



# Title IX/BRICS III: A Proactive (REACT)ion to Title IX Complaints

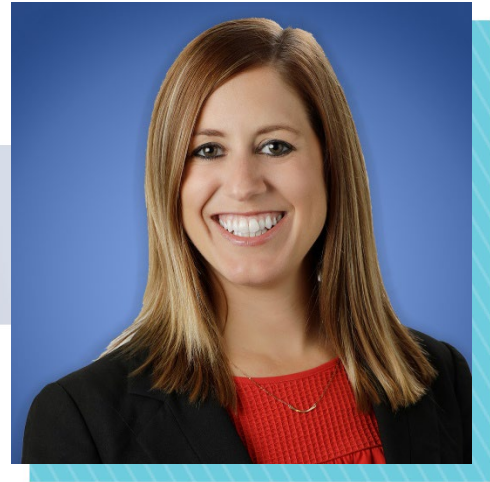
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Elk Grove Unified School District

2022 – 2023 School Year

## Carolyn L. Gemma

Partner



Sacramento Office  
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916.329.7433

### Overview

Carolyn L. Gemma is a Partner in Lozano Smith's Sacramento office. Ms. Gemma advises educational institutions throughout the state on all matters affecting employment, students and board governance.

Ms. Gemma is AWI (Association of Workplace Investigators) trained and has significant experience conducting prompt, thorough and effective workplace and Title IX investigations for both K-12 and higher education clients. In addition, her trauma-informed training offers clients further expertise in investigating allegations of sexual harassment, sexual assault and other forms of sexual misconduct. Ms. Gemma conducts respectful interviews of witnesses and understands how trauma has an impact on credibility determinations.

### Experience

Ms. Gemma specializes in labor and employment matters, including employee discipline and termination; responding and facilitating resolutions to grievances, unfair labor practice charges and DFEH/EEOC charges; and conducting workplace investigations. She also advises clients regarding compliance with state and federal laws; drafting, negotiating, and revising board policies, administrative regulations, employee handbooks, consent forms and contracts; and student matters such as discipline, search and seizure and free speech.

### Education

Ms. Gemma earned a law degree from the University of the Pacific, McGeorge School of Law. During law school, Ms. Gemma served as member of the McGeorge Law Review and as a Judicial Extern for the Honorable John A. Mendez of the United States District Court, Eastern District of California. Ms. Gemma earned a Bachelor of Arts degree from the University of San Diego, where she majored in Political Science, minored in Italian Studies, and graduated cum laude. Ms. Gemma has received certification through ATIXA as a participant in Level 1 and Level 3 ATIXA Civil Rights Investigator Trainings.

#### Practices

Labor & Employment  
Student  
Community Colleges  
Title IX  
Investigative Services

#### Education

J.D., University of the Pacific, McGeorge School of Law  
B.A. (cum laude), University of San Diego

#### Admissions

California

## Sarah E. Fama

Senior Counsel



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### 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.

She is routinely involved in investigations, either by guiding employers through the investigation process or by acting as an investigator herself. She also advises employers and provides training on various topics including investigations, Title IX, sexual harassment, Uniform Complaint Procedure, retaliation, discrimination and other complaints that may arise in an education setting.

### 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  
Title IX  
Investigations

#### Education

J.D., University of the Pacific,  
McGeorge School of Law  
B.A., University of Alberta

#### Admissions

California

# Jonathan E. Berry-Smith

Associate



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## 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. Mr. Berry-Smith also regularly assists school district clients on issues related to special education, Title IX compliance, and federal stimulus funding in response to COVID-19.

## 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 advice and counsel to school districts on Title IX compliance, and regularly provides trainings to employees on Title IX and sexual harassment prevention. Additionally, he provides guidance to clients on appropriate ways to expend COVID-19 relief grants, such as ESSER and GEER funds.

## 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

## Emma J. Sol

Associate



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### Overview

Emma J. Sol is an Associate in Lozano Smith's Walnut Creek office. Ms. Sol focuses her practice primarily on Title IX, student and investigations issues.

### Experience

Ms. Sol frequently assists clients in all aspects of Title IX compliance, including completing investigations and drafting policy. She also utilizes her knowledge and expertise in the area to present trainings on Title IX topics to assist clients in understanding this complex law. Ms. Sol is also familiar and experienced in guidance on student-related issues, such as constitutional student matters, and assisting clients in responding to California Public Records Act Requests. She applies her background and knowledge in college athletic compliance in many areas of her representation of clients.

### Education

Ms. Sol earned her law degree from Santa Clara University School of Law. She was a Dean's List graduate and received a High Tech Law Certificate, with honors. She also received CALI Awards in both Contracts and Negotiations. While in law school, she mentored first year law students as an Academic Support Program Fellow, and was the President of the Sports and Entertainment Law Society. Ms. Sol earned a Bachelor of Science in Sports Broadcasting, with an English minor and emphasis on Women & Gender Studies, from Texas Christian University.

