



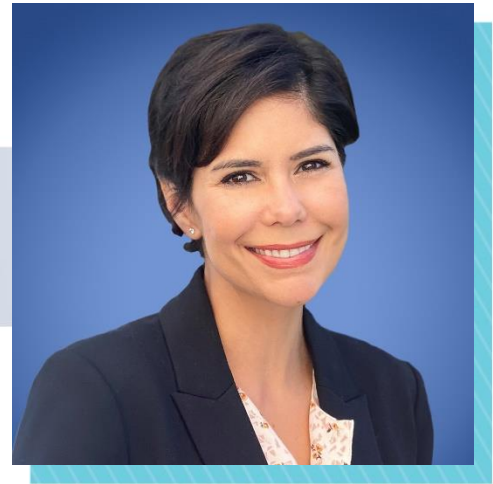
Title IX Compliance and Investigations

Presented by: Monica D. Batanero

Tulare County Office of Education
Law Seminars 2023-2024
January 17, 2024

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Overview

Monica D. Batanero is Senior Counsel in Lozano Smith's Los Angeles office. Ms. Batanero advises educational institutions on student, special education and personnel issues.

Experience

Ms. Batanero is chair of the firm's Title IX Practice Area and specializes in Title IX compliance, as well as conducting complex investigations into claims of sexual misconduct and harassment (including Title IX), discrimination, bullying, retaliation, and other issues that may arise in an educational setting.

Ms. Batanero provides legal counsel to community college districts and K-12 school districts on day-to-day issues involving Title IX compliance, sexual harassment, discrimination/harassment, Section 504, IDEA, governance, Public Records Act, and student discipline. She regularly conducts workplace and school investigations involving alleged misconduct in violation of board policy and/or law, including Title IX, sexual harassment, professional standards, and code of student conduct.

Ms. Batanero has represented school districts in all phases of special education matters, including Individualized Education Plan meetings, resolution meetings, mediations, and due process hearings conducted by the Office of Administrative Hearings.

She also frequently develops and provides trainings to clients on Title IX, Section 504, IDEA, workplace and school investigations, sexual harassment prevention, student discipline, and first amendment issues.

Education

Ms. Batanero earned her Juris Doctor from the University of San Francisco, School of Law. She earned both an M.S. and B.S. in Gerontology from the University of Southern California.

Practices

Student
Special Education
Labor and Employment
Investigations

Title IX
Governance

Education

J.D., University of San Francisco, School of Law
M.S., University of Southern California
B.S., University of Southern California

Admissions

California

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Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Sacramento, Walnut Creek, Fresno, Monterey, Bakersfield, San Luis Obispo, Los Angeles, and San Diego.

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

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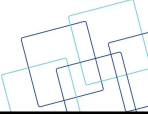
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Presenter

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AT LOZANO SMITH
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Title IX and the 2020 Regulations

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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.



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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



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Title IX Regulation Highlights

1. The definition of "sexual harassment"
2. "Actual knowledge" for notice
3. Procedural requirements for due process
 - a. Roles
 - b. Procedure
4. "Deliberate indifference" standard



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Deliberate Indifference

“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.”



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Title IX Definitions

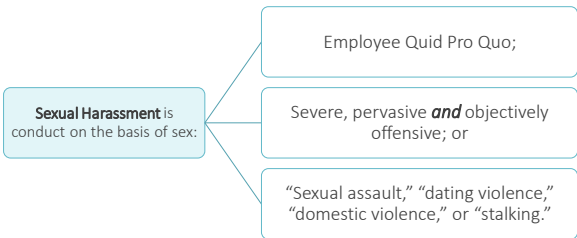
Actual Knowledge	Formal Complaint	Complainant	Respondent
<ul style="list-style-type: none">• (K-12) When any employee has notice of sexual harassment or allegations of sexual harassment• (Higher Ed) When the Title IX Coordinator or any official who has the authority to institute corrective measures has notice of sexual harassment or allegations of sexual harassment	<ul style="list-style-type: none">• A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent, and requesting that the recipient (District) investigate the allegation	<ul style="list-style-type: none">• An individual who is alleged to be the victim of the conduct that could constitute sexual harassment	<ul style="list-style-type: none">• An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



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Title IX Definitions – Sexual Harassment



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Title IX Definitions – Sexual Harassment

Sexual assault:

An offense classified as a sex offense or nonforcible sex offense under the FBI uniform crime reporting system

i. Sex Offenses

1. Rape—(Except Statutory Rape)
2. Sodomy
3. Sexual Assault With An Object

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Title IX Definitions – Sexual Harassment

Sexual assault (continued):

4. Fondling

ii. Sex Offenses, Nonforcible—(Except Prostitution Offenses)

1. Incest
2. Statutory Rape

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.

