



MURPHY HESSE
TOOMEY & LEHANE LLP

Attorneys at Law

Title IX

Schools for Children

March 29, 2022

Presented by: Felicia Vasudevan, Esq.

Title IX

- Schools for Children adheres to a policy of nondiscrimination which extends to students, families, staff, and individuals with whom it does business. No person shall be discriminated against, nor denied equal rights and opportunities, on account of race, color, age, sex, gender identity, religion, national origin, ancestry, sexual orientation, physical or mental disability, pregnancy or pregnancy-related condition, marital status, military status, or homelessness. If someone has a complaint or feels they have been discriminated against because of race, color, age, sex, gender identity, religion, national origin, ancestry, sexual orientation, physical or mental disability, pregnancy or pregnancy-related condition, marital status, military status, or homelessness, his or her complaint should be registered with the program's Title IX coordinator or program director

Definitions

- Under 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.

Definitions

- Under Federal law, sexual harassment 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)

Examples

- Verbal (e.g. comments about body, spreading sexual rumors, sexual remarks or accusations, dirty jokes or stories)
- Visual/Non-Verbal (e.g. display of naked pictures or sex-related objects, obscene gestures)
- Physical (e.g. grabbing, rubbing, flashing or mooning, touching, pinching in a sexual way, sexual assault)

Examples

- Continuous idle chatter of a sexual nature and graphic sexual descriptions;
- Sexual slurs, sexual innuendoes, sexual accusations and rumors, and other comments about a person's clothing, body and/or sexual activities;
- Offensive and persistent risqué jokes; “dirty” jokes; or jesting and teasing/kidding about sex or gender-specific traits;
- Inappropriate, offensive personal remarks/comments/statements of sexual nature;
- Suggestive or insulting sounds such as whistling, wolf calls or kissing sounds;
- “Cat-calling” / “Street Harassment” – (e.g. “Hey gorgeous!”) ... may deny an individual mobility, access, and presence;
- Disparaging gender remarks

Examples

- Sexually provocative comments or compliments about a person's clothing or the way their clothes fit;
- Comments of a sexual nature about weight, body shape, size or figure;
- Comments about the sensuality of a person, or his/her spouse or significant other;
- Distribution of written or graphic materials that are derogatory and are of a sexual nature; sexually demeaning comments, graffiti, illustrations, notes;
- Pressure / repeated unsolicited propositions for dates and/or sexual relations;
- Requests for sexual favors in exchange for a grade; sexual favoritism; and
- Asking about sexual fantasies, preferences or history

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.

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 School, except that this standard is not met when the only official of the School 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 School has actual knowledge of the allegation.

Other constraints

- Title IX only applies to locations, events, and/ or circumstances in which the School exercises substantial control.
 - Does not cover off-campus conduct over which the school does not exercise substantial control.
- 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, a complainant must be participating or attempting to participate in a program or activity of the School.

Upon receipt of actual knowledge

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

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 School 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

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 School 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 School 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.

Written notice

- Before any investigation can begin, the School 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.

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.

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.

Investigation

- Prior to completion of the investigative report, the School 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.

Investigation

- Investigative report will be sent to both the complainant and respondent. It will also be sent to the decision-maker.

Decision-making

- The decision-maker must not be biased against any of the parties at the outset of this process.
- Offer parties 10 days to respond to report.
- 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.

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 must think about how a reasonable person would view the conduct when determining whether the conduct constitutes sexual harassment. In making this determination, Schools may consider the age and number of parties involved.
- Everything about best practices stated during investigation section applies here, such as not prejudging.

Appeal

- Any party may appeal the decision in writing 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.

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 School staff will document the basis for the School's conclusion that its response was not deliberately indifferent.
- The School 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's website.

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 School 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.

Questions?





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