



Lozano Smith

ATTORNEYS AT LAW



Presented by:

Stephanie M. White

Sarah E. Fama

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

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 Title IX practice area. Ms. White represents California public school districts, county offices of education and community college districts in all aspects of education law. She specializes in Labor and Employment and student issues.

Experience

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

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

Education

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

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

Sarah E. Fama

Senior Counsel



Walnut Creek Office
sfama@lozanosmith.com
925.953.1620

Overview

Sarah E. Fama is Senior Counsel in Lozano Smith's Walnut Creek office. She represents public agencies through various aspects of employment and general liability issues.

Experience

Ms. Fama represents public employers at California Superior Court, California Labor Commission, California Unemployment Insurance Appeals Board, California Workers' Compensation Appeals Board, Department of Fair Employment and Housing, and Equal Employment Opportunity Commission. She regularly defends employers against claims of harassment, discrimination, wrongful termination, and wage and hour violations. Clients seek her out to provide guidance, education and training to employers regarding employment law compliance, in areas of harassment, discrimination, separation, accommodation, and wage and hour compliance.

Education

Ms. Fama received her Juris Doctor degree from the University of the Pacific, McGeorge School of Law, where she was named to the Dean's Honor List. Her J.D. concentration was focused on International Legal Studies. She earned her Bachelor of Arts in Sociology from the University of Alberta.

Practices

Labor & Employment
Litigation

Education

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

B.A., University of Alberta

Admissions

California

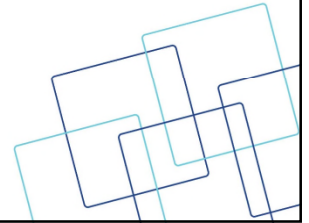


Best Practices for Identifying, Responding to, and Investigating Sexual Harassment Complaints Under Title IX

Presented by: Stephanie M. White & Sarah E. Fama

ELK GROVE UNIFIED SCHOOL DISTRICT

January 13, 2021



Presenter

Stephanie M. White

AT LOZANO SMITH

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



CONNECT

swhite@lozanosmith.com
925.953.1620



Presenter

Sarah E. Fama

AT LOZANO SMITH

Sarah E. Fama is Senior Counsel in Lozano Smith's Walnut Creek office. She represents public agencies through various aspects of employment and general liability issues. She regularly defends employers against claims of harassment, discrimination, wrongful termination, and wage and hour violations.



CONNECT

sfama@lozanosmith.com
925.953.1620



What We Will Cover

Title IX and the New Regulations

The Roles and Responsibilities of District Administrators and Employees

12 Steps for an Effective Title IX Investigation

Educational Equity

Ensures the decisions, policies, and practices in our learning system are culturally sensitive and provides all students with access, opportunity, support, and resources.

- High-Quality Curriculum & Instruction**: All students will have access to standards aligned curriculum and receive high quality instruction to promote college, career, and life readiness and eliminate the achievement gap.
- Assessment, Data Analysis, & Action**: All students will benefit from instruction guided by assessment results (formative, interim and summative) and continuous programmatic evaluation.
- Wellness**: All students will have an equitable opportunity to learn in a culturally responsive, physically, and emotionally healthy and safe environment.
- Family & Community Engagement**: All students will benefit from programs and services designed to inform and involve family and community partners.

The Investigation

Investigation Findings

- Findings Letters (Under District Policies)
- BACKGROUND - BRICS Employee Discipline Document
- Student Expulsion Documents

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.*



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



Sexual Misconduct in Schools

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



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



11

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.



12

What Hasn't Changed Under Title IX?

- 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

Actual Knowledge (K-12)

- When **any employee** has notice of sexual harassment or allegations of 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 recipient (District) investigate the allegation

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



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).

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).)



17

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).)



18

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.



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



GROUP ACTIVITY

Which of the following is considered “Sexual Harassment” under Title IX?

1. A student conditioning the provision of an aid or benefit on the complainant’s participation in unwelcome sexual conduct.
2. An employee conditioning the provision of an aid, benefit, or service of the district on the complainant’s participation in unwelcome sexual conduct.
3. Unwelcome conduct determined by a reasonable person to be severe and pervasive.



GROUP ACTIVITY

True or False: Under the new Title IX Regulations...

1. The District must conduct a formal investigation into an incident that occurred between two students over the weekend, at a student's home.
2. The District must conduct a formal investigation into an incident in which a coach communicated with a current student athlete via text message, multiple times over the course of three months, using personal cell phones, about subjects of a personal and sexual nature.
3. The District must conduct a formal investigation into a complaint submitted by a former student against a teacher regarding an incident that took place three years ago.



The Roles and Responsibilities of District Administrators and Employees

Who are your Title IX Coordinators?

For Complaints Involving Employees:

- **Kanitra Lopez** - Legal Compliance Specialist

For Complaints Involving Students:

- **Dr. Bindy Grewal** - Assistant Superintendent, PreK-6 Education
- **Craig Murray** - Assistant Superintendent, Secondary Education

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



25

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
- May be asked to recommend findings to the decision-maker.



26

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



27

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 person
- 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



28

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



29

Group Activity

A student informs her English teacher after class that a classmate has been repeatedly touching her in the halls between classes, even though she's asked him to stop. The student asks the teacher not to tell anyone.

Can the teacher keep the student's secret?



