

2021 TITLE IX TRAINING

Session #2

Presented by Debra Silk, Tony Koenig, Kris Goss, Andrew Vigeland



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 discussion on the Case Study, an overview of sexual harassment policies and procedures relating to staff and student sexual harassment, the supportive measure that must be made available, and 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: DISCUSSION OF CASE STUDY

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.

CASE STUDY DISCUSSION

How should a school district handle this situation?

- The District now has actual knowledge of the allegations of sexual harassment.
- The guidance counselor has an obligation to inform the Title IX Coordinator of the information received.
- The Title IX Coordinator must now:
 - Promptly contact the Complainant and ask the Complainant if she wishes to file a 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.
 - Offer supportive measures to the complainant.
 - Requires investigation with any formal complaint.

CASE STUDY DISCUSSION, CONT.

- The Title IX Coordinator must now:
 - Inform the Respondent of the allegations of sexual harassment
 - Inform the Respondent that he is presumed not responsible
 - May offer supportive measures to the Respondent
 - Inform the parties of the steps in the grievance process and anticipated timelines
 - Inform parties of the prohibition on retaliation
 - Inform the parties that they may have an advisor of their choosing
 - Inform the parties of their right to inspect/review the evidence
 - Inform the parties of policy or handbook provisions prohibiting false statements
 - Inform the parties of any additional allegations

CASE STUDY DISCUSSION, CONT.

- The District must now:
 - Investigate the allegations in a fair and unbiased manner providing both the Complainant and the Respondent with an opportunity to provide information/evidence to support their positions
 - Prepare an investigation report that must be provided to both parties
 - Give parties an opportunity for additional input
 - Make a decision regarding the merits of the allegations
 - Inform the parties of the appeal process
 - Follow grievance process before the imposition of discipline or other non-supporting measures against the Respondent

THREAD 2: MTSBA MODEL POLICES, PROCEDURES, AND FORMS

MTSBA MODEL POLICIES 3210 AND 5010

Overview:

- Policies outline equal educational and employment opportunities
- Policies specify the identity and contact information of the Section 504 and Title IX Coordinators
- Policies cross reference the other policies that play a role in the preservation of a safe learning and working environment

MTSBA MODEL POLICIES 3225 AND 5012

Overview:

- Policies specify the definition of sexual harassment for employees and students in accordance with Title IX regulations
- Policies identify the Title IX Coordinator
- Policies state that retaliation is prohibited
- Policies outline the confidentiality expectations, notice requirements, training expectations, and need for staff to remain impartial

MTSBA MODEL PROCEDURES 3225P AND 5012P

- Policies outlining grievance process in compliance with Title IX regulations
- Policies specify the definitions required to comply with regulations
- Policies note obligations of specific district staff and timelines by which to complete process
- Policies include steps to respond to a complaint, investigate a complaint, honor rights of respondent and complainant, provide support services and informal resolution if applicable
- Policies also detail the methods to make a determination about a complaint, offer opportunity for evidence review, ways to comment on an investigative report, and documenting appeal rights

MTSBA MODEL POLICIES (FORMS) 3225F AND 5012F

- Reporting and intake forms for Title IX Coordinator to use when receiving or documenting a complaint.
- Form is not required but can be used as a guide to initiate complaint and related aspects of grievance process.

MTSBA MODEL POLICIES 3226 AND 5015

Student and Staff bullying/intimidation/harassment policies include a cross reference Title IX Coordinator responsibilities and staff obligation to report sexual harassment.

MTSBA MODEL POLICY 3310

Student discipline policy includes sexual harassment in the student code of conduct and documentation of option for non-disciplinary removal from school during an investigation to provide student with offsite instruction

THREAD 3: SUPPORTIVE MEASURES AND EQUITABLE TREATMENT OF THE PARTIES

SUPPORTIVE MEASURES: INTRODUCTION

- Title IX Coordinator “must serve as the point of contact for the affected student to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements” does not fall on the student receiving the supportive measures.
- Title IX Coordinator “is responsible for coordinating effective implementation of supportive measures” to the parties.

SUPPORTIVE MEASURES: DEFINED

- Elements: Non-disciplinary, non-punitive individualized services offered as appropriate and reasonably available, without fee or charge to both parties
- Availability: Prior to or after filing formal complaint or even if no formal complaint is filed
- Purpose:
 - Customized to restore or preserve equal access to school's program or activity
 - Protect safety of all parties or school's educational environment or to prevent and deter sexual harassment

SUPPORTIVE MEASURES: SPECIFICALLY IDENTIFIED

- Counseling
- Extensions of deadlines or other class adjustments
- Mutual restrictions on contact between the parties
- Changes in work or learning locations
- Leaves of absence
- Modifications of work or class schedules
- Increased security and monitoring of certain areas of school

SUPPORTIVE MEASURES: BEST PRACTICES

- Must take into account the complainant's wishes
- The school should follow up with both parties to determine if supportive measures are working
- Supportive measures may be offered regardless of whether a determination has been made about the allegations or even investigated if the measures help prevent harassment

SUPPORTIVE MEASURES: COMPLIANCE

- Requirement to keep any supportive measures confidential
- Requirement to create and maintain records, for period of seven years, regarding any actions taken in response to report or formal complaint of sexual harassment including supportive measures
- If district does not provide complainant with supportive measures, it must document the reasons why this was not clearly unreasonable in light of known circumstances

THREAD 4: RIGHTS OF COMPLAINANT AND RESPONDENT

OVERVIEW OF MANDATORY RESPONSE OBLIGATIONS

- Mandatory response obligations:
 - Title IX Coordinator must promptly contact the complainant
 - Must offer supportive measures to the complainant. May offer supporting measures to the respondent
 - 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

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

BOTH PARTIES MUST BE TREATED FAIRLY

- Treat complainants and respondents equitably
- No sanctions until process complete
- No conflict of interest or bias through effectively trained staff
- Presumption that respondent is not responsible
- Reasonably prompt timeframes
- Range of possible disciplinary sanctions and remedies
- Remedies are designed to restore or preserve equal access to district's education program or activity

FAIRNESS TO BOTH PARTIES

- Evidentiary Standard: preponderance of evidence in MTSBA Model Policy
 - Same standard applicable to complaints against students and employees
 - Same standard applicable to all complaints of sexual harassment
- Objective evaluation of all relevant evidence and credibility determinations
- Describe supportive measures
- Exclude privileged information

NOTICE TO PARTIES

- Steps in grievance process
- Summary of the allegations
- Sufficient details known at the time
- Identity of parties; date and location of alleged incident; alleged conduct
- Sufficient time to prepare response
- Prohibition on retaliation

NOTICE TO PARTIES

- Statement that respondent is presumed not responsible and that determination will be made at the conclusion of grievance process
- May have advisor of choice
- May inspect/review evidence
- Inform of policy or handbook provision prohibiting false statements
- Notice of any additional allegations that may arise

DISCLAIMER

Montana School Boards Association has designed these training materials to provide the required training for Title IX personnel, 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.

**THANK
YOU FOR
ATTENDING!**

Staff Contact Information:

Debra Silk, Associate Executive Director, General Counsel

dsilk@mtsba.org | (406) 439-3520

Kris Goss, Director of Policy Services, Senior Counsel

kgoss@mtsba.org | (406) 459-6518

Tony Koenig, Director of Legal Services, Senior Counsel

tkoenig@mtsba.org | (406) 439-2473

Andrew Vigeland, Staff Attorney

avigeland@mtsba.org | (406) 274-0207