



Title IX: Best Practices for Identifying, Responding to, and Investigating Sexual Harassment Complaints Under Title IX

Presented by:
Stephanie M. White
Jonathan E. Berry-Smith

Lancaster School District
September 9 and 10, 2021

Stephanie M. White

Partner



Walnut Creek Office
swhite@lozanosmith.com
925.953.1620

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 firm's 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 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.

Experience

Ms. White has experience in 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 serves 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 sexual harassment, discrimination, bullying, and workplace conduct.

Ms. White regularly provides trainings to employees on areas that include: sexual harassment (AB 1825), employee discipline, Title IX, and investigations. Ms. White also spoke as a panelist at the 2021 Sexual Harassment in Education Conference, hosted by the UC Berkeley School of Law.

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. She is certified as a Civil Rights Investigator (Levels 1 and 3) and as a Title IX Hearing Officer and Decision-Maker through ATIXA. She is also certified in Interest-Based Bargaining. Ms. White is a member of the Association of Workplace Investigators, and regularly participates in their in-house trainings.

Practices

Labor & Employment
Student
Community Colleges
Technology & Innovation

Investigative Services
Title IX

Education

J.D., Golden Gate University School of Law
B.A., University of California, Los Angeles

Admissions

California

Jonathan E. Berry-Smith

Associate



Walnut Creek Office
jberrysmith@lozanosmith.com
925.953.1620

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.

Practices

Student
Labor & Employment
Governance

Education

J.D., Stanford Law School
M.A., Stanford Graduate School of Education)
B.A., University of California, Berkeley

Admissions

California

WHO WE ARE & WHAT WE DO

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.

AREAS OF EXPERTISE

- 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

COST CONTROL is important for public agencies and an area we have mastered. We recognize and understand your financial restraints and work tirelessly to provide the best legal representation with those limitations in mind. One of the best ways we keep legal costs to a minimum is through strategic, preventive legal services. These include Client News Briefs to keep you updated on changing laws affecting education. In addition, we offer extensive workshops and legal seminars providing the tools needed to minimize liability, reducing the need for legal assistance down the road.

CLIENT SERVICE is our top priority and we take it very seriously. With premier service as the benchmark, we have established protocols and specific standards of practice. Client calls are systematically returned within 24 hours and often sooner when required.

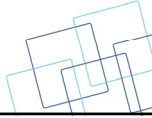
DIVERSITY IS KEY and we consciously practice it in all that we do. It is one of our core beliefs that there is a measurable level of strength and sensitivity fostered by bringing together individuals from a wide variety of different backgrounds, cultures and life experiences. Both the firm and the clients benefit from this practice, with a higher level of creative thinking, deeper understanding of issues, more compassion, and the powerful solutions that emerge as a result.



Title IX: Best Practices for Identifying, Responding to, and Investigating Sexual Harassment Complaints Under Title IX

Presented by: Stephanie M. White
Jonathan E. Berry-Smith

Lancaster School District
September 9 and 10, 2021



1

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 firm's 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 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.



CONNECT
swhite@lozanosmith.com
925.953.1620



2

2

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



3

3



What We Will Cover

- Title IX and the New Regulations
- The Roles and Responsibilities of District Administrators and Employees
- 10 Steps for an Effective Title IX Investigation



4

4


Title IX and the New Regulations

5

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.



6

6

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




LS

7

7

Title IX is Important: Potential Impact on Students and Employees Who Experience Sexual Harassment



- 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

LS

8

8

What's New Under the Title IX Regulations?

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

LS

9

9

LS

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

10

10

LS

New Definitions – Sexual Harassment (1 of 4)

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

- An **employee** conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;
- 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
- "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).

11

11

LS

New Definitions – Sexual Harassment (2 of 4)

Sexual assault:

- Any sexual act direct against another against a person, **without consent of that person** that may, including instances where the person is incapable of giving consent.
- Sexual assault includes: Forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, incest, 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.
- Dating violence includes: Sexual or physical abuse or the threat of such abuse.

