Title IX in Practice: Rights, Responsibilities and Response

Session #1

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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CURRENT 2020 Title IX Regulations
U.S. Department of Education Stated intentions

Intent:

- Provide clear, predictable, and effective rules to ensure schools have the tools they need to address incidents of sexual harassment in their programs and activities
- Schools understand the importance of responding to complaints appropriately
- Provide a fair, transparent process for investigating and adjudicating harassment matters
- 2024 regulations promulgated by the Biden administration enjoined initially and recently rolled back by Trump administration.

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Training Requirements

Schools must ensure that Title IX personnel receive training as follows:

- Title IX's definition of "sexual harassment"
- The scope of the school's education program or activity
- How to conduct an investigation and grievance process
- How to serve impartially, including by avoiding prejudgment of the facts at issue
- How to avoid conflicts of interest and bias
- Decision-makers must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

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Availability of Training Materials

- All materials used to train Title IX personnel:
  - Must not rely on sex stereotypes
  - Must promote impartial investigations and adjudications of formal complaints of sexual harassment
  - Must be maintained by the school for at least 7 years
  - Must be publicly available on the school's website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.

- Under the Title IX Rule, students, employees, the Department, and the public will be able to examine a school's training materials, providing a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings. This requirement will improve the overall transparency and integrity of a school's Title IX policies and procedures.

- Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel.

- Section 106.45(b)(10)(i)(D) does not permit a school to *choose* whether to post the training materials or offer a public inspection option. Rather, if a school has a website, the school must post the training materials on its website.
  - A school must post on its website: "*All materials used to train* Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process." Posting anything less than "all materials" on the website is insufficient. Accordingly, merely listing topics covered by the school's training of Title IX personnel, or merely summarizing such training materials is not the same as posting "all materials."

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Notice Requirements

- The employee designated to coordinate the district's efforts to comply with Title IX must be referred to as the "Title IX Coordinator".

- Schools must notify applicants for enrollment and employment, parents/legal guardians, and unions of Title IX Coordinator's name/title, office address, email address and phone number.

- Must be prominently displayed on the district's website.

- Any person may report sex discrimination/harassment (whether or not the person reporting is the person alleged to be the complainant of conduct that could constitute sex discrimination/harassment) by any means.

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Office of Civil Rights Enforcement of Title IX

- OCR enforces Title IX to ensure that institutions receiving federal funds comply with the law. They evaluate, investigate, and resolve complaints alleging sex discrimination.

- OCR also provides technical assistance and guidance to schools.

- Many current executive opinions regarding compliance with Title IX and enforcement actions threatened by OCR.

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Hypothetical 1

- In a suburban K-12 high school, a sophomore named Jessica begins to experience unwanted attention from a classmate, Alex. Over the course of several weeks, Alex frequently makes crude comments about Jessica's appearance, often in front of their peers, and sends her unsolicited messages with explicit content through social media. Despite Jessica's attempts to avoid Alex, he follows her closely in the hallways, often invading her personal space and touching her shoulder or arm in ways that make her uncomfortable.

- Jessica confides in her friends, who express concern and encourage her to report the behavior to a teacher. When Jessica finally approaches the school's guidance counselor, she is told that such behavior is common in high school and that she should ignore Alex and avoid him. Feeling unsupported and isolated, Jessica struggles to concentrate on her studies and begins to dread going to school.

- As Jessica's distress escalates, she notices a decline in her grades and increased anxiety around social interactions. After a particularly uncomfortable incident where Alex cornered her in the band room after class, causing her to feel physically threatened, Jessica decides to take action.

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The Core of Title IX

Title IX (20 U.S.C. § § 1681 – 1688)

– “No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”

– Signed into law in 1972 by President Nixon

– Applies to virtually all aspects of federally funded education programs or activities

– MTSBA Model Policies 3210 and 5010

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U.S. Supreme Court Case of Note

Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020)

– United States Supreme Court, 6-3 Majority Opinion

- "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision; exactly what Title VII forbids."

