

Notice of Student Rights under Title IX

(34 C.F.R. § 106.8, subd. (b); Cal. Ed. Code § 221.61.)

Federal Title IX of the Education Amendments of 1972 (“Title IX”), implemented at 34 C.F.R. § 106.31, subd. (a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives federal financial assistance.

Relevant here, Title IX requires that school districts take immediate and appropriate action to address any potential Title IX violations that are brought to its attention. Any inquiries about the application of Title IX, this notice, and who is protected by Title IX may be referred to T. Jeffrey Cooley, Superintendent, to the Assistant Secretary for Civil Rights from the United States Department of Education, or both.

Title IX Coordinator

T. Jeffrey Cooley, Superintendent is the Title IX Coordinator for the Waukena Union Elementary School District, and can be reached by telephone at 559-686-3328, by e-mail at tjeffrey@waukenaschool.org, by mail 19113 Road 28, Tulare, CA 93274 or in person Waukena Joint Union Elementary School District at 19113 Road 28, Tulare, CA 93274.

Sexual Harassment Under Title IX

Sexual harassment under Title IX means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the school district conditioning the provision of an aid, benefit or service of the school district on an individual’s participating in unwelcome sexual conduct (*quid pro quo*);
2. 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; or
3. “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).

Alleged conduct that does not rise to the level of sexual harassment under Title IX will be addressed in accordance with other District policies that prohibit sexual harassment and/or sex-based discrimination, or other forms of inappropriate conduct, as is deemed appropriate.

Filing a Title IX Complaint with the District

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is also the alleged victim), in person, by mail, by telephone or by e-mail, using the contact information listed for the District’s Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such reports may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

Student complaints alleging a Title IX violation should be submitted in written form no later than six months from the date of the alleged incident, or six months from the date the complainant first obtained knowledge of the facts of the alleged incident. If the complainant is unable to prepare the complaint in writing, administrative staff shall help the complainant to do so. The time for filing may be extended up to 90 days by the Superintendent or the Superintendent's designee, for good cause, upon written request by the complainant setting forth the reasons for the request for an extension of time to file a written complaint. To qualify as a Title IX complaint, the complainant/victim must also be participating in or attempting to participate in the District's education program or activity. The length of time elapsed between an incident of alleged sexual harassment, and the filing of a formal complaint may, in specific circumstances, prevent the District from collecting enough evidence to reach a determination, justifying a discretionary dismissal under Title IX.

The District will process all formal complaints in accordance with Title IX and District Board Policy ("BP") and Administrative Regulation ("AR"), BP/AR 5145.7 – Sexual Harassment, AR 5145.71 - Title IX Sexual Harassment Complaint Procedures, and other applicable policies, which include the option of informal resolution for certain matters. Under Title IX, a formal complaint means a document filed by a victim, or signed by the Title IX Coordinator, that alleges sexual harassment against a respondent and requests that the school district investigate the allegation of sexual harassment. Complaints that do not rise to the level of a Title IX complaint will be processed in accordance with BP/AR 1312.3 – Uniform Complaint Procedures, or in a manner that is otherwise deemed appropriate.

All investigations will be conducted as confidentially as possible. Upon receipt of any formal complaint, the District will provide all known parties with adequate notice of the District's complaint process and the underlying allegations. During the course of the investigation, the District will provide the complainant and respondent (or "the parties") with an equal opportunity present witnesses and evidence. The District will not restrict the ability of the parties to discuss the allegations under investigation, and it will allow parties to utilize an advisor of their choice. Prior to the conclusion of the investigation, the complainant and respondent will have the opportunity to inspect and respond to evidence directly related to the allegations in the complaint that was gathered during the course of the investigation. Thereafter, and prior to any final decision being made, the parties will receive a copy of the investigation report that fairly summarizes relevant evidence, and they will have an opportunity to submit written, relevant questions to be asked of the other party. Next, a determination regarding responsibility will be made and issued to both parties. Under Title IX and District policy, the responding party is presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the end of the complaint process. Any party not satisfied with the final determination will have the option to appeal the final determination.

Additionally, any complainant who is dissatisfied with the District's determination may file an appeal in writing with the California Department of Education within 30 calendar days of receiving the District's final written decision. Complaints made by or on behalf of students may also be filed with the U.S. Department of Education, Office of Civil Rights within 180 calendar days of the date of the alleged discrimination, unless the time for filing is extended by the Office of Civil Rights for good cause shown under certain circumstances.

Student Rights Pursuant to Education Code Section 221.8

In addition to federal law, the California Education Code similarly prohibits schools from discriminating against its students on the basis of sex. Education Code section 221.8 provides as follows: The following list of rights, which are based on the relevant provisions of the federal regulations implementing Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), may be used by the department for purposes of Section 221.6:

- (a) You have the right to fair and equitable treatment and you shall not be discriminated against based on your sex.
- (b) You have the right to be provided with an equitable opportunity to participate in all academic extracurricular activities, including athletics.
- (c) You have the right to inquire of the athletic director of your school as to the athletic opportunities offered by the school.
- (d) You have the right to apply for athletic scholarships.
- (e) You have the right to receive equitable treatment and benefits in the provision of all the following:
 - 1. Equipment and supplies.
 - 2. Scheduling of games and practices.
 - 3. Transportation and daily allowances.
 - 4. Access to tutoring.
 - 5. Coaching.
 - 6. Locker rooms.
 - 7. Practice and competitive facilities.
 - 8. Medical and training facilities and services.
 - 9. Publicity.
- (f) You have the right to have access to a gender equity coordinator to answer questions regarding gender equity laws.
- (g) You have the right to contact the State Department of Education and the California Interscholastic Federation to access information on gender equity laws.
- (h) You have the right to file a confidential discrimination complaint with the United States Office for Civil Rights or the state Department of Education if you believe you have been discriminated against or if you believe you have received unequal treatment on the basis of your sex.
- (i) You have the right to pursue civil remedies if you have been discriminated against.
- (j) You have the right to be protected against retaliation if you file a discrimination complaint.

Additional Resources

- United States Department of Education Office for Civil Rights:
<https://www2.ed.gov/about/offices/list/ocr/index.html>
- United States Department of Education Office for Civil Rights Complaint:
<https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>
- United States Department of Education Office for Civil Rights Contact Information:
1-800-421-3481 or ocr@ed.gov

- California Department of Education Office of Equal Opportunity:
<https://www.cde.ca.gov/re/di/or/oeo.asp>
- Board Policy and Administrative Regulation 1312.3 – Uniform Complaint Procedures, Board Policy and Administrative Regulation 5145.3 – Nondiscrimination/Harassment, Board Policy and Administrative Regulation 5145.7 –Sexual Harassment, Board Policy and Administrative Regulation, and other District policies: www.waukenaschool.org

Training Materials

All trainings for the Title IX coordinator, investigator and decision-maker were conducted by Lozano Smith Attorneys at Law on September 29, 2020 and October 8, 2020. See attached training materials.



Implementing the New Title IX Regulations

Presented by:

Desiree Serrano

Stephanie M. White

Jonathan E. Berry-Smith

Tulare County of Education— L&E Consortium
September 29, 2020

WHO WE ARE & WHAT WE

Lozano Smith is a full-service K-12 and community college. Established in 1988, the firm while advising and counseling stay focused on what matters serve. Lozano Smith has Fresno, Monterey, Bakersfield,

AREAS OF EXPERTISE

- Administrative
- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology &
- Title IX

COST CONTROL is recognize and understand representation with those minimum is through strategic, you updated on changing laws legal seminars providing the assistance down the road.

CLIENT SERVICE is our top benchmark, we have are systematically returned

DIVERSITY IS KEY and we that there is a measurable individuals from a wide variety and the clients benefit from understanding of issues, more

DO

education and public agency law firm serving hundreds of California's districts, and numerous cities, counties, and special districts. prides itself on fostering longstanding relationships with our clients, on complex and ever-changing laws. Ultimately, this allows clients to most – the success of their district, students and communities they offices in eight California locations: Sacramento, Walnut Creek, Los Angeles, Mission Viejo, and San Diego.