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

12

12

New Definitions – Sexual Harassment (3 of 4)

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).)



13

13

New Definitions – Sexual Harassment (4 of 4)

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).)



14

14

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.



15

15

Standards to Consider

Litigation

Policies and Regulations

Professionalism and Civility

LS

16

16

Poll 1:
Sexual Harassment




LS

17

17

Poll 2:
True or False



LS

18

18

The Roles and Responsibilities of District Administrators and Employees

19

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



20

20

Who Are Your Title IX Coordinators?

Charles Coleman, Jr.
Title IX Coordinator
colemanc@lancsd.org
(661) 948-4661

Michael Davis
Title IX Coordinator
davismb@lancsd.org
(661) 948-4661



21

21

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, unbiased, and without conflict

LS

22

22

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
- Must be trained, unbiased, and without conflict

LS

23

23

Responsibilities of the Informal Resolution Officer:

- Facilitates the informal resolution process
- Must be 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

LS

24

24

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 trained, unbiased, and without conflict
- Cannot be the Title IX Coordinator, investigator, or decision-maker



25

25

Serving Impartially

- Preserve the integrity of the investigation from its inception.
- Avoid prejudgment of the facts.
- Consider any actual or perceived conflict of interest with the parties and the person serving in any of the Title IX roles.
 - If conflict may exist, can it be addressed?



26

26

Group Activity

An 8th grade student informs her English teacher after class that on almost a daily basis a classmate has been touching her “inappropriately” in the halls between classes, even though she has asked him to stop. The student asks the teacher not to tell anyone because she believes it will just make things worse.

- Can the teacher keep the student’s secret, as long as she appropriately monitors the situation or otherwise intervenes?

Enter your responses in the Chat box.



27

27

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.



28

28

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.



29

29

10 Steps for an Effective Title IX Investigation

30

Case Study

A 7th grade student, Riley, reported that Ms. Skyler, a new librarian, requested they exchange cell phone numbers so they could communicate about the new Harry Potter books the library purchased. At first the text messages were just that. However, as the semester went on, Ms. Skyler would text Riley about unrelated matters, like personal questions about the types of relationships Riley has been in. The texts happened at all hours of the day/night. Riley did not think much of their conversations because Ms. Skyler is 25 and "gets middle school students." Riley felt like Ms. Skyler was "like a close friend." However, when Ms. Skyler showed up to Riley's soccer game and proposed taking Riley out for ice cream to celebrate a victory, things began to change. Ever since the game, Riley noticed Ms. Skyler's text messages included more emoji like 🤔🤔🤔🤔. However, Riley's friends use those types of emoji all the time. Ms. Skyler also made positive comments about Riley's body and asked if the two of them could "do stuff together." Eventually, Riley wrote about Riley's interactions with Ms. Skyler in a journal, describing more of what they did, including one instance when Ms. Skyler touched Riley "inappropriately" when they were alone in the library. Riley's English teacher read the entry.



31

31

Step 1: Receiving and Assessing Complaints

1

2

3

4

5

6

7

8

9

10

32

Group Activity – Breakout Room



- 1) Is Riley's journal entry a complaint?
- 2) What specifically, if anything, concerns you about Riley's journal entry?
- 3) What would you do if you were Riley's English teacher?



33

33

Do You Have a “Formal” Title IX Complaint?

- *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.



34

34

Examples of “Red Flag” Conduct

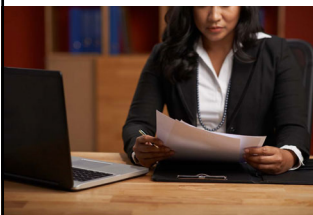
- Flirtations or propositions
- Derogatory comments
- Sexual jokes or gestures
- Spreading sexual rumors
- Massaging, grabbing, or touching
- Comments on an employee or student’s body
- Sexual acts without consent or based on coercion
- Non-consensual “sexting”
- Sexploitation



35

35

Receiving Formal and Informal Complaints



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



36

36

LS

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
- Confidentiality cannot be promised to complainant or anyone

37

37

LS

Discuss: “I was just venting...”

