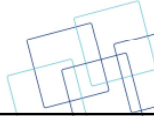


Effective Investigations

Presented by: Alyse Pacheco Nichols

Fremont Union High School District
July 28, 2021



Presenter

Alyse Pacheco Nichols

AT LOZANO SMITH

Alyse Pacheco Nichols is an Attorney in Lozano Smith's Walnut Creek Office. She represents clients in the facilities and business, litigation, and construction aspects of education law. Ms. Nichols frequently assists clients through Brown Act compliance, particularly related to agenda questions and issues; reviews vendor contracts; and helps conduct investigations into both employee and student Title IX complaints. Ms. Nichols prepares and assists clients in presenting expulsion cases, on behalf of school sites, before school boards and admin panels. She assists admin panels throughout the expulsion hearing process, and presents on student discipline, including expulsion appeals.



CONNECT
anichols@lozanosmith.com
925.953.1620




Why are Investigations Important?

1. MOST IMPORTANTLY – fostering an environment where students and staff are safe to share their concerns, and we can work to create better outcomes.
2. Legal Compliance

GOAL TODAY: Understand how an effective investigation is conducted.



Lozano Smith



Objectives


- Understand When an Investigation Needs to Occur
- Learn Steps to Conduct an Effective Investigation
 - Receiving and Assessing the Nature of a Complaint
 - Initiating a Formal Investigation
 - Conducting Interviews
 - Completing the Investigation and Issuing the Outcome

LS

4

Interactive Polling


1. Open a browser on your device
2. Go to: pollev.com/lozanosmith



LS

5

Parent filed a complaint with the school site principal that teacher assigns too much homework to her 9th grade student. Do you need to investigate?



Yes No

Start the presentation to see live control. For screen share software, share the entire screen. Get help at pollev.com/app

When poll is active, respond at polllev.com/lozanosmith
Text **LOZANOSMITH** to **223333** once to join

A group of female students, all juniors in high school, file a complaint against their male science teacher alleging he treats them differently than their male classmates. Do you need to investigate?

Start the presentation to see live control. For screen share software, share the entire screen. Get help at polllev.com/app

Julia, a food service worker, alleges that her supervisor, Sarah, keeps asking her to go out on dates and constantly asks questions about her love life. Julia says that Sarah stares at her body too. Do you need to investigate?

Start the presentation to see live control. For screen share software, share the entire screen. Get help at polllev.com/app

An employee files a complaint against another employee and alleges "harassment, "retaliation," and a "hostile work environment." Do you need to investigate?

Start the presentation to see live control. For screen share software, share the entire screen. Get help at polllev.com/app

A well-respected veteran teacher emails the Principal and complains that the new Department Chair has repeatedly been rude to the teacher during meetings. The teacher believes that the Department Chair is unqualified for her role and attempting to overcome her inadequacies by trying to intimidate others.



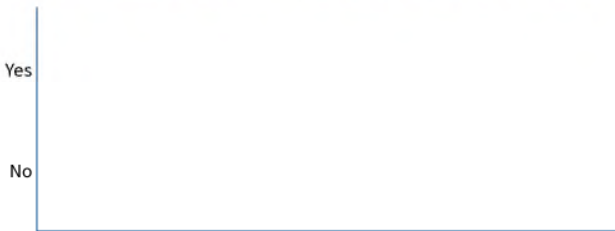
10

Veteran teacher complaint: Do you need to investigate?



Start the presentation to see live control. For screen share software, share the entire screen. Get help at pollin.com/app

A family friend files a complaint after she discovers questionable text messages on the phone of a student, which appear to have been received from the student's school mentor. Do you need to investigate?



Start the presentation to see live control. For screen share software, share the entire screen. Get help at pollin.com/app

A high school student with a history of discipline problems tells her teacher that she ran into the new male custodian in the restroom and that he looked and smelled drunk. Do you need to investigate?

Yes

No

Start the presentation to see how control. For screen share software, share the entire screen. Get help at pelev.com/app



PHONES DOWN

LS

Complaints

What Constitutes a Complaint?

