



Lozano Smith
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Title IX Coordinators: Decisions and Implementations

Presented by: Sarah E. Fama and Monica Batanero

Lozano Smith Webinar
August 7, 2024

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Overview

Monica D. Batanero is Senior Counsel in Lozano Smith's Los Angeles office. Ms. Batanero advises educational institutions on student, special education and personnel issues.

Experience

Ms. Batanero provides legal counsel to community college districts and K-12 school districts on day-to-day issues involving Title IX compliance, sexual harassment, discrimination/harassment, Section 504, IDEA, governance, Public Records Act, and student discipline. She regularly conducts workplace and school investigations involving alleged misconduct in violation of board policy and/or law, including Title IX, sexual harassment, professional standards, and code of student conduct.

Ms. Batanero has represented school districts in all phases of special education matters, including Individualized Education Plan meetings, resolution meetings, mediations, and due process hearings conducted by the Office of Administrative Hearings.

She also frequently develops and provides trainings to clients on Title IX, Section 504, IDEA, workplace and school investigations, sexual harassment prevention, student discipline, and first amendment issues.

Education

Ms. Batanero earned her Juris Doctor from the University of San Francisco, School of Law. She earned both an M.S. and B.S. in Gerontology from the University of Southern California.

Practices

Student
Special Education
Labor and Employment
Investigations

Title IX
Governance

Education

J.D., University of San Francisco, School of Law
M.S., University of Southern California
B.S., University of Southern California

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.

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

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

Admissions

California

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

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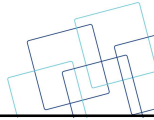
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LOZANO SMITH WEBINAR



1

Presenter

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AT LOZANO SMITH

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2

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AT LOZANO SMITH

Monica D. Batanero is Senior Counsel in Lozano Smith's Los Angeles office. Ms. Batanero represents California public school districts, county offices of education, and community college districts in all aspects of education law. She is co-chair of the firm's Title IX Practice Area and 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.



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3

3

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Topics

- Compliance by August 1, 2024
- Overview of 2024 Title IX Regulations
- Pregnancy and parenting

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4

4

Compliance by August 1, 2024

5

The 2024 Regulations are NOT Retroactive

- Only applies to sex discrimination that **occurred on or after August 1, 2024.**
- All incidents that take place on or before July 31, 2024, must be processed through the 2020 Title IX Regulations.



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6

6

Policies/Procedures

Adding and Updating

- 2020 Title IX Regulations still in effect



Compliance by August 1, 2024

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7

7

Notice of Nondiscrimination

Must be posted on:

- Website
- Handbook
- Other means of notifying students/parents/employees etc.



Compliance by August 1, 2024

§106.8(c)(2)

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8

8

Trainings

- All employees
- Investigators, Decision-makers, Informal Resolution Officers and persons implementing supportive measures (All Supervisors)
- Title IX Coordinators and designees



Implementation by August 1, 2024

§106.8(d)

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9

9

Overview of the 2024 Regulations

10

Scope of Sex Discrimination

- Title IX prohibits sex discrimination.
- Based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



§ 106.10

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11

11

Definition of Sex-Based Harassment

- Quid Pro Quo (person authorized by the District)
- Hostile environment harassment – unwelcome sex conduct
 - is subjectively and objectively offensive;
 - so severe **or** pervasive; and
 - that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity
- Sexual Assault, Dating Violence, Domestic Violence, and Stalking

§ 106.2

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12

12

Sex-Based Harassment - HEH

Factors to consider:

- Affect on the complainant's ability to access the district's education program or activity;
- The type, frequency, and duration of the conduct;
- The parties' ages, roles, previous interactions, and other individual factors;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment.



13

Sexual Assault

- Rape
- Sodomy (meaning forcible oral or anal sexual intercourse with a complainant)
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape



14

Hypothetical

Principal Jones tells Claire, a student teacher at his site, "If you spend your lunch hour with me every day for the rest of the year, I will make sure you get a job here next year." When Claire doesn't join him for lunch, Principal Jones threatens that he will make sure she never has a job in this District.

Is this Title IX?



15

Hypothetical

You are a Title IX Coordinator at a K-12 District. Michelle, a 7th grader, comes to you and complains that another 7th grader, Brady, keeps following her in the hallway and calling her names, such as “dyke,” and “lesbian.” Michelle is extremely upset and is requesting that she be transferred to a new school.

Is this Title IX?



16

Title IX Jurisdiction

Must address all sex discrimination occurring under the district’s education program or activity in the United States. Includes, but not limited to:

- Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution; and,
- Conduct that is subject to the recipient’s **disciplinary authority**.



§ 106.11



17

Title IX Jurisdiction vs. Impact

Must also address a sex-based hostile environment under its education program or activity, even when **some** conduct alleged to be contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.

