

MONTANA SCHOOL BOARDS ASSOCIATION

TITLE IX TRAINING

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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.

TODAY'S TRAINING:

Third of three MTSBA training sessions:

Nov. 5, 12, and 19 (1-3 p.m.)

This session will be devoted to following up on questions from last week's session, providing an overview of the required steps involved in the investigative process, the decision-making process and the appeal process.

THREAD 1: FOLLOW-UP QUESTIONS AND ANSWERS FROM SESSION #2

Follow-up Q&A from Session #2

- (1) How intensive does the training need to be for bus drivers, custodians, etc?**
- (2) Does MTSBA have Investigators that could help districts?**
- (3) For small districts, can we call on an MTSBA attorney to be the decision- maker?**
- (4) Is there a need to ask the respondent or complainant if they have any complaint over who is chosen as the investigator, etc?**
- (5) Is MTSBA going to provide any training for staff we can use?**

Follow-up Q&A from Session #2, cont.

- (6) When dealing with staff-to-staff complaints, what if an employee is requesting "unreasonable support considerations - Do we have control on what we feel is reasonable in terms of support?**
- (7) When is the proper time to provide evidence? When the party asks or when the investigation is completed?**
- (8) Suppose that a complainant withdraws the complaint after the District has concluded that the allegation was substantiated -- do I assume correctly that the District still takes essentially the same actions it would with the respondent?**
- (9) Can we have a digital record, or must be paper, or both?**
- (10) Are there sample reports to have for reference?**

THREAD 2: THE INVESTIGATIVE PROCESS AND TECHNIQUES

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: DRAFTING INVESTIGATIVE REPORTS AND DECISIONS

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

THREAD 5: CASE STUDY

Ms. Social Studies has a friendly rapport with all the students in her class – male and female. However, in recent weeks she has been joking more with two male members of the chess team. It seems like most lessons begin and end with the two male students complimenting Ms. Social Studies looks and appearance and suggesting that “girls our age don’t know how to treat us!” Ms. Social Studies responds that they, “wouldn’t know what to do with her if they could catch her.” The class usually laughs and moves on with their day. Neither Ms. Social Studies nor the two male members of the chess team are bothered by the exchanges, but last night another student in the class, Jenny Poster, posted a Tik Tok using Ms. Social Studies’ professional portrait. The Tik Tok uses the theme of the Twilight Zone TV show and contains a caption asking, “Would we laugh if Ms. Social Studies was a male teacher?” The post is inadvertently viewed by the parent of another student who promptly captures it and attaches it to an email she sends to the principal.

Food for thought: How should Ms. Social Studies and the school district handle this situation? What happens if none of the girls in the class want to make a formal complaint?

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THANK YOU

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