

2024 MTSBA ANNUAL TITLE IX TRAINING

Session #2

Presented by MTSBA Legal Team



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 12: 1:00-3:00 p.m. – **Session 1: Understanding Sexual Harassment**

- Explore relevant national cases and their impact on the 2024 regulations in Montana.
- Dive into the nature of sexual harassment and the application of new regulations in Montana.
- Learn to identify warning signs and respond appropriately.
- Understand mandatory reporting requirements and privacy safeguards.

November 19: 1:00-3:00 p.m. – **Session 2: Policies and Procedures**

- Focus on anti-harassment policies for staff and students.
- Discuss supportive measures and the rights of both complainants and respondents.

November 26: 1:00-3:00 p.m. – **Session 3: Investigative Method**

- Navigate the stages of the grievance process.
- Understand the responsibilities of a Title IX Coordinator.
- Learn the steps involved in investigations, decision-making, and appeals.

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 confidentiality expectations, notice requirements, training expectations, and the need for staff to remain impartial

MTSBA MODEL PROCEDURES 3225P AND 5012P

These Policies:

- Outline the grievance process in compliance with Title IX regulations
- Specify the definitions required to comply with regulations
- Note obligations of specific district staff and timelines by which to complete the process
- Include steps to respond to a complaint, investigate a complaint, honor rights of respondent and complainant, provide support services, and informal resolution if applicable
- 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 PROCEDURES 3225P

- The district is required to respond promptly to reports of sexual harassment and not be "deliberately indifferent."
- If the incident does not meet the definition of sexual harassment, the Title IX Coordinator will direct the individual to the appropriate process.
- The district is required to offer supportive measures to both the complainant and respondent, which may include counseling, extensions of deadlines, or changes in work or class schedules.
- The Title IX Coordinator is responsible for coordinating the implementation of supportive measures and must promptly contact the complainant to discuss options.
- The district must document reasons if they do not provide supportive measures. The district has established timelines for the grievance process but may extend them for good cause.

MTSBA MODEL PROCEDURES 3225P

- The district must provide written notice to the complainant and respondent, which includes information about the allegations, identities of the parties, and the date and location of the incident.
- The district must explain their investigation procedures and inform the parties of their right to an advisor.
 - The respondent is presumed not responsible until the conclusion of the investigation.
- The district may consolidate formal complaints if they arise from the same facts or circumstances.

MTSBA MODEL PROCEDURES 3225P

- The district is responsible for gathering evidence and deciding the case, not the complainant or respondent.
- Both parties must be given an equal opportunity to present evidence and witnesses.
- The district cannot restrict either party from discussing the allegations or gathering evidence.
 - Both parties are allowed an advisor, who may be an attorney, but the district can restrict the advisor's participation.

MTSBA MODEL PROCEDURES 3225P

- The district must provide written notice of any interviews or meetings with sufficient time for the parties to prepare.
- Both parties must have equal access to evidence collected during the investigation.
 - The district must objectively evaluate evidence without relying on sex stereotypes or bias.
- The district must dismiss the complaint if the conduct does not meet the definition of sexual harassment, did not occur in the district's education program, or did not occur in the United States.

MTSBA MODEL PROCEDURES 3225P

- The Title IX Coordinator may dismiss the complaint if the complainant withdraws, or the respondent is no longer employed or enrolled.
- If the complaint is dismissed, the Title IX Coordinator must provide written notice to both parties.
- Both parties must be given the opportunity to inspect and review evidence collected during the investigation.

MTSBA MODEL PROCEDURES 3225P

- The investigator must prepare a report summarizing the evidence and send it to the Title IX Coordinator.
- The Title IX Coordinator must provide the report to both parties, who have 10 days to respond.
- The decision-maker cannot be the investigator. The decision-maker cannot make a determination until 10 days after the parties receive the report.

MTSBA MODEL PROCEDURES 3225P

- The decision-maker must allow both parties to submit written questions to any party or witness.
- Questions about the complainant's sexual behavior are not relevant unless they are used to prove someone else committed the conduct or to prove consent.
- Questions must be submitted within three days of receiving the investigator's report.

MTSBA MODEL PROCEDURES 3225P

- The decision-maker must issue a written determination based on a preponderance of the evidence.
- The written determination must include the allegations, procedural steps, findings of fact, conclusions, and resolution.
- The written determination must be provided to both parties within 60 days of the formal complaint.

