

2021 TITLE IX TRAINING

Session #3

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: THE ROLE OF THE TITLE IX COORDINATOR

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 contact 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 2: THE INVESTIGATIVE PROCESS

BEING AN EFFECTIVE INVESTIGATOR

- Be reasoned and calm
- Be impartial when considering evidence and weighing the credibility of parties and witnesses
- Do not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Be prepared to identify any actual or perceived conflict of interest and take necessary action to address

INVESTIGATION REMINDERS

- Burden of proof and burden of gathering evidence is on school district
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide same opportunity to have others present including advisor of choice
- Written notice of any hearings/interviews/meetings
- Purpose is to gather facts and evidence for decision-maker

INITIAL STEPS

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
- Identify aspects of event(s) or conduct that will be disputed or agreed upon

TYPES OF EVIDENCE

- Electronic communications
- Security information
- Pictures, videos, audio
- Police reports
- Personnel files
- Prior complaints against respondent

IDENTIFYING WITNESSES TO INTERVIEW

- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Refer to the policy or definition of sexual harassment when in need of guidance
- Consider what information witnesses are likely to have related to each element
- Consider what information witnesses are likely to have that may assist the decision-maker in determining credibility

INTERVIEW TOOLS

- Allegations
- Investigation log
- Investigation notes cover sheet
- Prepared questions
- Evidence you may need to reference or show witness
- Policy or Handbook

SETTING UP AND BEGINNING INTERVIEWS

- Develop a notetaking technique that allows for understanding days later
- Try to record exact quotes when possible
- Contact witnesses and begin by identifying yourself, your role, and a general outline of what you're investigating
- Don't give up on the interview until you've tried to schedule at least 3-4 times
- Be hospitable when interview begins
- Give overview of why they are being interviewed
- Invite questions
- Elicit a monologue about the incident
 - What happened earlier that day before the incident?
 - What happened with regard to the incident?
 - What happened next?

CONDUCTING INTERVIEWS

- On important moments, ask the witness to describe details
 - What could they see? Feel? Smell? Taste? Hear?
 - Where were they? How positioned? Other persons present?
 - What did they say to the other person? Other person to them?
 - Describe other person's tone, demeanor, body language
- During interview – don't be afraid to pause – no matter if uncomfortable – to understand what was said and review notes or ask further questions
- Re-review the elements of each charge
- Make sure to elicit all of the information this witness might have about each element
- Make sure you have a clear understanding of what witness said and how the witness obtained information shared

CONCLUDING INTERVIEWS

- Final questions
- Secure copies of all evidence potentially available from the witness
- Inform the witness of next steps and how to reach you
- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

CONCLUDING INVESTIGATIVE PHASE

- Provide All Evidence to Parties
 - Allow 10 days to review
 - Allow parties to submit a written response before completion of Investigative Report
- Prepare Investigative Report
 - Provide to parties 10 days prior to determination of responsibility
 - Allow parties to submit written response

THREAD 3: PREPARING INVESTIGATIVE REPORTS

DRAFTING AN INVESTIGATIVE REPORT

- Rely on the facts and evidence
- Remember the document is intended to be a summary of evidence and a description of what was learned through an investigation
- Develop a structure that is easy to follow
- Organize the report with the understanding it will be reviewed by many people: parties, decision-maker, appeal officer, and courts

START AT THE BEGINNING

- Identify:
 - ☐ Complainant
 - ☐ Respondent
 - ☐ Investigator
 - ☐ Date of complaint

REVIEW PROCEDURAL ASPECTS OF INVESTIGATION

- Outline the charges
- Definition of prohibited conduct alleged
- Related definitions as appropriate (e.g., consent, substantial incapacitation)
- How did the complaint make its way to an investigation
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- Any procedural issues that require explanation