1

2

3

4

5

6

7

8

9

10

After speaking with the Title IX Coordinator about student rights and options for moving forward, Riley shares that the journal entry was meant to be a “private vent.” Riley doesn’t want Ms. Skyler to get in trouble. Riley asks for the District not to do anything about this.

- Can the District honor Riley’s request?

38

38

LS

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, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant’s behalf

So, can the District honor Riley’s request?

39

39

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.



40

40

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

- Education Program or Activity
 - If the school exercises substantial control over the respondent; and
 - The school exercises substantial control over the context in which the sexual harassment occurred.
- Must be within the United States.
- 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.



41

41

Tests 1 and 2 Applied

Test 1: Meeting the Definitions of Sexual Harassment Under Title IX

- Would Ms. Skyler's conduct rise to the level of sexual harassment under Title IX?
- Would a reasonable person find Ms. Skyler's unwelcomed conduct **severe, pervasive, and objectively offensive**?

Test 2: Title IX Jurisdiction Over the Conduct

- Does the school exercise substantial control over Ms. Skyler?
- Does the school exercise substantial control over the context in which the sexual harassment occurred?



42

42

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.



43

43

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.



44

44

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*



45

45

Step 2: Supportive Measures

12345678910

46

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

47

47

Discuss: Supportive Measures

12345678910

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!

LS

48

48

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; and
- 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

49

49

Step 3: Initiate an Investigation or Engage in Informal Resolution

1

2

3

4

5

6

7


8

9

10

50

Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies
 - AR 5145.71 (Students) - 60 days
 - AR 4119.12 (Employees) – 60 days

LS

51

51

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.

*Do not restrict either party's ability to discuss the allegations under investigation.



52

52

Informal Resolution

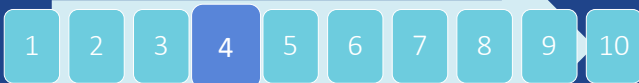
- Informal resolution is a process that does not involve a full investigation and adjudication.
- It can only be offered when:
 - A formal complaint is filed;
 - The school district has sent a written notice about the allegations and the informal resolution process;
 - A written determination has not 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.



53


53

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



54

Group Activity – Breakout Room



1.

Have you ever interviewed an employee or student?

2.

What is one thing you learned or one challenge you faced?

3.

Is there anything your group wants to know that relates to interviewing witnesses or gathering evidence?

LS

55

55

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.

LS

56

56

Discuss: Relevant Evidence

1

2

3

4

5

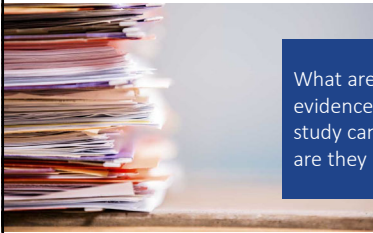
6

7

8

9

10



What are some key pieces of evidence the District in our case study can look to gather? Why are they relevant?

LS

57

57

Questioning Techniques

Tell me what happened

Explain why you're upset

Describe how it made you feel

Who? What? Where?

How? Why?

Were you ___?

Where was ___?

Did you ___?

LS

58

58

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.

LS

59

59

Step 5: Review of Evidence by the Parties

1

2

3

4

5

6

7

8

9

10

60

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.

