

Tipton Elementary School District
Notice of Employee Rights under Title IX

(34 C.F.R. § 106.8, subd. (b))

Federal Title IX of the Education Amendments of 1972 ("Title IX"), implemented at 34 C.F.R. § 106.31, subd. (a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives federal financial assistance. This includes employment at an educational institution.

Relevant here, Title IX requires that school districts take immediate and appropriate action to address any potential Title IX violations that are brought to its attention. Any inquiries about the application of Title IX, this notice, and who is protected by Title IX may be referred to Dr. Cherie Solian to the Assistant Secretary for Civil Rights from the United States Department of Education, or both.

Title IX Coordinator

Dr. Cherie Solian is the Title IX Coordinator for the Tipton Elementary School, and can be reached by telephone at 559-752-4213, by e-mail at csolian@tipton.k12.ca.us, by mail by mail Post Office Box 787, Tipton, California 93272 or in person at 370 North Evans Road, Tipton, California 93272.

Sexual Harassment Under Title IX

Sexual harassment under Title IX means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the school district conditioning the provision of an aid, benefit or service of the recipient on an individual's participating in unwelcome sexual conduct (*quid pro quo*);
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 recipient'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).

Alleged conduct that does not rise to the level of the sexual harassment under Title IX will be addressed in accordance with other District policies that prohibit sexual harassment and/or sex-based discrimination, or other forms of inappropriate conduct, as is deemed appropriate.

Filing a Title IX Complaint with the District

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such reports may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

Employee complaints alleging a Title IX violation should be submitted in written form as soon as possible from the date of the alleged incident or from the date the complainant first obtained knowledge of the facts of the alleged incident. If the complainant is unable to prepare the complaint in writing, administrative staff shall help the complainant to do so. To qualify as a Title IX complaint, the complainant must also be participating in or attempting to participate in the District's education program or activity. The length of time elapsed between an incident of alleged sexual harassment, and the filing of a formal complaint may, in specific circumstances, prevent the District from collecting enough evidence to reach a determination, justifying a discretionary dismissal under Title IX.

The District will process all formal complaints in accordance with Title IX and District Board Policy ("BP") and Administrative Regulation ("AR") 4119.11/4219.11/4319.11 – Sexual Harassment, and AR 4119.12/4219.12/4319.12 – Title IX Sexual Harassment Complaint Procedures, which includes an option for informal resolution for certain matters. Under Title IX, a formal complaint means a document filed by a victim, or signed by the Title IX Coordinator, that alleges sexual harassment against a respondent and requests that the school district investigate the allegation of sexual harassment. Complaints that do not rise to the level of a Title IX complaint will be processed in accordance with BP/AR 4030 – Nondiscrimination in Employment, or any other procedure deemed appropriate.

All investigations will be conducted as confidentially as possible. Upon receipt of any formal complaint, the District will provide all known parties with adequate notice of the District's complaint process and the underlying allegations. During the course of the investigation, the District will provide the complainant and respondent (or "the parties") with an equal opportunity to present witnesses and evidence. The District will not restrict the ability of the parties to discuss the allegations under investigation, and it will allow parties to utilize an advisor of their choice. Prior to the conclusion of the investigation, the complainant and respondent will have the opportunity to inspect and respond to evidence directly related to the allegations in the complaint that was gathered during the course of the investigation. Thereafter, and prior to any final decision being made, the parties will receive a copy of the investigation report that fairly summarizes relevant evidence, and they will have an opportunity to submit written, relevant questions to be asked of the other party. Next, a determination regarding responsibility will be made and issued to both parties. Under Title IX and District policy, the responding party is

presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the end of the complaint process.

Any party not satisfied with the final determination will have the option to appeal the final determination. In addition, a person may file a complaint concerning sexual harassment with either the California Department of Fair Employment and Housing or the Equal Employment Opportunity Commission.

Additional Resources

- California Department of Fair Employment and Housing: <https://www.dfeh.ca.gov/Employment/>
- U.S. Equal Employment Opportunity Commission: <https://www.eeoc.gov/sex-based-discrimination>; <https://www.eeoc.gov/sexual-harassment>
- Link to Access Board Policy and Administrative Regulation 4119.11/4219.11/4319.11 – Sexual Harassment, Administrative Regulation 4119.12/4219.12/4319.12 – Title IX Sexual Harassment Complaint Procedures, Board Policy and Administrative Regulation 4030 – Nondiscrimination in Employment: <http://gamutonline.net/district/tiptonesd/>

Training Materials

Tulare County Office of Education – Lozano Smith, Attorneys at Law – Implementing the New Title IX Regulations



Implementing the New Title IX Regulations

Presented by:

Desiree Serrano

Stephanie M. White

Jonathan E. Berry-Smith

Tulare County of Education – L&E Consortium
September 29, 2020

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.

