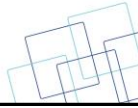


## Title IX: Best Practices for Identifying, Responding to, and Investigating Sexual Harassment Complaints Under Title IX (Part 2)

Presented by: Alyse Pacheco Nichols

Oak Grove School District  
December 10, 2021



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### 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.



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### Today's Training



- An Overview of the Duties of the Title IX Coordinator, Investigator, and Decision-Maker
- "Sexual Harassment" Under Title IX
- Receiving Complaints & Initial Interactions with Complainants
- Trauma-informed Interviewing Skills
- Determining Whether Evidence is "Relevant"
- Making Final Determinations—Avoiding Bias & Assessing Credibility



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# Overview of Duties of Title IX Coordinator, Investigator, and Decision-maker

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## Title IX Coordinator's Duties

- Receives complaints and oversees the complaint/grievance or informal resolution process
- Explains the complaint/grievance process to complainant
- Offers supportive measures to complainant and respondent
- Determines mandatory and discretionary dismissals
- Evaluates corrective actions and identifies systemic issues
- Ensures overall Title IX compliance, which includes trainings, policies, and notice requirements



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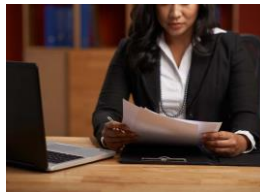
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## Investigator's Duties

- Interviews parties and witnesses
- Gathers and reviews evidence
- Allows parties to inspect, review, and respond to all evidence
- Considers all parties' responses
- Prepares investigative report that summarizes relevant evidence



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### Decision-Maker's Duties

- Reviews investigation report
- Allows parties to submit relevant written questions
- Asks questions they deem relevant or provides an explanation as to why a question was deemed irrelevant
- Makes determination about responsibility
- Prepares written determination
- May recommend sanctions and/or corrective actions



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## Recognizing Sexual Misconduct

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You don't need to do a complicated analysis on your own but you need to know when Title IX requirements are triggered

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### Activity

A female teacher comes to the office and shares that one of the school's newer male teachers looks at her in ways that makes her uncomfortable. She claims that she regularly sees him stare at her body. When asked if he has said anything to make her feel uncomfortable, she says that he has not – it's the staring that is "creeping her out".

What is this?

simply inappropriate conduct

sexual harassment

Title IX



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### Sexual Harassment Under District Policy

Tab 1

Sexual harassment means any unwelcome sexual advance, unwelcome requests for sexual favors, or other unwelcome verbal, visual, or physical conduct of a sexual nature, whether it occurs between individuals of the same sex or individuals of opposite sex, under any of the following conditions

1. Submission to the conduct is explicitly or implicitly made a term or a condition of a student's academic status or progress/employee's employment;
2. Submission to, or rejection of, the conduct by the student/employee is used as the basis of an academic/employment decision affecting the student/employee;
3. The conduct has the purpose or effect of having a negative impact upon the student's academic performance or progress/employee's work or progress, or has the purpose or effect of creating an intimidating, hostile, or offensive educational/working environment.
4. Submission to, or rejection of, the conduct is used as the basis for any decision affecting the student/employee regarding benefits and services, honors, programs, or activities available at or through the District.



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### Sexual Harassment Under Title IX

Tab 2

- **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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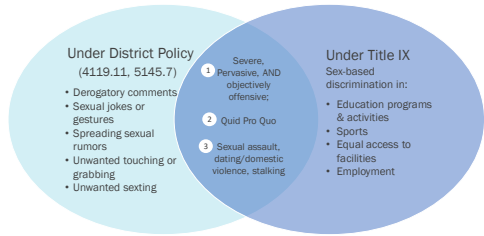
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## Sexual Harassment and Sex-Based Discrimination




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## Analyzing the “Severe, Pervasive and Objectively Offensive” Threshold

- All 3 elements required to trigger Title IX
- Pervasiveness is an indispensable element of a Title IX offense
  - Single incident often not enough to meet this element, even if severity and objective offense can be demonstrated
- Objectively offensive and severe are indispensable elements of a Title IX offense
  - Verbal conduct often not enough to meet these elements, unless the frequency and severity of these statements are objectively offensive and they hinder access to education

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## Activity—Part 1

Finley, a 9th grade student, went into her principal’s office and told the Principal that Jaime, a 12th grade student, is “harassing” her. She explains that Jaime was staring at her breasts during math class that day and the prior week. The day Hugh Hefner died, Jaime posted a tribute to Hugh Hefner on his Instagram. The Principal asks Finley if she can see the posting. Finley shows it to the Principal and the Principal sees a photo of Hugh Hefner posted with writing that states “Hugh, you are my role model and you will be missed.” The statement is followed by numerous emoji of breasts. Finley tells the Principal she is highly offended by this student.




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## Activity – Part 2

The Principal talks to Jaime. He denies looking at Finley's breasts and seems genuinely remorseful that the Instagram post offended anyone. No further action is taken.

Two weeks go by and Finley goes into the Principal's office. She reports that Jaime is really upset she complained about the original Instagram post. She says that now every time she walks by Jaime in the lunchroom Jaime calls her a slut. He has also started texting her with messages such as, "It's only normal that teenagers like to look at boobs. Come on and text me a picture of yours." Someone also wrote "bitch" on her locker, and she suspects it was Jaime. Finley appears severely distraught.

What is this?

simply inappropriate conduct

sexual harassment

Title IX

What are your next steps?



