



bulletin



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Excellence in North Dakota public education through local school board governance ■ VOL XLVII ISSUE 7

NDSBA Seeking Committee Members

NDSBA is seeking board members to serve on various committees both prior and during our Annual Convention and the 2023 Legislative Session. These committees are an important part of setting the direction for NDSBA and ensuring we are able to serve our members accordingly. If you are interested in serving on a committee, please fill out the form at <https://forms.gle/PZhEfMMTDLQwYhJy7>. Board members will be appointed to the following committees in the coming months:

Government Affairs Committee

The Government Affairs Committee meets once in late August via conference call to discuss and approve any resolutions submitted to NDSBA. Approved resolutions are then submitted to the Delegate Assembly for final consideration.

Nominating Committee

Members of the Nominating



committee meet once via conference call prior to the October convention. The committee reviews all candidate applications for positions on the NDSBA Board of Directors and approves which candidates will be placed on the ballot for election at the October convention.

Credentials Committee

Credentials Committee members assist NDSBA staff in seating delegates at the Delegate Assembly during the October convention.

Ballot Counting Committee

Members of the Ballot Counting Committee tally votes and certify election results for board of director positions at the October convention. They are also available to tally ballot votes during the Delegate Assembly, if necessary.

Legislative Committee

The Legislative Committee meets weekly via conference call during the legislative session. Members advise NDSBA staff on proposed legislation, help determine legislative strategy, and may occasionally be asked to testify in front of the legislature.

Exit Interview Policy Now Available

The *Legal Spotlight* in the May *Bulletin* addressed exit interviews and the importance of having a clear policy and set of practices in place to foster constructive employee feedback and suggestions, and render a deeper look at district workplace culture, day-to-day processes, management solutions, and employee morale. Having an exit interview policy can also play an essential role in risk management. If a district can address workplace issues before they cause unhappy employees to quit, they can

avoid the cost and disruption caused by high turnover.

In addition, the likelihood for external investigations, litigation, or even bad publicity is significantly minimized when employee issues are addressed justly and effectively within the workplace.

Policy Services recently shared policy DKEA, Exit Interview, and its associated exhibit DKEA-E, Exit Interview Questionnaire, with its members in the June edition of *Policy Ponderings*. Members must

be logged into Policy Services to see these and other available templates. These templates may be requested by completing the Policy Request Form at https://policy.ndsba.org/?page_id=2366 or by contacting the NDSBA office at 1-800-932-8791.

It is recommended that exit interviews be reserved for voluntary separations only. Interviews of employees who are being terminated may not accurately reflect the workplace environment. Interviews of these employees may still be conducted, but the approach used may need to be modified to account for the specific circumstances leading to the separation. Please contact NDSBA for additional information regarding employee exit interviews.

Welcome!

NDSBA would like to welcome all of the newly-elected school board members who were seated this month. Your board service will be challenging but rewarding. NDSBA is here to serve you as you serve the children of your district, and we look forward to meeting you at the New Member Seminar!



Legal Spotlight

Department of Education Releases New Proposed Title IX Regulations

by Amy De Kok, NDSBA Legal Counsel

For the second time in just two years, the Title IX regulations are being changed. This past June, on the 50th Anniversary of Title IX of the Education Amendments of 1972, the Department of Education released for public comment its proposed amendments to the Department's regulations implementing Title IX. The Department stated the proposed regulations aim to ensure full protection under Title IX for students, employees, and others, and end all forms of sex discrimination, including sex-based harassment and sexual violence, in federally funded elementary schools, secondary schools, and postsecondary institutions. The regulations will modify and/or replace the 2020 regulations, but for now (and likely for many months), the 2020 regulations remain in effect. The proposed 2022 regulations make several important changes to a district's handling of its Title IX obligations.

While too numerous to cover fully in this article, the following highlights a few of the key changes of which districts and their staff should be aware.

Actual Knowledge v. Information

Under the current regulations, a school or district has a duty to respond when it has actual knowledge of an allegation of sexual harassment.

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Under the 2022 proposed regulations, a district would be required to respond when any district employee has "information about conduct that may constitute sex discrimination."

This wouldn't apply, however, if the employee with information is a "confidential employee", meaning an employee designated as confidential due to their role in provided services to persons regarding sex discrimination. An example of such an employee could be a school counselor. While the confidential employee would not be required to report "information" about sex discrimination to the Title IX Coordinator under the new regulations, they would be required to explain their confidential status, provide Title IX Coordinator information, and explain how to report information about such conduct under Title IX to the person who informs the employee of conduct that may constitute sex discrimination.

Sexual Harassment v. Sex Discrimination

The current regulations cover sexual harassment but do not address other forms of sex-based harassment. The newly-proposed regulations would more broadly prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and

gender identity. These proposed rules would therefore extend the required grievance procedures to many more complaints than the current regulations. Sex-based harassment for purposes of the regulations includes harassment on the basis of sex, including on the basis of a person's LGBTQI+ status; however, the regulations provide no specific guidance or clarification regarding the use of facilities and participation in athletics for transgender students. It is expected, however, that the Department will issue additional rulemaking on transgender student participation in athletics.

In addition, under the current regulations, the definition of sexual harassment includes 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 school's education program or activity. This part of the definition is known commonly as hostile environment sexual harassment. The new regulations expand the definition of hostile environment sexual harassment to cover conduct that is "sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity."

In An Education Program or Activity & Against a Person in the U.S.

