

2021 TITLE IX TRAININGS

Session #1

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Montana School Boards Association has designed the materials enclosed to provide helpful information regarding areas of the law and best practices concerning the administration and governance of Montana K-12 public schools. MTSBA does not intend these materials to be a rendering of legal advice. The reader of these materials should request legal advice on specific legal inquiries.

OVERVIEW OF THIS THREE-PART TRAINING

November 9: 1:00-3:00 pm

The focus of this session will be on what constitutes sexual harassment and what school employees need to know about the warning signs, how to respond to reports of sexual harassment, reporting requirements, and protecting the privacy rights of students and staff. Review of new MTSBA checklist documents.

November 16: 1:00-3:00 pm

This session will be devoted to an overview of sexual harassment policies and procedures relating to staff and student sexual harassment, the supportive measure that must be made available, the rights of both the complainant and the individual about whom the complaint is made.

November 23: 1:00-3:00 pm

The focus of this session will be on the required steps involved in the grievance procedure, the role of the Title IX Coordinator, the investigative process, the decision-making process, and the appeal process.

THREAD 1: OVERVIEW OF TITLE IX REGULATIONS

TITLE IX REGULATIONS U.S. DEPARTMENT OF EDUCATION STATED INTENTIONS

Intent:

- Provide clear, predictable, and effective rules to ensure schools have the tools they need to address incidents of sexual harassment in their programs and activities
- Schools understand the importance of responding to complaints appropriately
- Provide a fair, transparent process for investigating and adjudicating harassment matters

TRAINING REQUIREMENTS

- Schools must ensure that Title IX personnel receive training as follows:
 - On Title IX's definition of "sexual harassment"
 - On the scope of the school's education program or activity
 - On how to conduct an investigation and grievance process
 - On how to serve impartially, including by avoiding prejudgment of the facts at issue
 - On how to avoid conflicts of interest and bias
 - Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
 - Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

AVAILABILITY OF TRAINING MATERIALS

- All materials used to train Title IX personnel:
 - Must not rely on sex stereotypes,
 - Must promote impartial investigations and adjudications of formal complaints of sexual harassment,
 - Must be maintained by the school for at least 7 years,
 - Must be publicly available on the school's website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.
- Under the Title IX Rule, students, employees, the Department, and the public will be able to examine a school's training materials, providing a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings. This requirement will improve the overall transparency and integrity of a school's Title IX policies and procedures.
- Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel.
- Section 106.45(b)(10)(i)(D) does not permit a school to *choose* whether to post the training materials or offer a public inspection option. Rather, if a school has a website, the school must post the training materials on its website.
 - A school must post on its website: "*All materials used to train* Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process." Posting anything less than "all materials" on the website is insufficient. Accordingly, merely listing topics covered by the school's training of Title IX personnel, or merely summarizing such training materials is not the same as posting "all materials."

EXPANDED ROLE OF TITLE IX COORDINATORS

- Employee designated to coordinate the district's efforts to comply with Title IX must be referred to as the "Title IX Coordinator"
- Schools must notify applicants for enrollment and employment, parents/legal guardians, and unions of Title IX Coordinator's name/title, office address, email address and phone number
- Must be prominently displayed on the District's website
- Any person may report sex discrimination/harassment (whether or not the person reporting is the person alleged to be the complainant of conduct that could constitute sex discrimination/harassment) by any means

OFFICE OF CIVIL RIGHTS ENFORCEMENT OF TITLE IX

- OCR enforces Title IX to ensure that institutions receiving federal funds comply with the law. They evaluate, investigate and resolve complaints alleging sex discrimination.
- OCR also provides technical assistance and guidance to schools.

