



A Deeper Dive into Title IX

A Specialized Training for the Title IX Coordinator, Investigator and Decision-Maker of Metropolitan Education District

Presented by:
Stephanie M. White
Sarah E. Fama

April 14, 2021

Stephanie M. White

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Overview

Stephanie White is a Partner in Lozano Smith's Walnut Creek office. She is chair of the firm's Community College practice area and co-chair of the firm's 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 Title IX compliance, as well as conducting complex investigations into claims of sexual misconduct and harassment (including Title IX), discrimination, bullying, retaliation, and other issues that may arise in an educational setting.

Experience

Ms. White has experience in 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 serves 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 sexual harassment, discrimination, bullying, and workplace conduct.

Ms. White regularly provides trainings to employees on areas that include: sexual harassment (AB 1825), employee discipline, Title IX, and investigations. Ms. White also spoke as a panelist at the 2021 Sexual Harassment in Education Conference, hosted by the UC Berkeley School of Law.

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. She is certified as a Civil Rights Investigator (Levels 1 and 3) and as a Title IX Hearing Officer and Decision-Maker through ATIXA. She is also certified in Interest-Based Bargaining. Ms. White is a member of the Association of Workplace Investigators, and regularly participates in their in-house trainings.

Practices

Labor & Employment
Student
Community Colleges
Technology & Innovation

Investigative Services
Title IX

Education

J.D., Golden Gate University School of Law
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Admissions

California

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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.

Education

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

Practices

Labor & Employment
Litigation

Education

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

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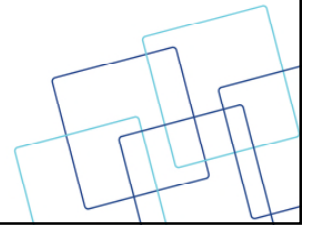
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Today's Training



- 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

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



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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Analyzing the Definition of “Sexual Harassment” Under Title IX

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



Sexual Harassment Under District Policy (cf. 4119.11, 5145.7)

- Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the work or educational setting when: (Education Code section 212.5; Government Code section 12940; 2 CCR 11034)
 1. Submission to the conduct is made explicitly or implicitly a term or condition of the individual's employment/student's academic status or progress
 2. Submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual/academic decisions affecting the student
 3. Submission to or rejection of the conduct is used as the basis for any decision affecting the individual regarding benefits, services, honors, programs, or activities available at or through the district.
 4. The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment.
- Prohibited sexual harassment also includes conduct which, regardless of whether or not it is motivated by sexual desire, is so severe or pervasive as to unreasonably interfere with the victim's work performance or create an intimidating, hostile, or offensive work environment
- Any prohibited conduct that occurs off campus or outside of school-related or school-sponsored programs or activities will be regarded as sexual harassment in violation of district policy if it has a continuing effect on or creates a hostile school environment for the complainant or victim of the conduct
(AR 4119.11, 5145.7)



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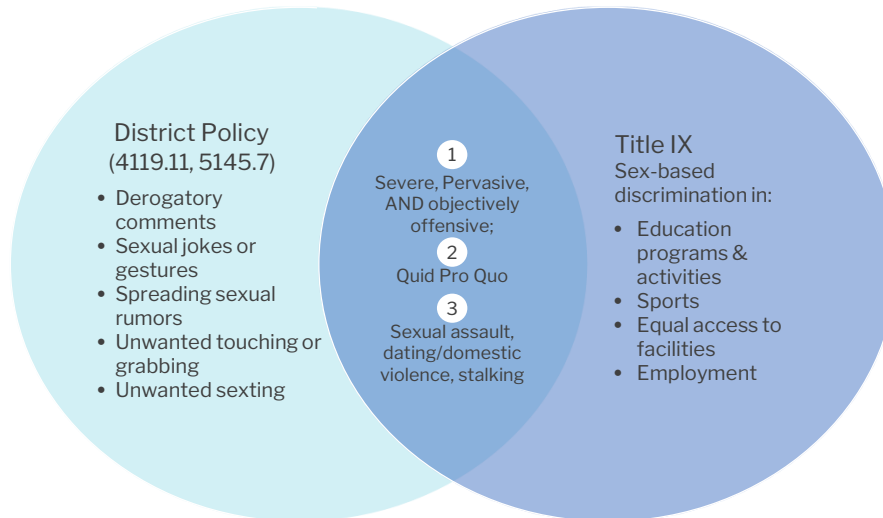
Sexual Harassment Under District Policy (cf. 4119.11, 5145.7)