- Off campus conduct (no effect on campus and District has no jurisdiction in policy) = **No Title IX jurisdiction**.
- Off campus conduct but with impact that is not a Title IX violation (i.e., complainant is upset by seeing respondent) = **No Title IX jurisdiction**, but District must **remedy**/provide supportive measures.
- Off campus conduct with impact that is a Title IX violation (i.e., hostile environment harassment from rumors, bullying, retaliation, etc.) = **Title IX jurisdiction**.
- Off campus conduct when District has jurisdiction over off campus conduct in policy = **Title IX jurisdiction**.



18

Hypothetical

Lauren and Michael are juniors in high school. Over the weekend, they attend a party, where Lauren performs oral sex on Michael, who is intoxicated and unable to consent. When they return to school on Monday, rumors spread about Michael being “raped” by his girlfriend. Michael does not come to school for the rest of the week.

You are the Title IX Coordinator.

1. Is this Title IX?
2. What do you do?



19

Sex-Based Distinctions or Separation

- Recipients can impose sex-based distinctions or separation in their educational programs **if they do not impose more than a *de minimis* harm.**
- More than *de minimis* harm is any harm that **is genuine and objectively non-trivial**, from a reasonable person’s perspective.
- Prohibiting a student from participating in an education program or activity consistent with their gender identity **violates this standard** and is thus prohibited.



§ 106.31(a)(2)



20

Sex-Based Distinctions or Separation

- Religious exemption
- Military and merchant marine educational institutions
- Social fraternities and sororities
- Housing
- Athletics **



21

2024 Title IX Definitions

Complainant:

- Includes person(s) other than student(s)/employee(s) who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX **at a time when that individual was participating or attempting to participate** in the district's education program or activity.

Respondent

- A person who is alleged to have violated the recipient's prohibition on sex discrimination. (§ 106.2)

LS 22

22

2024 Title IX Definitions

Knowledge

- Knowledge of conduct that reasonably may constitute sex discrimination requires a **prompt and effective response**. (§ 106.44)

Evaluation:

- The district's decision to dismiss or investigate a complaint. (§ 106.45(b)(4))

LS 23

23

2024 Title IX Definitions

Complaint:

- May be oral or written, as long as the complaint can be objectively understood as a request for the district to investigate. (§ 106.45(a)(2))

Pregnancy or Related Conditions

- Pregnancy, childbirth, termination of pregnancy, or lactation; medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions. (§106.2)

LS 24

24

2024 Title IX Definitions

Retaliation:

- Retaliation means intimidation, threats, coercion, or discrimination against any person by the District, a student, or an employee or other person authorized to provide aid, benefit, or service, for the purpose of interfering with any right or privilege secured by Title IX, or because the person has participated in any manner in a Title IX process. (§ 106.2)

Peer Retaliation:

- Peer retaliation means retaliation by a student against another student.



25

25

Responding to Sex Discrimination

- The district must respond **promptly and effectively** and **must prevent the recurrence** of any sex discrimination and remedy its effects.
- All non-confidential employees must notify the Title IX Coordinator of conduct that could reasonably be considered sex discrimination.
- Title IX reporting is separate from mandated reporting requirements.



§ 106.44 (c)(2)

26

26

Responding to Sex Discrimination (K-12)

- All non-confidential employees must notify the Title IX Coordinator of conduct that could reasonably be considered sex discrimination.



§ 106.44 (c)(2)

27

27

Responding to Sex Discrimination (Higher Ed.)

Employee Role	Disclosure From	Notify TIXC	Provide TIXC's Contact Info
Confidential Employees	<ul style="list-style-type: none"> Student Employee 	No	Yes
Employees With Authority To Institute Corrective Measures	<ul style="list-style-type: none"> Student Employee 	Yes	Yes
Employees With Responsibility For Administrative Leadership, Teaching, And Advising	<ul style="list-style-type: none"> Student Employee 	Yes	Yes
All Other Employees Who Are Not Confidential Employees	<ul style="list-style-type: none"> Student Employee 	Yes/Or	Yes/Or



§ 106.44 (c)(2)

28

28

Public Awareness Events

- No obligation to act in response unless imminent and serious threat to health or safety.
- Must use the information to inform efforts to prevent sex-based harassment.



29

29

Confidential Employees



An employee whose communications are privileged or confidential under Federal or State law or an employee that has been designated as a confidential employee for the purpose of providing services to persons related to sex discrimination.



§ 106.2

30

30

Confidential Employees


Under Law	Designation
<ul style="list-style-type: none"> ▪ School counselor ▪ Licensed psychologist ▪ Licensed clinical social worker ▪ School psychologist with credential ▪ Licensed marriage and family therapist (MFT) ▪ Licensed professional clinical counselor ▪ Licensed educational psychologist (Evid. Code, § 1010.5) 	<ul style="list-style-type: none"> ▪ Will you designate additional people? ▪ How Many?