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Title IX Definitions – Sexual Harassment

Domestic violence:

Felony or misdemeanor crimes of violence committed by a qualified person.

Stalking:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for safety or the safety of others; or
- Suffer substantial emotional distress.

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Hypothetical

Elizabeth regularly sits with a male student, Josh, in Social Studies. Elizabeth reported to you that although she initially would flirt with Josh and liked the attention, he recently put his hand on her inner thigh in class and pulled her leg closer to him. She is uncomfortable sitting next to Josh and does not want to sit next to him anymore.

Is this Title IX?

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Title IX Jurisdiction

In the United States;

The District exercised **substantial control** over both:

- 1) the **respondent** and
- 2) the **context** in which the sexual harassment occurs; and

Participating/attempting to participate at the time the complaint is filed.

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Hypothetical True or False

The District **must** conduct a Formal Title IX investigation into an incident


1. that occurred between two students over the weekend, at a student's home.
2. in which an administrator allows an office manager to leave early and work from home in exchange for the office manager going on a date with the administrator.
3. that occurred last year, and the Complainant has graduated.

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"Red Flags" for Sexual Harassment

- Flirtations or propositions
- Derogatory comments
- Sexual jokes or gestures
- Spreading sexual rumors
- Massaging, grabbing, or touching
- Comments on a student's or employee's body
- Sexual acts without consent or based on coercion
- Non-consensual "sexting"
- Exploitation




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Retaliation Prohibitions




- Retaliation is prohibited
- Retaliation complaints under the same process
- Confidential, unless required by law
- First Amendment rights
- Cannot make false statement in bad faith

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Why Title IX is Important - Potential Impact of Sexual Misconduct



- 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

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The Roles and Responsibilities of District Administrators and Employees

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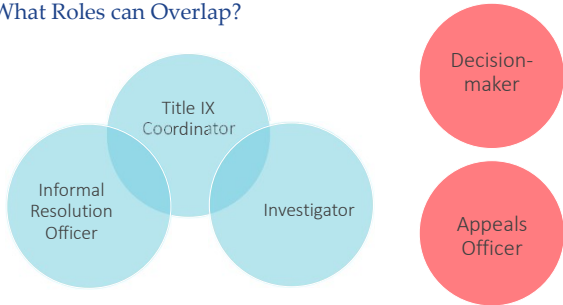
What are the Roles?



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What Roles can Overlap?



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Title IX Coordinator's Duties

- Receives and oversees
- Explains options and process to complainant*
- Offers supportive measures *
- Determines dismissal of complaints
- Evaluates corrective actions*
- Identifies systemic issues
- Ensures overall Title IX compliance

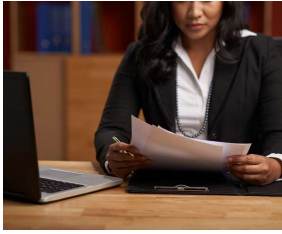
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Investigator's Duties

- Interview
- Gather evidence
- Parties to review evidence
- Consider responses
- Prepare investigation report

May be the Title IX Coordinator



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Decision-Maker's Duties (K-12)

- Reviews investigation report
- Facilitates exchange of questions
- Asks relevant questions
 - Explains if questions are irrelevant
- Makes determination about responsibility
- Prepares written determination

Cannot be the Title IX Coordinator

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Informal Resolution Officer's Duties

- Facilitates the informal resolution process
- Verifies a complaint meets the criteria
- Verifies voluntary, written consent
- Ensures the parties know their rights

May be the Title IX Coordinator

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Responsibilities of the Appeals Officer:

- Evaluates any appeal
- Makes a decision on the appeal
- Issues a written decision

Cannot be the Title IX Coordinator, investigator, or decision-maker

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Hypothetical

Two students, Diana and Steve, plan to meet in the bathroom. Both students begin to kiss in the stall. While in a stall Steve asks Diana to perform oral sex on him. Diana allegedly refuses but continues to kiss Steve. A few days later, Diana hears from a friend that Steve was telling students that Diana "went down on him." While in class together, Steve looked at Diana and pointed at his erection.