- Examples of actions that might constitute sexual harassment in the work or educational setting, whether committed by a supervisor, a co-worker, or a non-employee, student, include, but are not limited to:
 - Unwelcome verbal conduct such as sexual flirtations or propositions; graphic comments about an individual's body; overly personal conversations or pressure for sexual activity; sexual jokes or stories; unwelcome sexual slurs, epithets, threats, innuendoes, derogatory comments, sexually degrading descriptions, or the spreading of sexual rumors
 - Unwelcome visual conduct such as drawings, pictures, graffiti, derogatory posters, notes, cartoons, leering, computer-generated images of a sexual nature, or obscene gestures; sexually explicit emails, displaying sexually suggestive objects; electronic communications containing comments, words, or images described above
 - Unwelcome physical conduct such as massaging, grabbing, fondling, stroking, or brushing the body; touching an individual's body or clothes in a sexual way; cornering, blocking, leaning over, or impeding normal movements or any interference with school activities when directed at an individual on the basis of sex
- Teasing or sexual remarks about students enrolled in a predominantly single-sex class



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Title IX: Where Sexual Harassment and Sex-Based Discrimination Intersect



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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

Which of the following, if true, may rise to the level of “Sexual Harassment” under Title IX?

1. A high school senior threatens to sabotage a sophomore’s reputation unless she sends him nude photographs of herself.
2. A Principal suggests that if a job applicant declines the Principal’s dinner invitation, the job applicant will be less likely to secure a position in the District.
3. A student slaps another students on the bottom and says, “I want some of that.”



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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.

- 1) Is this sexual harassment or simply inappropriate conduct?
- 2) Do you think it triggers Title IX?



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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.

1) Is this sexual harassment or simply inappropriate conduct?

2) Do you think it triggers Title IX?



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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.

1) Is this sexual harassment or simply inappropriate conduct?

2) Do you think it triggers Title IX?



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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.

- 1) Is this sexual harassment or simply inappropriate conduct?
- 2) Do you think it triggers Title IX?



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Receiving Reports/Complaint

Receiving a Complaint

TYPES OF COMPLAINANTS

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

TYPES OF COMPLAINTS

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



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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 tell 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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Initial Intake

- Use trauma-informed approach—Create an environment of safety and empowerment
- Understand the employee/student's report/complaint, but limit follow up questions
- Discuss the employee/student's immediate physical safety and emotional well-being
- Ask the employee/student how the school can do to support them and make them feel safe
- Discuss importance of evidence preservation

*All employees who are likely to receive complaints should be training on the initial intake process and understand that this information should be transmitted to the Title IX Coordinator or their designee.



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Explaining Options and the Title IX Process



- Explain options for filing a formal complaint
- Explain the investigatory process & timelines
- Review policy against retaliation
- Explain “no contact” directives
- Discuss confidentiality and limitations/expectations
- Inform complainant that they may have an advisor/support person of their choice
- Consider parent notice/involvement



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Supportive Measures

- Offered to complainant and respondent
- Designed to restore or preserve equal access to educational program without unreasonable burden to either party
- No discipline permitted until completion of grievance procedure if conduct rises to level of Title IX
 - Exception - Emergency Removal of Students
 - Respondent must be an immediate threat to the physical health or safety of any person;
 - The immediate threat must arise from the allegations of sexual harassment; and
 - Respondent must be provided with notice and an opportunity to challenge the decision immediately after removal.



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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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Is there Title IX Jurisdiction?

- Does the alleged conduct meet the definition of “sexual harassment” under Title IX?
- Did the conduct take place in an education program or activity?
 - Substantial control over the respondent, and
 - Substantial control over the context in which the harassment occurred, and
 - Within the United States
- At the time of filing a formal complaint, was the complainant participating/attempting to participate in the educational program?

*If no to any of the above, you must dismiss the complaint/allegations.



