

## **DEFINITION**

### **AP 3430 Prohibition of Harassment / Discrimination**

Reference Educational Code Sections: Education Code Sections 212.5 ; 44100 ; 66281.5 ; Title IX Education Amendments of 1972 ; Title 5 Sections 59320 et seq. ; Title VII of the Civil Rights Act of 1964 ; 42 U.S.C.A. Section 2000

The San Jose /Evergreen Community College District is committed to providing an educational and employment environment free of unlawful harassment / discrimination. This procedure defines sexual harassment and other forms of harassment, and sets forth a procedure for the investigation and resolution of complaints of harassment / discrimination by or against any staff, faculty member, or student within the District.

### **Definitions**

- **Academic Freedom**

Institutions of higher learning exist for the common good and not to further the interest of either the individual instructor or the institution as a whole. The common good depends on the uninhibited search for truth and its open expression, and to this end both faculty and students must hold the right of full freedom of inquiry and expression.

Academic freedom is equally essential to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom is fundamental to the protection of the rights of the instructor in teaching and to the student in learning.

Academic freedom cannot be separated from academic and professional responsibility. Instructors have the right to study and investigate, to interpret their findings, and express conclusions. Instructors may present views that are controversial and may evaluate opinions held by others, while respecting the right of free expression.

Academic freedom does not include use of discriminatory, discourteous, offensive, abusive conduct or language toward students, supervisors, other employees, or the public while in performance of District employment.

- "Appeal" means a request by a complainant made in writing to the Sample Community College District governing board pursuant to title 5, section 59338, and/or to the State Chancellor's Office pursuant to title 5, section 59339, to review the administrative determination of the District regarding a complaint of discrimination.
- "Association with a person or group with these actual or perceived characteristics" includes advocacy for or identification with people who have one or more characteristics of a protected category listed under the District's Nondiscrimination policy, participation in a group associated with persons having such characteristics, or use of a facility associated with use by such persons.
- "Days" means calendar days.

- “Discrimination” means unfavorable or unfair treatment, or preferential treatment of a person or class of persons, or treatment that has an adverse impact on persons or a class of persons, on the basis of a person’s membership, or perceived membership, in a legally protected category. Discrimination includes harassment and retaliation that occurs on the basis of these legally protected categories. Discrimination can be a violation of the District Board policy on Nondiscrimination or can amount to a violation of state or federal law in the area of unlawful discrimination.
- “District” means the San Jose/Evergreen Community College District or any District program or activity.
- "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.
- “Harassment” is a form of discrimination. A person must show that (1) he/she was subjected to verbal, written or physical conduct (including, but not limited to jokes, demeaning comments, derogatory remarks, slurs, name-calling, gestures, physical contact, bullying, stalking, threatening, or display or offensive materials) of a harassing nature because of a legally protected category; (2) the conduct was subjectively and objectively unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the victim’s working or learning environment so as to create an abusive working or learning environment. There are two types of harassment “quid pro quo” and “hostile work environment”.
- “Hostile work/learning environment” is a form of harassment. A work or learning environment is hostile if it is both objectively offensive and subjectively offensive such that it interferes with a person’s ability to do his/her work or interferes with their ability to learn. The harassment must be severe or pervasive and must be based on a legally protected category. Important factors to be considered are the frequency, severity and the level of interference with work or learning performance. Hostile work environment can be created by supervisors, colleagues and in some instances other third parties.
- “Legally protected categories”, under SJECCD Policy, includes ethnic group identification, race, color, language, accent, immigration status, ancestry, national origin, age, sex or gender, religion, sexual, orientation, gender identity, marital status, medical condition, veteran status, and physical or mental disability.
- "Mental disability" includes, but is not limited to, all of the following:
  - (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:
    - (A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

- (B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.
  - (C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.
- (2) Any other health impairment not described in paragraph (1) that requires specialized supportive services.
  - (3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the District.
  - (4) Being regarded or treated by the District as having, or having had, any physical condition that makes achievement of a major life activity difficult.
  - (5) Being regarded or treated by the District as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.<sup>4</sup>

- "Physical disability" includes, but is not limited to, all of the following:
  - (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
    - (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
    - (B) Limits a major life activity. For purposes of this section:
      - (i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
      - (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

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<sup>4</sup> If the Americans with Disabilities Act of 1990 definitions would result in broader protection of the civil rights of individuals with a mental or physical disability, or would include any medical condition not included within these definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of the definitions in Government Code section 12926 and should be included in district policy. (Gov. Code, § 12926(1).)