- "[H]omosexuality and transgender status are inextricably bound up with sex.... because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

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U.S. Supreme Court Cases integrated into the Title IX Regulations

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)

- A school district can be liable for money damages under Title IX for employee-on-student sexual harassment if:

- An official of the district **with authority** to institute correct measures on the district's behalf:
  - Has **actual notice** of the teacher's misconduct and
  - Is **deliberate indifferent** to the teacher's misconduct.

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U.S. Supreme Court Cases integrated into the Title IX Regulations

Davis. Monroe County Board of Education, 526 U.S. 629 (1999)

- A school district can be liable under Title IX for student-on-student sexual harassment if:
  - The *Gebser* standards of notice and deliberate indifference are met;
  - The district has **substantial control** over the "context" in which the harassment occurs and over the harasser;
  - The conduct is "so **severe, pervasive, and objectively offensive**" that it effectively denies equal access to an institution's resources or opportunities.

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Montana Supreme Court:
Sexual harassment is a form of sex discrimination

- *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200 (1990)

"When sexual harassment is directed at an employee solely because of gender, the employee is faced with a working environment fundamentally different from that faced by an employee of the opposite gender. . . . That difference constitutes sexual discrimination in employment. We hold that sexual harassment is sexual discrimination under the Montana Human Rights Act."

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Title IX Prohibitions

- Treating one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service.
- Providing different aid, benefits, or services or provide aid, benefits, or services in a different manner.
- Denying any person any such aid, benefit, or service.
- Subjecting any person to separate or different rules of behavior, sanctions, or other treatment.
- Applying any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition.
- Aiding or perpetuating discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.
- Otherwise limiting any person in the enjoyment of any right, privilege, advantage, or opportunity. *34 C.F.R. 106.31(b).*

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Definition of Sexual Harassment

Includes any of the three (3) types of misconduct on **the basis of sex**:

1. *Quid Pro Quo* harassment by a school employee
2. Hostile Environment
3. Any instance of sexual assault, dating violence, domestic violence, or stalking

MTSBA Model Policies 3225 and 5012

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QUID PRO QUO SEXUAL HARASSMENT

"Something for something else"

- Definition: An employee making an aid, service, or benefit of the District conditional on an individual's participation in unwelcome sexual conduct:
  - Standard only applies to employees
  - Not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access
  - The unwelcomeness and severity of conduct is presumed
  - One instance is enough to be quid pro quo sexual harassment

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Hostile Environment Sexual Harassment

Definition:

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive **and** objectively offensive that it **effectively denies a person's equal access** to the recipient's education program or activity

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Sexual Assault, Dating Violence, Domestic Violence or Stalking

Violence Against Women Act

- Sexual Assault (20 U.S.C. 1092(f)(6)(A)(v)
- Domestic Violence (34 U.S.C. 12291(a)(8)
- Dating Violence (34 U.S.C. 12291(a) (10)
- Stalking (34 U.S.C. 12291(a)(30)
- Violations of State law

Even if law enforcement are investigating a crime, the District has a duty to address this from a sexual harassment perspective and take appropriate action.

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Hypothetical 2

At a rural K-12 middle school, two teachers, Mr. Thompson and Ms. Carter, work closely together on a special education team. Over time, Ms. Carter begins to make suggestive comments towards Mr. Thompson, often complimenting him on his appearance and making jokes that blur professional boundaries.

Initially, Mr. Thompson tries to dismiss these comments as harmless, but he soon feels uncomfortable during their collaborative meetings, particularly when Ms. Carter's comments become more frequent and aggressive. After an after-school meeting, during which Ms. Carter insists on walking him to his car, she makes a comment about wanting to "take him out" sometime, which raises alarms for Mr. Thompson about her intentions. Feeling trapped in the situation; he addresses her concerns with a trusted colleague who encourages him to report the harassment to school administration.

After discussing the issue with his colleague, Mr. Thompson decides to file a formal complaint with the school principal, detailing Ms. Carter's behavior over the past few months. The principal takes the complaint seriously and initiates an investigation, interviewing both Mr. Thompson and Ms. Carter, along with several other staff members who have witnessed the behavior.