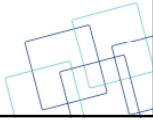
DIVERSITY IS KEY and we consciously practice it in all that we do. It is one of our core beliefs that there is a measurable level of strength and sensitivity fostered by bringing together individuals from a wide variety of different backgrounds, cultures and life experiences. Both the firm and the clients 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.



Implementing the New Title IX Regulations

Presented by: Desiree Serrano, Stephanie M. White & Jonathan E. Berry-Smith

TULARE COUNTY OFFICE OF EDUCATION – L&E CONSORTIUM
September 29, 2020



Presenter

Desiree Serrano

AT LOZANO SMITH

Desiree Serrano is Senior Counsel in Lozano Smith's Los Angeles office. Her practice focuses on the student, labor & employment and government relations aspects of education law. Ms. Serrano has extensive experience as general legal counsel for school districts. She presents trainings on a number of topics to school employees such as sexual harassment, discipline, cyberbullying, student searches, transgender student rights, contract drafting, Brown Act, and the Americans with Disabilities Act.



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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.



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Jonathan E. Berry-Smith

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Jonathan E. Berry-Smith is an associate in Lozano Smith's Walnut Creek Office. His practice is focused on the student, labor and employment and governance aspects of education law. He is experienced in researching California statutes and case law, and advises school district administrators on all aspects of education law. He reviews and revises documents used throughout the employee discipline process, such as charge packets, notices of administrative leave, and collective bargaining grievance responses. He participates in the review of charter school petitions, inter-district attendance transfer requests, and student expulsion appeals.




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Lozano Smith



What We Will Cover

Title IX and the New Regulations

The Roles and Responsibilities of District Administrators and Employees

Training, Notice and Posting Requirements

10 Steps for an Effective Title IX Investigation

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Title IX and the New Regulations

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The Plain Language of Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

20 U.S.C. § 1681 et seq.



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What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. **Sexual Harassment***

(34 C.F.R. Part 106)

*New regulations that have the full force and effect of law



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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



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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.



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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



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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



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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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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).)



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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).)



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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).)



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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:
 - the **respondent** and
 - 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.

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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

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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



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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



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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



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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



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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



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Responsibilities of All Employees:



- All employees must report to the Title IX Coordinator, and/or any additional designated individuals (school site administrators), any known claims of potential sexual harassment.
- This does not change any mandated reporter duties for “reasonable suspicion” of child abuse or neglect.

Training, Notice and Posting Requirements

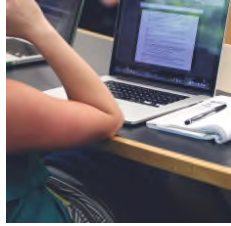
Training Requirements for the Title IX Team

- The **definition of sexual harassment** in § 106.30,
- The scope of the **education program or activity**,
- The **complaint/grievance process**, including how to conduct an investigation and all resolution options,
- How to serve **impartially**,
- Any **technology** that will be used, and
- Determining issues of **relevancy**.

*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, applicants, and unions
- 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



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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 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.



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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.



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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



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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)



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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.



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10 Steps for an Effective Title IX Investigation

10 Steps for Effective Title IX Investigations

Step 1 Receiving and Assessing Complaints



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Group Activity

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



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Receiving a Complaint



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



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Contact the Victim/Complainant

- 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



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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?



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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.



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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.**



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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.**



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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.



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Dismissals (Mandatory and Discretionary)

- The decision to dismiss a complaint should be made in consultation with the Title IX Coordinator.
- Notice of dismissal must be issued to both parties in writing.
- Parties must be informed of their right to appeal the dismissal on the basis of:
 1. Procedural irregularity;
 2. New evidence that was not reasonably available earlier; or
 3. Involved personnel had a conflict of interest or bias.



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10 Steps for Effective Title IX Investigations

Step 2 Supportive Measures



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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



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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 absence (employees)
- Emergency removals in compliance with Title IX



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Emergency Removals (Students)

Districts are prohibited from disciplining a student for alleged sexual harassment until a full Title IX investigation has been completed.

EXCEPTION: An Emergency Removal

- Respondent must be an immediate threat to the physical health or safety of any student or individual;
- The immediate threat must arise from the allegations of sexual harassment;
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.

***Note:** There are no restrictions for placing an employee on paid administrative leave.



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10 Steps for Effective Title IX Investigations

Step 3
Initiate an Investigation into the Formal Complaint or Engage in Informal Resolution Process



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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 policies proposed by CSBA.



