



Lozano Smith
ATTORNEYS AT LAW

Conducting Title IX Investigations

Presented by: Sarah E. Fama and Monica Batanero

Lozano Smith Webinar
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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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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

WHO WE ARE & WHAT WE DO

Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Sacramento, Walnut Creek, Fresno, Monterey, Bakersfield, San Luis Obispo, Los Angeles, and San Diego.

AREAS OF EXPERTISE

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

COST CONTROL is important for public agencies and an area we have mastered. We recognize and understand your financial restraints and work tirelessly to provide the best legal representation with those limitations in mind. One of the best ways we keep legal costs to a minimum is through strategic, preventive legal services. These include Client News Briefs to keep you updated on changing laws affecting education. In addition, we offer extensive workshops and legal seminars providing the tools needed to minimize liability, reducing the need for legal assistance down the road.

CLIENT SERVICE is our top priority and we take it very seriously. With premier service as the benchmark, we have established protocols and specific standards of practice. Client calls are systematically returned within 24 hours and often sooner when required.

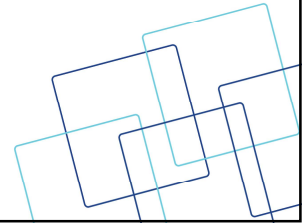
DIVERSITY IS KEY and we consciously practice it in all that we do. It is one of our core beliefs that there is a measurable level of strength and sensitivity fostered by bringing together individuals from a wide variety of different backgrounds, cultures and life experiences. Both the firm and the clients benefit from this practice, with a higher level of creative thinking, deeper understanding of issues, more compassion, and the powerful solutions that emerge as a result.



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AUGUST 22, 2024
LOZANO SMITH WEBINAR



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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 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. Ms. Batanero also specializes in student discipline and special education.



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Topics

- Steps of a Title IX Investigation
- Bias and Impartiality
- Relevance
- Report-Writing
- Credibility

Title IX – Sex Discrimination

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Case Study: Jake Handsome and Old Thespian

The Complaint: On October 31, 2024, Jake Handsome, junior at Green Vale High School, flags you in the hallway. You are the Title IX Coordinator.

Handsome is upset and tells you his drama teacher and faculty sponsor of the theater club, Mr. Thespian, gives preferential treatment to Jessica and Amanda who are juniors at the high school.

According to Handsome, Thespian only provides mentorship to cis-female students. He helps them with reading their lines, rehearsing for plays and applying to auditions.



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The Plain Language

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

20 U.S.C. § 1681 *et seq.*



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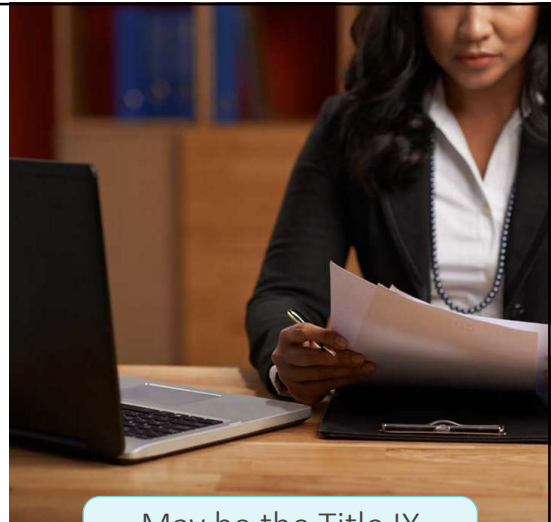
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Steps of a Title IX Investigations