Diana comes to your office upset about Steve's behavior, and says she wants to file a complaint. You speak to Steve and he informs you Diana asked to "go down on him" and she is the one who keeps asking to see his erection. He says he has text messages to prove it and that he is now uncomfortable around Diana.

Is this Title IX? What supportive measures would you offer?

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Responsibilities of All Employees (K-12)



Identify and Report


This does not relieve an employee of their mandated reporter duties!

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Duties of a Mandated Reporter



The duties of a Mandated Reporter are to:

- Make a report to CPS
- Cooperate with an investigation
- Notify the police, if appropriate
- Testify in proceedings that result from the report, if requested to do so

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Hypothetical

During PE, a 3rd grade male, Lincoln, slaps a male classmate, Harrison on the buttocks after Harrison runs the bases while they are playing softball or while they are playing basketball. This has happened every day for the past few weeks.

ADD: When Lincoln was in 1st grade, it was reported that he was calling one his classmates gay and homosexual.

Is this Title IX?

Does your answer change if these are high school students?

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Criminal Investigation

1. A police investigation does *not* relieve a district of its obligations under Title IX or state laws
2. Gathering evidence
 - 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



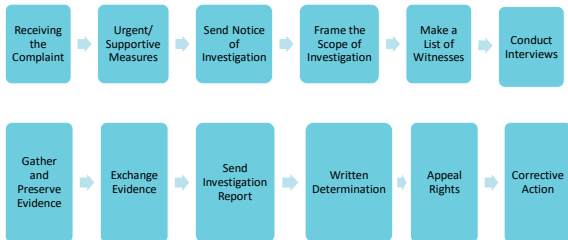
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Title IX Complaint Procedures

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The Life of a Formal Title IX Complaint & Investigation



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Rights of Parties

- Receive detailed notice of investigation
- Can have advisor present throughout the Title IX grievance process
- At least 10 days to review directly related evidence
- At least 10 days to review relevant evidence in the final investigation report and submit written questions to the decision maker (K-12) or Live Hearing (Higher Ed)
- Right to appeal decision

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Notice of Investigation

- Identify complaint/investigation process, including informal resolution process;
- Identify allegations with sufficient details;
- Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process;
- Explain that they may have an advisor of their choice inspect and review the evidence; and
- Identify the District's code of conduct that prohibits knowingly making false statements or submitting false information.
- Do not restrict either party's ability to discuss the allegations under investigation.

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Investigation Timelines



- Title IX - "reasonably prompt time frame"
- District policies

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Receiving and Analyzing Complaint

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Receiving Complaints (In General)

WHERE COMPLAINTS COME FROM	FORM OF COMPLAINTS
Student	Verbal
Parent	
Employee	Written
Member of Public	
Anonymous Person	No Complaint (Rumor or Observation)

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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

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Contact the Victim/Complainant

Initial discussion with complainant

- Gather facts
- Supportive measures
- Explain options for filing
- Discuss the District's policy that prohibits retaliation


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Hypothetical

You get the following text message from a teacher.

Can you "do nothing"?



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What if the Complainant says "Do Nothing"?

The Title IX Coordinator must inform them of their options

- This includes supportive measures without filing a formal complaint

The Title IX Coordinator can sign a formal complaint on the complainant's behalf

- Assess the conduct!
- If NOT filing a formal complaint would be deliberately indifferent, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant's behalf

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Reporting a Complaint under AR 5145.7 (Model AR)

“A student or parent/guardian who believes that the student has been subjected to sexual harassment by another student, an employee, or a third party or who has witnessed sexual harassment is strongly encouraged to report the incident to a teacher, the principal, the district’s Title IX Coordinator, or any other available school employee. **Within one school day of receiving such a report**, the principal or other school employee shall forward the report to the district’s Title IX Coordinator. Any school employee who observes an incident of sexual harassment involving a student shall, **within one school day**, report the observation to the principal or Title IX Coordinator. The report shall be made regardless of whether the alleged victim files a formal complaint or requests confidentiality.