Hearings

Innovation

important for public agencies and an area we have mastered. We your financial restraints and work tirelessly to provide the best legal limitations in mind. One of the best ways we keep legal costs to a preventive legal services. These include Client News Briefs to keep affecting education. In addition, we offer extensive workshops and tools needed to minimize liability, reducing the need for legal

priority and we take it very seriously. With premier service as the established protocols and specific standards of practice. Client calls within 24 hours and often sooner when required.

consciously practice it in all that we do. It is one of our core beliefs level of strength and sensitivity fostered by bringing together of different backgrounds, cultures and life experiences. Both the firm this practice, with a higher level of creative thinking, deeper compassion, and the powerful solutions that emerge as a result.



Implementing the New Title IX Regulations

Presented by: Desiree Serrano, Stephanie M. White & Jonathan E. Berry-Smith

TULARE COUNTY OFFICE OF EDUCATION –L&E CONSORTIUM
September 29, 2020



Presenter

Desiree Serrano

AT LOZANO SMITH

Desiree Serrano is Senior Counsel in Lozano Smith's Los Angeles office. Her practice focuses on the student, labor & employment and government relations aspects of education law. Ms. Serrano has extensive experience as general legal counsel for school districts. She presents trainings on a number of topics to school employees such as sexual harassment, discipline, cyberbullying, student searches, transgender student rights, contract drafting, Brown Act, and the Americans with Disabilities Act.



CONNECT
dserrano@lozanosmith.com
213.929.1066



Presenter

Stephanie M. White

AT LOZANO SMITH

Stephanie White is a Partner in Lozano Smith's Walnut Creek Office. She is chair of the firm's Community College practice area and co-chair of the Title IX practice area. Ms. White represents California public school districts, county offices of education and community college districts in all aspects of education law. She specializes in Labor and Employment and student issues.



CONNECT
swhite@lozanosmith.com
925.953.1620

3

Presenter

Jonathan E. Berry-Smith

AT LOZANO SMITH

Jonathan E. Berry-Smith is an associate in Lozano Smith's Walnut Creek Office. His practice is focused on the student, labor and employment and governance aspects of education law. He is experienced in researching California statutes and case law, and advises school district administrators on all aspects of education law. He reviews and revises documents used throughout the employee discipline process, such as charge packets, notices of administrative leave, and collective bargaining grievance responses. He participates in the review of charter school petitions, inter-district attendance transfer requests, and student expulsion appeals.



CONNECT
jberrysmith@lozanosmith.com
925.953.1620

4



What We Will Cover

Title IX and the New Regulations

The Roles and Responsibilities of District Administrators and Employees

Training, Notice and Posting Requirements

10 Steps for an Effective Title IX Investigation

Title IX and the New Regulations

The Plain Language of Title IX

"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."

20 U.S.C. § 1681 et seq.



7

What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. Sexual Harassment*

(34 C.F.R. Part 106)

*New regulations that have the full force and effect of law



8



Why Title IX is Important - Potential Impact of Sexual Misconduct on Students and Employees



- Shame, humiliation, stress, anxiety, depression, loss of sleep
- Impaired learning/poor work performance
- Absenteeism/turnover
- Culture of discrimination
- Civil liability (monetary damages, attorney fees)
- Negative media attention and public outcry
- OCR Resolution Agreement
- Loss of federal funds



1. The definition of "sexual harassment"
2. "Actual knowledge" for notice
3. Procedural requirements for due process
4. "Deliberate indifference" standard:

LS

10

- Duty to identify and promptly investigate and address allegations of sexual harassment
- Duty to adopt and publish clear policies on how to file complaints and how complaints will be promptly addressed
- Notice to parties of the initiation of the investigation and the outcome of investigation and appeal rights
- Duty to prevent recurrence and remedy effects
- Obligation to have a Title IX Coordinator

11

New Definitions

Complainant

- An individual who is alleged to be the *victim of the conduct* that could constitute sexual harassment

Respondent

- An individual who has been reported to be the *perpetrator of conduct* that could constitute sexual harassment

Formal Complaint

- A document filed by a *complainant* signed by the *Title IX Coordinator* alleging sexual harassment against a respondent, and requesting that the district investigate the allegation

Actual Knowledge (K-12)

- When *any employee* has notice of sexual harassment or allegations of sexual harassment



12

New Definitions – Sexual Harassment

Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

1. An *employee* conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;
2. 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 district's education program or activity; or
3. "*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).



13

New Definitions – Sexual Harassment

Sexual assault:

- Actual or intentional physical sexual acts against a person *without consent* that may include:
 - Rape, rape and seduction, sodomy, lewd and lascivious acts, oral copulation, sexual penetration, sexual battery, and sexual assault.
- "No consent" may include:
 - Force, duress, violence, fear of immediate harm, inability to consent (including statutory rape).

(20 U.S.C. 1092(f)(6)(A)(v).)

Dating violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

(34 U.S.C. 12291(a)(10).)



14

New Definitions – Sexual Harassment

Domestic violence:

- Felony or misdemeanor crimes of violence committed by:
 - A current or former spouse or intimate partner of the complainant,
 - A person with whom the complainant shares a child in common,
 - A person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner,
 - A person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
 - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws.

(34 U.S.C. 12291(a)(8).)



15

New Definitions –Sexual Harassment

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress.

(34 U.S.C. 12291(a)(30).)



16

Title IX Jurisdiction

Allegations of sexual harassment fall under Title IX when:

- The conduct occurs against a person *in the United States*
- The conduct occurs in an education program or activity over which the district exercised *substantial control* over both:
 - 1) the *respondent* and
 - 2) the *context* in which the sexual harassment occurs; *and*
- The complainant *was participating/attempting to participate in* the educational program or activity at the time the complaint was filed.



17

The New Regulations Are NOT Retroactive



- The new regulations do NOT apply to any alleged sexual harassment that occurred prior to August 14, 2020
- The Federal Rule governs how schools must respond to sexual harassment that allegedly occurs ON or AFTER August 14, 2020

18

The Roles and Responsibilities of District Administrators and Employees

LS

Responsibilities of the Investigator:

- Administers a fair investigation of formal complaints
- Interviews parties and witnesses
- Reviews evidence
- Provides parties the opportunity to inspect, review, and respond to all evidence gathered, and considers their responses
- Creates an investigative report that summarizes relevant evidence
- Does not make a determination of responsibility
- Must be trained
- Must be impartial, unbiased, and free of any conflicts of interest

LS

21

Responsibilities of the Title IX Coordinator:

- Provides or coordinates Title IX trainings and preventative measures
- Offers supportive measures to complainant and respondent
- Explains the complaint/grievance process to the complainant
- Receives all complaints and oversees the complaint/grievance or informal resolution process
- May sometimes investigate complaints, but is never the decision-maker
- Determines mandatory and discretionary dismissals
- Evaluates corrective actions
- Addresses patterns or problems

LS

20

Responsibilities of the Decision-Maker:

- Reviews the investigation report, but does not investigate
- Gives parties the opportunity to submit written relevant questions for the other party/witnesses, and asks those questions they deem relevant or provides an explanation as to why a question was deemed irrelevant
- Makes a determination about responsibility
- Prepares the written determination that is issued to each party
- May recommend sanctions and/or corrective actions

LS

22

Responsibilities of the Appeals Officer:

- Evaluates any appeal request made by the complainant or respondent
- Makes a decision on the appeal and issues a written decision to each party that states the decision and rationale
- Must be unbiased and without conflict
- Cannot be the Title IX Coordinator, investigator, or decisionmaker

LS

24

Responsibilities of the Informal Resolution Officer

- Facilitates the informal resolution process
- Trained, unbiased, and without conflict
- May be the Title IX Coordinator or another unbiased party
- Verifies a complaint meets the criteria for informal resolution, and that the parties have given voluntary, written consent
- Ensures the parties know their rights, including their right to withdraw at any time prior to a resolution being reached



23

Responsibilities of All Employees



- All employees must report to the Title IX Coordinator, and/or any additional designated individuals (school site administrators), any known claims of potential sexual harassment.
- This does not change any mandated reporter duties for “reasonable suspicion” of child abuse or neglect.



25

Training Requirements for the Title IX Team

- The *definition of sexual harassment* in § 106.30,
- The scope of the *education program or activity*,
- The *complaint/grievance process*, including how to conduct an investigation and all resolution options,
- How to serve *impartially*,
- Any *technology* that will be used, and
- Determining issues of *relevancy*.

*Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints.