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Investigator's Duties

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



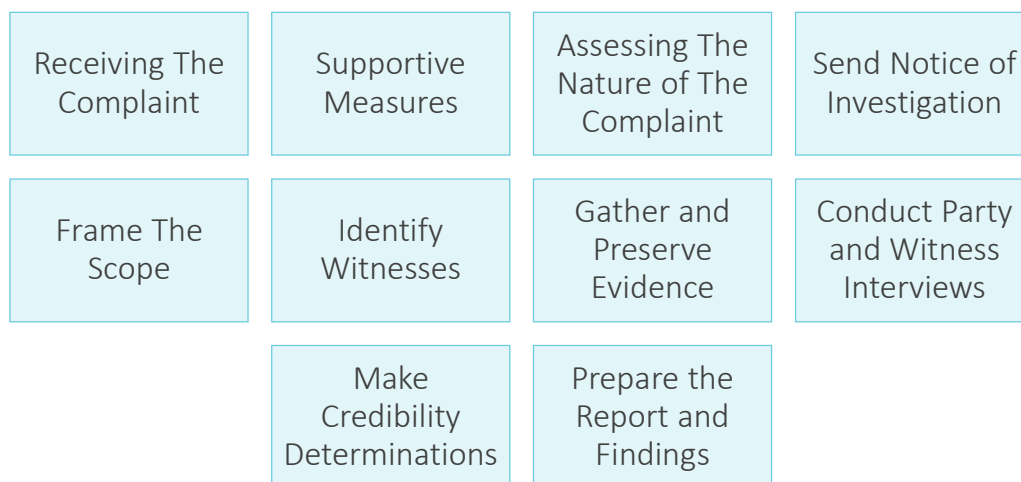
May be the Title IX Coordinator



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Checklist for Effective Investigations –



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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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Contact the Victim/Complainant

- Conduct initial discussion with complainant/victim to better understand the complaint and determine if it falls under Title IX
- Discuss supportive measures
- Explain options for informal vs. formal procedure
- Discuss the district's policy that prohibits retaliation
- Confidentiality cannot be promised to complainant or anyone



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Supportive Measures

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Supportive Measures

“Non-disciplinary, non-punitive individualized services offered [...] to the complainant **and** 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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Supportive Measures

Which of the following supportive measures might you offer Handsome?

- Counseling
- Medical services
- Academic support (e.g., extension of deadlines or other course adjustments)
- No-contact orders
- Increased security
- Changed schedules (e.g., modification of work or class schedule)
- Leaves of absences (employees)
- Emergency removals (student)
- Other



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

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Initial Evaluation/Assessment

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Case Study: Interview Summary – Handsome

- During summer 2024, Handsome saw Thespian touching Jessica’s back and whispering in her ear. When Handsome walked in, they dispersed laughing nervously.
- Same day, Jessica posted a video on TikTok in which she bragged about an upcoming audition. She said she did a “photoshoot” at her drama teacher’s house and that she was “sugar babying” for her teacher who was going to “take her places.”
- Jessica told Handsome on Snapchat that Thespian was a great guy and would help any student and Handsome was overreacting.

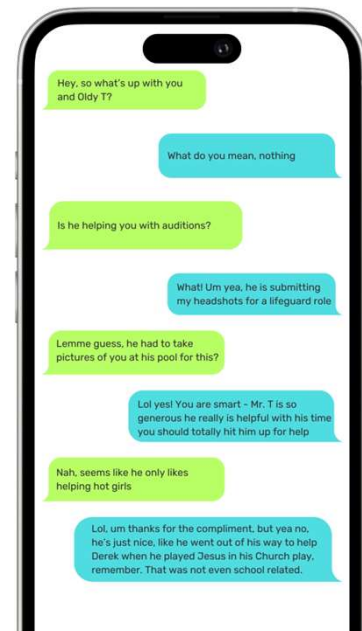


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Case Study: Interview Summary – Handsome

- During the first day of class, in August 2024, Handsome noticed that Mr. Thespian was staring at Amanda while Handsome was trying to talk to him.
- Amanda and Handsome have “hooked up” but they are now cool.



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Case Study: Interview Summary –Handsome

- Handsome went to Mr. Thespian’s office hours in September 2024, to request a photoshoot at his house like the “girls.”
- Mr. Thespian bragged about his former acting career and criticized Handsome.
- Handsome realized that Mr. Thespian was jealous of him because he was a younger and better actor. Handsome concluded that Mr. Thespian preferred to promote female student actresses.
- Handsome’s mom, who is a lawyer, told him promoting one gender over the other in school violated Title IX.