TYPES OF COMPLAINTS

- Student
- Parent
- Employee
- Member of Public
- **Verbal Reports**
- Written Complaints
- **Incident or observation**



16

The District is Responsible For...

- Appropriately *investigating* and *responding* to complaints in a *prompt* and *thorough* manner
- Implementing *appropriate* measures to immediately stop harmful conduct
- Determining if reporting obligations are triggered



17

Receiving a Complaint

Formal v. Informal Complaints

- "Don't tell anyone, but..."
- "Student X is a bully. He threw me into the lockers today."
- "My teacher gave me an unfair grade because she hates me."



18

Policies That May Be Triggered

- BP/AR 1312.1: Complaints Concerning District Employees
- BP/AR 1312.3: Uniform Complaint Procedures
- AR 1312.4: Williams Uniform Complaint Procedures
- BP 4030: Nondiscrimination in Employment
- BP/AR 4119.11: Sexual Harassment
- BP/AR 5144: Student Discipline
- BP/AR 5144.1: Suspension And Expulsion/Due Process
- BP/AR 5145.3: Nondiscrimination/Harassment
- BP/AR 5145.7: Sexual Harassment
- AR 5145.71: Title IX Sexual Harassment Complaint Procedures



19

Reporting Obligations

Mandatory:

- If reasonable suspicion of child abuse or neglect, then follow mandated reporter obligations

Discretionary:

- If potential criminal activity, call law enforcement
- If the allegations involve a student, determine whether the parents of the student should be notified



20

Starting the Investigation Checklist

- Investigate *promptly*
- Supportive measures?
- Police involvement?
- Preserve evidence
- Other considerations?



21

Title IX

Title IX--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.

LS

23

What Does Title IX Cover?

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

(34 C.F.R. Part 106)

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



LS

24

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



25

Responsibilities of All Employees: TITLE IX



- 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!**



26

Investigation Scope

Scope of the Investigation



- Clearly define allegations
- Avoid “scope creep”
- This step helps to outline or organize the whole investigation



28

Notices

Initiating an Investigation

Notice to both the complainant and the respondent



30

Notice Should Include Specific Information Concerning:

- Identify complaint process/policy
- Confidentiality
- Retaliation
- If appropriate, Administrative Leave



Conducting Interviews

Interview Witnesses

- Develop a witness list:
 - Start with the complaint and complainant – Who is listed as a witness?
 - Ask each witness who may have relevant information.
 - Ask the respondent to provide their list of those with information.
- Consider potential conflicts of interest.
- Consider location, timing, and order.
- If possible, have a witness to the interview.
- Never interview more than one person at the same time!



Initial Discussion With 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 the matter can be resolved informally
- Listen and “hear” the concern



Confidentiality & Preserving the Integrity of the Investigation

- Confidentiality cannot be promised to a witness. Reassure witnesses that you will maintain confidentiality to the extent possible.
- Witnesses themselves should maintain confidentiality to the extent necessary to protect the integrity of the investigation (excluding discussions with their union representative or lawyer).
- Explain that the integrity of the investigation requires witnesses to maintain confidentiality.



Interview Questions

- Funnel approach: Start broad and go narrow.
- Don't ask compound questions!
- 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, always ask:
 - Is there anything else you think I should know?
 - Is there anyone else you think I should speak with?



Common Questions and Issues

- What if the witness is underage?
- 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?



Tone and Demeanor

- Calm
- Listen
- Aware of positioning
- Use correct or mirroring terminology



Example Questions

- | | |
|--|--|
| (1) "On April 2, you had an argument with Student B, right?" | (5) "What time did you arrive?" and "How long did you stay there?" |
| (2) "Did you have a conversation with Student B with on April 2?" [If answer is yes] "Tell me about the conversation." | (6) "What was your thought process at that time?" |
| (3) "Tell me how that made you feel." | (7) "What time did you arrive, and who else was there?" |
| (4) "That must have made you feel scared, didn't it?" | (8) "Why didn't you just say 'No'?" |



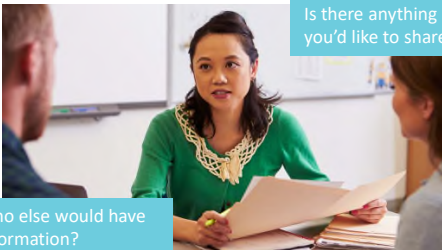
Recording the Interview



- Take detailed notes or have a second administrator or confidential employee involved to take notes.
- Avoid audio recordings
- Consider signed witness statement summaries.