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Hypothetical

An 8th grade student, Erica, comes and tells you that a 7th grade student, Natalie, has been making her feel uncomfortable at school. Erica tells you that Natalie has been staring at her in the locker room, and that one of her friends overheard Natalie call her “sexy” when she was changing in the locker room.

Is this Title IX?

What supportive measures do you offer?

What do you do next?



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Do You Have a “Formal” Title IX Complaint?

Document filed by Complainant

OR

Signed by Title IX Coordinator



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Does it Meet the Tests?

Definition of
Title IX Sexual
Harassment

AND

Title IX
Jurisdiction

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

Employee Quid Pro Quo;

SPOO (severe, pervasive **and** objectively offensive); OR

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.**

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

Substantial control over both

- Respondent; and
- Context.

Within the United States.

Participating/attempting to participate at the time the complaint is filed.

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

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Hypothetical

Eli, a senior in high school, comes to you to tell you that when he was a freshman, his classmate Drew raped him in the bathroom of the park across the street from the school.

Is there Title IX jurisdiction?

Does the school exercises substantial control over

- The respondent; and
- The context in which the sexual harassment occurred?

If it is determined there is no Title IX jurisdiction, do you still investigate?

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Mandatory and Discretionary Dismissals

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Mandatory Dismissals

- Does not meet definition;
- Did not occur in District education program or activity; or
- Did not occur in the United States.

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Discretionary Dismissals

- Request in writing to withdraw;
- Respondent is no longer enrolled or employed;
or
- Inability to gather sufficient evidence.



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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:

- Procedural irregularity;
- New evidence that was not reasonably available earlier; or
- Involved personnel had a conflict of interest or bias.



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Even if You Determine Title IX Is NOT Triggered or the Complaint Should Be Dismissed, Do NOT Stop There!

- *Consider whether the alleged conduct may otherwise violate District policy or employee/student conduct standards*



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Policies and Procedures for Investigating Title IX/Sexual Harassment Complaints

- BP/AR 1312.3 – Uniform Complaint Procedures
- BP/AR 4030 – Nondiscrimination in Employment
- AR 4031 – Complaints Concerning Discrimination in Employment
- 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)



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Immediate Interventions and Supportive Measures

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Urgent Considerations



- Is there a threat of imminent harm to others?
- Was a crime potentially committed?
- Have mandated reporting obligations been triggered?



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Supportive Measures

- Designed to restore or preserve equal access to the educational program
- Cannot be disciplinary/punitive
- Cannot be retaliatory
- Offered to complainant and respondent
- Determined on a case-by-case basis

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Supportive Measures

Examples:

- Counseling
- Medical services
- Academic support
- No-contact orders
- Increased security
- Changed schedules
- Independent study (voluntary)

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

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Emergency Removals (Students)

Title IX Regulations contemplate that the full Title IX grievance procedure be completed prior to discipline being imposed.

EXCEPTION: 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; and
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.

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Administrative Leave

Placing an employee on Administrative Leave is not disciplinary


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Student Discipline

After the Formal Grievance procedure is complete, the student discipline timeline begins, and discipline can be imposed.



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Hypothetical

Over winter break, two eighth graders, Natasha and Josh, begin “talking.” The meet up a few times on campus during the break (school is not in session). During one of their meet ups, they begin kissing. Josh then moves his hand inside of Natasha’s shirt and under her bra. Natasha goes along with it, but then stops the action.

Natasha’s parents come to you with a complaint against Josh.

Is this Title IX? What do you say to Natasha’s parents?

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Hypothetical (continued)

Change the facts such that Natasha and Josh met up on campus after basketball practice and that Josh digitally penetrated Natasha.

Is this Title IX? Can you suspend Student A?

Would you implement an Emergency Removal?

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Hypothetical

4th grade transgender student Charlie, alleges that while in the restroom, another student crawled under the stall, forced Charlie to take his pants down and the student rubbed their penis against Charlie's buttocks.

Is this Title IX? Would you implement Emergency Removal?

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Informal Resolution

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Informal Resolution

Informal resolution is a process that does not involve a full investigation and adjudication.

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.

It can only be offered when:

- A formal complaint is filed;
- The 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.