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Understand the Scope of the Complaint/Investigation

- Prepare clear and concise “yes or no” questions or statements that the investigation will answer or address.
- Do not include legal terms such as “discriminated,” “harassed,” or “retaliated.”
 - Bad example: Did Suzie discriminate against Joe?
 - Good example: Did Suzie issue Joe a letter of reprimand because of Joe’s race?
- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
 - Bad example: Did Suzie act mean and unfairly toward Joe?
 - Good example: Did Suzie tell Joe “Go to Hell?”

* Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)



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Interviewing Skills and Trauma-Informed Methods

Preparing to Conduct Interviews

Considerations

- Order of interviews: complainant, witnesses, respondent (generally)
- Location and timing
- How to make initial contact with witnesses
- Age of the party to be interviewed
- May need multiple interviews with same person for clarification or to address inconsistencies that may have arisen subsequent to their first interview
- Use trauma-informed methods

Common Questions and Issues

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



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Confidentiality & Preserving the Integrity of the Investigation

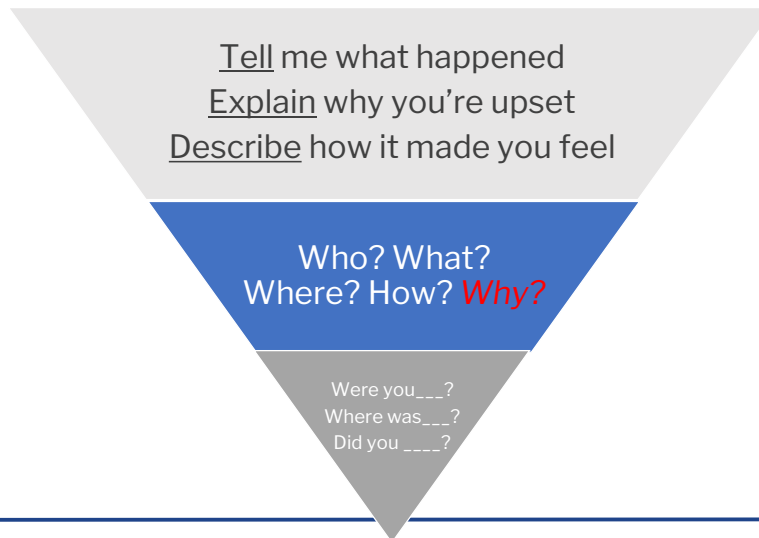


- Confidentiality cannot be promised
- All evidence will be shared with the complainant/victim and the respondent
 - Both parties will have an equal opportunity to inspect and review any evidence that is directly related to the allegations



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Questioning Techniques



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Trauma

“Trauma” refers to experiences that cause intense physical and psychological stress reactions. It can refer to a single event, multiple events, or a set of circumstances that is experienced by an individual and perceived as physically and emotionally harmful or threatening, and that has lasting adverse effects on the individual’s physical, social, emotional, or spiritual well-being.

—Concept of Trauma and Guidance for a Trauma-informed Approach,
Substance Abuse and Mental Health Services Administration (SAMHSA), 2014



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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

- | | |
|---|--|
| <ul style="list-style-type: none">▪ Questions to avoid:<ul style="list-style-type: none">▪ Why did you...?▪ Why didn't you...?▪ Didn't you consider...? | <ul style="list-style-type: none">▪ Questions that may be helpful:<ul style="list-style-type: none">▪ 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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Recognize Trauma-related Dissociation

- Some complainants may express fears and concerns
- Some complainants may exhibit signs of detachment and disconnection (dissociation)
- Triggering past trauma can result in severe forms of dissociation include losing time, forgetting who/where you are, going blank
- Signs of dissociation include:
 - glazed/fixed gaze
 - no eye contact
 - crying
 - confusion
 - rapid speech
 - sudden mood changes
 - flat affect
 - change in tone
 - monotonous voice
 - silence for long periods of time
 - loss of time
 - "I'm so ashamed..."
 - "This is all my fault..."
 - "People won't believe me..."
 - "How can I trust anyone again..."
 - "I'm overwhelmed and afraid..."
 - "What are my parents/teachers/supervisors/friends going to think..."
- Reporting students/employees need to be heard without skepticism or judgment



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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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Credibility Challenges: Incomplete, Inconsistent and Untrue Statements

- Common neurobiological effects of trauma: perceptual narrowing, loss of cognitive and motor skills.
- Discomfort providing sexual or other personal details during interview
- Having to describe sexual assault to many different people
- Fear of being blamed and/or doubted
- Fear of punishment for illegal behavior e.g. underage drinking, drug-use



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Credibility Challenges: Lack of Physical Resistance

- Majority of sexual assaults are committed by someone known to the complainant
- Most common response is not physical resistance but often feelings of betrayal, confusion, disorientation, shame and self-blame
- Never ask complainant:
 - Did you fight back?
 - Why didn't you try to get away?
 - Did you yell for help?
- Instead ask questions like:
 - What did you do next?
 - Can you tell me what you were thinking at that time?
 - Can you tell me what you were feeling when he did that?