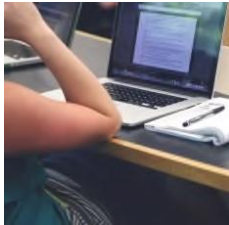
27

Training, Notice and Posting Requirements

LS

Title IX Notice/Posting Requirements

- Notice of Title IX rights must be given to all employees, students, applicants, and unions
- Must be posted in *a prominent location* on the district's *website*, and in each *handbook* or catalogue that it makes available to persons entitled to notification
- Training materials must be posted online – 7 years



LS

28

Title IX Notices Must Include:

- Contact information for the Title IX Coordinator.
- A statement that the district does not discriminate on the basis of sex in the education program or activity that it operates, including in employment, and that it is required by Title IX and specifically Section 106.8(b) not to discriminate in such a manner.

LS

- That inquiries about the application of Title IX and Section 106(b) may be referred to the Title IX Coordinator, to the Assistant Secretary of Education, or both.
- The complaint/grievance procedures and process, including:
 - how to report or file a complaint of sex discrimination, ▪ how to report or file a complaint of sexual harassment, and ▪ how the district will respond.

29

Title IX Policies Must (Per Section 106.45):

- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence
- Require that any individual involved as Title IX Coordinator, investigator, decision-maker, or informal resolution officer not have a conflict of interest or bias for or against complainants or respondents
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the complaint/grievance process



Title IX Policies

Complaint/grievance procedures must:

- Provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited under Title IX, and
- Comply with the requirements of Section 106.45.



30

Title IX Policies Must (Per Section 106.45):

- Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the district may implement following any determination of responsibility
- State the standard of evidence to be used to determine responsibility (i.e., preponderance of the evidence standard)
- Describe appeal procedures
- Describe supportive measures available to both parties
-  Protect information protected under a legally recognized privilege (unless there is a waiver)

Retaliation Prohibitions

- Retaliation is prohibited against anyone who has attempted to participate in the Title IX process.
- The district cannot use the student conduct process as a way to avoid the Title IX complaint/grievance process.
- Retaliation complaints must be filed under the same complaint/grievance process.
- The district must keep the identities of all involved parties confidential, unless disclosure is required by law or necessary to carry out Title IX proceedings.
- Exercising a First Amendment right is not retaliation.
- Charging an individual with making a false statement in bad faith during a Title IX process is not retaliation.

10 Steps for an Effective Title IX Investigation

LS



LS

36

10 Steps for Effective Title IX Investigations

Step 1 Receiving and Assessing Complaints



LS

35

Group Activity

1. What actions might you consider taking right away?
2. Do you ask Calvin anything else?
3. What can you tell Calvin about how you will be handling the situation?

LS

39

Contact the Victim/Complainant

- Conduct initial discussion with complainant/victim to better understand the complaint and if it rises to the level of sexual harassment under Title IX
- Discuss options for supportive measures
- Explain options for filing a formal complaint with the district
- Discuss the district's policy that prohibits retaliation

LS

41

Receiving a Complaint



- Notify the Title IX Coordinator
- Assess whether a CPS report should be filed (continue to reassess)
- Title IX Coordinator should promptly schedule a meeting with the victim



40

Group Activity

1. Have any obligations under Title IX been triggered?
2. Does Calvin's report constitute a formal complaint? What if he puts it in writing?
3. What if the victim or her parents request that the district "do nothing"?
4. Would it make a difference if this incident involved two employees, or parties of the same-sex?



42

Do You Have a "Formal" Title IX Complaint?

Test 1: If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

- Any *employee* conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
- Any unwelcome conduct that a reasonable person would find so *severe, pervasive, and objectively offensive* that it denies a person equal education access; OR
- Any instance of sexual assault, dating violence, domestic violence or stalking.

*If the answer is no, you must dismiss the complaint or allegations therein. If yes, move to test 2.



44

- *Formal Complaint:* Document filed by a complainant (who is also the victim or the victim's parent/guardian) or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation.
- If no formal complaint is filed by the complainant, the Title IX Coordinator should assess whether to independently initiate a complaint based on a threat to safety.



43

Test 2: Is there Title IX Jurisdiction Over the Conduct?

1. Education Program or Activity
 - a) If the school exercises substantial control over the respondent; and
 - b) The school exercises substantial control over the context in which the sexual harassment occurred.
2. Must be within the United States.
3. At the time of filing a formal complaint, complainant must be participating/attempting to participate in the educational program.

*If the answer is no, you must dismiss the complaint or allegations therein.



45

Dismissals (Mandatory and Discretionary)

- The decision to dismiss a complaint should be made in consultation with the Title IX Coordinator.
- Notice of dismissal must be issued to both parties in writing.
- Parties must be informed of their right to appeal the dismissal on the basis of:
 1. Procedural irregularity;
 2. New evidence that was not reasonably available earlier; or
 3. Involved personnel had a conflict of interest or bias.



47

Discretionary Dismissals

Districts *MAY* dismiss a formal complaint, or any allegations therein if:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the district; or
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



46

10 Steps for Effective Title IX Investigations

Step 2 Supportive Measures



LS

48

Supportive Measures

Examples:

- Counseling
- Medical services
- Academic support (e.g., extension of deadlines or other course adjustments)
- No-contact orders
- Increased security
- Changed schedules (e.g., modification of work or class schedule)
- Leaves of absence (employees)
- Emergency removals in compliance with Title IX

LS

50

Supportive Measures

“Non-disciplinary, non-punitive individualized services offered [...] to the complainant or respondent before and after the filing of a formal complaint or where no formal complaint has been filed.”

- Designed to restore or preserve equal access to the educational program without unreasonably burdening either party.
- Should be determined on a case-by-case basis
- Cannot be retaliatory

LS

49

Emergency Removals (Students)

Districts are prohibited from disciplining a student for alleged sexual harassment until a full Title IX investigation has been completed.

EXCEPTION: An Emergency Removal

- Respondent must be an immediate threat to the physical health or safety of any student or individual;
- The immediate threat must arise from the allegations of sexual harassment;
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.

*Note: There are no restrictions for placing an employee on paid administrative leave.

LS

51

Policies and Procedures for Investigating Title IX Complaints

- BP/AR 4119.11 – Sexual Harassment (Employee)
- AR 4119.12* – Title IX Sexual Harassment Complaint Procedures (Employee)
- BP/AR 5145.7 – Sexual Harassment (Students)
- AR 5145.71* – Title IX Sexual Harassment Complaint Procedures (Student)

*New policies proposed by CSBA.

LS

53

10 Steps for Effective Title IX Investigations

Step 3
Initiate an Investigation into the Formal Complaint or Engage in Informal Resolution Process



52

Investigation Timelines



- Title IX - "reasonably prompt time frame"
- District policies –60 days for Uniform Complaints



54

Send Written Notice of the Investigation

1. Identify investigation process, including informal resolution process;
2. Identify allegations with sufficient details;
3. Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process;

4. Explain that they may have an advisor of their choice inspect and review the evidence; and
5. Identify the district's code of conduct that prohibits knowingly making false statements or submitting false information.
6. Do not restrict either party's ability to discuss the allegations under investigation.



55

Informal Resolution

- Informal resolution is a process that does not involve a full investigation and adjudication.
- It can only be offered when:
 - A formal complaint is filed;
 - The school district has sent a written notice about the allegations and the informal resolution process;
 - A written determination has not yet been made; and
 - Both parties have provided voluntary, written consent to the process.
- Either party can withdraw from the informal resolution process at any time, and should be notified of this right.
- Cannot be used for allegations where an employee is alleged to have sexually harassed a student.



56

10 Steps for Effective Title IX Investigations

Step 4
Gather, Review, and Preserve Evidence;
Conduct Witness Interviews



57

Title IX Evidence Requirements

- District has the burden of gathering evidence.
- District cannot access or use a party's medical, psychological or other similar records unless they obtain the party's voluntary, written consent.
- District cannot restrict parties from discussing allegations or gathering and presenting relevant evidence.
- District must provide an opportunity for parties to present fact and expert witnesses and other exculpatory or inculpatory evidence.



58

Party/Witness Interviews

- Start with an outline of questions, but be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each witness.
- If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- At the end, ask: Is there anything else?



59

Trauma-Informed Approach

- Do not victim-blame.
- Choose a comfortable setting that is not triggering.
- Build rapport.
- Ask difficult questions with care —explain why you're asking the question.
- Allow the witness to speak freely and then ask follow up questions.