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Tips for Conducting Effective Investigations

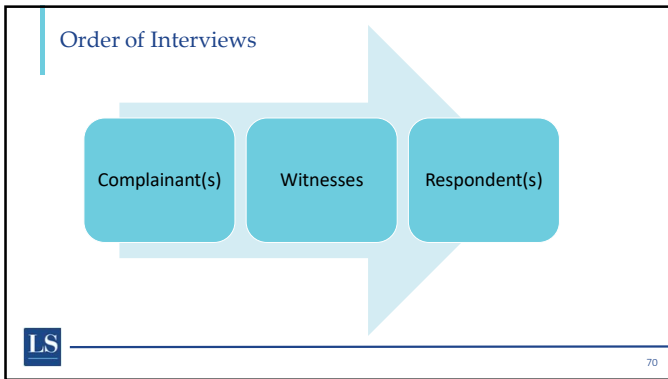
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Checklist for Effective Investigations

Receiving the Complaint	Gather and Preserve Evidence
Urgent/Supportive Measures	Conduct Witness and Respondent Interviews
Assessing the Nature of the Complaint	Conduct Additional Interviews If Needed
Send Notice of Investigation	Prepare the Report and Findings
Frame the Scope	Corrective Action and Tying up Loose Ends
Make a List of Witnesses	
Draft Questions for and Interview the Complainant	

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Tips for Conducting Effective Interviews

- Create an outline of questions but be flexible!
- Use the outline as a roadmap for issues/topics.
- Keep in mind big picture goals.
- At the end, ask:
 - "...anything else I should know?"
 - "... anyone else I should talk to?"
 - "...any documents?"



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Gathering Evidence

Complaint, written statements	Phone Records, voicemails
Social Media (posts, direct messages, chats)	Video Surveillance
Text Messages	Sign in sheets
Emails	Seating charts
Zoom Chat Logs	Collective Bargaining Agreement

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Trauma-Informed Approach

Use of trauma-informed techniques during the complainant's interview can facilitate rapport building, cooperation and complainant's emotional recovery.

- Schedule interview at convenient time and place
- Listen attentively and actively without interrupting
- Save technical questions for the end of the interview once open-ended ones exhausted
- Display compassion and sincerity
- Interview without judgment or skepticism
- Do NOT Victim-Blame
- Permit student/employee to control information flow
- Suggest breaks as needed
- Explain the need/context when asking sensitive questions

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Statements/Questions to Avoid

Questions to avoid:

- Why did you...?
- Why didn't you...?
- Didn't you consider...?

Questions that may be helpful:

- How did that make you feel?
- What was your thought process at that time?
- Do you remember smelling/hearing anything?

Don't insert your opinion into the victim's experience

Don't make assumptions about what the victim needs or wants

Avoid questions that can be answered with one-word or short responses

Avoid leading questions "And then you did this..." v. "What happened next?"

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Understand the Scope/Frame the Allegations

- **Problematic:** Did Suzie create a hostile work environment for Joe?
 - *****Break this up into separate allegations focusing on whether or not the alleged conduct occurred.**
- **Best Practice:** On May 15, 2021, did Suzie tell Joe that she wanted to go on a date with him?
- **Best Practice:** On May 17, 2021, did Suzie touch Joe on his thigh?
- **Best Practice:** On May 20, 2021, did Suzie deny Joe's vacation request?

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Understand the Scope/Frame the Allegations

- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
 - **Problematic:** Was Cathy’s interaction with Dale inappropriate?
 - **Best Practice:** Did Cathy tell Dale “If you went on a date with Linda, who is a tramp, why won’t you go out with me?”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)



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Take Notes

Take detailed notes and second administrator or confidential employee involved to take notes.

Consider signed witness statement summaries.

Audio recordings not permitted.



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Understanding Bias

Implicit Bias

- Unconscious
- Often based on social stereotypes
- Many (if not most) people are unaware

Confirmation Bias

- Subconscious tendency to affirm existing beliefs, ideas, expectations, and/or hypotheses.
- Therefore, confirmation bias is both affected by and feeds our implicit biases.