#### Practices

Title IX  
Student  
Investigations

#### Education

J.D., Santa Clara University School of Law  
B.S., Texas Christian University

#### 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.

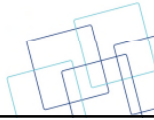
**CLIENT SERVICE** is our top priority and we take it very seriously. With premier service as the benchmark, we have established protocols and specific standards of practice. Client calls are systematically returned within 24 hours and often sooner when required.

**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.



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Elk Grove Unified School District  
2022-2023 School Year



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REACT to Sexual Misconduct

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Lozano Smith



### Topics

- Recognize
- Evaluate
- Act
- Corrective Measures
- Thoughtful Reflection

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## REACT---RECOGNIZE

*You don't need to do a complicated analysis on your own, but you need to know when Title IX may be triggered.*

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### Activity

A 12th grade student, Riley, reported that Ms. Skyler, a new social studies teacher who Riley is a TA for, requested they exchange cell phone numbers so they could communicate about the work Riley would be doing as a TA. At first the text messages were just that. However, as the semester went on, Ms. Skyler would joke around with Riley about other teachers and students. Ms. Skyler would ask Riley about soccer (a passion of Riley's), and eventually 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 high school students." Riley felt like Ms. Skyler was a "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, Riley felt uncomfortable and reported the conduct.

What is this?

simply inappropriate conduct

sexual harassment

Title IX




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## Sexual Harassment Under Title IX

- **Employee** quid pro quo
- Reasonable person would find conduct so **severe, pervasive, and objectively offensive** that it denies a person equal education access
- Any instance of sexual assault, dating violence, domestic violence or stalking



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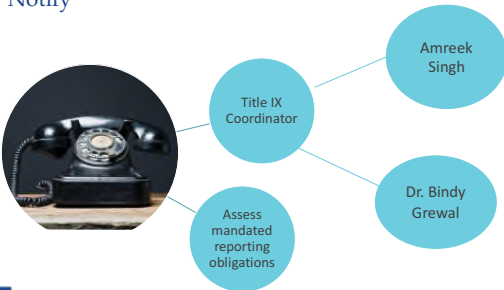
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## Notify



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# REACT---EVALUATE

*How to receive information on potential Title IX matters*

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## 12 Steps for Effective Investigations

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



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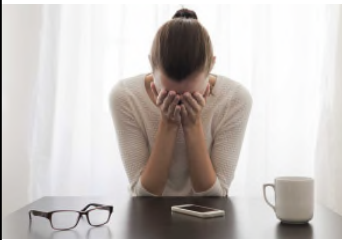
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## Urgent Considerations



- Supportive Measures
- Paid Administrative Leave
- Student Suspension
- Mandated Reporting
- Criminal Acts
- Complainant's Request



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## Initial Discussion

- Location/environment
- Provide choices
- Tone
- Supportive measures
- Don't victim blame
- Get it in writing
- Options for filing
- Retaliation and other District policies
- Discuss importance of evidence preservation
- Discuss confidentiality and limitations/expectations
- Inform Complainant/victim that they can have a support person present if they would like
- Listen and "hear" the concern



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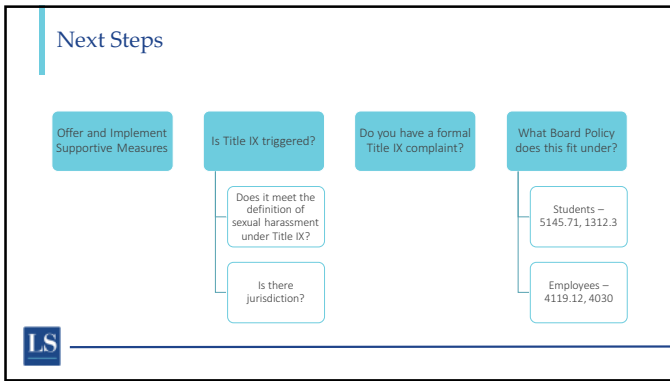
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## REACT---ACT

*How to conduct effective interviews, assess issues of relevancy, and make determinations*

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### How to ACT



- Send notice
- Initiate an investigation into Formal Complaint or engage in Informal Resolution process
- Gather, Review and Preserve evidence
- Make Witness List
- Prepare for and Conduct Interviews
- Parties to Review Evidence
- Prepare Investigation Report

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## Questioning Techniques



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## What do you think?



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## Let's talk about...

Setting the stage.

Questions that were asked.

Title IX.