60

Interview Questions

- “Did you tell anyone about what happened to you?”
- “Tell me how that made you feel.”
- “Did you ever feel like this before?”
- “What was your thought process at that time?”
- “I’m asking you this to try to understand...”



61

Common Questions and Issues

- What if the complainant/victim want their identity to be kept confidential?
- What if the respondent refuses to answer any questions?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?
- Do all witnesses get a union representative or support person?
- What if the police are investigating?



62

10 Steps for Effective
Title IX Investigations

Step 5

Review of Evidence by the Parties



LS

63

Meaningful Access to Information

*Both parties must have an
opportunity to inspect and
review evidence



LS

64

Review of Evidence By the Parties

- Send the parties any evidence directly related to the allegations raised in the formal complaint
- Includes evidence the district does not intend to rely on in reaching its decision regarding responsibility
- Use of a draft investigation report or report of evidence
- Must be done prior to the completion of the investigation report
- Parties should be given at least 10 days to respond to the evidence, which must be considered by the investigator

*The investigator should work with the Title IX Coordinator to securely transmit the evidence to the parties, and to assess whether redactions may be appropriate.



65

10 Steps for Effective
Title IX Investigations

Step 6

Prepare the Investigation Report



66

Investigation Report

- The final investigation report should be prepared by the investigator and must summarize relevant evidence.
- Parties must be offered the opportunity to provide a written response to the investigation report.
- The report must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.



67

Investigation Report (Recommended Content)

- Identify the date the investigation commenced
- Identify the investigator
- Identify supportive measures offered to and accepted by the parties
- Summary of the investigation process
- Identify the legal standard of review applied to the review of evidence/applicable policies
- Identify number of/identity of witnesses
- Summary of evidence – documents and witness statements



68

10 Steps for Effective Title IX Investigations

Step 7
Decision-Maker Makes a
Determination



69

Submission of Written Questions

- The decision-maker must allow parties the opportunity to submit written, relevant questions that they want to ask any other party or witness.
- Once the parties are provided with the answers, they are permitted to submit additional, limited follow-up questions from each party.
- Decision-maker determines relevancy, or explains why questions were deemed irrelevant.
- Complainant's sexual history is irrelevant unless offered to prove someone else committed the conduct or for proof of consent.

LS

70

Written Determination Regarding Responsibility – Issued by the Decision-Maker

- Identification of the allegations potentially constituting sexual harassment.
- A description of the procedural steps taken from formal complaint through the determination of responsibility.
- Findings of Fact supporting the determination.
- Conclusions regarding the application of the recipient's code of conduct to the facts.

LS

71

Written Determination Regarding Responsibility – Issued by the Decision-Maker (Cont.)

- Rationale for each finding and conclusion, including a determination of responsibility for each allegation.
- Statement of potential disciplinary sanctions.
- Appeal rights.

LS

72

10 Steps for Effective Title IX Investigations

Step 8 Appeal Rights



73

Appeal Rights for Both Parties at the District

Parties may appeal the written determination on the following bases:

1. Procedural irregularity;
2. New evidence that was not reasonably available earlier;
3. Title IX personnel had a conflict of interest or bias.

*Students/employees may also be afforded the right to file a complaint or an appeal with federal and/or state agencies (e.g., OCR, CDE, DFEH, EEOC).



74

10 Steps for Effective Title IX Investigations

Step 9 Recordkeeping Requirements



75

Recordkeeping –Records Must Be Maintained for 7 Years

Formal Title IX Complaints:

- Any investigation of sexual harassment, including determinations regarding responsibility, recordings or transcripts of involved hearings, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant
- Any appeal and the result therefrom
- Any informal resolution and the result therefrom



76

Recordkeeping – Records Must Be Maintained for 7 Years

Actual Knowledge But No Formal Title IX Complaint:

- Documentation of all actions, including any supportive measures implemented to demonstrate the response was not deliberately indifferent. Particular detail should be included if supportive measures are not offered to a complainant Training Materials;
- All training materials for Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process



77

10 Steps for Effective Title IX Investigations

Step 10
Reflect



78

Loose Ends

- Is a Commission on Teacher Credentialing (CTC) report required?
- Have all mandated reporter duties been satisfied if child abuse or neglect is at issue?
- What can be learned? Any evidence of a systemic issue?
- Would staff benefit from further training?
- Be proactive



79

Questions



80



Subscribe on your favorite app or device.

LS

Stay informed on your time.

Lozano Smith Podcast

lozanosmith.com/podcast

81



Thank you from Lozano Smith.

Together with you, we're impacting communities and lives through:

- Professional development
- Volunteer projects
- Sponsorships and award programs
- Scholarships

#BlueHatProject
#LozanoSmithFoundation

LS

82

*For more information, questions and
comments about the presentation,
please feel free to contact:*

Desiree Serrano
Senior Counsel

Tel: 213.929.1066

dserrano@lozanosmith.com

*Or any of the attorneys
in one of our 8 offices.*



*For more information, questions and
comments about the presentation,
please feel free to contact:*

Stephanie M. White
Partner

Tel: 925.953.1620

swhite@lozanosmith.com

*Or any of the attorneys
in one of our 8 offices.*



*For more information, questions and
comments about the presentation,
please feel free to contact:*

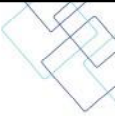
Jonathan E. Berry-Smith
Associate

Tel: 925.953.1620

jberrysmith@lozanosmith.com

*Or any of the attorneys
in one of our 8 offices.*





@LozanoSmith

Disclaimer: These materials and all discussions of these materials are for instructional purposes only and do not constitute legal advice. If you need legal advice, you should contact your local counsel or an attorney at Lozano Smith. If you are interested in having other in-service programs presented, please contact clientservices@lozanosmith.com or call (951) 431-5600.

Copyright © 2020 Lozano Smith

All rights reserved. No portion of this work may be copied, distributed, sold or used for any commercial advantage or private gain, nor any derivative work prepared therefrom, nor shall any sub-license be granted, without the express prior written permission of Lozano Smith through its Managing Partner. The Managing Partner of Lozano Smith hereby grants permission to any client of Lozano Smith to whom Lozano Smith provides a copy to use such copy intact and solely for the internal purposes of such client. By accepting this product, recipient agrees it shall not use the work except consistent with the terms of this limited license.

86

DESIREE SERRANO

SENIOR COUNSEL
dserrano@lozanosmith.com

515 S. Figueroa St., Suite 750
Los Angeles, CA 90071
T 213.929.1066 | F 213.929.1077



EDUCATION

J.D., University of San Diego
School of Law

B.A., University of California,
Santa Barbara

PRACTICE AREAS

Students
Labor & Employment
Local Government

BAR ADMISSION

California

OVERVIEW

Desiree Serrano is Senior Counsel in Lozano Smith's Los Angeles office. Her practice focuses on the student, labor & employment and government relations aspects of education law. Ms. Serrano has extensive experience as general legal counsel for school districts. She presents trainings on a number of topics to school employees such as sexual harassment, discipline, cyberbullying, student searches, transgender student rights, contract drafting, Brown Act, and the Americans with Disabilities Act.

She provides legal advice to administrators on personnel matters such as discipline, layoffs, discrimination complaints, disability accommodations, and leaves, in addition to preparing responses to DFEH and EEOC complaints and negotiating settlement agreements. She also has substantial experience with student issues including records, discipline, searches and constitutional issues.

ADDITIONAL EXPERIENCE

While in Law School, Ms. Serrano worked as a Law Clerk for San Diego Unified School District, Mexican American Legal Defense and Educational Fund and the Children's Law Center of Los Angeles. She was also a Mediation Intern for the National Conflict Resolution Center and a Land Use Intern for the City of San Diego.

PROFESSIONAL AFFILIATIONS

Ms. Serrano is a member of the California Bar and involved with the California Council of School Attorneys.

EDUCATION

Ms. Serrano received her Juris Doctor from the University of San Diego School of Law. She earned a Bachelor of Arts in Law and Society, and minored in Education and Applied Psychology, from the University of California, Santa Barbara. Ms. Serrano has received certification through ATIXA as a participant in Level 1 and Level 3 ATIXA Civil Rights Investigator Trainings.

