



Lozano Smith
ATTORNEYS AT LAW

Title IX: Responding to and Investigating Complaints of Sexual Harassment

Presented by:
Michelle L. Cannon
Stephanie M. White

Lozano Smith Webinar
September 10, 2020

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EDUCATION

J.D., University of the Pacific,
McGeorge School of Law

B.A., St. Mary's College of
California

PRACTICE AREAS

Labor & Employment
Students
Litigation
Community Colleges
Charter Schools

BAR ADMISSION

California

OVERVIEW

Michelle L. Cannon is a Partner in Lozano Smith's Sacramento office who works closely with school districts, county offices of education and community colleges in all areas of education law. She is an active member in the Labor & Employment, Students, Community Colleges, Charter Schools and Litigation Practice Groups. Ms. Cannon represents clients in all areas of education law, and has extensive experience in board governance, labor and personnel-related matters, student discipline, and charter school facilities. She was named to the Northern California Super Lawyers list each year from 2013 to 2018, and a Top Lawyer in Schools & Education by Sacramento Magazine from 2016-2020.

Ms. Cannon's practice focuses on representing public entity clients in the following areas:

- > General governance
 - Brown Act issues
 - Conflicts of interest
 - Public Records Act
- > Labor and personnel-related matters
 - Employee discipline and dismissal
 - Collective bargaining
 - First Amendment issues
 - Investigation of discrimination and harassment complaints
 - Certificated and classified employee issues
- > Student issues
 - Student discipline
 - First Amendment issues
 - Search and seizure related to students
- > Charter school issues
 - Review of charter petitions
 - Revocation of charters
 - Charter school facilities.
- > Litigation
 - Sexual discrimination

- Sexual harassment
- Wrongful termination
- First Amendment issues
- 42 U.S.C. section 1983 claims
- Contract disputes
- Writs and appeals in both state and federal courts

Her litigation experience includes bench and jury trials in both state and federal courts as well as writs and appeals before state and federal appellate courts. She has also successfully handled numerous administrative trials, arbitrations, and mediations on behalf of various public entities before PERB and OAH. She is highly successful in litigation involving student issues, First Amendment issues, wrongful termination, sexual discrimination and sexual harassment, as well as contract disputes.

ADDITIONAL EXPERIENCE

Michelle has worked extensively in the collective bargaining arena in various roles. These roles include, but are not limited to, working as a facilitator in Interest Based Bargaining, acting as lead negotiator in the creation of new contracts, and advising clients through impasse proceedings.

Ms. Cannon has also prosecuted numerous successful permanent certificated and classified termination proceedings.

SIGNIFICANT CASES

- > *Cole v. Oroville Union High School District* (9th Cir. 2000) 228 F.3d 1092 - Assisted in the successful defense of a Northern California school district's decision not to allow graduates to deliver a sectarian invocation and proselytizing co-valedictorian speech.
- > *PLANS, Inc. v. Sacramento City Unified School District* (9th Cir. 2003) 319 F.3d 504 - Successfully defended the school district's innovative Waldorf Methods instruction in public schools.

PRESENTER EXPERIENCE

Ms. Cannon is a frequent speaker at workshops and CSBA and ACSA conferences. She regularly presents on topics such as sexual harassment prevention training, board issues, including the Brown Act and conflicts of interest, collective bargaining, discrimination, employee discipline and dismissals, student discipline, certificated employee lay off procedures, First Amendment issues, and charter schools.

PROFESSIONAL AFFILIATIONS

- > Board Member, Roseville Chamber of Commerce
- > Board Member, Roseville City School District Foundation
- > Member, California School Boards Association
- > Member, California Council of School Attorneys
- > Member, Placer County Bar Association
- > Member, Sacramento County Bar Association
- > Member, California State Bar Association
- > Member, Animal Legal Defense Fund

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EDUCATION

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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 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 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.

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, Los Angeles, Mission Viejo, 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.

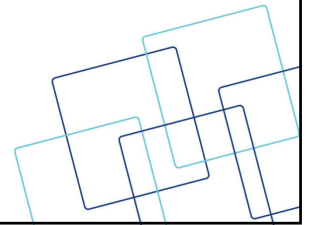
CLIENT SERVICE is our top priority and we take it very seriously. With premier service as the benchmark, we have established protocols and specific standards of practice. Client calls are systematically returned within 24 hours and often sooner when required.