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Suggestions to Counteracting Bias

- Recognize it
- Identify it
- Consider it
 - Avoid early hypothesis
 - Alternative hypothesis
 - Chart out the evidence
- Write it
- Talk about it
- Good investigation skills



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Hypothetical

Charlie tells you that a TA in the class said Charlie would receive an "A" in the course in exchange for providing sexual favors throughout the semester.

What gender did you ascribe to Charlie?

What gender did you ascribe to the TA?

Submit answers in Chat.

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Assessing Credibility

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

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Credibility Factors (continued)

- **Past record:** Did the alleged harasser have a history of similar behavior in the past?
- **Opportunity and capacity to observe/actual knowledge:** Did the person see it themselves, or are they recounting what someone else told them?
- **Consistent or inconsistent statements:** Is the person changing their story? Did the person say the same thing to three other witnesses?
- **Reputation for veracity or deceit:** Does this person have a reputation of lying, cheating, etc.?
- **Bias:** Is this person the Complainant's best friend? Does the person have their own complaint against Respondent?



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Common Challenges to Complainant's Credibility



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Credibility Challenge: Incomplete, Inconsistent and Untrue Statements

Common neurobiological effects of trauma: perceptual narrowing, loss of cognitive and motor skills

Discomfort providing sexual or other personal details during interview

Having to describe sexual assault to many different people

Fear of being blamed and/or doubted

Fear of punishment for illegal behavior e.g. underage drinking, drug-use



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Credibility Challenge: Lack of Physical Resistance

Majority of sexual assaults are committed by someone known to the complainant

Most common response is not physical resistance but often feelings of betrayal, confusion, disorientation, shame and self-blame

Never ask complainant:

- Did you fight back?
- Why didn't you try to get away?
- Did you yell for help?


Instead ask questions like:

- What did you do next?
- Can you tell me what you were thinking at that time?
- Can you tell me what you were feeling when they did that?

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Credibility Challenge: Delayed Reporting



Victims need time to process what has happened to them

Perpetrators of sexual assault are often known to victims




Fear

Self-blame

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Conduct Additional Interviews

-  Review your witness summaries and evidence and ask yourself if there are any holes.
-  Do you have all the information you need to thoroughly address each allegation?
-  It is OK to conduct follow-up interviews of witnesses if needed.

LS 87

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Exchange of Evidence

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Meaningful Access to Information

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



LS

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Review of Evidence By the Parties

- Send the parties all 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 must 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.

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Investigation Report

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Investigation Report

- The investigation report is prepared by the investigator and must summarize all relevant evidence.
- The investigator does not determine responsibility. Rather, decision-maker does.
- Investigator gives the investigation report to the decision-maker.



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Relevant Evidence

Evidence is relevant if the information helps to prove or disprove a fact at issue and should be admitted.

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Relevant Evidence

Relevant evidence includes evidence that is "inculpatory" or "exculpatory"

Relevant evidence must be **objectively** evaluated by Investigators and Decision-Makers

Inculpatory Evidence:
Evidence that shows or tends to show, a person's involvement in an act

Exculpatory Evidence:
Evidence tending to excuse, justify, or absolve an alleged act or guilt

LS 94

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Irrelevant

- Privileged information
- Duplicative
- Complainant's sexual predisposition
- Complainant's or prior sexual behavior, unless used to prove
 - Consent, or
 - Someone other than Respondent

LS 95

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Hypothetical

Bella reported sexual assault by Jason, a classmate, in a bathroom on campus. As part of the investigation process, Jason has submitted witness statements from other classmates who claim that Bella has a reputation for giving male students oral sex in the school bathroom in support of the Respondent's defense that their encounter was consensual.

Not Directly Related

Directly Related and Relevant

Directly Related and Not Relevant

LS 96

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Hypothetical

Frank reported that a teammate sexually assaulted him while they were sitting in Frank's car in the school parking lot. In response to the charge, Joey has presented text messages and testimony suggesting a consensual sexual relationship existed between Joey and Frank.

Not Directly Related

Directly Related and Relevant

Directly Related and Not Relevant



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Written Decision

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Legal Framework

Preponderance of the Evidence




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Written Decision

- The written decision is prepared by the decision-maker.
- Decision-maker determines responsibility.
- Note certain requirements needed in Written Decision.