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## Notify



Title IX Coordinator

Ivan Chaidez

Assess mandated reporting obligations



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## Receiving Reports/Complaints

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## Activity

During class, an 11th grade Psychology teacher assigned homework that required students to read a series of a graphic novels that describe in detail and depict numerous sexual acts (including same sex acts), drug use, suicide, marital infidelity, etc. One student found the content to be disturbing. The student is a devout Catholic and was reportedly "appalled." He reported the matter to the Title IX Coordinator. The Principal informed the Title IX Coordinator that the graphic novels did not meet any learning objectives and the teacher could have chosen a variety of content available among the high school's resources.

What is this?

simply inappropriate conduct

sexual harassment

Title IX

What are your next steps?



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## 12 Steps for Effective Investigations

Tab 3

- Receiving the Complaint
- Urgent/Supportive Measures
- Assessing the Nature of the Complaint
- Send Notice of Investigation
- Frame the Scope
- Make a List of Witnesses
- Draft Questions for and Interview the Complainant

- Gather and Preserve Evidence
- Conduct Witness and Respondent Interviews
- Conduct Additional Interviews If Needed
- Prepare the Report and Findings
- Corrective Action and Tying up Loose Ends



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## Urgent Considerations

Tab 4



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



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## Initial Discussion

Tab 5

- 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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## Next Steps

Offer and Implement Supportive Measures

Is Title IX triggered?

Does it meet the definition of sexual harassment under Title IX?

Is there jurisdiction?

Do you have a formal Title IX complaint?

What Board Policy does this fit under?

Students – 5145.71, 1312.3

Employees – 4119.12, 4030



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## Interviewing Skills and Trauma-Informed Methods

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## Investigations

Tab 3



- 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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## Tips for Witness Interviews

- Funnel approach – start broad and go narrow.
- Don't ask compound questions!
- 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.
- Be flexible!
- 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?



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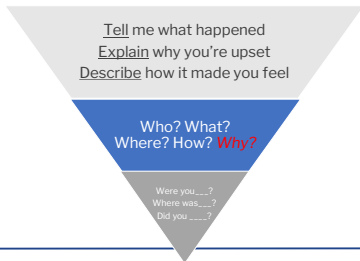
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## Questioning Techniques – Funnel Approach



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



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## Statements/Questions to Avoid

- Questions to avoid:
  - 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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## Example Questions

### Bad

- “On April 2, you had an argument with Student B, right?”
- “That must have made you feel scared, didn't it?”
- “What time did you arrive, and how long were you there?”
- “Why didn't you just say 'No'?”

### Good

- “Did you have a conversation with Student B with on April 2?” [If answer is yes] “Tell me about the conversation.”
- “Tell me how that made you feel.”
- “What time did you arrive?” and “How long did you stay there?”
- “What was your thought process at that time?”



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## Activity

A transgender student comes into your office visibly upset. You ask her if she wants to sit down and talk. She tells you that she does but that she doesn't know where to begin. You are able to get her started, but her story is confusing at times.



- 1) How do you get the student to open up?
- 2) What do you say when her story is confusing at times and doesn't make much sense?



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## Complainant Regain Control

- Remind the person that their feelings and their experience right now are normal and that it is not unusual to have different types of strong feelings arise during an interview of this kind
- Pause interview and check in: "We have covered a lot of ground over the past half-hour. How are you feeling now?"
- Engage and restore control by using grounding techniques like providing a glass of water or suggesting a break and standing up
- Inform the reporting party about next steps in the process and that they can reach out at any time to talk



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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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## Determining Whether Evidence is "Relevant"

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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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## Determining Relevancy

Tab 7

- The investigator is tasked ensuring both parties have an equal opportunity to present, inspect and review any evidence obtained as part of the investigation. Ultimately, they create an investigation report that fairly summarizes relevant evidence.
- The decision-maker is tasked with making factual findings and a final determination as to whether policies have been violated. As part of this process, they provide the parties the opportunity to ask relevant questions of each other and witnesses.



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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

Respondent wants to provide context that the sexual intercourse the night before was consensual by introducing evidence showing that the morning after allegedly non-consensual sexual intercourse, the complainant consensually performed oral sex on respondent.

Respondent also claims that the complainant is filing her complaint of sexual harassment because the respondent beat her out for a coveted spot on the high school's debate team for which they were both competing.



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Investigation Report Tab 6

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graph LR; A[Prepare draft report with all evidence directly related to the allegation] --> B[The parties have 10 days to review the evidence and respond]; B --> C[Finalize report with only relevant evidence];
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## Making Final Determinations and Avoiding Bias

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Decision-maker

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graph LR; A[Decision-maker exchanges questions] --> B[Makes final determination];
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### Assessing the Investigation Report

- Review uncontested and contested information
- Are there any unanswered questions?
- List facts relevant to the allegation/s that must be true for the allegation/s to be supported
  - School policies should guide necessary elements
  - List supporting/corroborating data for each fact
- Weigh the evidence



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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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### Suggestions to Counteracting Bias

- Develop the ability to be self-observant
- Actively doubt your objectivity
- Be mindful of snap judgments
- Oppose your stereotyped thinking
- Deliberately expose yourself to counter-stereotypical models and images
- Engage in relationships with those who are different from you
- Seek out cultural and social situations that are challenging
- Develop empathy to view things from other's perspectives
- Find commonalities



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## Written Determination of Responsibility

Tab 8

- Identification of the allegations
- A description of the procedural steps
- Findings of Fact Conclusions
- Rationale and determination of responsibility for each allegation
- Potential disciplinary sanctions
- Appeal rights



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## Corrective Measures

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## Corrective Measures

### For the Respondent



### For the Complainant



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# Reflection: Self-evaluation and Improvement

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Reflection Tab 9

**Reflect**

- Policies and procedures
- Staff responses
- 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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*For more information, questions and comments about the presentation, please feel free to contact:*

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



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