to teach, provide special services, and administer by the Commissioner of Education. Neb. Rev. Stat. § 79-802.

Federal Prohibition on Aiding and Abetting

Under federal law, 20 U.S.C. §7926, a school district is required to have policies in place to ensure that no person or agency aids or abets a school employee from obtaining new employment when probable cause exists to believe that the school employee engaged in sexual misconduct with a student. Under federal law, in addition to school employee as defined herein, a school employee may also include a contractor, or agent of the school district.

Exceptions:

- (1) The allegations of sexual misconduct have been reported to a law enforcement agency with jurisdiction over the alleged sexual misconduct AND has been reported to the Nebraska Child Abuse and Neglect Hotline along with any other agencies as required by state, federal, or local law including title IX (20 U.S.C. §§ 1681 et seq) and any corresponding regulations.
AND
- (2) The matter has been officially closed by the prosecutor or police with jurisdiction over the allegations and said prosecutor or law enforcement notified school officials that there is insufficient information to establish probable cause that the school employee engaged in sexual misconduct, OR
- (3) The school employee has been criminally charged or acquitted of the misconduct, OR
- (4) The investigation remains open and no charges have been filed within four years of the date the information was reported.

In other words, school districts nor any employee of a school district may assist a school employee in obtaining employment if the school employee has probable cause to believe that the school employee engaged in sexual misconduct with a student unless they have reported the allegations to the proper authorities and the alleged school employee is cleared of all allegations or four years has passed since the allegations were reported or the appropriate agency has notified school officials there is insufficient information to establish probably cause that the school employee engaged in sexual misconduct with a student.

Mandatory Reporting

Separate and distinct from the federal prohibition, allegations of sexual misconduct may create a duty to report to the Commissioner of Education, to the Child Abuse and Neglect Hotline, and to the appropriate law enforcement agency.

- Mandatory reporting to the Department of Education for certificated educators:
Sexual misconduct by a certificated educator is an act of moral turpitude and therefore all certificated educators have an obligation to report such allegations to the Commissioner of Education. Title 92, *Nebraska Administrative Code*, Chapter 27, Sections 004.02I, 004.04E. You will find more information about moral turpitude on this webpage.

In addition, under a new state law, school districts must have policies in place to ensure that the Nebraska Department of Education will be notified when

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teachers engaged in unacceptable conduct with students. Neb. Rev. Stat. § 79-879(2)(e).

For a certificated educator to discharge his or her duties to report to the Commissioner of Education, a specific complaint form must be completed and notarized. Title 92, *Nebraska Administrative Code*, Chapter 28, Section 003.01.

- A letter or email does not constitute a report under the regulations.
 - Documentation that accompanies a complaint form should have any students' names or otherwise identifiable student information redacted.
- Mandatory reporting to Law Enforcement or the Child Abuse and Neglect Hotline for all school employees and certificated educators:
 - All school employees have an obligation to report suspected allegations of child abuse and allegations of child neglect to the appropriate law enforcement authorities or Nebraska Child Abuse Reporting Hotline or both. Neb. Rev. Stat. § 28-711. Sexual misconduct would likely be considered child abuse. Neb. Rev. Stat. § 28-707.

While a school district policy may require a report to a direct supervisor, the statute requires a report to the hotline or law enforcement and report to a supervisor does not obviate one's duty to report to the proper authorities.

A failure to report child abuse and neglect allegations to the hotline may constitute a criminal offense.

Required Policy

Nebraska state law now requires all public, private, denominational or parochial schools to adopt a policy addressing the professional boundaries between students and school employees before June 30, 2021.

Each policy must:

- (1) Prohibit employees from engaging in grooming, sexual contact, and sexual penetration while any student is attending the same school as the school employee and for a minimum of one year after the student graduates or the date the student otherwise ceases enrollment

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- (2) Include examples of grooming and other conduct the governing authority deems unacceptable
- (3) Procedures for school employees, student teachers or interns to verify receipt and understanding of the policy
- (4) Procedures for reporting unacceptable conduct to administrators, the State Department of Education, the Department of Health and Human Services, and law enforcement
- (5) Identify preferred methods for employees and students including permissible preferred personal communication systems. to communicate with students
- (6) Notice that violation of the policy could result in disciplinary action for any employee and could also result in the revocation of a certificated employee's certificate
- (7) Notice that violations could also result in a referral to the Department of Health and Human Services, law enforcement or both

In addition to those required elements, it is best practice that each district provide an annual training on these issues and that attendance be mandatory at least on a semi-annual basis. In addition, the school district should maintain and signed attendance sheet to ensure all employees are properly educated on these issues.

New Criminal Statute creating an office of Sexual Abuse by a School employee

Effective November 14, 2020, the Nebraska legislature created a new criminal offense. That offense is "sexual abuse by a school employee" and applies to any student who is 16 years of age or older and any school employees while that student is a student at the same school the school employee works and for one year after that student graduates or otherwise ceases enrollment.

Any sexual misconduct conducted by a school employee and a student under the age of 16 was already a criminal offense.

Guidelines for best practices for administrators in conducting an investigation into alleged sexual misconduct:

While this guidance provides some suggestions regarding considerations for anyone conducting an investigation into alleged educator misconduct, each situation and investigation is different and legal counsel should be consulted to determine the best course of action.

One of the first steps to take in order to prevent any undue influence on any potential witnesses, school employees should be placed on administrative leave pending the outcome of allegations of sexual misconduct with any students. In addition, school personnel should work with the district's information technology experts to restrict access to, and prevent deletion of, any exculpatory evidence of any emails or other digital information contained in district-controlled servers and equipment.