EXPLAIN THE FACTS AND EVIDENCE

- Include verbatim statements if necessary
- Explain your structure
 - Chronologically
 - By witness summary
 - By allegation/topic
- Include citations to the evidence or log
- Give an overview of evidence collected
- Attach as appendices any statements, policies, and evidence

EXPLAIN THE FACTS AND EVIDENCE

- Where the stories diverge:
 - “Information from [Complainant]”
 - “Information from [Respondent]”
- Insert into the report screenshots of text messages and pictures where relevant or helpful
- Undisputed Facts
 - Series of numbered sentences
- Disputed Facts
 - Series of numbered sentences
- Make sure you have facts for each element of each charge

EDITING CONSIDERATIONS

- Are there any additional procedural concerns to be explained?
- Is every element of each aspect of the complaint accounted for?
- Is every undisputed fact identified?
- Is every relevant disputed fact resolved in the analysis?
- Is there a clear connection between the **charges**, the **investigation**, the **evidence**, and the **conclusions**?
- Could an unfamiliar reader be able to understand allegations, findings, and conclusions?
- Is there any perception of bias?

REQUIREMENTS OF WRITTEN DECISIONS

- Identification of the allegations potentially constituting sexual harassment
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- District's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously

THREAD 4: THE DECISION-MAKING AND APPEAL PROCESS

GUIDING PRINCIPLES

- Keep an open mind until all evidence has been heard
- Render a sound, reasoned decision on every charge
- Determine the facts in the case based on the information presented
- Determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

ROLE OF THE DECISION-MAKER

- Conduct an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence
- Mandatorily dismiss Title IX complaint that does not rise to the level of “sexual harassment,” did not occur in the recipient’s education program or activity, or did not occur against a person in the country
- Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party
- Explain to the party proposing the questions any decision to exclude a question as not relevant
- Issue a written determination regarding responsibility by applying the “preponderance of the evidence” standard

LIVE HEARING NOT REQUIRED

- The Office of Civil Rights determined cross examination in a live hearing is “not necessarily effective in elementary and secondary schools where most students tend to be under the age of majority and where.... parents or guardians would likely exercise a party’s rights.”
- Live hearings are not required in K-12 schools, but districts have the option of holding one if determined to be necessary.

STANDARD OF EVIDENCE

- MTSBA Model Policy 3225P and 5012P use the “preponderance of the evidence” standard
- This standard means the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true
- Issue a written determination regarding responsibility by applying the “preponderance of the evidence” standard

REVIEWING EVIDENCE

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits
- It is the weight of the evidence, or its strength in proving the issue at stake
- An investigator will evaluate all the evidence based on judgment, experience, and circumstances
- Always evaluate witness credibility when considering testimony
- Give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive

EVALUATING CREDIBILITY

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony
 - Does the witness have any motive?
 - Is there any bias?
 - Is there any inconsistency, inaccuracy, memory gaps, implausibility, or unreliability?
- Credibility is determined fact by fact, not witness by witness
- The most earnest and honest witness may share information that turns out not to be true due to misperception
- Be prepared to make difficult decisions when locating the truth
- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met
- Any time you make a decision, use your standard of evidence

REASONABLE INFERENCES

- Draw reasonable inferences when reviewing direct evidence
- Inferences are sometimes called “circumstantial evidence”
- Reasonable inferences can be useful when determining course of investigation
- Use inferences only as warranted and reasonable

MAINTAINING FOCUS

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges
- Do not consider the impact of your decision on parties, district, or community; seek the truth

APPEALS

- The Appeals Officer cannot be the investigator, Title IX Coordinator, or decision-maker that worked on the case
- The Appeals Officer must be trained in the same manner as the decision-maker
- The District must:
 - Offer the appeal to both parties
 - Let both parties know when an appeal has been filed
 - Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties

BASES FOR APPEALS

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator/investigator/decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- A District may offer an appeal equally to both parties on additional bases

DISCLAIMER

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**THANK
YOU FOR
ATTENDING!**

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