STEPHANIE M. WHITE

PARTNER

swhite@lozanosmith.com

2001 North Main Street, Suite 500

Walnut Creek, CA 94596

T 925.953.1620 | F 925.953.1625



EDUCATION

J.D., Golden Gate University
School of Law

B.A., University of California,
Los Angeles

PRACTICE AREAS

Labor & Employment
Students
Community Colleges

BAR ADMISSION

California

OVERVIEW

Stephanie White is a partner in Lozano Smith's Walnut Creek Office. She is chair of the firm's Community College practice area and co-chair of the Title IX practice area. Ms. White represents California public school districts, county offices of education and community college districts in all aspects of education law. She specializes in Labor and Employment and student issues.

EXPERIENCE

Ms. White has experience handling a wide variety of employment matters, from investigating and overseeing investigations into discrimination and workplace harassment complaints, to providing advice and counsel to Human Resources managers on various employee relations matters. She also serve as the lead negotiator at both certificated and classified bargaining tables.

Ms. White is well-versed in responding to administrative charges from DFEH and EEOC, as well as OCR and CDE for student-related complaints. She routinely drafts, reviews and revises employee and student policies on workplace conduct and provides sexual harassment trainings to employees. She is certified as a Civil Rights Investigator through ATIXA, and is also certified in Interest-Based Bargaining.

EDUCATION

Ms. White received her Juris Doctor from Golden Gate University School of Law, and earned a Bachelor of Arts in Sociology from the University of California, Los Angeles. While in law school, Ms. White taught practical legal classes to inner-city high school students in San Francisco.

JONATHAN E. BERRY-SMITH

ASSOCIATE

jberrysmith@lozanosmith.com

2001 North Main St., Suite 500
Walnut Creek, CA 94596
T 925.953.1620 | F 925.953.1625



EDUCATION

J.D., Stanford Law School

M.A., Stanford Graduate
School of Education

B.A., University of California,
Berkeley

PRACTICE AREAS

Student
Labor & Employment
Governance

BAR ADMISSION

California

OVERVIEW

Jonathan E. Berry-Smith is an associate in Lozano Smith's Walnut Creek Office. His practice is focused on the student, labor and employment and governance aspects of education law.

EXPERIENCE

Mr. Berry-Smith is experienced in researching California statutes and case law, and advises school district administrators on all aspects of education law. He reviews and revises documents used throughout the employee discipline process, such as charge packets, notices of administrative leave, and collective bargaining grievance responses. He participates in the review of charter school petitions, inter-district attendance transfer requests, and student expulsion appeals.

Mr. Berry-Smith counsels and coordinates with school districts transitioning to a by-trustee area method of election pursuant to the California Voting Rights Act (CVRA). He also provides guidance on the Brown Act to school district administrators and board members.

EDUCATION

Mr. Berry-Smith received his Juris Doctor from Stanford Law School where he was Co-President of Street Law, and Co-Founder of Youth & Education Advocates at Stanford. He was also involved with the Youth and Education Law Project Clinic and the Stanford Prison Education Project. He earned a M.A. in Education from Stanford Graduate School of Education and a B.A. in Legal Studies from the University of California, Berkeley.

Disclaimer:

These materials and all only and do not constitute local counsel or an attorney programs presented, please 5600.

Copyright © 2020 Lozano

All rights reserved. No for any commercial therefrom, nor shall any permission of Lozano Smith Smith hereby grants Smith provides a copy to such client. By accepting consistent with the terms of

discussions of these materials are for instructional purposes legal advice. If you need legal advice, you should contact your at Lozano Smith. If you are interested in having other inservice contact clientservices@lozanosmith.com or call (559) 431-

Smith

portion of this work may be copied, distributed, sold or used advantage or private gain, nor any derivative work prepared sublicense be granted, without the express prior written through its Managing Partner. The Managing Partner of Lozano permission to any client of Lozano Smith to whom Lozano use such copy intact and solely for the internal purposes of this product, recipient agrees it shall not use the work except this limited license.

Title IX REACT Checklist

Title IX Compliance	Prepare to REACT ✓ Update employee/student sexual harassment policies ✓ Post and/or disseminate required notices and materials ✓ Train Title IX Coordinator, Investigators, Decision-Makers, Informal Resolution Officers
Recognize	Identify Potential Allegations of Sexual Harassment ✓ Sexual Harassment under Title IX 1. Quid pro quo by an employee 2. Unwelcome conduct that is severe, pervasive, and objectively offensive 3. Sexual assault, dating violence, domestic violence, or stalking Notify Title IX Coordinator ✓ Assess mandated reporter duties
Evaluate	Assess the Nature of the Complaint ✓ Does the complaint/allegation trigger a Title IX obligation? 1. Does the alleged conduct constitute sexual harassment under Title IX? 2. Is there jurisdiction over the conduct? ✓ Do you have a formal complaint signed by a victim or the Title IX Coordinator?
Act	Implement Supportive Measures Determine Whether the Complaint/Allegations Trigger a Mandatory/Discretionary Dismissal Initiate an Investigation into the Formal Complaint or Engage in the Informal Resolution Process ✓ Send written Notice of Investigation to Complainant and Respondent ✓ Consider/Offer Informal Resolution, as appropriate Gather, Review, and Preserve Evidence Conduct Witness Interviews Review of Evidence by the Parties ✓ Send the parties any evidence directly related to allegations in the complaint ✓ Parties should be given 10 days to respond to evidence Prepare the Investigation Report ✓ Send the parties the Investigation Report at least 10 days before a determination of responsibility is made and allow them the opportunity to respond ✓ Allow the parties the opportunity to submit written, relevant questions Decision-Maker Makes a Determination of Responsibility for Sexual Harassment Afford the Parties the Right to Appeal the Determination of Responsibility
Corrective Measures	Take Actions in Response to Sexual Harassment That Are Reasonably Calculated to Stop Harassment and Prevent Recurrence of Harassment

Thoughtful
Reflection/Recording

Reflect on REACT

Recordkeeping Requirements

- ✓ Post and keep training materials and resources for seven years
- ✓ Retain records of response to complaints/allegations, as required

Disclaimer: As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this document does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

Copyright © 2020 Lozano Smith All rights reserved. No portion of this work may be copied, distributed, sold or used for any commercial advantage or private gain, nor any derivative work prepared therefrom, nor shall any sub-license be granted, without the express prior written permission of Lozano Smith through its Managing Partner. The Managing Partner of Lozano Smith hereby grants permission to any client of Lozano Smith to whom Lozano Smith provides a copy to use such copy intact and solely for the internal purposes of such client. By accepting this product, recipient agrees it shall not use the work except consistent with the terms of this limited license.



Title IX: Responding to and Investigating Complaints of Sexual Harassment

Presented by:

Stephanie M. White

Jonathan E. Berry-Smith

Lozano Smith Webinar

October 8, 2020

STEPHANIE M. WHITE

PARTNER

swhite@lozanosmith.com

2001 North Main Street, Suite 500
Walnut Creek, CA 94596
T 925.953.1620 | F 925.953.1625



EDUCATION

J.D., Golden Gate University
School of Law

B.A., University of California,
Los Angeles

PRACTICE AREAS

Labor & Employment
Students
Community Colleges

BAR ADMISSION

California

OVERVIEW

Stephanie White is a partner in Lozano Smith's Walnut Creek Office. She is chair of the firm's Community College practice area and co-chair of the Title IX practice area. Ms. White represents California public school districts, county offices of education and community college districts in all aspects of education law. She specializes in Labor and Employment and student issues.

EXPERIENCE

Ms. White has experience handling a wide variety of employment matters, from investigating and overseeing investigations into discrimination and workplace harassment complaints, to providing advice and counsel to Human Resources managers on various employee relations matters. She also serve as the lead negotiator at both certificated and classified bargaining tables.

Ms. White is well-versed in responding to administrative charges from DFEH and EEOC, as well as OCR and CDE for student-related complaints. She routinely drafts, reviews and revises employee and student policies on workplace conduct and provides sexual harassment trainings to employees. She is certified as a Civil Rights Investigator through ATIXA, and is also certified in Interest-Based Bargaining.

EDUCATION

Ms. White received her Juris Doctor from Golden Gate University School of Law, and earned a Bachelor of Arts in Sociology from the University of California, Los Angeles. While in law school, Ms. White taught practical legal classes to inner-city high school students in San Francisco.