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Before engaging in any investigation, one of the next steps is to determine whether the case has been reported to law enforcement and whether a law enforcement officer is investigating. As of November 14, 2020, all sexual contact between a school employee and a student is a criminal matter and law enforcement must be notified.

If law enforcement is investigating, then best practice is to contact the law enforcement officer assigned and request additional information to ensure any further investigation conducted by any district personnel does not impede any pending criminal investigations.

Each school district should have an individual with specialized knowledge and training to handle sexual misconduct allegations and coordinate any pending law enforcement activity. Often that person is also the assigned Title IX coordinator. Whomever is chosen should develop a plan of investigation in coordination with a school district administrator and school district legal counsel. That plan should include a list of potential witnesses, the best order to interview those witnesses, an alleged timeline of events, and a target date for the conclusion of any investigation.

The plan should also identify other sources of potential evidence. Such sources may include any security surveillance tapes, any correspondence exchanged on any district owned electronic devices such as cell phones, tablets, laptops, or other equipment. In addition, if there are relevant telephone logs, voice messages, entry and exit logs, those may also be reviewed to determine if there is any relevant information that may be gleaned regarding the allegations.

When collecting video surveillance, it is better to permanently preserve the entire day or time period at issue rather than a limited clip of a discrete event. You can certainly save a shorter period of time of the specific event but to prevent arguments of events that occurred that were “edited out” it is better to a copy of a much longer period of time.

Personnel files should be reviewed to determine if there have been prior concerns.

In addition, for each party involved all publicly available social media or other readily available public sources should be reviewed. If there is any relevant information discovered, such information can be captured via screen shots, printed or otherwise preserved. One other way to preserve that information is to physically take a photograph. This is another method to preserve information on another person’s cell phone screen. Take note of whose phone, time, date, and location of the photograph and who took the photograph.

When obtaining information from any potential witnesses, record the interview whenever possible. If you do not have a digital recorder, there are multiple voice recording apps available that may be installed on any smart phone or tablet. If recording an interview is impossible, then have a third-party present to take notes and to ensure there are at least one other person who can verify what was said or not said from any witness.

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In addition, careful consideration should be given to the interview location. Interviews should be conducted in person whenever practicable and the interviewees should feel safe and comfortable. School personnel should review any policies in place regarding interviewing student witnesses and whether a parent or guardian must first be consulted.

Students who are alleged to be victims of sexual misconduct by an educator should only be interviewed by an individual trained in conducting forensic interviews of children. Your local child advocacy center should be able to provide additional information in conjunction with law enforcement before proceeding.

If a student is being interviewed and there was no prior knowledge of any allegations regarding this student being a victim and the student discloses that he or she might be a victim, the adult conducting the interview should only obtain a potential timeline of any sexual misconduct and location of the sexual misconduct and then cease the interview and contact the appropriate law enforcement agency.

If there is an ongoing law enforcement investigation, no information should be shared with the school employee who is suspected of sexual misconduct without first consulting the law enforcement investigator assigned. If there is no law enforcement investigation, legal counsel should be consulted before confronting the suspected employee. In addition, like all other witness interviews, the interview with the school employee should always be recorded whenever possible.

Red Flags:

The following are examples of information gathered throughout the course of an investigation could provide a reasonable person articulable suspicion that sexual misconduct may have occurred and could be cause for further investigation:

- School employees that communicate with students through any method not approved by the school district including social networking apps or websites and texting, or other instant messaging, one-on-one with a student
- Communications with students that are primarily personal in nature and seek to obtain private information about a student or a student's family or a student's mental health
- Telling jokes that are sexual in nature or discussing sexual topics
- Making comments about student's physical appearance
- Creating opportunities to be alone with a student
- Closing the door or otherwise engaging in private conversations with a student
- Showing a student sexually suggestive material
- Walking in on a student while changing in a locker room or bathroom

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- Hugging a student or engaging in any physical contact that makes a student uncomfortable
- Continuing to engage in physical contact with a student after being previously warned about such conduct
- Having a favorite student or providing a group of students' privileges that are not available to other students or not disciplining specific students when the student engages in conduct that are other students are discipline for
- Discussing personal matters such as a divorce or issues with another adult. Making disparaging comments about other school employees
- Giving rides to students in a personal vehicle without the parent or guardian's permission
- Spending time with a student outside of school such as attending a movie, going out to dinner, or other personal activity unrelated to a school sponsored activity or event
- Giving or receiving gifts to or from one student
- Consuming alcohol in the presence of any student or providing alcohol to any student when the student's parent or guardian is not present
- Other behavior which could exploit the unique position of trust and authority between a student and employee such as having a student confide in the school employee and the school employee not reporting any concerning information to another adult

Title IX Requirements

Title IX Final Rule

When there are allegations of sexual misconduct by a school employee, personnel must also recognize that Title IX will likely also be implemented and should consult with the district's Title IX coordinator to ensure those requirements are also met. The US Department of Education has provided a [questions and answers guidance for implementation of the Department's Final Title IX Rule that was effective August 14, 2020](#).

The US Department of Education has provided a new website and provides additional resources [regarding Title IX requirements](#).

Other available resources:

Below are links for further information and resources:

- [To locate your local child advocacy center](#)
- [US Department of Education Dear Colleague Letter on the Prohibition on Aiding and Abetting Sexual Abuse](#)
- [US Department of Education, Office of Safe and Healthy Students guidance on Addressing Adult Sexual Misconduct in the School Setting](#)

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- [Nebraska Department of Education webinar on the process of investigating educator misconduct on YouTube](#)

NDE Guidance

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