MURPHY HESSE
TOOMEY & LEHANE LLP
Attorneys at Law

Title IX 2020 Training Slides

Felicia Vasudevan, Esq.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Title IX

- School district does not and will not discriminate on the basis of sex in the educational programs and activities of the public schools. This policy will extend not only to students with regard to educational opportunities, but also to employees with regard to employment opportunities and to third parties.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Definitions

- State law: Sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment under Massachusetts law when:
  - Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's advancement (quid pro quo harassment);
  - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions;
  - Such conduct interferes with an individual's job duties; or
  - The conduct creates an intimidating, hostile or offensive work environment.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Definitions

- Sexual harassment for Title IX means conduct on the basis of sex that satisfies one or more of the following:
  - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct ("quid pro quo harassment");
  - 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 recipient's education program or activity ("hostile environment harassment"); or
  - "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Definitions

- "Complainant" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment

- "Respondent" means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Actual Knowledge

- Must respond to complaints when have actual knowledge

- "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to any employee of the district, except that this standard is not met when the only official of the district with actual knowledge is the respondent (where the respondent is an employee). Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. Complaints will be addressed whenever the district has actual knowledge of the allegation.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Other constraints

- Title IX only applies to locations, events, and/ or circumstances in which the school district exercises substantial control.
  - No longer have to investigate or address off-campus conduct over which the school does not exercise substantial control under Federal law.
  - It must have occurred in the school district program.

- It does not apply to events that were alleged to have occurred outside the United States.

- There is no time limit or statute of limitation on timing to file a formal complaint. However, at the time of filing a formal complaint, complainant must be participating or attempting to participate in a program or activity of the school district.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Upon receipt of actual knowledge

- Employees notify Title IX Coordinator or people file report directly with Title IX officer

- The Title IX Coordinator must then contact the complainant upon receiving the complaint and do the following:
  - Discuss and offer supportive measures;
  - Consider the complainant's wishes with respect to supportive measures;
  - Explain that supportive measures may be received with or without filing a formal complaint;
  - Determine whether the complainant wishes to file a formal complaint; and
  - Explain to the complainant the purpose of filing a formal complaint

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Offer Supportive Measures

- Complainant and respondents must be offered supportive measures even if they do not file a formal complaint.

- "Supportive measures" means 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. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient'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, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar 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

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Document, document, document

- The Title IX Coordinator must document in writing the supportive measures offered/provided or why no supportive measures were offered/provided.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Formal complaint

- Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment and requesting that the district investigate the allegation of sexual harassment.

- If the complainant declines to file a formal complaint, the Title IX Coordinator must consider whether to sign a formal complaint and start an investigation despite the complainant's preferences.
  - This decision may be appropriate when safety or similar concerns lead the district to conclude it must investigate and potentially sanction a respondent.
  - A Title IX Coordinator's decision to override the complainant's decision not to file a formal complaint must be documented in writing along with an explanation of why this decision was necessary.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Dismiss Formal Complaint

- May dismiss complaint if:
  - Would not constitute sexual harassment as defined even if proved
  - Did not occur in the school district's education program or activity
  - Did not occur against a person in the United States
- The school district must send written notice of any dismissal.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Timeframe

- Must be prompt – generally within sixty days, but can be 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.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Written notice

- Before any investigation can begin, the district must send written notice to both parties including sufficient details. Sufficient details include:
  - the identities of the parties involved in the incident, if known
  - the conduct allegedly constituting sexual harassment,
  - the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform 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 evidence.
- The written notice must inform the parties that the District's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- If additional allegations are added during the course of the investigation, additional written notice must be provided.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Informal Resolution

- Only after a formal complaint and written notice has been issued.
- Title IX Coordinator can consider offering mediation.
- The parties must give written consent to engage in this process.
- Informal resolution may not be used if the allegation is against an employee respondent.
- Mediator should not prejudge outcome.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Informal Resolution

- Mediation can be shuttle mediation or both parties in the room together, depending on the age, maturity, relationship of the parties.
- Set norms for the mediation.
- Provide both sides an opportunity to be heard and hear the other side.
- Mediator can always stop mediation.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Informal Resolution

- Facilitators of informal resolution will be designated by the Title IX Coordinator and must not be biased against any of the parties or have a conflict of interest.
  - A conflict of interest would typically be a personal financial interest or personal interest that would prevent someone from being impartial.
- Informal resolution is entirely voluntary.
- If the complainant and the respondent feel that their grievances have been sufficiently addressed via informal resolution, then no further action needs to be taken. The results of an informal resolution shall be maintained by the facilitator, in writing.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Investigation

- The Title IX Coordinator will designate an investigator and a decision maker, who may not be the same person.
- The investigator must not be biased against any of the parties at the outset of the investigation.
- The investigator will be responsible for interviewing parties and witnesses, finding facts, and making determinations related to credibility, all of which will go into a written report.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Investigation

- The investigator must avoid all questions that are protected by legal privilege, unless the privilege has been waived, and should avoid asking about the complainant's sexual history unless it is directly relevant to prove consent to the conduct at issue or to prove that the conduct was committed by someone other than the respondent.
- Complainants and respondents have a right to have advisors of their choice participate in all aspects of the proceedings.
- During the investigation, each party must be provided an equal opportunity to present both fact and expert witnesses.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Conducting the Investigation