JONATHAN E. BERRY-SMITH

ASSOCIATE

jberrysmith@lozanosmith.com

2001 North Main St., Suite 500
Walnut Creek, CA 94596
T 925.953.1620 | F 925.953.1625



EDUCATION

J.D., Stanford Law School

M.A., Stanford Graduate
School of Education

B.A., University of California,
Berkeley

PRACTICE AREAS

Student
Labor & Employment
Governance

BAR ADMISSION

California

OVERVIEW

Jonathan E. Berry-Smith is an associate in Lozano Smith's Walnut Creek Office. His practice is focused on the student, labor and employment and governance aspects of education law.

EXPERIENCE

Mr. Berry-Smith is experienced in researching California statutes and case law, and advises school district administrators on all aspects of education law. He reviews and revises documents used throughout the employee discipline process, such as charge packets, notices of administrative leave, and collective bargaining grievance responses. He participates in the review of charter school petitions, inter-district attendance transfer requests, and student expulsion appeals.

Mr. Berry-Smith counsels and coordinates with school districts transitioning to a by-trustee area method of election pursuant to the California Voting Rights Act (CVRA). He also provides guidance on the Brown Act to school district administrators and board members.

EDUCATION

Mr. Berry-Smith received his Juris Doctor from Stanford Law School where he was Co-President of Street Law, and Co-Founder of Youth & Education Advocates at Stanford. He was also involved with the Youth and Education Law Project Clinic and the Stanford Prison Education Project. He earned a M.A. in Education from Stanford Graduate School of Education and a B.A. in Legal Studies from the University of California, Berkeley.

WHO WE ARE & WHAT WE

Lozano Smith is a full-service K-12 and community college. Established in 1988, the firm while advising and counseling stay focused on what matters serve. Lozano Smith has Fresno, Monterey, Bakersfield,

AREAS OF EXPERTISE

- Administrative
- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology &
- Title IX

COST CONTROL is recognize and understand representation with those minimum is through strategic, you updated on changing laws legal seminars providing the assistance down the road.

CLIENT SERVICE is our top benchmark, we have are systematically returned

DIVERSITY IS KEY and we that there is a measurable individuals from a wide variety and the clients benefit from understanding of issues, more

DO

education and public agency law firm serving hundreds of California's districts, and numerous cities, counties, and special districts. prides itself on fostering longstanding relationships with our clients, on complex and ever-changing laws. Ultimately, this allows clients to most – the success of their district, students and communities they offices in eight California locations: Sacramento, Walnut Creek, Los Angeles, Mission Viejo, and San Diego.

Hearings

Innovation

important for public agencies and an area we have mastered. We your financial restraints and work tirelessly to provide the best legal limitations in mind. One of the best ways we keep legal costs to a preventive legal services. These include Client News Briefs to keep affecting education. In addition, we offer extensive workshops and tools needed to minimize liability, reducing the need for legal

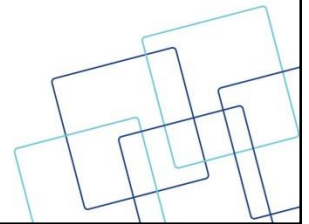
priority and we take it very seriously. With premier service as the established protocols and specific standards of practice. Client calls within 24 hours and often sooner when required.

consciously practice it in all that we do. It is one of our core beliefs level of strength and sensitivity fostered by bringing together of different backgrounds, cultures and life experiences. Both the firm this practice, with a higher level of creative thinking, deeper compassion, and the powerful solutions that emerge as a result.



Title IX: Responding to and Investigating Complaints of Sexual Harassment

Lozano Smith Webinar
October 8, 2020



Today's Presenters



Stephanie M. White

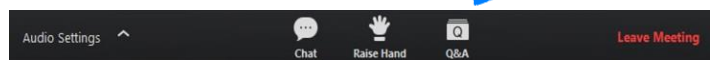
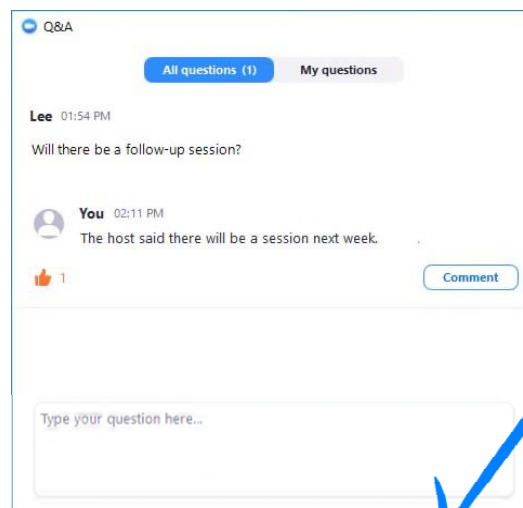


Jonathan E. Berry-Smith

Q&A

Please submit questions through the Q&A feature, accessible in the panel at the bottom of your screen.

We will try to verbally answer as many questions as we can in our allotted time.





Evaluation

An evaluation form will pop up on your screen when you exit the webinar.

We consider all feedback important, and would appreciate you taking a quick minute to help us enhance any future webinars.

Lozano Smith



Today's Training

Title IX and the New Regulations

The Roles and Responsibilities of District Administrators and Employees

Prevention: Training, Notice and Posting Requirements

REACT to Sexual Misconduct (12-Step Investigative Process)

Poll 1

Introduction



Title IX and the New Regulations

LS

The Plain Language

“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.”

20 U.S.C. § 1681 et seq.

LS

What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. Sexual Harassment*

(34 C.F.R. Part 106)

*New regulations that have the full force and effect of law



What Could Happen if a District Fails to Comply with Title IX?



- Action for monetary damages
- Attorney's fees
- Loss of federal funding
- Resolution agreement with OCR



Why Title IX is Important -Potential Impact of Sexual Harassment on Students and Employees



- Shame, humiliation, stress, anxiety, depression, loss of sleep
- Impaired learning/poor work performance
- Absenteeism/turnover
- Culture of discrimination
- Civil liability (monetary damages, attorney fees)
- Negative media attention and public outcry
- OCR Resolution Agreement
- Loss of federal funds



New Regulations on Sexual Harassment

In May 2020, OCR released the Final Rule under Title IX, which carries the force and effect of law as of August 14, 2020.

- Prior to this, schools only had guidance in handling Title IX sexual harassment claims
- Final Rule:
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regsunofficial.pdf>



Under the Final Rule...

What's New?

1. The definition of “sexual harassment”
2. “Actual knowledge” for notice
3. Procedural requirements for due process
4. “Deliberate indifference” standard



Required Response to Sexual Harassment

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

- Section 106.44 of the 2020 Final Rule (emphasis added)



Under the Final Rule...

What Hasn't Changed?

- Duty to identify and promptly investigate and address allegations of sexual harassment
- Duty to adopt and publish clear policies on how to file complaints and how complaints will be promptly addressed
- Notice to parties of the initiation of the investigation and the outcome of investigation and appeal rights
- Duty to prevent recurrence and remedy effects
- Obligation to have a Title IX Coordinator



New Definitions

Complainant

- An individual who is alleged to be the *victim of the conduct* that could constitute sexual harassment

Respondent

- An individual who has been reported to be the *perpetrator of conduct* that could constitute sexual harassment

Formal Complaint

- A document filed by a *complainant* or signed by the *Title IX Coordinator* alleging sexual harassment against a respondent, and requesting that the district investigate the allegation

Actual Knowledge (K-12)

- When *any employee* has notice of sexual harassment or allegations of sexual harassment



New Definitions – Sexual Harassment

Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

1. An *employee* conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;
2. 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 district's education program or activity; or
3. "*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).



New Definitions – Sexual Harassment

Sexual assault:

- Actual or intentional physical sexual acts against a person *without consent* that may include:
- Rape, rape and seduction, sodomy, lewd and lascivious acts, oral copulation, sexual penetration, sexual battery, and sexual assault.
- "No consent" may include:
- Force, duress, violence, fear of immediate harm, inability to consent (including statutory rape). (20 U.S.C. 1092(f)(6)(A)(v).)

Dating violence:

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

(34 U.S.C. 12291(a)(10).)



New Definitions –Sexual Harassment

Domestic violence

- Felony or misdemeanor crimes of violence committed by:
 - A current or former spouse or intimate partner of the complainant,
 - A person with whom the complainant shares a child in common,
 - A person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner,
 - A person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
 - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws.