LS 31

31

Confidential Employees

- Only confidential when providing those services.
- Must specify who they are in policies.
- Must provide specific training to them about their reporting requirements.



§ 106.44(d) 32

32

Confidential Employees

- Must explain to any person who informs them of conduct that reasonably may constitute sex discrimination:
 - Their status as confidential
 - Title IX Coordinator's contact information
 - How to make a complaint
 - That supportive measures, informal resolution and an investigation may be available


LS 33

33

Barriers to reporting

Title IX Coordinator must:

- Monitor for barriers to reporting
- Take reasonable steps to address such barriers



§ 106.44(b)

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34

34

Initial Evaluation

Upon notice, Title IX Coordinator must:

- Treat parties equitably
- Offer supportive measures
- Inform of grievance procedure
- Initiate process
- If no complaint, determine path

Must consider and evaluate the parties wishes.

§106.44(f)

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35

35

Complaint Initiated by Title IX Coordinator – Factors to Consider

- Complainant request
- Complainant’s reasonable safety concerns
- Risk of additional acts
- Severity
- Age and relationship
- Scope (i.e., pattern, ongoing acts, or impact on multiple individuals)
- Availability of evidence
- Whether the alleged sex discrimination can be stopped

§ 106.44(f)(1)(V)

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36

36

Complaint Initiated by Title IX Coordinator



May Initiate If Alleges Conduct:	If Initiating, Must:
<ul style="list-style-type: none"> ▪ Presents an imminent and serious health or safety threat ▪ Prevents the district from ensuring equal access on the basis of sex to its education program or activity 	<ul style="list-style-type: none"> ▪ Notify complainant prior to initiation ▪ Address safety concerns <ul style="list-style-type: none"> ▪ Complainant ▪ Others

§ 106.44(f)

LS 37

37

Supportive Measures

-  Must offer supportive measures to both Complainants and Respondents.
-  Parties have the right to challenge supportive measures.

§ 106.44(g)

LS 38

38

Supportive Measures


Must/May Be:	Must NOT Be:
<ul style="list-style-type: none"> ▪ Must be designed to protect the safety of the parties or environment ▪ May be modified or terminated at the end of the resolution process ▪ May include emergency removal and administrative leave 	<ul style="list-style-type: none"> ▪ Must not unreasonably burden either party ▪ May not be imposed for punitive or disciplinary reasons

§106.44(g) and (k)

LS 39

39

Supportive Measures



- Parties may challenge a decision regarding their supportive measures
- Challenge heard by an impartial employee with the ability to modify or reverse the original decision

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40

40

Hypothetical

Charlie, a 4th grade non-binary student, filed a Title IX complaint against two classmates for repeatedly misgendering them, and teasing them for not being “a boy or a girl.”

1. What supportive measures would you offer Charlie?

2. What supportive measures would you offer the two classmates?

LS

41

41

Supportive Measures

Examples:

- No-contact orders
- Change of class or work schedules
- Modified lunch schedules
- Campus escort services
- Change in work locations
- Increased security/monitoring
- Extensions of deadlines or other course-related adjustments
- Counseling
- Independent study (must be nonpunitive/nondisciplinary)

Emergency Removal & Administrative Leave

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42

42

Students with Disabilities

K-12	Higher Education
<ul style="list-style-type: none"> MUST consult with a student's IEP/Section 504 team. 	<ul style="list-style-type: none"> MAY consult with the student or office designated to support students with disabilities.

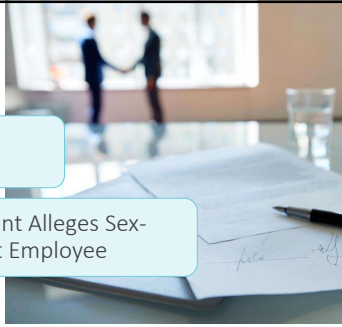
LS § 106.44(g)(6) 43

43

Informal Resolution

Formal Complaint Not Required

Not Available When Student Alleges Sex-based Harassment Against Employee



LS § 106.44(k) 44

44

Informal Resolution

- Must provide notice to parties, which include:
 - Allegations;
 - Requirements of informal resolution process;
 - Right to withdraw and initiate investigation;
 - Resolution would preclude an investigation;
 - Potential terms of resolution; and
 - What information the district will maintain and how the district could disclose such information.
- Must obtain parties' voluntary consent.
- Informal Resolution Officer cannot be Investigator or Decision-maker.

LS § 106.44(k) 45

45

Dismissal of Complaint

- **May** dismiss complaint when:
 - District is unable to identify the respondent after taking reasonable steps to do so
 - The respondent is no longer enrolled or employed by the district
 - The complainant voluntarily withdraws any or all allegations
 - The alleged conduct would not constitute sex discrimination, if proven



§ 106.45(d)

46

46

Hypothetical

Ms. Parke, a 10th grade English teacher, filed a Title IX Complaint against the high school athletic director, Mr. Brown, alleging that Mr. Brown sexually assaulted her on campus after a football game.