While the investigation is occurring, Mr. Thompson gives in to his newfound feelings for Ms. Carter, and they go on a date together. The next day, both teachers change their Facebook relationship status and indicate they are in a relationship together. Although Mr. Thompson was initially dismayed by Ms. Carter's actions in wooing him, he now regards all the previous conduct by her as entirely welcome and actually providential in his newfound bliss, stating as much in an email to the principal. In light of evidence gathered during the investigation, the school district implements mandatory sensitivity training and a school assembly where the District's Title IX policies are reviewed.

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Important Points

Sexual Harassment is a Form of Sex Discrimination

- Includes words, gestures, actions, or overall statements that are sexual in nature
- Conduct must be unwelcome
- Claimant doesn't have to be person to whom the conduct is directed; it can be anyone affected by the conduct

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Broad Application

Sexual Harassment is a Form of Sex Discrimination (“on the basis of sex”)

- Employee – Employee
- Employee – Student
- Student – Employee
- Student – Student
- Different or Same gender

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EXAMPLES of Improper Sexual-Based Conduct

- ❑ Performing sexual gestures or touching oneself sexually in front of others
- ☐ Telling sexual or dirty jokes
- ❑ Making sexual propositions or pressuring co-workers for sexual favors
- ☐ Touching of a sexual nature
- ☐ Writing graffiti of a sexual nature
- ☐ Displaying or distributing sexually explicit drawings, pictures, or written materials
- ☐ Spreading sexual rumors
- ☐ Circulating or showing e-mails or websites of a sexual nature
- ☐ Improper “grooming” of students

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Notice and Actual Knowledge

A school district:

- With **actual knowledge** of sexual harassment
- In an **education program or activity** of the District
- Against a person in the United States
- Must respond **promptly** in a manner that is **not deliberately indifferent**

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What is “Actual Knowledge”?

Notice of sexual harassment or allegations of sexual harassment to:

– The District’s Title IX Coordinator

– Any employee of a K-12 school district

Takeaway #1: If ANY EMPLOYEE has notice or knowledge of sexual harassment or allegations of sexual harassment, the District is deemed, by law, to have knowledge of sexual harassment!

Takeaway #2: ALL EMPLOYEES should be trained on what constitutes sexual harassment and the appropriate response.

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Sexual Harassment Occurring in a School's Education Programs or Activities

- Schools must respond when sexual harassment occurs against any person in any education program or activity

- Definition of "program or activity" includes:

  - Any locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred (*Davis* standard)

  - On and off campus

NOTE: Gray areas include: (1) on-line sexual harassment, and (2) off-campus sexual harassment that is occurring outside the jurisdiction of the District.

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The Deliberate Indifference Standard

Definition:

– Failure to respond reasonably in light of the circumstances (*Gebser* standard)

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Two-Part Response

1st Response: The response after actual knowledge (“Report”)

2nd Response: Response after Formal Complaint (“Formal Complaint”)

Terminology:

- **Complainant:** person alleged to be the complainant of sexual harassment
- **Respondent:** person alleged to be the respondent of sexual harassment

Note: Parent may act on behalf of a minor student who is a complainant or respondent.

MTSBA Model Policies 3225F and 5012F are available for intake.

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Mandatory Response Obligations

- Must offer supportive measures to the complainant. May offer supporting measures to the Respondent
- Title IX Coordinator must promptly contact the complainant
- 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

MTSBA Model Policies 3225P and 5012P

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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

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Mandatory Response Obligations, cont.

- At time of filing a 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 seconded guessed

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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

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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 contacting 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

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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

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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 review

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.

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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

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MTSBA'S Title IX Checklist

Title IX Compliance: Sexual Harassment Intake, Investigation, and Records Checklist:

- ❑Section 1: Receiving a Complaint
- ❑Section 2: Investigating a Complaint
- ❑Section 3: Completing an Investigation Report
- ❑Section 4: Record Keeping Requirements

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Thank you

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