30

Responsibilities of All Employees:



- Report to the District’s Title IX Coordinator, as well as 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 it.
- This does not relieve an employee of their mandated reporter duties!



31

“Red Flag” Conduct of Potential 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”
- Sexploitation



32

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



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.



Group Activity

1. What questions do you have about the various roles identified in the new Title IX Regs (Investigator, Decision Maker, Informal Resolution Officer, Appeals Officer)?
2. At your school site/department, who do you think is best to fill each role?



35

12-Step Investigations for Title IX Complaints

12 Steps for Effective Title IX Investigations

Step 1 Receiving and Assessing Complaints



37

Receiving Complaints (In General)

WHERE COMPLAINTS COME FROM

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

FORM OF COMPLAINTS

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



38

Initial Considerations

Formal v. Informal Complaints

- What is the age of the involved students?
- Are there signs of a power dynamic?
- Has this issue come up before with the same or other students?
- Is staff seeing issues with inclusivity?



39

Receiving a Complaint



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



40

12 Steps for Effective Investigations

Step 2 Supportive/Urgent Measures



Group Activity

On Friday, January 6th, around 11:15 a.m., you (Vice Principal) are in your office answering some emails, and Calvin (a male junior) comes into your office and shows you this video. Calvin said he recorded the video yesterday in Mr. Smith's fourth period class.



44

Group Activity

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



45

Urgent Considerations



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



46

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



47

Initial Discussion With Victim/Complainant

- Ask open-ended questions
- Get complaint in writing or confirm allegations in writing if not already received
- Review policy against retaliation
- Do not promise confidentiality
- Determine whether matter can be resolved informally
- Listen and “hear” the concern



48

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



49

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!



50

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.



51

12 Steps for Effective Investigations

Step 3 Assessing the Nature of the Complaint



52

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.



53

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.**



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

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

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



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 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*



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

Policies and Procedures for Investigating Title IX Complaints

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

*New District policies



60

Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies – 60 calendar days



61

Group Activity

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



62

12 Steps for Effective Investigations

Step 4 Send Notice of the Investigation



63

Notice of Investigation

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



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.



12 Steps for Effective Investigations

Step 5 Frame the Scope



Understand the Scope of the Investigation

- Prepare clear and concise “yes or no” questions or statements that the investigation will answer or address.
- Do not include legal terms such as “discriminated,” “harassed,” or “retaliated.”
 - Bad example: Did Suzie discriminate against Joe?
 - Good example: Did Suzie issue Joe a letter of reprimand because of Joe’s race?
- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
 - Bad example: Did Suzie act mean and unfairly toward Joe?
 - Good example: Did Suzie tell Joe “Go to Hell?”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)

Practice Tip: If you are not sure, have someone from the District Office review your allegations before proceeding. This will save you time in the long run.



Factual Findings v. Legal Conclusions

Focus your investigation on gathering information so it may be determined what the respondent did or did not do.

You may be asked to make recommended factual findings or legal conclusions.

Example:

- Factual Findings: *“Mr. Smith caressed Bella’s back on one occasion, and the conduct was unwelcome.”* vs.
- Legal Conclusions: *“Mr. Smith sexually harassed Bella.”*



68

Legal Framework

Preponderance of
the Evidence



69

12 Steps for Effective Investigations

Step 6 Gather, Review, and Preserve Evidence



70

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.



71

Child Pornography

- Call School Resource Officer, Police Department, or Safety & Security Department right away before touching anything
- Third party witness
- Track chain of custody

Warning: It is a state and federal crime to possess and/or distribute child pornography. There's no exception for school administrators or investigators.



72

12 Steps for Effective Investigations

Step 7 Make a List of Witnesses



73

Preparing to Conduct Interviews

Other Considerations

- Consider potential conflicts of interest.
- Consider location, timing, and order.



74

12 Steps for Effective Investigations

Step 8

Draft Interview Questions and Apply a Trauma-Informed Approach



75

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*



76

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



77

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...”



78

12 Steps for Effective Investigations

Step 9 Conduct Interviews



79

Common Questions and Issues

- What if the witness is under age?
- What if the witness is biased or lies?
- Do all witnesses get a union representative or support person?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?
- What if the police are investigating?



80

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



81

12 Steps for Effective Investigations

Step 10 Conduct Additional Interviews If Needed



82

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 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.



83

12 Steps for Effective Investigations

Step 11

Prepare the Investigation Report



84

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.



85

Investigation Report (Recommended Content)

- Identify the date the investigation commenced
 - Identify the investigator
 - Identify supportive measures offered to and accepted by the parties
 - Summary of the investigation process
 - Identify the legal standard of review applied to the review of evidence/applicable policies
 - Identify number of/identity of witnesses
 - Summary of evidence – documents and witness statements
- * You may be asked to make recommended, non-binding findings of fact and responsibility under District policies and codes of conduct.



86

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.



87

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.



88

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**.



89

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; or
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).



12 Steps for Effective Investigations

Step 12 Corrective Action and Tying Up Loose Ends



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



92

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.



93

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.



94

Questions



95



Subscribe on your favorite app or device.



Stay informed on your time.

Lozano Smith Podcast

lozanosmith.com/podcast

96



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



97

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

Sarah E. Fama

Senior Counsel

Tel: 925.953.1620

sfama@lozanosmith.com

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



@LozanoSmith

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



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.