MTSBA MODEL PROCEDURES 3225P

- The determination becomes final either after an appeal is resolved or the window to appeal closes.
- If the respondent is found responsible, the district will provide remedies to the complainant.
- Remedies may include supportive measures or disciplinary sanctions. - Either party can appeal the decision on the grounds of procedural irregularity, new evidence, or bias.
- The appeal must be made within seven days and will be decided by someone without a conflict of interest.

MTSBA MODEL PROCEDURES 3225P

- The district may facilitate an informal resolution process, such as mediation, before a determination is made. The district must provide written notice to the parties, outlining the requirements and consequences of the informal resolution process.

- The parties must consent to the informal resolution process in writing.
 - The informal resolution process should be completed within 30 days.
 - If the parties don't reach a resolution, they will resume the formal complaint process.
 - The district must keep records of investigations, determinations, and appeals for seven years.

MTSBA MODEL PROCEDURES 3225P

- The district must make training materials for Title IX Coordinators, investigators, decision-makers, and facilitators of the informal resolution processes publicly available on its website.
- The district must document its response to reports or formal complaints of sexual harassment including any supportive measures taken. - The district must justify its response as not being "deliberately indifferent" and demonstrate that it has taken measures to restore or preserve equal access to its education program or activity.
- The policy references several other policies and legal references related to equal education, nondiscrimination, and sex equity.

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 the grievance process.

MTSBA MODEL POLICIES 3226 AND 5015

- Student and Staff bullying/intimidation/harassment policies include a cross reference to 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.

HYPOTHETICAL 1

- Jamie, a female 15yr old student at Elkview High School, reports to the school's Title IX Coordinator that Mr. Smith, a teacher, made inappropriate comments and engaged in unwanted physical contact (not amounting to sexual intercourse) during after-school tutoring sessions. After making the report, Jamie changes her mind and requests that the coordinator erase the report because Jamie is in love with Mr. Smith, and she admits to leading him on. The Title IX Coordinator confirms the allegations fall under Title IX jurisdiction and initiates an investigation. Both Jamie and Mr. Smith receive written notice of the investigation, and the school provides supportive measures to Jamie, including counseling services and a schedule change. Mr. Smith is placed on administrative leave with pay and requests – as a supportive measure – that the investigator direct Jamie not to discuss the matter with her classmates, the media, or anyone else from the small community. The investigator interviews both parties and witnesses and collects relevant evidence. Both Jamie and Mr. Smith review and respond to the draft report and the investigator reviews these responses before finalizing the report.
- The final report is submitted to the Title IX Decision-Maker, who reviews the evidence and makes a determination regarding responsibility. Both parties receive a written determination, including findings. Mr. Smith, as his main line of defense, asserts that Jamie was leading him on through provocative statements and conduct and therefore this was welcome conduct.

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How should the District respond to Mr. Smith's request for supportive measures?

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How should the investigator address Mr. Smith's affirmative defense that the conduct was welcome and Jamie led him on?

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SUPPORTIVE MEASURES: INTRODUCTION

- Title IX Coordinator “must serve as the point of contact for the affected student to ensure that supportive measures are effectively implemented so 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 the 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 BUT NOT EXCLUSIVE

- 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 the 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

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 the 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
- School's 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

HYPOTHETICAL 2

- Ms. Johnson, a coach at Bearview Middle School, found herself in an uncomfortable situation when Sam, a 14yr old male student, began making sexual comments to her and sending her suggestive messages via social media. Concerned for her safety and the integrity of her professional environment, Ms. Johnson reported the incidents to the school's Title IX Coordinator. The Coordinator assumed that Sam was responsible and told Ms. Johnson to reprimand him sternly and tell him to knock it off.
- Sam continued to attend school activities without any restrictions, exacerbating Ms. Johnson's distress. Ms. Johnson reports again to the District superintendent and when the investigation finally began, it was conducted haphazardly, with the investigator neglecting to interview key witnesses and failing to collect crucial evidence, such as the social media messages.
- The draft report was poorly compiled, and both Ms. Johnson and Sam were not given adequate opportunities to review and respond to the evidence. The final report, submitted to the Title IX Coordinator, was riddled with inaccuracies and lacked a clear determination of responsibility.

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What parts of Title IX were violated at Bearview?

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What supportive measures should be implemented for Ms. Johnson and/or Sam?

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**THANK
YOU FOR
ATTENDING!**

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