When Mr. Brown received the notice of investigation, he immediately resigned.

1. Is this Title IX?
2. Should you dismiss this complaint?



47

47

Dismissal Appeal

- Must offer appeal of dismissal
- Basis for appeal
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias



48

48

Title IX Grievance Procedures

**Adequate, Reliable
and Impartial**

§ 106.45

49

49

Title IX Grievance Procedures

106.45	106.46
<ul style="list-style-type: none"> ▪ K-12 ▪ Higher Education complaints, except sex-based harassment complaints involving a student. 	<ul style="list-style-type: none"> ▪ Higher Education complaints of sex-based harassment involving a student.

50

50

Notice of Complaint

106.45	106.46
<ul style="list-style-type: none"> ▪ Grievance procedures; ▪ Informal resolution process; ▪ Identities of parties; ▪ The conduct alleged to constitute sex discrimination; ▪ Dates/locations of incident; ▪ Anti-retaliation statement; and ▪ A statement regarding access to evidence. 	<ul style="list-style-type: none"> ▪ All of the 106.45 ▪ A statement that respondent is presumed not responsible, ▪ Right to an advisor, and ▪ Statement on code of conduct on false statements/information.

51

51

Hypothetical

Priya is a sophomore at State college. While at a party in her sorority house after a Saturday football game, Priya is sexually assaulted by another student, Rob.

1. Is this Title IX?

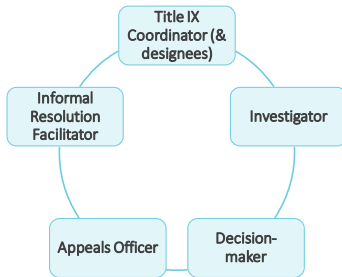
2. If Priya and Rob were employees, which grievance procedure do you use?



52

52

Title IX Team



53

53

Potential Investigator Models

Name of Model	Process	Options
Single Investigator	T IX Coordinator = Investigator = Decision-maker	Can have someone else sign off on decision
Single Investigator +	T IX Coordinator = Investigator → Decision-maker	Inv. makes recommended findings
Title IX Coordinator/Decision-maker	T IX Coordinator → Investigator → T IX Coordinator/Decision-maker	Have Inv. make recommended findings Have DM collaborate with Investigator regarding questions DM may have
2020 Regs	T IX Coordinator → Investigator → Decision-maker	



54

54

Hypothetical

Julie, a middle school student, reports to you that Bryan, an instructional aide, inappropriately touched her shoulders and chest when she went to him for homework assistance.

What investigation model would be best?



55

Pregnancy and Parenting

56

Discrimination Based on Pregnancy or Related Conditions

Discrimination Prohibited

Specific Actions

Employee Notice Responsibilities



57

Notice of student pregnancy


All Employees	Title IX Coordinator
<ul style="list-style-type: none"> Provide the Title IX Coordinator's contact information Inform of the district's obligations to ensure equal access Maintain privacy 	<ul style="list-style-type: none"> Inform of the district's obligations to ensure equal access Maintain privacy

LS 58

58

Pregnancy and Related Conditions – Students

- Reasonable modifications according to policies, practices or procedures
 - Cannot fundamentally alter the education program or activity
 - Student can accept or decline
- Limitation of supporting documentation



LS 34 C.F.R. § 106.40 59

59

Pregnancy and Related Conditions – Students

- Voluntary access to a separate and comparable portion of the education program or activity
- Voluntary leaves of absence
- Lactation space
- Certification to participate

LS 60

60

Pregnancy and Related Conditions - Employees



- Comparable treatment to other temporary medical conditions
- Voluntary leaves of absence
- Lactation time and space

LS § 106.57 61

61

2020 Regs Still Apply

62

2020 Title IX – Sexual Harassment

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**," "**dating violence**," "**domestic violence**," or "**stalking**."

LS 63

63

2020 Title IX Jurisdiction

The conduct occurs against a person **in the United States**;

The conduct occurs in an education program or activity over which the District exercised **substantial control** over both:

1) The **respondent** and

2) The **context** in which the sexual harassment occurs; **and**

The complainant was **participating/attempting to participate in** the educational program or activity at the time the complaint was filed.

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64

64

Hypothetical

RECALL: Julie, a middle school student, reports to you that Bryan, an instructional aide, inappropriately touched her shoulders and chest when she went to him for homework assistance.

Julie notes that this happened last year, around December 2023.

Which Regulations Apply?
2020 Regulations or 2024 Regulations?

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65

65

Questions

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66

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 68

68

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70

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71

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