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## Trauma-Informed Approach

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

- Schedule interview at convenient time and place
- Listen attentively and actively without interrupting
- Permit student/employee to control information flow
- Save technical questions for the end of the interview once open-ended ones exhausted
- Explain the need/context when asking sensitive questions
- Display compassion and sincerity; Interview without judgment or skepticism
- Suggest breaks as needed



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## Statements/Questions to Avoid

- **Questions to ask with caution/care:**
  - Why did you...?
  - Why didn't you...?
  - Didn't you consider...?
- **Questions that may be helpful:**
  - How did that make you feel?
  - What was your thought process at that time?
  - Do you remember smelling/hearing anything?
- **Don't** insert your opinion into student's/employee's experience
- **Don't** make assumptions about what student/employee needs or wants
- **Avoid** questions that can be answered with one-word or short responses
- **Avoid** leading questions
  - "And then you did this..." v. "What happened next?"



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## 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.



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## Understanding Challenges to Complainant's Credibility



- Common challenges to credibility:
- Incomplete, inconsistent and untrue statements
  - Lack of physical resistance
  - Delayed reporting



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## Factors in Assessing Credibility



- \_\_\_\_\_ Demeanor
- \_\_\_\_\_ Inherent plausibility
- \_\_\_\_\_ Motive to lie
- \_\_\_\_\_ Corroboration, or lack thereof
- \_\_\_\_\_ Past record of conduct
- \_\_\_\_\_ Opportunity and capacity to observe/actual knowledge
- \_\_\_\_\_ Consistent or inconsistent statements
- \_\_\_\_\_ Reputation for veracity or deceit
- \_\_\_\_\_ Bias



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## Investigation Report

Prepare draft report with all evidence directly related to the allegation



The parties have 10 days to review the evidence and respond



Finalize report with only relevant evidence



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### Activity

The respondent, a teacher, provides the investigator with evidence that the complainant, a student, was failing all her classes and was using a baseless sexual harassment allegation against respondent to obtain supportive measures as an excuse for her poor academic performance.



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### Limitations on Relevance

- Information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent
- When evidence is duplicative of other evidence, it may be deemed not relevant
- A complainant's predisposition is never relevant.
- A complainant's prior sexual behavior is irrelevant unless:
  - To prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent



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### Activity

**RECALL:** The scenario with the two seniors in the back of the SUV after the soccer game. Respondent, Jeff, wants to introduce evidence that the Complainant engaged in oral sex with a friend of his, the weekend prior.



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### Activity

RECALL: The scenario with the two seniors in the back of the SUV after the soccer game. Respondent, Jeff, wants to introduce evidence that he and Complainant engaged in oral sex the day prior.



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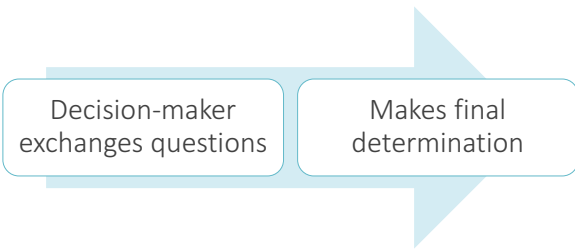
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### Decision-maker Written Determination



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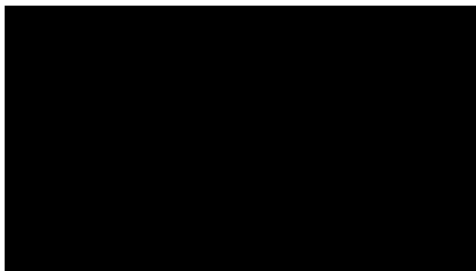
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### What do you think?



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Let's talk about...

Questions to ask.

Title IX.



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## REACT---CORRECTIVE MEASURES

*Understanding how expansive corrective measures might be*

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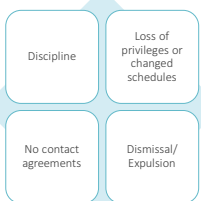
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Corrective Measures May Include, But Are Not Limited to:

### For the Respondent



### For the Complainant



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# REACT---THOUGHTFUL REFLECTION

*Understanding that we should be constantly self-evaluating and trying to improve on the process*

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## Thoughtful Reflection

### Reflect on REACT

- Staff responses
- Policies and procedures
- Evidence of systemic issues

### Education to prevent future harm

- Staff trainings
- Student trainings

### Recordkeeping Requirements

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



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## Activity

- Within last 2 years had 4 sexual harassment complaints against Mr. Smith (Teacher).
- 1 of the 4 sexual harassment complaints was submitted by a students.
- 3 of the 4 sexual harassment complaints were submitted by employees.

What is your Thoughtful Reflection?



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@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](mailto:clientservices@lozanosmith.com) or call (539) 431-8600.

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