Understanding Title IX:
Navigating Rights and Responsibilities

Session #2

PRESENTED BY MTSBA LEGAL STAFF



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Training Schedule and Topics

Session One - Tuesday, November 3 | 1:00-3:00 pm
Title IX Foundations: Building a Legally Compliant Program

Session Two - Tuesday, November 10 | 1:00-3:00 pm
Managing the Title IX Process

Session Three - Tuesday, November 17 | 1:00-3:00 pm
Decision-Making, Remedies, and Preventing Liability

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THREAD ONE – MTSBA MODEL POLICIES

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Hypothetical

- Red Valley School District (an imaginary school district in Montana) receives a complaint from the parents of Emily, a 10th-grade student, alleging that Tyler, another student, has repeatedly made sexually explicit comments about her and circulated a digitally altered, sexually suggestive photograph of her. Although the photograph was initially distributed through Snapchat outside school hours, Tyler allegedly displayed it to other students during school and on a bus traveling to a school-sponsored basketball game. Emily has missed three days of school, stopped attending basketball practice, and expressed anxiety about returning. Her parents demand an immediate Title IX investigation. The District's Title IX Coordinator is the high school principal, who has a longstanding personal friendship with Emily's parents.

- Emily's parents also demand immediate supportive measures, including Tyler's suspension from school and extracurricular activities until the investigation concludes, removal of three of Tyler's friends from Emily's classes, administrative leave for the basketball coach who allegedly dismissed Emily's earlier concerns, a guaranteed starting position for Emily on the varsity basketball team, and an order prohibiting Tyler and his friends from attending any school event where Emily is present. They also demand a public apology from Tyler and copies of all investigative materials and witness statements. The parents insist that failure to implement these measures within 24 hours constitutes deliberate indifference and retaliation under Title IX. Tyler denies creating the photograph but acknowledges forwarding it to friends. His parents demand supportive measures of their own, reporting that Emily's older brother has threatened Tyler.

- The Superintendent proposes assigning the investigation to the school counselor, who has already expressed the opinion that Tyler should be expelled, and immediately suspending Tyler for ten days to demonstrate that the District takes harassment seriously. Meanwhile, Emily's parents submit a formal complaint, the school board chair requests access to the investigative materials, and law enforcement asks the District to suspend its investigation pending a criminal inquiry. Discussion: What obligations does the District have upon receiving these allegations? Which requested supportive measures are appropriate, and which would constitute unreasonable burdens or premature disciplinary sanctions? How should the District address jurisdiction, impartiality, confidentiality, notice, emergency removal, equitable treatment of the parties, and the concurrent criminal investigation?

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MTSBA MODEL POLICIES 3225 AND 5012

MTSBA Model Policies 3225 and 50012 set forth aspects of Title IX and its regulations including the following:

- Nondiscrimination statement: "The District does not discriminate on the basis of sex in any education program or activity that it operates."

- Identity of and contact information for the District's Title IX Coordinator.

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MTSBA MODEL POLICIES 3225 AND 5012 (Continued)
"Sexual Harassment" Defined

For purposes of this policy and the grievance process, "sexual harassment" means conduct on the basis of sex that satisfies one or more of the following:

1. A District employee conditioning the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct;

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the District's education program or activity; or

3. "Sexual assault" as defined in 20 USC 1092(f)(6)(A)(v), "dating violence" as defined in 34 USC 12291(a)(10), "domestic violence" as defined in 34 USC 12291(a)(8) or "stalking" as defined in 34 USC 12291(a)(30).

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MTSBA MODEL POLICIES 3225 AND 5012 (Continued)

Retaliation Prohibited

The District prohibits intimidation, threats, coercion or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation proceeding or hearing, if applicable. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

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MTSBA MODEL POLICIES 3225 AND 5012 (Continued)

Confidentiality

The District must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any individual who has been alleged to be the victim or perpetrator of conduct that could constitute sexual harassment, and any witness, except as may be permitted by Family Educational Rights and Privacy Act (FERPA) or as required by law, or to carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing or judicial proceeding arising thereunder.