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: Responding to and Investigating Complaints of Sexual Harassment

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Today's Presenters



Michelle L. Cannon

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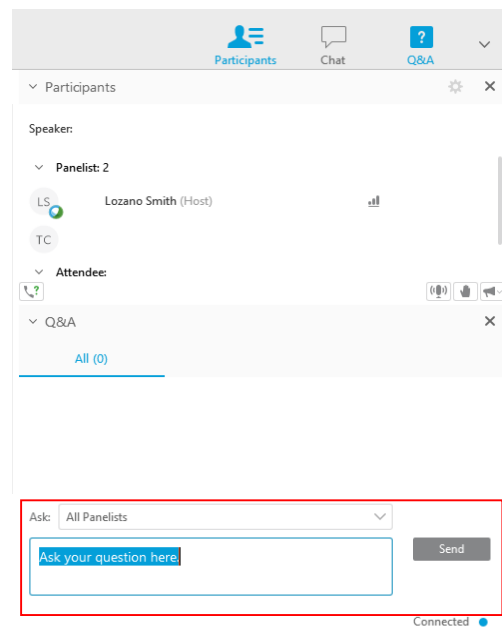
Partner



Q&A

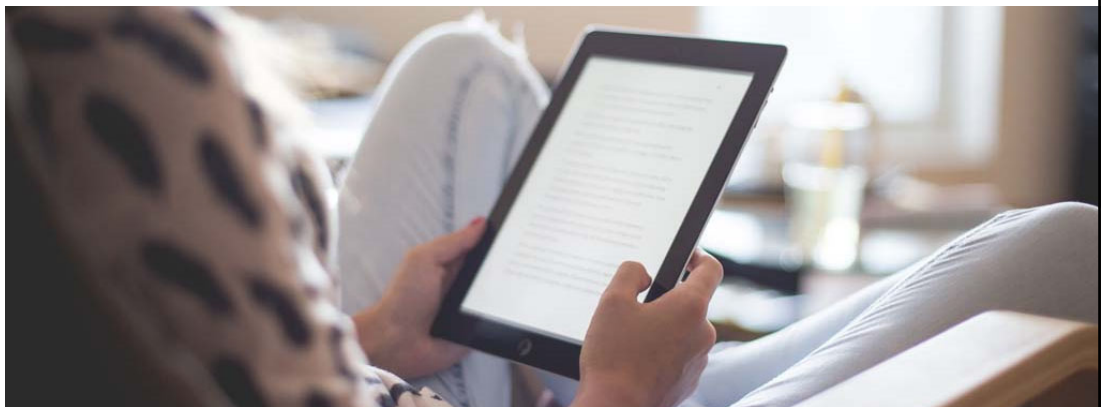
Please type questions in the Q&A panel on the right hand side of your screen.

We have reserved a few minutes at the end of the presentation to verbally answer as many questions as we can.



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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.

Today's Training

- What is Title IX?
- New Title IX Regulations – Overview
- The Roles and Responsibilities of District Administrators and Employees
- REACT



Interactive Polling

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Title IX and the New Regulations

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



Who Enforces Title IX?

The US Department of Education's Office of Civil Rights (OCR) is the public entity that enforces Title IX.

- 34 C.F.R. Part 106
- Guidance Documents:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>



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-regs-unofficial.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).)