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Credibility Challenges: Delayed Reporting



- Victims need time to process what has happened to them
- Perpetrators of sexual assaults are often known to victims
- Fear
- Self-blame



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Determining Whether Evidence is “Relevant”

Where Relevancy Comes Into Play...

- 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.

Review of Evidence By the Parties

- Send the parties all evidence directly related to the allegations raised in the formal complaint.
 - Includes evidence the District does not intend to rely on in reaching its decision regarding responsibility.
- 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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Investigation Report

- The final investigation report should be prepared by the investigator and must summarize relevant evidence.
- Parties must be offered the opportunity to provide a written response to the investigation report.
- Must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.



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Relevant Evidence

- Relevant evidence includes evidence that is “inculpatory” or “exculpatory”
 - Inculpatory Evidence: Evidence that shows or tends to show, a person’s involvement in an act
 - Exculpatory Evidence: Evidence tending to excuse, justify, or absolve an alleged act or guilt
 - Relevant evidence must be objectively evaluated by investigators and decision-makers
 - Contrast with evidence that is directly related or not relevant



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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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Prior Sexual History

- Rape shield protection does not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence
- Scenarios where respondent might try to prove complainant had motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the complainant's sexual behavior



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Prior or Subsequent Misconduct

Regulations do not prohibit the use of prior or subsequent misconduct

- Evidence of a pattern of inappropriate behavior by an alleged harasser permitted if relevant

Decision-maker will need to determine if such conduct is:

- Relevant
- May be used in determining responsibility
- May be used in sanctioning

Prior or subsequent misconduct may be relevant to demonstrate:

- Intent/knowledge/state of mind; Motive; Opportunity; Lack of mistake; Pattern; Identity; Information that is inextricably interwoven with the facts



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Exchange of Written Questions

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



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Decision-Maker: Explaining Exclusion of Questions

- Before complainant, respondent, or witness answers a question, the decision-maker must first determine whether the question is relevant and must explain their decision to exclude a question as not relevant
- This provision does not require the decision-maker to give lengthy or complicated explanation



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Live Hearings*

- “Postsecondary institutions” are required to have live hearings (no written exchange of questions)
- Vocational education falls under this category
- At the live hearings, cross-examination must be conducted directly, orally, and in real time by the party’s advisor of their choice
- If a party does not submit to cross-examination at the live hearing, the decision-maker cannot rely on any statement that person provided in reaching their determination



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Activity

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

- Is this evidence relevant, directly related or not relevant?



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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.

- Is this evidence relevant, directly related or neither?



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Activity

Respondent, a student, who has been accused of stalking, wants to introduce evidence that the complainant, a student, had told him that she suffered from a mental disorder which caused her to be paranoid at times.

- Is this evidence relevant, directly related or not relevant?



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Activity

Complainant alleges respondent sexually assaulted her. Complainant also states she is very religious and was a virgin before the assault. Respondent requests to introduce complainant's ex-boyfriend as a witness who will testify that he had sex with her when they were together. Respondent asserts that he is not introducing the ex-boyfriend's testimony as prior sexual history but rather to show complainant's lack of credibility as to her virginity claim.

- Is this evidence relevant, directly related or not relevant?



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Activity

A witness for the complainant, a student, provides Investigator with the name of a friend, another student, who the witness said the respondent, a student, had sexually assaulted earlier in the year. Although the witness gives a detailed account of what her friend told her about the sexual assault, which has similarities with the complainant's account of her recent sexual assault. However, the friend who was assaulted earlier in the year refuses to speak with the Investigator.

- Is this evidence relevant, directly related or not relevant?