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Written Decision Must Include:

- A description of the circumstances giving rise to the formal complaint;
- A description of the procedural steps taken during the investigation, including all individuals contacted and interviewed;
- A summary of the testimony of each witness the investigator interviewed;
- An analysis of relevant evidence collected during the investigation, including a list of relevant documents;
- **A specific finding as to whether the allegations occurred using a preponderance of the evidence standard (i.e. who is responsible?);**
- A table of contents if the report exceeds ten pages; and
- Any other information deemed appropriate by the District.

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Factual Findings v. Legal Conclusions

- Focus on whether the alleged conduct occurred.
- Avoid legal conclusions.
- *Examples:*
 - **PROBLEMATIC:** Sustained. "Cathy harassed Holly."
 - **BEST PRACTICE:** Sustained. Cathy told Holly "If you going on a date with me, I will promote you next month."

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Example: Findings/Rationale

Following a complete and thorough investigation, and based on the factual findings, there was sufficient evidence to find that Respondent engaged in conduct that met the definition of sexual harassment under Title IX and violated District policy BP/AR 5145.7 and AR 5145.71 by touching Complainant on her thighs and crotch. Complainant's crotch is her private body part. The preponderance of the evidence supports a finding that Respondent touched Complainant's crotch without her consent. The evidence showed that Respondent had at least some sort of sexual interest in Complainant, and the preponderance of the evidence showed he engaged in this conduct "for the purpose of sexual gratification." This conduct meets the definition of fondling under Title IX. Furthermore, the preponderance of the evidence supports a finding that Respondent touched Complainant's thighs without her consent on several occasions. While her thighs are not private body parts, this action, coupled with her asking him to stop, his refusal and his actions on or about January 24, 2023, lead to a finding that Respondent engaged in physical conduct of a sexual nature that denied Complainant equal access to her program. Respondent's conduct meets the definition of sexual harassment.



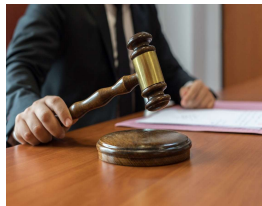
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Hearing

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Hearing to Determine Responsibility (Discretionary for K-12)

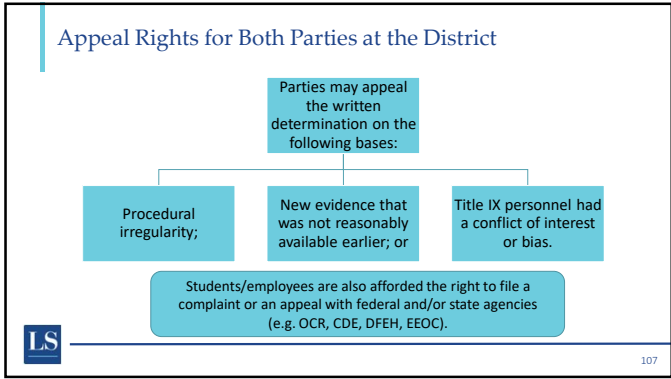
- The District will hold a live hearing to provide the Complainant and Respondent an opportunity to respond to the evidence gathered before a Decision-Maker.
- Neither Party may choose to waive the right to a live hearing, but the Parties can choose whether to participate in the hearing or answer some or all cross-examination questions.



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Appeals

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Post Investigation Follow Up

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Now What?

Investigation Findings

➔

OPTIONS

- Staff/student discipline (various forms)
- Ensuring no retaliation
- Additional support for victims or witnesses
- Generalized training for staff/students in class, school, or district-wide
- Generalized notification of policies/ rules
- Increased monitoring and check-ins
- Changes to District practice

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Record Keeping

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Recordkeeping – Records Must Be Maintained for 7 Years

Formal Title IX Complaints:			Actual Knowledge But No Formal Title IX Complaint:	Training Materials:
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.	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.	All training materials for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

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Proposed Title IX Regulations

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Major Changes Proposed


Definition of Sexual Harassment	Title IX Jurisdiction	Responding to Sex Discrimination
Ensuring Recipients Learn of Possible Sex Discrimination	Title IX Grievance Procedures	Discrimination Based on Pregnancy and Related Conditions

LS 113

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The 2020 Title IX Regulations remain in effect!


- *New Title IX regulations are undergoing the rulemaking process; however, these new regulations are NOT finalized and are NOT in effect at this time.*



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Questions



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

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