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Questions

1. Does Handsome’s complaint fall within Title IX?
2. What do you do, if anything about the information received about Jessica and Amanda?
3. Should the Title IX Coordinator continue to investigate or assign a different Investigator?
4. What is the next step for the Title IX investigation?



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Send Notice of Investigation

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Notice to the Parties

Requirements

- Identify grievance procedure;
- Identify allegations with sufficient details;
- Statement that retaliation is prohibited;
- Parties will be provided access to evidence.

Recommendations

- Prohibition of knowingly making false statements or submitting false information.
- Providing right to an advisor of their choice.

In Writing?



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Framing 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.”
- **Avoid** ambiguous and subjective words such as “inappropriate” and “unfair.”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)



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Case Study

Frame the Scope of your investigation for Handsome's complaint?



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Understand the Scope - Frame the Allegations - Examples

- **Bad example:** Did Mr. Thespian discriminate against Handsome?
- **Good example:** Did Mr. Thespian provide educational services to female students that were not offered to male students?
- **Bad example:** Did Mr. Thespian sexually harass Jessica?
- **Good example:** Did Mr. Thespian offer Jessica educational benefits in exchange for sexual favors?
- **Bad example:** Did Mr. Thespian behave inappropriately with Amanda?
- **Good example:** Did Mr. Thespian conduct a photoshoot for Amanda at his home?



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Identify Witnesses

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Witness List

- Complainant
- Respondent
- Any individual who may have information or evidence directly related to the allegations



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Case Study

Who would you interview as witnesses?
What order would you interview them?



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Case Study: Witness Background - Jessica

- Jessica is a 17-year-old junior. Her mother was friends with Mr. Thespian's ex-wife. Jessica's mother spent time at Mr. Thespian's house when he was still married.
- Jessica's father passed away when she was 12 or 13 due to opioid addiction. Jessica's mother has been on public assistance and has been in and out of rehab.
- Jessica cares deeply for Mr. Thespian. Around school it is well known that he is her favorite teacher.



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Case Study – Pin In It Questions

- How does the Investigator’s knowledge of Jessica’s personal life interplay with bias?
- Is it tempting to jump to a conclusion here?
- How does socio-economic status play into this?
- As we walk through the Case Study, think about what sort of conclusions you may already have drawn based implicit and/or confirmation bias.



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Bias and Impartiality

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Implicit Bias

An implicit bias is an unconscious bias towards or against certain groups of people.

It is often based on social stereotypes that have led to an association between a group and a trait.

Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment.

Many (if not most) of the people treating others differently are unaware of doing so.



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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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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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Five Minute Rule

“If I had to think about it for more than five minutes, I erred on the side of recusal...in a few cases where I did recuse myself, I had no doubt *that I could decide the case objectively*, I worried that the *public might have doubts...*, and since one of the most important things about courts is their *integrity* and *the public's perception* that courts are acting objectively... since that's so important, I always erred on the side of recusal.”



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Case Study: Witness Background - Amanda

- Amanda is a 17-year-old junior. She is a recent transfer to the school.
- In August 2023 she “hooked up” with Handsome, when they both participated in a theater camp in London.
- Amanda’s parents moved to Mountain School District from Palo Alto after her dad sold his AI company to Microsoft.



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Case Study – Pin In It Questions

How does Amanda’s socio-economic background play into what you think about her?

Do you think she will be more credible than Jessica?



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Conduct Party and Witness Interviews

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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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Interview Admonitions

- Reason for meeting/interview
- Neutral fact-finder
- Honesty
 - Not a test
 - Estimate, do not guess
- Confidentiality
 - Prohibited disclosure
- Retaliation prohibited
- Breaks



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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 including losing time, forgetting who/where you are, going blank



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Recognize Trauma-related Dissociation (Cont.)

- 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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Helping 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.