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MTSBA MODEL POLICIES 3225 AND 5012 (Continued)

Notice Requirements

The District provides notice to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees and the union(s) with the name or title, office address, email address and telephone number of the Title IX Coordinator and notice of the District grievance procedures and process, including how to report or file a complaint of sex discrimination, how to file a formal complaint of sexual harassment and how the District will respond. The District also posts the Title IX Coordinator's contact information and Title IX policies and procedures in a prominent location on the District website and in all handbooks made available by the District.

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MTSBA MODEL POLICIES 3225 AND 5012 (Continued)

Training Requirements

The District ensures that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receives training on the definition of sexual harassment, the scope of the District's education program or activity, how to conduct an investigation and grievance process including hearings, appeals and informal resolution processes, when applicable, and how to serve impartially including by avoiding prejudgment of the facts at issue, conflicts of interest and bias. The District also ensures that decision-makers and investigators receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant as set forth in the formal procedures that follow, and training on any technology to be used at a live hearing, if applicable. Investigators also receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. All materials used to train individuals who receive training under this section must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment and are made publicly available on the District's website.

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MTSBA MODEL POLICIES 3225 AND 5012 (Continued)

Conflict of Interest and Bias

The District ensures that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process do not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Determination of Responsibility

The individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment is presumed not responsible for alleged conduct. A determination regarding responsibility will be made by the decision-maker at the conclusion of the investigation in accordance with the process outlined in Policy 5012P. No disciplinary sanctions will be imposed unless and until a final determination of responsibility is reached.

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MTSBA MODEL POLICIES 3225-P AND 5012-P

Definitions

The following definitions apply for Title IX policies and procedures:

- "Actual knowledge:" notice of sexual harassment or allegations of sexual harassment to the District's Title IX Coordinator or any official of the District who has authority to institute corrective measures on behalf of the District, or to any employee of an elementary or secondary school.
- "Education program or activity:" includes locations, events or circumstances over which the District exercised substantial control over both the individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment, and the context in which the sexual harassment occurs.
- "Complainant:" an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- "Respondent:" an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- "Formal complaint:" a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the District investigate the allegation of sexual harassment.
- "Supportive measures:" non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available and without fee or charge to the Complainant or Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

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MTSBA MODEL POLICIES 3225-P AND 5012-P

District Requirements

When the District has actual knowledge of sexual harassment in an education program or activity of the District, the District will respond promptly in a manner that is not deliberately indifferent. When the harassment or discrimination on the basis of sex does not meet the definition of sexual harassment, the Title IX Coordinator will direct the individual to the applicable sex discrimination process, bullying and harassment policy, or public complaint procedure for investigation.

The District treats individuals who are alleged to be the victim (Complainant) and perpetrator (Respondent) of conduct that could constitute sexual harassment equitably by offering supportive measures. Supportive measures are designed to restore or preserve equal access to the District's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the District's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, mutual restrictions on contact between the parties, leaves of absence, increased security and monitoring of certain areas of the District's property, campus escort services, changes in work locations and other similar measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. Upon the receipt of a complaint, the Title IX Coordinator must promptly contact the Complainant to discuss the availability of supportive measures, consider the Complainant's wishes with respect to supportive measures, inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the Complainant the process for filing a formal complaint. If the District does not provide the Complainant with supportive measures, then the District must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

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MTSBA MODEL POLICIES 3225-P AND 5012-P

Timelines

The District has established reasonably prompt time frames for the conclusion of the grievance process, including time frames for filing and resolving appeals and informal resolution processes. The grievance process may be temporarily delayed or extended for good cause. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities. In the event the grievance process is temporarily delayed for good cause, the District will provide written notice to the Complainant and the Respondent of the delay or extension and the reasons for the action.