LS

61

61

Poll 3: Directly Related Evidence



LS

62

62

Step 6: Prepare the Investigation Report

12345678910

63

Investigation Report

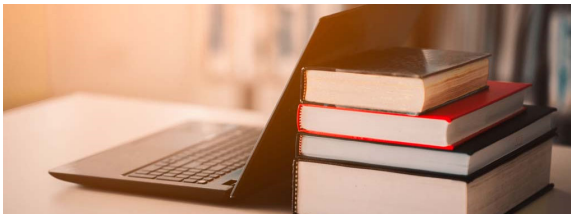
- The final investigation report should be prepared by the investigator and must summarize relevant evidence.
 - If the information helps to prove or disprove a fact, it should be included.
- Parties must be offered the opportunity to provide a written response to the investigation report.
- Must be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



64

64

Poll 4: Relevant Evidence



65

65

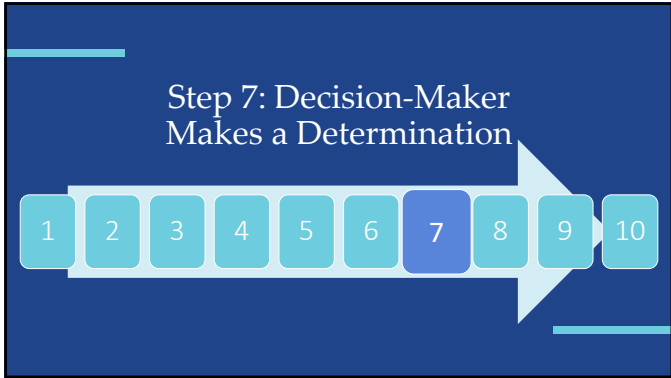
Investigation Report (Recommended Content)

- 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 that will be applied by the decision maker
- Identify number of/identity of witnesses
- Summary of evidence – documents and witness statements



66

66



67

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 not relevant unless offered to prove someone else committed the conduct or for proof of consent

LS

68

68

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

69

69

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**.



70

70

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).



71

71

Understanding Bias - Implicit Bias

- An implicit bias is an unconscious bias towards or against certain groups of people.
- It is often based on social stereotypes that have led to an association between a group and a trait.
- Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment.
- Many (if not most) of the people treating others differently are unaware of doing so.



72

72

Understanding Bias - Confirmation Bias

- Confirmation bias, or the selective collection of evidence, is our subconscious tendency to seek and interpret information and other evidence in ways that affirm our existing beliefs, ideas, expectations, and/or hypotheses.
- Therefore, confirmation bias is both affected by and feeds our implicit biases.



73

73

Suggestions to Counteracting Bias

- Actively consider an alternative hypothesis or why a favored hypothesis could be wrong.
- The process of writing might challenge the investigator to assess a decision more carefully.
- Have findings peer-reviewed.
- Good investigative skills and practices
 - In a study of the impact of interviewing skills on reducing confirmation bias, the authors conclude that interviewers who ask open-ended non-leading questions (who were dubbed "good interviewers") showed less confirmation bias than those who asked fewer open questions ("poor" interviewers).

Powell, Martine B., Hughes-Scholes, Carolyn H., and Sharman, Stefanie J., Skill in Interviewing Reduces Confirmation Bias, J. Investigative Psychology and Offender Profiling, (2012).



74

74

Poll 5: Appeals



75

75


Step 8: Corrective Action

12345678910

76

Corrective Actions

- Staff/student discipline
- Ensuring no retaliation
- Additional support for involved parties
- 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



LS

77

77

Step 9: Recordkeeping Requirements

12345678910

78

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

LS

79

79

Recordkeeping – Records Must Be Maintained for 7 Years (Cont.)

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, decision-makers, and any person who facilitates an informal resolution process

LS

80

80

Step 10: Reflect

1

2

3

4

5

6

7

8

9

10

81

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.

LS

82

82

Questions?



LS

83

83



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

84

84

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

Jonathan E. Berry-Smith
Associate
Tel: 925.953.1620
jberrysmith@lozanosmith.com

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

LS

85

@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 (509) 431-5600.

Copyright © 2011 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.

LS

86

86

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 (559) 431-5600.

Copyright © 2021 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.