



Title IX Team– Part I

Presented by:
Sarah E. Fama
Emma J. Sol

Calaveras Unified School District
March 22, 2022

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Senior Counsel



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Overview

Sarah E. Fama is Senior Counsel in Lozano Smith's Walnut Creek office. She represents public agencies through various aspects of employment and general liability issues.

Experience

Ms. Fama represents public employers at California Superior Court, California Labor Commission, California Unemployment Insurance Appeals Board, California Workers' Compensation Appeals Board, Department of Fair Employment and Housing, and Equal Employment Opportunity Commission. She regularly defends employers against claims of harassment, discrimination, wrongful termination, and wage and hour violations. Clients seek her out to provide guidance, education and training to employers regarding employment law compliance, in areas of harassment, discrimination, separation, accommodation, and wage and hour compliance.

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

Education

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

Practices

Labor & Employment
Litigation
Title IX
Investigations

Education

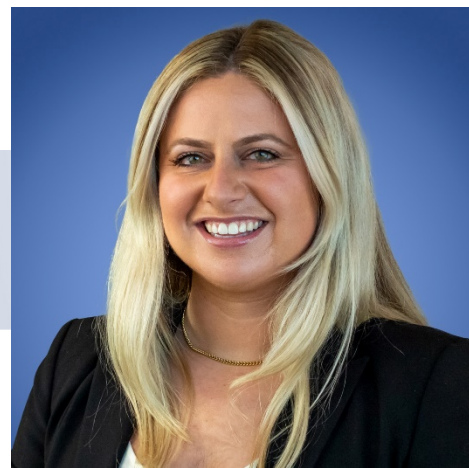
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B.A., University of Alberta

Admissions

California

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Overview

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

Experience

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

Education

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

Practices

Title IX
Student
Investigations

Education

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

Admissions

California

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- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology & Innovation
- Title IX

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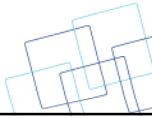
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AT LOZANO SMITH

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

What are the Roles?



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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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Investigator's Duties

May be the Title IX Coordinator

- Interviews parties and witnesses
- Gathers and reviews evidence
- Allows parties to inspect, review, and respond to all evidence directly related to the complaint
- Considers all parties' responses
- Prepares investigation report that summarizes relevant evidence



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Decision-Maker's Duties

Cannot be the Title IX Coordinator

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



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Informal Resolution Officer's Duties

- Facilitates the informal resolution process
- 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

May be the Title IX Coordinator



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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

Cannot be the Title IX Coordinator,
investigator, or decision-maker



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Responsibilities of All Employees:



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!



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12-Step Investigations for Title IX Complaints

12 Steps for Effective Investigations

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

Exchange the Evidence and Prepare the Report and Findings

Corrective Action and Tying up Loose Ends


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12 Steps for Effective Title IX Investigations

Step 1

Receiving and Assessing Complaints



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Receiving Complaints (In General)

WHERE COMPLAINTS COME FROM

FORM OF COMPLAINTS

Student

Parent

Employee

Member of Public

Anonymous Person

Verbal

Written

No Complaint (Rumor or Observation)

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GROUP ACTIVITY

You receive an anonymous note on you desk. It appears to be student handwriting and it says that B. Collins, in 7th grade is sexually harassing the other boys in Band. There is no name on the note, and no one saw who left it.

What do you do?

Is this a complaint?



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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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Setting the Stage



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What do you think?

- What did Principal Darand do well?
- What could Principal Darand improve on?
- If you were talking to Molly, what would you ask her? What would you talk about during the initial conversation?



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12 Steps for Effective Investigations

Step 2 Supportive/Urgent Measures



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Urgent Considerations



- Is there a threat of imminent harm to others?
- Was a crime potentially committed?
- Have mandated reporting obligations been triggered?



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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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Initial Discussion With Victim/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 matter can be resolved informally
- Listen and "hear" the concern



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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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GROUP ACTIVITY

RECALL: Molly comes to your office and tell you she was sexually assaulted by Jeff. They don't have any classes together, but their PE classes are at the same time and so they are often both outside on the fields at the same time.

What supportive measures would you offer?



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Supportive Measures

- Examples:
- Changed class or work schedules
 - No-contact orders
 - Increased security
 - Counseling
 - Medical services
 - Academic support
 - Change in work location

Document the implemented supportive measures, but don't stop there!



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Emergency Removals (Students)

School 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; and
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.