- Ask open-ended questions, such as who, what, where, when and why
  - Do not ask leading questions
  - Offer both sides the opportunity to present witnesses and evidence
- Create questions beforehand and try to use the same questions for all parties, as possible
- Take notes of the individuals' answers and note any behavioral observations, when appropriate
- Start with the complainant, then witnesses, and then the respondent

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Conducting the investigation

- Do not prejudge the facts at issue
- Do not coordinate or collaborate with the decision-maker
- Consider whether the information is relevant
  - Information must have a tendency to prove or disprove a fact, and that fact must be of consequence in determining the action.
  - For example, if the question is whether someone was sexually harassed by a peer, their grades are irrelevant.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Conducting the investigation

- Relevancy
  - Remoteness in time or place reduces relevancy. Events taking place at times or locations distant from the event at issue are of little or no relevancy.
  - The similarity of a prior event affects relevancy. Prior events involving different people or objects are of little or no relevancy.
  - Evidence that a person hid or destroyed evidence, tried to avoid capture, or otherwise behaved as if he or she had a guilty conscience, is usually admissible for the negative inference that the person had something incriminating to hide.
  - Evidence of motive is usually relevant.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Investigation

- Prior to completion of the investigative report, the school district will send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

- School districts may not limit students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Investigation

- Findings should be written in a factual way in an investigative report. Credibility determinations may not be based on an individual's status as complainant, witness, or respondent.
- The investigator must avoid making any final determinations of responsibility for sexual harassment.
- Investigative report will be sent to both the complainant and respondent. It will also be sent to the decision-maker.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Investigation

- Report should summarize relevant evidence. Best practice would be to include an explanation of evidence that was excluded based on being irrelevant.

- Cannot rely on sex stereotypes in either the investigation or decision-making.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Decision-making

- The decision-maker must not be biased against any of the parties at the outset of this process.

- The decision-maker will offer both the complainant and respondent the opportunity to submit proposed relevant, written questions to ask of any party or witness, to respond to questions posed by another party, and to offer additional limited follow-up.
  - Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
  - The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.
  - The decision-maker must consider what is relevant, using the same criteria of relevancy as discussed during the investigation.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Decision-making

- After this process is complete, the decision-maker will create a written determination regarding whether sexual harassment has occurred using a preponderance of the evidence standard.
- A school district must think about how a reasonable person would view the conduct when determining whether the conduct constitutes sexual harassment. In making this determination, school districts may consider the age and number of parties involved.
- Everything about best practices stated during investigation section applies here, such as not prejudging.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Decision-making

- The written determination must be issued to both parties simultaneously and must include:
  - 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;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the recipient's code of conduct to the facts;
  - A statement of, and rationale for, the result as to each allegation, including a 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; and
  - The district's procedures and permissible bases for the complainant and respondent to appeal (a copy of, or direct reference to, this policy will suffice).

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Decision-making

- A "preponderance of the evidence" means that it is more likely than not that the alleged conduct occurred.
- The decision-maker shall further recommend what action, if any, is required.
- If there is a finding that sexual harassment occurred, the school district will provide remedies to the complainant designed to restore or preserve equal access to the school district's education program or activity. Such remedies may include supportive measures.
- Formal disciplinary actions may be imposed in the event that the preponderance of the evidence indicates a violation of this policy, up to and including expulsion or termination. Any disciplinary action will be in accordance with due process rights under State law and any applicable collective bargaining agreement.
- School district cannot take discipline in the absence of following this formal process. It does not limit the District from removing a student or employee from a program or activity on an emergency basis based on immediate threats to people's physical health or safety or placing an employee on administrative leave during the pendency of the investigation.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Appeal

- Any party may appeal the decision in writing to the Superintendent on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or 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 of the matter.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Appeal

- The school district will notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.
- Both parties will have a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- The Superintendent or designee, as a further impartial decision-maker, will review the comprehensiveness and accuracy of the investigation and the conclusions, and issue written findings to both the complainant and respondent.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Records/Notice

- A record will be maintained for a period of seven years of any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment and district staff will document the basis for the district's conclusion that its response was not deliberately indifferent.

- The school district must notify applicants for employment, parents, employees and all unions of the name or title of the Title IX Coordinator, his or her address, email address and telephone number. The Title IX Coordinator's information must be displayed prominently on the school district's website.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Retaliation prohibited

- Complainants and those who participate in the complaint resolution process or who otherwise oppose in a reasonable manner an act or policy believed to constitute discrimination are protected from retaliation by law and District policy.
- The coordinator or designee will inform all involved individuals that retaliation is prohibited, and that anyone who feels that they have experienced retaliation for filing a complaint or participating in the resolution process should inform the coordinator.
- The coordinator will investigate reports of retaliation and, where retaliation is found, take separate remedial and disciplinary action.

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

Questions?



© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.

MURPHY HESSE TOOMEY & LEHANE LLP

Attorneys at Law

Quincy

Crown Colony Plaza
300 Crown Colony Drive
Quincy, MA 02169

Tel: (617) 479-5000
Fax: (617) 479-6469

Boston

75-101 Federal Street
Suite 410
Boston, MA 02210

Tel: (617) 479-5000
Fax: (617) 338-1324

Springfield

One Monarch Place
1414 Main Street 1310R
Suite 1310R
Springfield, MA 01144

Tel: (888) 841-4850
Fax: (617) 479-6469

© 2020 Murphy, Hesse, Toomey & Lehane LLP. All Rights Reserved.