THREAD 2: TITLE IX DEFINITIONS OF SEXUAL HARASSMENT

SEX DISCRIMINATION AND SEXUAL HARASSMENT

Title IX (20 U.S.C. § § 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”
- Signed into law in 1972 by President Nixon
- Applies to virtually all aspects of federally funded education programs or activities
- MTSBA Model Policies 3210 and 5010

U.S. SUPREME COURT CASES INTEGRATED INTO THE TITLE IX REGULATIONS

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)

- A school district can be liable for money damages under Title IX for employee-on-student sexual harassment if:
 - An official of the district **with authority** to institute correct measures on the district's behalf:
 - Has **actual notice** of the teacher's misconduct and
 - Is **deliberate indifferent** to the teacher's misconduct.

U.S. SUPREME COURT CASES INTEGRATED INTO THE TITLE IX REGULATIONS

Davis. Monroe County Board of Education, 526 U.S. 629 (1999)

- A school district can be liable under Title IX for student-on-student sexual harassment if:
 - The *Gebser* standards of notice and deliberate indifference are met;
 - The district has **substantial control** over the “context” in which the harassment occurs and over the harasser;
 - The conduct is “so **severe, pervasive, and objectively offensive**” that it effectively denies equal access to an institution’s resources or opportunities.

NEW U.S. SUPREME COURT CASE OF NOTE

Bostock v. Clayton County, Georgia, 590 U.S. ____ (2020)

- United States Supreme Court, 6-3 Majority Opinion
 - "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision; exactly what Title VII forbids."
 - "[H]omosexuality and transgender status are inextricably bound up with sex.... because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

MONTANA SUPREME COURT: SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION

- “When sexual harassment is directed at an employee solely because of gender, the employee is faced with a working environment fundamentally different from that faced by an employee of the opposite gender. . . . That difference constitutes sexual discrimination in employment. We hold that sexual harassment is sexual discrimination under the Montana Human Rights Act.” *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200 (1990).

TITLE IX PROHIBITIONS

- (1) Treating one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Providing different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Denying any person any such aid, benefit, or service;
- (4) Subjecting any person to separate or different rules of behavior, sanctions, or other treatment;
- (5) Applying any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;
- (6) Aiding or perpetuating discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
- (7) Otherwise limiting any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. 106.31(b)

DEFINITION OF SEXUAL HARASSMENT

Includes any of the 3 types of misconduct on **the basis of sex**:

- *Quid Pro Quo* harassment by a school employee
- Hostile Environment
- Any instance of sexual assault, dating violence, domestic violence or stalking

MTSBA Model Policies 3225 and 5012

QUID PRO QUO SEXUAL HARASSMENT

“Something for something else”

Definition: An employee making an aid, service, or benefit of the District conditional on an individual’s participation in unwelcome sexual conduct:

- Standard only applies to employees
- Not evaluated for severity, pervasiveness, offensiveness or denial of equal educational access
- The unwelcomeness and severity of conduct is presumed
- One instance is enough to be quid pro quo sexual harassment

HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- Definition:
 - Unwelcome conduct
 - Determined by a reasonable person
 - To be so severe, pervasive **and** objectively offensive that it **effectively denies a person's equal access** to the recipient's education program or activity

SEXUAL ASSAULT, DATING VIOLENCE, DOMESTIC VIOLENCE OR STALKING

- Violence Against Women Act
 - Sexual Assault (20 U.S.C. 1092(f)(6)(A)(v))
 - Domestic Violence (34 U.S.C. 12291(a)(8))
 - Dating Violence (34 U.S.C. 12291(a) (10))
 - Stalking (34 U.S.C. 12291(a)(30))
 - Violations of State law
- Even if law enforcement are investigating a crime, the District has a duty to address this from a sexual harassment perspective and take appropriate action

IMPORTANT POINTS

- Sexual Harassment is a Form of Sex Discrimination
 - Includes words, gestures, actions or overall statements that are sexual in nature
 - Conduct must be unwelcome
 - Claimant doesn't have to be person to whom the conduct is directed; it can be anyone affected by the conduct

BROAD APPLICATION

- Sexual Harassment is a Form of Sex Discrimination (“on the basis of sex”)
 - Employee – Employee
 - Employee – Student
 - Student – Employee
 - Student – Student
 - Different or Same gender