(34 U.S.C. 12291(a)(8).)



New Definitions – Sexual Harassment

Stalking:

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress.

(34 U.S.C. 12291(a)(30).)



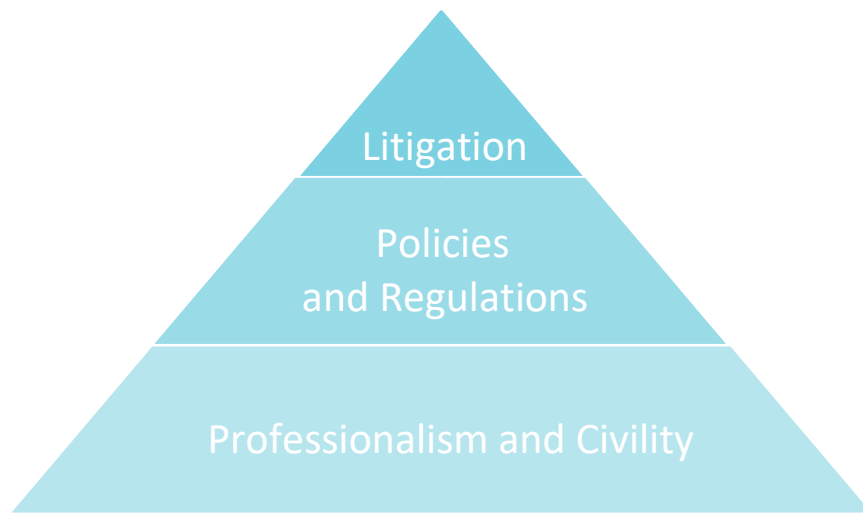
Title IX Jurisdiction

Allegations of sexual harassment fall under Title IX when:

- The conduct occurs against a person *in the United States*
- The conduct occurs in an education program or activity over which the district exercised *substantial control* over both:
 - 1) the *respondent* and
 - 2) the *context* in which the sexual harassment occurs; and
- The complainant was *participating/attempting to participate in* the educational program or activity at the time the complaint was filed.



Standards to Consider



The Roles and Responsibilities of District Administrators and Employees



Responsibilities of the Title IX Coordinator:

- Provides or coordinates Title IX trainings and preventative measures
- Offers supportive measures to complainant and respondent
- Explains the complaint/grievance process to the complainant
- Receives all complaints and oversees the complaint/grievance or informal resolution process
- May sometimes investigate complaints, but is never the decision-maker
- Determines mandatory and discretionary dismissals
- Evaluates corrective actions
- Addresses patterns or problems

LS

Responsibilities of the Investigator:

- Administers a fair investigation of formal complaints
 - Interviews parties and witnesses
 - Reviews evidence
 - Provides parties the opportunity to inspect, review, and respond to all evidence gathered, and considers their responses
 - Creates an investigative report that summarizes relevant evidence
- Does not make a determination of responsibility
- Must be trained
- Must be impartial, unbiased, and free of any conflicts of interest





Responsibilities of the Decision-Maker:

- Reviews the investigation report, but does not investigate
- Gives parties the opportunity to submit written relevant questions for the other party/witnesses, and asks those questions they deem relevant or provides an explanation as to why a question was deemed irrelevant
- Makes a determination about responsibility
- Prepares the written determination that is issued to each party
- May recommend sanctions and/or corrective actions





Responsibilities of the Informal Resolution Officer:

- Facilitates the informal resolution process
- Trained, unbiased, and without conflict
- May be the Title IX Coordinator or another unbiased party
- Verifies a complaint meets the criteria for informal resolution, and that the parties have given voluntary, written consent
- Ensures the parties know their rights, including their right to withdraw at any time prior to a resolution being reached





Responsibilities of the Appeals Officer:

- Evaluates any appeal request made by the complainant or respondent
- Makes a decision on the appeal and issues a written decision to each party that states the decision and rationale
- Must be unbiased and without conflict
- Cannot be the Title IX Coordinator, investigator, or decisionmaker



Responsibilities of All Employees:



- All employees must report to the Title IX Coordinator, and/or any additional designated individuals (school site administrators), any known claims of potential sexual harassment.
- All employees should be trained on how to identify potential sexual harassment issues and report them.
- This does NOT change an employee's obligations as a mandated reporter!



Criminal Investigation

1. A police investigation does *not* relieve a district of its obligations under Title IX or state laws
2. What if law enforcement is involved?
 - A brief delay is permissible, but it is not good cause to delay sending the written notice of the investigation
 - Criminal reports may be useful for fact gathering
 - Coordinate with local law enforcement



Poll 2

Roles & Responsibilities



LS

32

Prevention:
Training, Notice and
Posting Requirements

LS

Prevention



- ✓ Adopt appropriate written policy
- ✓ Publish and disseminate the policy
- ✓ Designate a Title IX coordinator
- ✓ Train the Title IX team, staff and students

Training Requirements

Title IX Coordinators, investigators, decision-makers, appeals officers, and any person who facilitates an informal resolution process, must be trained on, at least:

- The *definition of sexual harassment* in § 106.30,
- The scope of the *district's education program or activity*,
- How to conduct an *investigation* and the *complaint/grievance process*, including appeals (and hearings, if applicable), and the informal resolution processes, as applicable,
- How to serve *impartially*, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias,
- Any *technology* they will be required to use to fulfill their duties, and
- Deciding *issues of relevance* to fulfill the duties of their roles.

*Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints.



Title IX Notice/Posting Requirements

- Notice of Title IX rights must be given to all employees, students, and applicants
- Must be posted in a *prominent* location on the district's *website*, and in each *handbook* or catalogue that it makes available to persons entitled to notification
- Training materials must be posted online – 7 years



Title IX Notices Must Include:

- Contact information for the Title IX Coordinator
- A statement that the district does not discriminate on the basis of sex in the education program or activity that it operates, including in employment, and that it is required by Title IX and specifically Section 106.8(b) not to discriminate in such a manner
- That inquiries about the application of Title IX and Section 106(b) may be referred to the Title IX Coordinator, to the Assistant Secretary of Education, or both
- The district's complaint/grievance procedures and process, including:
 - how to report or file a complaint of sex discrimination,
 - how to report or file a complaint of sexual harassment, and
 - how the district will respond



Title IX Policies

Complaint/grievance procedures must:

- Provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited under Title IX, and
- Comply with the requirements of Section 106.45.



Title IX Policies Must (Per Section 106.45):

- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence
- Require that any individual involved as Title IX Coordinator, investigator, decision-maker, or informal resolution officer not have a conflict of interest or bias for or against complainants or respondents
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the complaint/grievance process



Title IX Policies Must (Per Section 106.45):

- Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the district may implement following any determination of responsibility
- State the standard of evidence to be used to determine responsibility
(i.e., preponderance of the evidence standard)
- Describe appeal procedures
- Describe supportive measures available to both parties
- Protect information protected under a legally recognized privilege
(unless there is a waiver)

LS

The New Regulations Are NOT Retroactive



- The new regulations do NOT apply to any alleged sexual harassment that occurred prior to August 14, 2020
- The Federal Rule governs how schools must respond to sexual harassment that allegedly occurs ON or AFTER August 14, 2020

LS

Retaliation Prohibitions

- Retaliation is prohibited against anyone who has attempted to participate in the Title IX process.
- The district cannot use the student conduct process as a way to avoid the Title IX complaint/grievance process.

BREAK

LS

- Retaliation complaints must be filed under the same complaint/grievance process.
- The district must keep the identities of all involved parties confidential, unless disclosure is required by law or necessary to carry out Title IX proceedings.
- Exercising a First Amendment right is not retaliation.
- Charging an individual with making a false statement in bad faith during a Title IX process is not retaliation.



REACT to Sexual Misconduct

LS



LS

REACT to Sexual Misconduct

- Recognize
- Evaluate
- Act
- Corrective Measures
- Thoughtful Reflection/
Tying Up Loose Ends



REACT Recognize

REACT
Recognize

Step 1:
Identify Potential Title IX Issues

LS

Examples of “Red Flag” Conduct

- Flirtations or propositions
- Derogatory comments
- Sexual jokes or gestures
- Spreading sexual rumors
- Massaging, grabbing, or touching
- Comments on an employee or student’s body
- Sexual acts without consent or based on coercion
- Non-consensual “sexting”
- Sexploitation



New Definitions – Sexual Harassment

Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

1. An *employee* conditioning the provision of an aid, benefit, or service of the district on the complainant’s participation in unwelcome sexual conduct;
2. 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 district’s education program or activity; or
3. “*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).