Ending the Interview



Is there anything else you'd like to share?

Who else would have information?



41

Common Mistakes

- Telling complainants or their parents conclusions too early.
- Not using open-ended questions.
- Failing to communicate with complainant, respondent.
- Not following up on leads.



42

Written Statements

A wisely-developed witness statement ultimately saves time, preserves stronger evidence, and can help provide leverage with the wrongdoer at an earlier stage in the proceedings.

Bad Example

"I was in class last week when Mr. X threatened Sam. I think Sam was calling Mr. X out to throw down right there. When Mr. X pushed their chair back and stood up, it scared everyone."

Good Example

"Last Monday at the end of 3rd period, Sam walked up to Mr. X's desk and said loudly, "Why did you give me an F?" Mr. X. stood up to talk to Sam, who is very tall. When Mr. X stood up, their chair rolled back into a metal filing cabinet and it made a loud "boom" sound that surprised me a lot."



Trauma Sensitivity and Avoiding Bias

How Trauma May Impact the Investigation...

- Trauma victims often don't remember events in chronological order
- Trauma victims may not be able to recall extensive detail
- The trauma victim's conduct immediately after the traumatic event occurs might not be reasonable



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



Cultural Competence

- The process by which individuals and systems respond respectfully and effectively to people of all cultures, languages, classes, races, ethnic backgrounds, religions, and other factors in a manner that recognizes, affirms, and value worth of individuals, families, and communities.

- National Association of Social Workers (NASAW) 2007



Implicit Bias

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



Confirmation Bias

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



Suggestions to Counteracting Bias

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

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



Reviewing and Preserving Evidence

Documentation & Evidence

TYPES OF EVIDENCE

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



52

Small Group Activity



53

Investigation Report

Investigation Report

- Basics: dates, titles and relationships
- Role: finder of fact
- Deliberative Issues: “Preliminary Draft” and “For Legal Counsel” Labels
- Provide written overview of process
- Make findings by answering the allegation question and explain the conclusion
- Optional: Prepare Executive Summary



55

Factual Findings v. Legal Conclusions

- Don't focus your investigation on whether an employee or student committed, for example, “sexual harassment” or violated some other law; instead, focus on what you determined the employee or student did or did not do.
- Also, consider if the conduct was inappropriate, unprofessional, and/or in violation of District policies or standards.
 - Example:
 - Factual Findings: “*Ms. Ross massaged Mr. Smith's shoulders on two occasions, and the conduct was unwelcome. Such conduct was unprofessional and in violation of the District's sexual harassment policies*” vs.
 - Legal Conclusions: “*Ms. Ross sexually harassed Mr. Smith*”



56

Legal Framework

Preponderance of the Evidence
(Standard for Investigations)

Substantial Evidence
(Student Discipline)



57

Content of Investigation Report



- Refer back to policy for contents of report
- Provide written overview of process
- Timelines, witnesses, documents
- Think about your audience
- Proofread!

Confidentiality of Investigation Report

It is important to consider who may have access to investigative notes, statements and reports.



Questions





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



61



Subscribe on your
favorite app or device.

LS

Stay informed on your time.

Lozano Smith Podcast

lozanosmith.com/podcast

*For more information, questions and
comments about the presentation,
please feel free to contact:*

Alyse Pacheco Nichols
Attorney

Tel: 925.953.1620
anichols@lozanosmith.com

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



LS

@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 clientservice@lozanosmith.com or call (559) 431-9600.

Copyright © 2011 Lozano Smith
All rights reserved. No portion of this work may be copied, distributed, sold or used for any commercial advantage or private gain, nor any derivative work prepared therefrom, nor shall any sub-license be granted, without the express and/or 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.