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Administrative Leave

Placing an employee on Administrative Leave is not disciplinary

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Criminal Investigation

A police investigation does **not** relieve a district of its obligations under Title IX or state laws

Gathering evidence

- A brief delay is permissible, but it is not good cause to delay sending the written notice of the investigation
- Criminal reports may be useful for fact gathering
- Coordinate with local law enforcement

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Activity: Police Investigation

RECALL: Molly who comes into your office and tells you she was sexually assaulted.

Molly tells you she went to the police, and they are doing an investigation. You contact the police to coordinate, and they tell you they have not yet spoken to Respondent, and they ask that you NOT contact Respondent until they do.

What do you do?

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12 Steps for Effective Investigations

Step 3

Assessing the Nature of the Complaint

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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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Sexual Harassment Under Title IX

Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

An **employee** conditioning the provision of an aid, benefit, or service of the district on the complainant’s participation in unwelcome sexual conduct;

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

“**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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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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GROUP ACTIVITY

A high school senior threatens to sabotage a sophomore’s reputation unless she sends him nude photographs of herself. She also tells you he forcibly kissed her, reached up her skirt and tried to pull down her panties.

SEVERE?

Is this Title IX?

PERVASIVE?

OBJECTIVELY OFFENSIVE?



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When MUST you dismiss a complaint under Title IX?

If it doesn’t meet the three-part definition of sexual harassment under Title IX

If it did not occur in the recipient’s education program or activity

- If the school exercises substantial control over the respondent; and
- The school exercises substantial control over the context in which the sexual harassment occurred.

If it did not occur against a person in the United States



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GROUP ACTIVITY

RECALL: A coach communicated with a current student athlete via text message, multiple times over the course of three months, using personal cell phones, about subjects of a personal and sexual nature.

Is there Title IX Jurisdiction?

Does the school exercises substantial control over

- The respondent; and
- The context in which the sexual harassment occurred.

If it is determined there is no Title IX Jurisdiction, do you still investigate?

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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:

- Procedural irregularity;
- New evidence that was not reasonably available earlier; or
- Involved personnel had a conflict of interest or bias.

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Even if You Determine Title IX Is NOT Triggered or the Complaint Should Be Dismissed, Do NOT Stop There!

- Consider whether the alleged conduct may otherwise violate District policy or employee/student conduct standards



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GROUP ACTIVITY

RECALL: Molly was telling Principal Darand that she believes she was sexually assaulted.

- Molly was at a party on the weekend with her friends, Charlotte and Jane, when Jeff, a senior boy from her high school gave her a drink.
- Molly, Charlotte, and Jane all hung out with Jeff and his friends, Brian, and Sean, for a while, and had a few drinks each.
- Jeff invited Molly up to a bedroom, where they started kissing on the bed.
- Jeff pulled Molly's skirt and underwear down and began touching her genitals.
- Molly was uncomfortable and did not want Jeff touching her there. She tried to move away but did not tell him to stop.
- Molly is now uncomfortable seeing Jeff and his friends at school.
- Molly does not want Principal Darand to tell her parents or ask her friends about the incident.

Is this Title IX?

What do you tell Molly in response to her not wanting you to tell her parents or talk to her friends?



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Policies and Procedures for Investigating Title IX Complaints

BP/AR 1312.3 – Uniform Complaint Procedures

BP/AR 4030 – Nondiscrimination in Employment

BP/AR 4119.11 – Sexual Harassment (Employee)

AR 4119.12* – Title IX Sexual Harassment Complaint Procedures (Employee)

BP/AR 5145.7 – Sexual Harassment (Students)

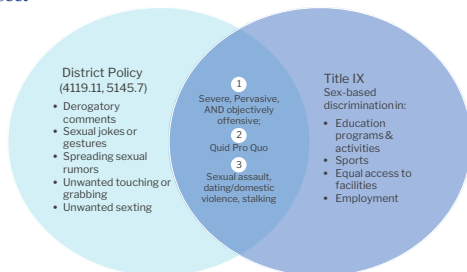
AR 5145.71* – Title IX Sexual Harassment Complaint Procedures (Student)

*New District policies



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



What if the Complainant says “Do Nothing”?

The Title IX Coordinator must inform them of their options

- This includes supportive measures without filing a formal complaint

The Title IX Coordinator can sign a formal complaint on the complainant’s behalf

- Assess the conduct!
- If NOT filing a formal complaint would be deliberately indifferent, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant’s behalf

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.