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Making Final Determinations and Avoiding Bias

Timelines and Evidence Standard



- “Reasonably prompt time frame”
- “Preponderance of the Evidence” standard

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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Implicit Bias

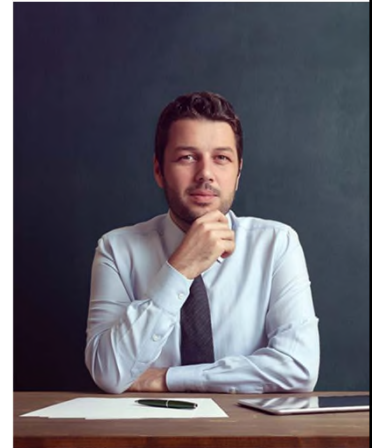
- Unconscious bias towards or against certain groups of people
- Often based on social stereotypes that have led to an association between a group and a trait
- Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment
- Many (if not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



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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.



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Intersectionality

- Intersectionality is the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experience of marginalized individuals or group
 - [Kimberlé] Crenshaw introduced the theory of *intersectionality*, the idea that when it comes to thinking about how inequalities persist, categories like gender, race, and class are best understood as overlapping and mutually constitutive rather than isolated and distinct.— Adia Harvey Wingfield (Merriam-Webster Dictionary)
- Many cases involve complainant's word against respondent's word
- Intersectionality of categories to which complainant, respondent and witnesses belong may inadvertently affect Investigator's/Decision-maker's credibility assessments
- Bias check: Has the race/ethnicity/race/sexual orientation of complainant, respondent and/or witnesses influenced your assessment of credibility?



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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.
 - 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).



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Making Final Determinations: Assessing Credibility

Factors in Assessing Credibility

1. Demeanor
2. Inherent plausibility
3. Motive to lie
4. Corroboration, or lack thereof
5. Past record of conduct
6. Opportunity and capacity to observe/actual knowledge;
7. Consistent or inconsistent statements
8. Reputation for veracity or deceit
9. Bias



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Demeanor

- Note if party is uncomfortable or uncooperative with certain lines of questioning and try to uncover source of resistance
- Because a witness's demeanor during an interview or cross-examination can be affected by many factors, such as nervousness, stress or emotion, do not rely on demeanor as a *determinative* factor in assessing credibility
- Where necessary to resolve disputed facts, evaluate credibility on one or more of the remaining factors



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Inherent Plausibility

- Ask yourself if evidence/testimony presented makes sense and is consistent with other evidence
- Is it likely that a reasonable person in the same situation would do/say the same things?
 - Could someone in same physical location/proximity heard/seen what they heard/saw e.g. free of impediments like darkness and physical barriers?
 - Could someone remember the same information if the same amount of time had passed since the alleged occurrence?
- Are there alternative scenarios that would be more likely to occur based on the same evidence
- Be wary of influence of own bias in determining what is “logical”



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Motive to Lie

- Would there be a reason for person to present false evidence?
- What would be ramifications if allegations were true e.g. academic, career, relationship consequences?
- What would be ramifications if allegations were false e.g. outside pressure like failing classes, dramatic social life changes, other academic consequences?
- When testifying, witness relies heavily on written document



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Corroboration

- Objective, independent authentication is strongest indicator of credibility e.g. receipts, screenshots of texts messages, emails, voicemails
- Is corroboration of primary or peripheral evidence?
- Does current testimony correspond to what was said at the time of the alleged occurrence?
- Not just aligning with friend's, teammates, group member's account because of allegiance
- Includes contemporaneous eyewitness accounts



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Past Record of Conduct

- Is there past misconduct that has been documented?
- Were there findings of responsibility for similar conduct?
- Even if not found responsible, could there be a pattern of conduct or proclivity?
- Are there written or verbal statements that describe an existing relationship?
- Be wary of assumption that past misconduct is dispositive of current misconduct



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Final Credibility Assessments

- Like determining relevance of evidence, Decision-maker may use Investigator's credibility assessments but they are not binding
- Decision-maker makes final decision on determining credibility of evidence/testimony
- Be aware of testimonial performance and presentation of evidence vs. believability of evidence
- Admitted evidence is fundamental to due process
- Current regulations: Credibility is undermined if witness/party does not participate in the adjudication process



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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.
- 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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*For more information, questions and comments
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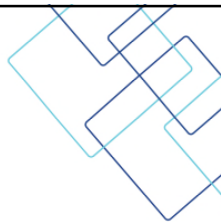
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