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MTSBA MODEL POLICIES 3225-P AND 5012-P

Response to a Formal Complaint

At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the District with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, by electronic mail, or other means designated by the District.

The District must follow the formal complaint process before the imposition of any disciplinary sanctions or other actions that are not supportive measures. However, nothing in this policy precludes the District from removing a Respondent from the District's education program or activity on an emergency basis, provided that the District undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the Respondent with notice and an opportunity to challenge the decision immediately following the removal. A period of removal may include the opportunity for the student to continue instruction in an offsite capacity. The District may also place a non-student employee Respondent on administrative leave during the pendency of the grievance process. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

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Upon receipt of a formal complaint, the District must provide written notice to the known parties including:

- Notice of the allegations of sexual harassment, including information about the identities of the parties involved in the incident, the conduct allegedly constituting sexual harassment, the date and location of the alleged incident, and any sufficient details known at the time. Such notice must be provided with sufficient time to prepare a response before any initial interview;
- An explanation of the District's investigation procedures, including any informal resolution process;
- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility will be made by the decision-maker at the conclusion of the investigation;
- Notice to the parties that they may have an advisor of their choice who may be, but is not required to be, an attorney, and may inspect and review any evidence; and
- Notice to the parties of any provision in the District's code of conduct or policy that prohibits knowingly making false statements or knowingly submitting false information.

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- If, in the course of an investigation, the District decides to investigate allegations about the Complainant or Respondent that are not included in the notice initially provided, notice of the additional allegations must be provided to known parties.

- The District may consolidate formal complaints as to allegations of sexual harassment against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

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MTSBA MODEL POLICIES 3225-P AND 5012-P

Recordkeeping

The District must maintain for a period of seven years records of:

- ❑ Each sexual harassment investigation, including any determination regarding responsibility, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the Complainant designed to restore or preserve equal access to the District's education program or activity;
- ❑ Any appeal and the result therefrom;
- ❑ Any informal resolution and the result therefrom; and
- ❑ All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. The District must make these training materials publicly available on its website.
- ❑ The District must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the District must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the District's education program or activity.

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MTSBA MODEL POLICIES 3226 AND 5015
BULLYING, HARASSMENT, INTIMIDATION

"Harassment, intimidation, or bullying" means any act that substantially interferes with an employee's opportunities or work performance, that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation, or anywhere such conduct may reasonably be considered to be a threat or an attempted intimidation of a staff member or an interference with school purposes or an educational function, and that has the effect of:

- Physically harming an employee or damaging an employee's property;
- Knowingly placing an employee in reasonable fear of physical harm to the employee or damage to the employee's property; or
- Creating a hostile working environment

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MTSBA MODEL POLICIES 3226 AND 5015 BULLYING, HARASSMENT, INTIMIDATION

"Bullying" means any harassment, intimidation, hazing, or threatening, insulting, or demeaning gesture or physical contact, including any intentional written, verbal, or electronic communication (“cyberbullying”) or threat directed against a student that is persistent, severe, or repeated, and that substantially interferes with a student’s educational benefits, opportunities, or performance, that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation, at any official school bus stop, or anywhere conduct may reasonably be considered to be a threat or an attempted intimidation of a student or staff member or an interference with school purposes or an educational function, and that has the effect of:

- Physically harming a student or damaging a student’s property;
- Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property;
- Creating a hostile educational environment, or;
- Substantially and materially disrupts the orderly operation of a school.

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THREAD TWO – SUPPORTIVE MEASURES

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SUPPORTIVE MEASURES DEFINED

“Supportive measures” means individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

(1) Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or

(2) Provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

(34 CFR § 106.2)

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SUPPORTIVE MEASURES

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

- Supportive measures are designed to restore or preserve equal access to the District's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the District's educational environment, or deter sexual harassment.

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SUPPORTIVE MEASURES

The District must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

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EXAMPLES OF SUPPORTIVE MEASURES

- ❑ 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

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Thank you

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