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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Investigation Timelines



- Title IX - "reasonably prompt time frame"
- District policies



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12 Steps for Effective Investigations

Step 4

Send Notice of the Investigation



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Notice of Investigation

- Identify complaint/investigation process, including informal resolution process;
- Identify allegations with sufficient details;
- Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process;
- Explain that they may have an advisor of their choice inspect and review the evidence; and
- Identify the District's code of conduct that prohibits knowingly making false statements or submitting false information.
- 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.

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.

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.



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Conducting Informal Resolution

- Identify ground rules for the chosen resolution process
- Allow both parties to share their side of the story without interruption
 - Feel free to prompt the parties with open-ended questions (i.e., "How did this make you feel?" "Help us understand..." etc.)
- Ask clarifying questions to fill in any details
- The facilitator should be able to objectively summarize what each party has shared
- Let the parties propose their own possible solutions first



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Informal Resolution Agreements

Agreement

- Reduce agreement to writing
- May look like a summary of commitments, or a contract
- Can include discipline, supportive measures, etc.

No Agreement

- Voluntary process: parties may withdraw at any point prior to reaching a determination of responsibility and resume a formal grievance process



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12 Steps for Effective Investigations

Step 5 Frame the Scope



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Understand the Scope - Frame the Allegations

- 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?



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Understand the Scope - Frame the Allegations

- 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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Factual Findings v. Legal Conclusions

- Focus on whether or not the alleged conduct occurred
- Avoid legal conclusions
- Examples:
 - **Bad Example:** “Coach Ross sexually harassed Angela Smith.”
 - **Good Example:** “Coach Ross sent multiple text messages to Angela Smith over a three-month period, discussing the details of their personal relationships and various sexual acts.”



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GROUP ACTIVITY: Frame the Scope

RECALL: Jeff kissed Molly and touched her genital area.

- Now, Jeff has started to message Molly over the Zoom private chat function during their independent study Zoom class.
- Jeff keeps asking Molly to come over so they can “finish what they started.”
- Molly is uncomfortable by the messages because she doesn’t want to go back over to Jeff’s, but she doesn’t want to say no because Jeff is the captain of the soccer team and could ruin her reputation.
- Molly mentioned that she was uncomfortable to her friend, Charlotte, but wouldn’t explain why because she was embarrassed.




What are the Allegations to Investigate?

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Legal Framework

Preponderance of the Evidence




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12 Steps for Effective Investigations

Step 6

Gather, Review, and Preserve Evidence



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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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Child Pornography

Call School Resource Officer, Police Department, or Safety & Security Department right away before touching anything

Third party witness

Track chain of custody

Warning: It is a state and federal crime to possess and/or distribute child pornography. There's no exception for school administrators or investigators.

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12 Steps for Effective Investigations

Step 7
Make a List of Witnesses



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Preparing to Conduct Interviews

Consider potential conflicts of interest

Consider location, timing, and order

How to make initial contact

Age of the party being interviewed

As you conduct interviews, be sure to ask each witness if there are other witnesses you should speak with.

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GROUP ACTIVITY: Make a Witness List

RECALL: Jeff and Molly.

Who are the witnesses you would interview?

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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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GROUP ACTIVITY

RECALL: Molly tells you about the incident with Jeff. Instead of the incident occurring at a party over the weekend, she tells you it occurred in the back of his car at a tailgate party, in the school parking lot following a school soccer game.

Molly asks you to “Do Nothing” because she is worried Jeff will ruin her reputation. She wants to remain anonymous and keep this confidential.


Is this Title IX?

What do you tell her about staying anonymous/keeping it confidential?

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Confidentiality & Preserving the Integrity of the Investigation



Confidentiality cannot be promised

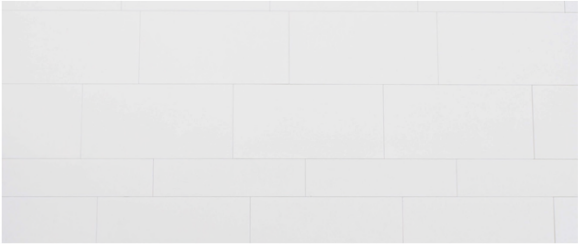
All evidence will be shared with the complainant/victim and the respondent

Both parties will have an equal opportunity to inspect and review any evidence that is directly related to the allegations

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See you tomorrow for Part II!



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