- (iii) "Major life activities" shall be broadly construed and include physical, mental, and social activities and working.
- (2) Any other health impairment not described in paragraph (1) that requires specialized supportive services.
- (3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the District.
- (4) Being regarded or treated by the District as having, or having had, any physical condition that makes achievement of a major life activity difficult.
- (5) Being regarded or treated by the District as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).
- (6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.<sup>5</sup>
- "Quid Pro Quo" is a type of harassment. Quid Pro Quo means "this for that". In the context of sexual harassment, quid pro quo occurs when submission to sexual conduct is explicitly or implicitly made a condition of a job, a job benefit, or the absence of a job detriment. The accused harasser must be in a position to affect the accuser's employment. This form of harassment most often includes sexual propositions.
  - "Retaliation" occurs when an individual can prove (1) he/she engaged in a protected activity; (2) the employee or student was subjected to an adverse employment or educational action and (3) there was a causal connection between the two.
  - **Retaliation**  
The district will not tolerate retaliation against any individual for initiation, pursuit, defense or assistance with a lawful complaint of discrimination. The term "retaliation" includes any negative action taken against an individual by anyone because of the individual's filing of a complaint, making a charge of, or otherwise opposing, any discriminatory or harassing conduct. Any individual who engages in retaliation against any District employee or student in violation of this policy may be subject to disciplinary or corrective action, up to and including termination for employees and expulsion for students. It is unlawful for anyone to retaliate against someone who files a discrimination complaint; who refers a matter for investigation or complaint; who participates in an investigation of a complaint; who represents, or serves as an advocate for an alleged victim or alleged offender; or who otherwise furthers the principles of this non-discrimination policy.

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<sup>5</sup> Ibid.

Refer to District Policy 3410 for more information on the District's Nondiscrimination Policy and District Policy 1561 for information on the District's Policy regarding Consensual Relationships.

- “Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person’s gender, as defined in section 422.56 of the Penal Code, Discrimination on the basis of sex or gender also includes sexual harassment.
- “Sex Discrimination” means sexual harassment or discrimination on the basis of gender.
- “Sexual harassment” is discrimination in the form of unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, and includes but is not limited to:
  - (1) Making unsolicited written, verbal, physical, and/or visual contacts with sexual overtones. (Examples of possible sexual harassment that appear in a written form include, but are not limited to: suggestive or obscene letters, notes, or invitations. Examples of possible visual sexual harassment include, but are not limited to: leering, gestures, display of sexually aggressive objects or pictures, cartoons, or posters.)
  - (2) Continuing to express sexual interest after being informed that the interest is unwelcome.
  - (3) Making reprisals, threats of reprisal, or implied threats of reprisal following a rebuff of harassing behavior. The following are examples of conduct in an academic environment that might be found to be sexual harassment: implying or actually withholding grades earned or deserved; suggesting a poor performance evaluation will be prepared; or suggesting a scholarship recommendation or college application will be denied.
  - (4) Engaging in explicit or implicit coercive sexual behavior within the work environment which is used to control, influence, or affect the employee’s career, salary, and/or work environment.
  - (5) Engaging in explicit or implicit coercive sexual behavior within the educational environment that is used to control, influence, or affect the educational opportunities, grades, and/or learning environment of a student.
  - (6) Offering favors or educational or employment benefits, such as grades or promotions, favorable performance evaluations, favorable assignments, favorable duties or shifts, recommendations, reclassifications, etc., in exchange for sexual favors.
  - (7) Awarding educational or employment benefits, such as grades or duties or shifts, recommendations, reclassifications, etc., to any student or employee with whom the decision maker has a sexual relationship and denying such benefits to other students or employees.

- "Sexual orientation" means heterosexuality, homosexuality, or bisexuality.
- "Zero Tolerance" means that in all instances where there is a finding that discrimination has occurred, corrective action or discipline will be taken in accordance with state law and the District's collective bargaining agreements and District Policies.

Board Approval: 7/8/08:

Revised 12/08; Approved by District Council 3/19/09

Revised May 1, 2013

PLEASE SEE SEPARATE LINK FOR AP3430 (Complaint form to complete)