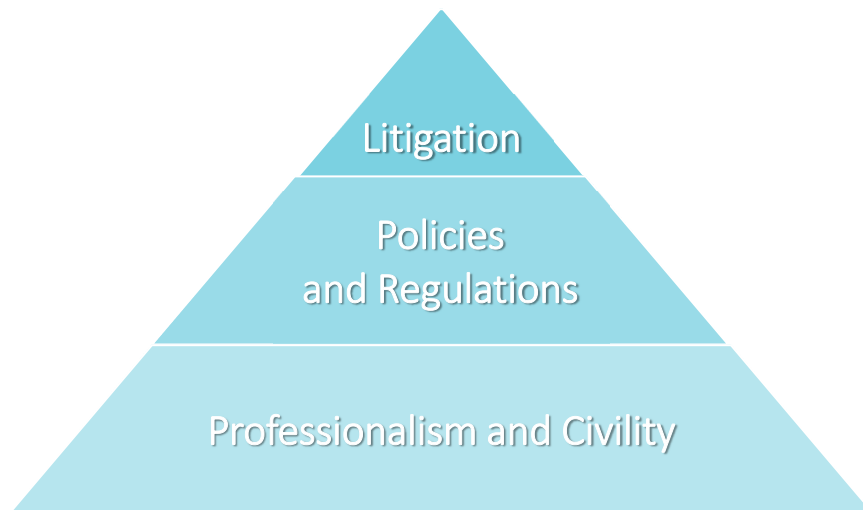
Title IX Jurisdiction

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



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 decision-maker



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.



Title IX and Overlapping Obligations



- Contacting Law Enforcement
- Mandated Reporter Duties
 - “Reasonable suspicion” of child abuse or neglect



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



Prevention: Training, Notice and Posting Requirements

Prevention

Taking the right proactive measures is just as important as how you respond.



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:

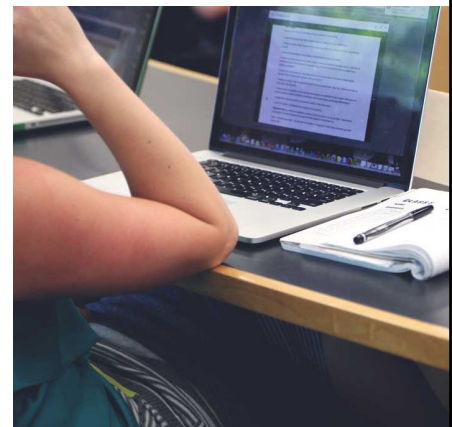
- The **definition of sexual harassment** in § 106.30,
- The scope of the **district's education program or activity**,
- How to conduct an **investigation** and the **complaint/grievance process**, including appeals (and hearings, if applicable), and the informal resolution processes, as applicable,
- 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)



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



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.

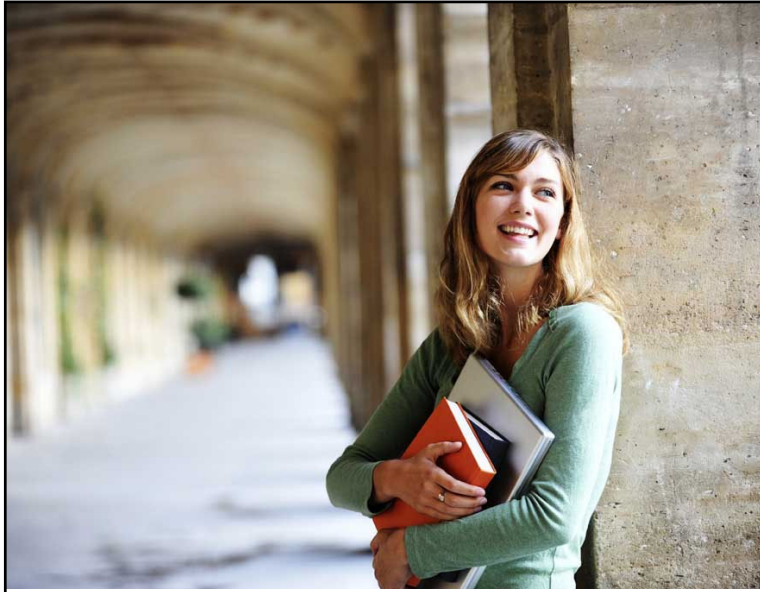




BREAK



REACT to Sexual
Misconduct



REACT to Sexual Misconduct

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

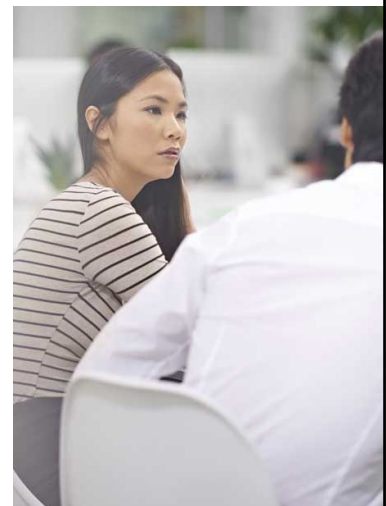


REACT
Recognize

Step 1: Identify Potential Title IX Issues

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).