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Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies – 60 days for Uniform Complaints

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Send Written Notice of the Investigation

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

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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.

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10 Steps for Effective Title IX Investigations

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



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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.

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Party/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?

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Trauma-Informed Approach

- Do not victim-blame.
- Choose a comfortable setting that is not triggering.
- Build rapport.
- Ask difficult questions with care – explain why you’re asking the question.
- Allow the witness to speak freely and then ask follow up questions.



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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...”



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Common Questions and Issues

- What if the complainant/victim want their identity to be kept confidential?
- What if the respondent refuses to answer any questions?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?
- Do all witnesses get a union representative or support person?
- What if the police are investigating?



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10 Steps for Effective Title IX Investigations

Step 5

Review of Evidence by the Parties



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Meaningful Access to Information

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



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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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10 Steps for Effective Title IX Investigations

Step 6

Prepare the Investigation Report



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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.
- The report must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.

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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

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10 Steps for Effective Title IX Investigations

Step 7 Decision-Maker Makes a Determination



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Submission of Written Questions

- The decision-maker must allow parties the opportunity to submit written, relevant questions that they want to ask any other party or witness.
- Once the parties are provided with the answers, they are permitted to submit additional, limited follow-up questions from each party.
- Decision-maker determines relevancy, or explains why questions were deemed irrelevant.
- Complainant's sexual history is irrelevant unless offered to prove someone else committed the conduct or for proof of consent.

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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.

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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**.



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10 Steps for Effective Title IX Investigations

Step 8 Appeal Rights



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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).



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10 Steps for Effective Title IX Investigations

Step 9

Recordkeeping Requirements



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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

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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

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10 Steps for Effective Title IX Investigations

Step 10 Reflect



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Loose Ends

- Is a Commission on Teacher Credentialing (CTC) report required?
- Have all mandated reporter duties been satisfied if child abuse or neglect is at issue?
- What can be learned? Any evidence of a systemic issue?
- Would staff benefit from further training?
- Be proactive.

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Questions



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OVERVIEW

Desiree Serrano is Senior Counsel in Lozano Smith's Los Angeles office. Her practice focuses on the student, labor & employment and government relations aspects of education law. Ms. Serrano has extensive experience as general legal counsel for school districts. She presents trainings on a number of topics to school employees such as sexual harassment, discipline, cyberbullying, student searches, transgender student rights, contract drafting, Brown Act, and the Americans with Disabilities Act.

She provides legal advice to administrators on personnel matters such as discipline, layoffs, discrimination complaints, disability accommodations, and leaves, in addition to preparing responses to DFEH and EEOC complaints and negotiating settlement agreements. She also has substantial experience with student issues including records, discipline, searches and constitutional issues.

ADDITIONAL EXPERIENCE

While in Law School, Ms. Serrano worked as a Law Clerk for San Diego Unified School District, Mexican American Legal Defense and Educational Fund and the Children's Law Center of Los Angeles. She was also a Mediation Intern for the National Conflict Resolution Center and a Land Use Intern for the City of San Diego.

PROFESSIONAL AFFILIATIONS

Ms. Serrano is a member of the California Bar and involved with the California Council of School Attorneys.

EDUCATION

Ms. Serrano received her Juris Doctor from the University of San Diego School of Law. She earned a Bachelor of Arts in Law and Society, and minored in Education and Applied Psychology, from the University of California, Santa Barbara. Ms. Serrano has received certification through ATIXA as a participant in Level 1 and Level 3 ATIXA Civil Rights Investigator Trainings.

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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.

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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.

EXPERIENCE

Mr. Berry-Smith is experienced in researching California statutes and case law, and advises school district administrators on all aspects of education law. He reviews and revises documents used throughout the employee discipline process, such as charge packets, notices of administrative leave, and collective bargaining grievance responses. He participates in the review of charter school petitions, inter-district attendance transfer requests, and student expulsion appeals.

Mr. Berry-Smith counsels and coordinates with school districts transitioning to a by-trustee area method of election pursuant to the California Voting Rights Act (CVRA). He also provides guidance on the Brown Act to school district administrators and board members.

EDUCATION

Mr. Berry-Smith received his Juris Doctor from Stanford Law School where he was Co-President of Street Law, and Co-Founder of Youth & Education Advocates at Stanford. He was also involved with the Youth and Education Law Project Clinic and the Stanford Prison Education Project. He earned a M.A. in Education from Stanford Graduate School of Education and a B.A. in Legal Studies from the University of California, Berkeley.

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