The current regulations require a complaint to be dismissed if the alleged sexual harassment did not occur in the district's education program or activity or against a person in the United States. In other words, these are both jurisdictional requirements under the regulations. The new 2022 regulations do not change these limitations but provide different interpretations of the phrases. Regarding the phrase "education program or activity", the

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■ Legal Spotlight

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current regulations define it as including locations, events or circumstances over which the district exercised *substantial control* over both the respondent and the context in which the sexual harassment occurs. The proposed 2022 regulations interpret this phrase to mean conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned by the district and conduct that is *subject to the recipient's disciplinary authority*. With this difference in interpretation, a school would have the obligation to address a sex-based hostile environment in its program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the school's educational program or activity or against a person outside of the United States. The regulations provide an example to illustrate:

Student A reports that Student B sexually assaulted her while participating in the recipient's study abroad program and both students have now returned to campus in the United States. Student A reports that Student B has been taunting her with sexually suggestive comments about the prior assault since their return to campus. Because of the sexual assault and Student B's continuing conduct, Student A is unable to concentrate or participate fully in her classes and activities where Student B is present. In this scenario, because Student A has alleged a hostile environment based on sex within the recipient's education program or activity within the United States, the recipient would have an obligation to take action to address those allegations.

It is arguable that the existing regulations already cover this example if the school is on the hook for investigating only the on-campus "downstream effects" of the conduct. However, if the 2022 proposed rule is interpreted to require investigating conduct occurring outside the United States, that would be a change.

Initial Response

Under the proposed regulations, a district would be required to take prompt and effective action to end any sex discrimination in its education program or activity. The proposed regulations would require a recipient to ensure that its Title IX Coordinator takes the following steps upon being notified of information about possible sex discrimination:

- Treat the complainant and respondent equitably at every stage of the recipient's response.
- Notify the complainant of the recipient's grievance procedures and, if a complaint is made, notify the respondent of the grievance procedures and notify the parties of the informal resolution process, if any.
- Offer and coordinate supportive measures, as appropriate, to the complainant and respondent.
- In response to a complaint, initiate the recipient's grievance procedures or informal resolution process.
- In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity.
- Take other appropriate, prompt, and effective steps to ensure that sex discrimination does not continue or recur in the recipient's education program or activity, in addition to providing remedies to an individual complainant.

The proposed regulations further require districts to offer supportive measures as appropriate to the complainant and/or respondent to the extent necessary to restore or preserve that person's access to the recipient's education program or activity. Unlike the current regulations, the newly-proposed regulations allow supportive measures offered to the complainant to include temporary measures that burden a respondent if imposed for non-punitive and non-disciplinary

reasons and that are designed to protect the safety of the complainant or the educational environment or to deter the respondent from engaging in sex-based harassment. Such measures could include voluntary or involuntary changes in class assignments or extracurricular activity participation, regardless of whether there is or is not a comparable alternative.

The current regulations permit informal resolution only if a formal complaint alleging sexual harassment has been filed. The proposed regulations would permit a district to offer an informal resolution process if appropriate whenever it receives a complaint of sex discrimination or has information about conduct that may constitute sex discrimination under Title IX in its education program or activity. However, like the current regulations, participation in informal resolution must be voluntary and would not be permitted in situations in which an employee is accused of sex discrimination against a student.

These are just a few of the key changes proposed by the new regulations. NDSBA is in the process of comprehensively examining the proposed rule. While the timeline of the federal rulemaking process varies based on a number of factors, NDSBA expects this proposed Title IX rule to generate significant interest and thousands of comments. For context, the previous Title IX rulemaking process, which occurred during the Trump administration, took almost 18 months to complete. Over 124,000 comments were submitted during the 60-day comment period. While it is not possible to predict whether this rule will follow a similar timeline, it is safe to say it will take a number of months before a final rule is published. The current Title IX regulations remain in effect until a final rule is issued and effective. This means that districts must continue to comply with the current regulations throughout the rulemaking process.

Please contact NDSBA or your district legal counsel for further information.

RETURN SERVICE REQUESTED

 **mark your calendar**

2022 NDSBA Annual Convention
October 27-28, 2022
Ramkota Hotel, Bismarck

State Mileage Rate Changes

As of July 1, 2022, state rate for mileage reimbursement is \$0.625 per mile.

State mileage rates can be found on the North Dakota Office of Management and Budget website at www.nd.gov/omb/agency/financial/fiscal-policies under Fiscal and Administrative Policy Updates Updated 6/1/2022.

Mileage rate updates can also be found on NDSBA's webpage under QuickClicks: Mileage Reimbursement Rate (link to www.gsa.gov website).



NDSBA DUES STATEMENTS have been sent to district business managers. School districts in North Dakota have long benefited from the support, training, information, and legislative advocacy provided by the North Dakota School Boards Association. When public school boards join together, they make a difference in their own effectiveness and overall support for public education.

NDSBA INFORMATION FORMS have also been sent to district business managers. The information is vital to ensure NDSBA has record of: (1) all **NEW** board members, Superintendent, and Business Managers receive our mailings as soon as they are a member of the board or district, (2) we have the **correct** board president, and (3) mailing addresses, phone numbers, and email addresses for board members and staff are up to date.

POLICY SERVICES RENEWAL INVOICES, along with an explanation of the different types of services available, will be mailed to each district's Policy Services contact on July 1. Districts will also receive an email requesting their school's contact information and the individuals they would like to receive future Policy Services correspondence. Your Policy Services membership will ensure that you have the latest policy updates.

Keep your school district up to date by submitting payments promptly.



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