EXAMPLES OF IMPROPER SEXUAL-BASED CONDUCT

- Performing sexual gestures or touching oneself sexually in front of others
- Telling sexual or dirty jokes
- Making sexual propositions or pressuring co-workers for sexual favors
- Touching of a sexual nature
- Writing graffiti of a sexual nature
- Displaying or distributing sexually explicit drawings, pictures, or written materials
- Spreading sexual rumors
- Circulating or showing e-mails or Web sites of a sexual nature
- Improper “grooming” of students

THREAD 3: NOTICE AND RESPONSE REQUIREMENTS

NOTICE AND ACTUAL KNOWLEDGE

A school district:

- with **actual knowledge** of sexual harassment
- in an **education program or activity** of the District
- against a person in the United States
- must respond **promptly** in a manner that is **not deliberately indifferent**

WHAT IS “ACTUAL KNOWLEDGE”?

- Notice of sexual harassment or allegations of sexual harassment to:
 - The District’s Title IX Coordinator
 - Any employee of a K-12 school district

Takeaway #1: If ANY EMPLOYEE has notice or knowledge of sexual harassment or allegations of sexual harassment, the District is deemed, by law, to have knowledge of sexual harassment!!!

Takeaway #2: ALL EMPLOYEES should be trained on what constitutes sexual harassment and the appropriate response.

SEXUAL HARASSMENT OCCURRING IN A SCHOOL'S EDUCATION PROGRAMS OR ACTIVITIES

- Schools must respond when sexual harassment occurs against any person in any education program or activities
- Definition of “program or activity” includes:
 - Any locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred (*Davis* standard)
 - On and off campus
- *NOTE: Gray areas include: (1) on-line sexual harassment, and (2) off-campus sexual harassment that is occurring outside the jurisdiction of the District.*

THE DELIBERATE INDIFFERENCE STANDARD

- Definition:
 - Failure to respond reasonably in light of the circumstances (*Gebser* standard)

TWO-PART RESPONSE

1st Response: The response after actual knowledge (“Report”)

2nd Response: Response after Formal Complaint (“Formal Complaint”)

Terminology:

- Complainant: person alleged to be the complainant of sexual harassment
- Respondent: person alleged to be the respondent of sexual harassment

Note: Parent may act of behalf of a minor student who is a complainant or respondent. MTSBA Model Policies 3225F and 5012F are available for intake.

MANDATORY RESPONSE OBLIGATIONS

- Mandatory response obligations:
 - Must offer supportive measures to the complainant. May offer supporting measures to the Respondent
 - Title IX Coordinator must promptly contact the complainant
 - Must follow grievance process before the imposition of discipline or other non-supporting measures against a respondent
 - Must not restrict other rights (e.g., 1st Amendment, 5th Amendment, 14th Amendment, etc.)
 - Requires investigation with any formal complaint
 - Wishes of complainant re: whether the school investigates shall be respected unless Title IX Coordinator determines investigation is warranted (not clearly unreasonable) in light of the known circumstances
- Allegations not meeting definition of sexual harassment must be dismissed
- MTSBA Model Policies 3225P and 5012P

BASIC ELEMENTS OF FORMAL COMPLAINT PROCESS

- Parties are to be treated equitably
- Objective evaluation of all evidence
- No conflict of interest or bias for investigator or decision-maker(s)
- Presumption that the Respondent is not responsible (“presumption of non-responsibility”)
- Reasonable prompt time frames
- Description or list of possible discipline/other remedies
- Standard of evidence must be established and be consistent (preponderance of evidence or clear and convincing evidence)
- Appeal procedures and bases for the same
- Range of supportive measures available
- No breach of privilege without waiver

MANDATORY RESPONSE OBLIGATIONS, CONT.