Title IX Jurisdiction

Allegations of sexual harassment fall under Title IX when:

- The conduct occurs against a person in the United States;
- The conduct occurs in an education program or activity over which the district exercised substantial control over both:
 - 1) the respondent, and
 - 2) the context in which the sexual harassment occurs and
- The complainant was participating/attempting to participate in the educational program or activity at the time the complaint was filed.



REACT
Evaluate



Step 2: Assess the Complaint

LS

Receiving a Complaint



- Notify the Title IX Coordinator
- Assess whether a CPS report should be filed (continue to reassess)
- Title IX Coordinator should promptly schedule a meeting with the victim

LS

Contact the Victim

- Conduct initial discussion with complainant/victim to better understand the complaint and if it rises to the level of sexual harassment under Title IX
- Discuss options for supportive measures
- Explain options for filing a formal complaint with the district
- Discuss the district's policy that prohibits retaliation



Does the Complaint/Allegation Trigger a Title IX Obligation?

1. Does the alleged conduct, if true, constitute sexual harassment under Title IX?
2. Is there jurisdiction over the conduct?

*If “no” to any of the above, any formal complaint must be dismissed.



1) If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

- 
1. Any *employee* conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
 2. Any unwelcome conduct that a reasonable person would find so *severe, pervasive, and objectively offensive* that it denies a person equal education access; OR
 3. Any instance of sexual assault, dating violence, domestic violence or stalking (as defined in the Clery Act or Violence Against Women Act)



2) Is there Title IX Jurisdiction Over the Conduct?

1. Education Program or Activity
 - a) Substantial control over the respondent; and
 - b) Substantial control over the context in which the sexual harassment occurred
2. Within the United States
3. At the time of filing a formal complaint, complainant must be participating/attempting to participate in the educational program



Do You Have a “Formal” Title IX Complaint?

- *Formal Complaint:* A document filed by a complainant (who is also the victim or the victim's parent/guardian) or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation.
- If no formal complaint is filed by the complainant, the Title IX Coordinator should assess whether to independently initiate a complaint based on a threat to safety.



What if the Complainant says “Do Nothing”?

- The Title IX Coordinator must inform them of their options
- Example: supportive measures without filing a formal complaint
- The Title IX Coordinator may sign a formal complaint on the victim's behalf
- Assess the conduct!
- If NOT filing a formal complaint would be deliberately indifferent, or clearly unreasonable given the known circumstances, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant's behalf



REACT

Step 3: Implement Supportive/Urgent Measures

Act

LS

REACT
Act

Supportive Measures

Examples:

- Counseling
- Medical services
- Academic support (e.g., extension of deadlines or other course adjustments)
- No-contact orders
- Increased security
- Changed schedules (e.g., modification of work or class schedule)
- Leaves of absences (employees)
- Emergency removals in compliance with Title IX

Document the implemented supportive measures, but don't stop there!



Emergency Removals (Students)

School districts are prohibited from disciplining a student for alleged sexual harassment until a full Title IX investigation has been completed.

EXCEPTION: An Emergency Removal

REACT
Act

Step 4:
Determine Whether Complaint or
Allegations Trigger Title IX Obligations

- Respondent must be an immediate threat to the physical health or safety of any student or individual;
- The immediate threat must arise from the allegations of sexual harassment; and
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.

*There are no restrictions under Title IX for placing an employee on administrative leave.

Mandatory Dismissals

Districts *MUST* dismiss a Title IX complaint, or any allegations therein if:

- The alleged conduct, if true, does not constitute sexual harassment under Title IX; or
- The conduct did not occur in the district's education program or activity; or
- The conduct did not occur against a person in the United States; or
- The complainant was not participating/attempting to participate in the educational program at the time the complaint was filed.

Discretionary Dismissals

Districts *MAY* dismiss a formal complaint, or any allegations therein if:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the district; or
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Step 5:
Initiate an Investigation into the
Formal Complaint or Engage in the
Informal Resolution Process

Notice of Investigation

1. Identify investigation process, including informal resolution process
2. Identify allegations with sufficient details

3. Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process
4. Explain that they may have an advisor of their choice inspect and review the evidence
5. Identify the district's code of conduct that prohibits knowingly making false statements or submitting false information
6. Do not restrict either party's ability to discuss the allegations under investigation

Informal Resolution

- Informal resolution is a process that does not involve a full investigation and adjudication.
- It can only be offered when:
 - A formal complaint is filed;
 - The school district has sent a written notice about the allegations and the informal resolution process;
 - A written determination has not yet been made; and
 - Both parties have provided voluntary, written consent to the process.
- Either party can withdraw from the informal resolution process at any time, and should be notified of this right.
- Informal resolution cannot be used for allegations where an employee is alleged to have sexually harassed a student.

Step 6: Gather, Review, and Preserve Evidence

BREAK

Step 7: Conduct Witness Interviews

Witness Interviews

- Start with an outline of questions, but be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each witness.
- If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- At the end, ask: Is there anything else?
- *If possible, have a 2nd administrator in the room*

Confidentiality & Preserving the Integrity of the Investigation

- Confidentiality cannot be promised.
- All evidence will be shared with the complainant/victim and the respondent.
- Both parties will have an equal opportunity to inspect and review any evidence that is directly related to the allegations.

REACT
Act

Step 8: Review of Evidence by the Parties

Review of Evidence By the Parties

- Send the parties any evidence directly related to the allegations raised in the formal complaint
- Includes evidence the district does not intend to rely on in reaching its decision regarding responsibility
- Use of a draft investigation report or report of evidence
- Must be done prior to the completion of the investigation report
- Parties should be given at least 10 days to respond to the evidence, which must be considered by the investigator

*The investigator should work with the Title IX Coordinator to securely transmit the evidence to the parties, and to assess whether redactions may be appropriate.

REACT
Act

Step 9: Prepare the Investigation Report

Investigation Report

- The final investigation report should be prepared by the investigator and must summarize relevant evidence.
- Parties must be offered the opportunity to provide a written response to the investigation report.
- Must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.

Step 10: Decision-Maker Makes a Determination of Responsibility for Sexual Harassment

Submission of Written Questions

- The decision-maker must allow parties the opportunity to submit written, relevant questions that they want to ask any other party or witness
- Once the parties are provided with the answers, they are permitted to submit additional, limited follow-up questions from each part
- Decision-maker determines relevancy, or explains why questions were deemed irrelevant

- Complainant's sexual history is irrelevant unless offered to prove someone else committed the conduct or for proof of consent

Written Determination Regarding Responsibility – Issued by the Decision-Maker

- Identification of the **allegations** potentially constituting sexual harassment
- A description of the **procedural steps** taken from formal complaint through the determination of responsibility
- **Findings of Fact** supporting the determination
- **Conclusions** regarding the application of the district's code of conduct to the facts

Step 11: Appeal ^{Act} Rights

REACT

Corrective Measures

Step 12: Corrective Actions

REACT

Thoughtful Reflection and Tying Up Loose Ends

Recordkeeping Requirements

Recordkeeping – Records Must Be Maintained for 7 Years

Actual Knowledge But No Formal Title IX Complaint:

- Documentation of all actions, including any supportive measures implemented to demonstrate the response was not deliberately indifferent. Particular detail should be included if supportive measures are not offered to a complainant Training Materials:
- All training materials for Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process

Disclaimer:

These materials and all discussions of these materials are for instructional purposes only and do not constitute legal advice. If you need legal advice, you should contact your local counsel or an attorney at Lozano Smith. If you are interested in having other inservice programs presented, please contact clientservices@lozanosmith.com or call (559) 431-5600.

Copyright © 2020 Lozano Smith

All rights reserved. No portion of this work may be copied, distributed, sold or used for any commercial advantage or private gain, nor any derivative work prepared therefrom, nor shall any sublicense be granted, without the express prior written permission of Lozano Smith through its Managing Partner. The Managing Partner of Lozano Smith hereby grants permission to any client of Lozano Smith to whom Lozano Smith provides a copy to use such copy intact and solely for the internal purposes of such client. By accepting this product, recipient agrees it shall not use the work except consistent with the terms of this limited license.