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- 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



REACT
Evaluate

Step 2:
Assess the Nature
of the Complaint

Receiving Complaints (In General)

TYPES OF COMPLAINANTS

- Student
- Parent
- Employee
- Member of Public
- Anonymous Person

TYPES OF COMPLAINTS

- Verbal
- Written
- No Complaint (Rumor or Observation)



Involved Parties May Include...

- Student-on-student
- Employee-on-student
- Employee-on-employee
- Student-on-employee
- Same-sex parties



Receiving a Complaint

Formal v. Informal Complaints

- “Don’t tell anyone, but...”
- “Student X is a bully. He threw me into the lockers today because of my outfit.”
- “My teacher gave me an unfair grade because she hates me.”
- “We were playing tag and he slapped my butt.”



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



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



Evaluate the Allegations

Consider:

1. Severity of the allegations
2. Imminent harm
3. Criminal acts
4. Mandated reporting obligations
5. Involved parties (adult and student)
6. Complainant's request for actions



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



Evaluate How to Proceed (Possible Options)

1. Dismissal
2. Informal resolution
3. Formal Complaint/Investigation
4. Supportive Measures
5. Other actions needed immediately





REACT
Act



REACT
Act

Step 3:
Implement
Supportive/Urgent
Measures

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



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

- 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.



Administrative Leave (Employees)

There are no restrictions under Title IX for placing an employee accused of sexual harassment on administrative leave.



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

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.



Dismissals (Mandatory and Discretionary)

- The decision to dismiss a *formal* 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.



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*



REACT

Act

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

Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies



Send Written Notice of Investigation

Send “notice” letters to both the complainant and the respondent



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

Legal Framework

Preponderance of the
Evidence
-or-
Clear and Convincing



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.



Reviewing and Preserving Evidence

Documentation & Evidence

- Emails
- Phone records
- Attendance records
- Travel logs
- Security records
- Computer records/files
- Complaint
- Internet usage and websites visited
- Voicemail messages
- Pictures
- Audio/Video
- Credit Card Receipts
- Observing Locations
- Collective Bargaining Agreement



BREAK

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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*



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 Freely Speak and Then Ask Follow Up Questions



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...”



Credibility Determinations

1. Demeanor;
2. Inherent plausibility;
3. Motive to lie;
4. Corroboration, or lack thereof;
5. Past record of conduct;
6. Opportunity and capacity to observe/actual knowledge;
7. Consistent or inconsistent statements;
8. Reputation for veracity or deceit; and
9. Bias.



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.



Lybarger/Spielbauer Warning/Rights



- Fifth Amendment Protection Against Self-Incrimination
- Lybarger/Spielbauer Warning – Public employees may be compelled to answer potentially incriminating questions about their job performance as long as they are not required to waive the constitutional protections.



Fifth Amendment Rights for Students

- School cannot use student's silence during an investigation against them in a disciplinary proceeding as an admission of guilt.
- However, you may inform the student of the impact of withholding their side of the story.



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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.



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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.



Investigation Report (Recommended Content)

- Identify the date the investigation commenced
- Identify the investigator
- Identify interim 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



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



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**



Step 11: Appeal Rights

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).



REACT
Corrective
Measures



REACT
*Corrective
Measures*

Step 12:
Corrective Actions

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



REACT Thoughtful Reflection and Tying Up Loose Ends

Recordkeeping Requirements

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

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



Thoughtful Reflection

1. Reflect on REACT
 - Staff responses
 - Policies and procedures
 - Evidence of systemic issues
2. Education to prevent future harm
 - Staff trainings
 - Student trainings



Questions



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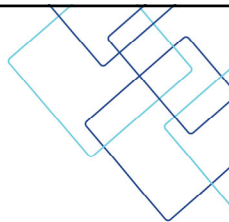
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