- At time of filing formal complaint, complainant must be participating in or attempting to participate in the district's education program/activity
- Complainant must sign or otherwise indicate the complainant is the person filing the formal complaint
- If Title IX Coordinator signs a formal complaint, must remain free from conflicts and bias
- Supporting measures include: individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party designed to ensure equal educational access, protect safety or deter sexual harassment
- Schools supportive measures and remedies are evaluated, but a school's disciplinary decisions are not second-guessed

THREAD 4: TITLE IX COORDINATORS

TITLE IX COORDINATOR(S) ROLES AND RESPONSIBILITIES

Title IX Coordinator(s) must:

- Remain free from conflicts of interest and bias
- Remain impartial

Title IX Coordinator(s) may:

- File and sign a Formal Complaint

Title IX Coordinator may be the investigator but may not be the decision-maker for districts with limited staff

TITLE IX COORDINATOR(S) ROLES AND RESPONSIBILITIES

Schools must:

- Designate one or more Title IX Coordinators to coordinate and ensure compliance with the legal requirements under Title IX
- Inform those applying for admission and employment, students, parents or legal guardians of students, employees, and all unions of the identity and contact information for the Title IX Coordinator(s):
 - Name(s) of Title IX Coordinator(s)
 - Physical address
 - Email address
 - Phone number

TITLE IX COORDINATOR(S) ROLES AND RESPONSIBILITIES

- Intake Responsibilities:
 - Receiving reports alleging sex discrimination or sexual harassment
 - Receiving formal complaints submitted and signed by the Complainant
- Response Duties:
 - Promptly contacting the Complainant re: supportive measures
 - Availability of Supportive Measures (with or without the filing of a formal Complaint)
 - Consideration of Complainants wishes re: what supportive measures they would like implemented
 - Explain Formal Complaint Process
- Coordination Duties:
 - Implementation of Supportive Measures
 - Facilitate the scheduling of voluntary informal resolution process

TITLE IX COORDINATOR(S) ROLES AND RESPONSIBILITIES

- Confidentiality and Recordkeeping Duties:
 - Must maintain confidentiality with respect to supportive measures implemented
 - Required to create and maintain records relating of any reports or formal complaints for a period of seven (7) years
 - *NOTE: If the District doesn't provide a Complainant with supportive measures it must keep documentation that it was not clearly unreasonable to do so in light of the circumstances presented.*
- Facilitation of Inspection/Evidence Review:
 - Both parties must be provided an opportunity to inspect and review evidence obtained during the investigation
 - Both parties must be provided at least 10 days to submit a written response to the evidence reviewed
 - *NOTE: Investigator can also facilitate this process.*
- Distribution of Written Investigation Report
 - Both parties must be provided with a copy of the written investigative report at least 10 days before a determination of responsibility is made and be provided with an opportunity to submit written questions
 - *NOTE: Investigator can facilitate the distribution of the written investigative report, but only the Decision-Maker must be the one involved in facilitating the written questions of the parties.*

TITLE IX COORDINATOR(S) ROLES AND RESPONSIBILITIES

- Coordination of Determination, Remedies and Appeals:
 - Written determination of decision-maker is to be provided to the parties simultaneously
 - Implementation of remedies
 - Both parties must be afforded an opportunity to appeal

THREAD 5

REVIEW NEW MTSBA TITLE IX CHECKLIST

- Title IX Compliance: Sexual Harassment Intake, Investigation, and Records Checklist:
 - Section 1: Receiving a Complaint
 - Section 2: Investigating a Complaint
 - Section 3: Completing an Investigation Report
 - Section 4: Record Keeping Requirements
- Document Shared with Training Registrants

THREAD 5: CASE STUDY

Mary Manager is a student enrolled in school and serves as the volleyball team manager. One night during an away tournament she receives a direct message on social media from Carl Coach an assistant volleyball coach for the team Mary serves. Carl is making sexually-suggestive inquiries and comments to Mary. Mary is uncomfortable with the nature of the messages and doesn't know what to do. Mary informs her Friend Fay via a text message about the situation. Fay is back at the school during the tournament. Fay tells a guidance counselor about what is happening to Mary.

How should a school district handle this situation?

DISCLAIMER

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**THANK
YOU FOR
ATTENDING!**

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