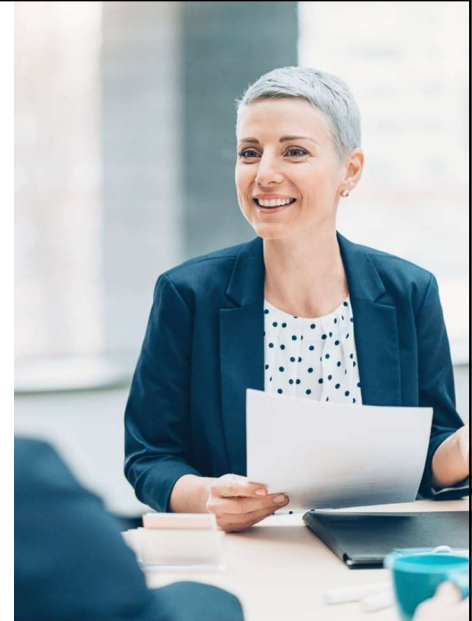


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Interviews

- Be an active listener and critical thinker
 - “Does this make sense?”
 - “Do I understand exactly what happened?”
 - “Will someone else reading my report understand exactly what happened?”
- Challenge the facts
- Clarify basis for witness’ knowledge of a “fact”
- Distinguish between “no” and “I don’t recall”



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Interviewing the Complainant

- What is the nature and history of your relationship with Respondent?
- Tell me what happened? Use 5 W’s
- Has anything like this ever happened before?
- Have you told or reported the misconduct to anyone? If so, whom?
- Did anyone know of or join in the misconduct?
- Are you aware of other incidents by Respondent toward other individuals?
- How has this impacted you?
- Do you have any documentation to support your allegations?



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Questioning Techniques

Tell me what happened. Explain why you're upset. Describe how it made you feel.

Who? What? Where?
When? How? **Why?**

Were you __?
Where was __?
Did you __?

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Framing the Questions

- **Funnel Approach** – Start broad and then follow up with specific questions.
 - Tell me what happened on July 31, 2024.
 - Who was present?
 - Any documentation of this incident (text messages, emails, videos, pictures)?
 - You said he “attacked” you. Can you explain that further? What does “attack” mean to you?
- **Avoid Leading Questions**
 - **PROBLEMATIC:** On July 31, 2024, you were alone with Mr. Thespian, correct?
 - **PROBLEMATIC:** Did you engage in any inappropriate behavior?
 - **PROBLEMATIC:** Isn't it true that you are over familiar with many students?

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Statements/Questions to Avoid

Questions to avoid:

- Why did you...?
- Why didn't you...?
- Didn't you consider...?

Questions that may be helpful

- How did that make you feel?
- What was your thought process at that time?
- Do you remember smelling/hearing anything?



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Statements/Questions to Avoid (cont.)

Don't insert your opinion into the victim's experience

Don't make assumptions about what the victim 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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Case Study: Good or Bad questions

- 1) "Have you ever been to Mr. Thespian's House?"
- 2) "What is Mr. Thespian like as a teacher?"
- 3) "Have you ever spent time with Mr. Thespian outside of school? *If yes*, how did that happen?"
- 4) "And you didn't think it was weird for Mr. Thespian to invite you to his house?"
- 5) "Tell me about an audition you had in San Francisco?"
- 6) "Do you realize you were raped?"
- 7) "In college I also had a creepy professor, you can tell me how you feel? I am on your side."
- 8) "So did Mr. Thespian get you drunk or high when you went to his house?"



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Case Study: Interview - Jessica

You meet with Jessica for an in-person interview. You ask:

- Q. How long have you known Mr. Thespian?
- A. Oh since I was 12.
- Q. *surprised* How did you meet him?
- A. His ex-wife was friends with my mom, we used to go to his house all the time. He has a great pool.
- Q. What did you guys do at the house?
- A. It was great, we'd swim and he's the one who told me he couldn't wait for me to get to high school. He offered to mentor me. He's such a great guy.
- Q. Have you been to Mr. Thespian's house recently?
- A. "um yea, I mean none-of your business he's a nice guy – I can see what you are getting at."



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Case Study

Has the Investigator hit a trauma response?
What can you do to get the conversation going again?



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Case Study: Interview Summary – Jessica

- Mr. Thespian and Jessica “hooked up” at his house in summer of 2024 when she was 17. It was 100% her idea.
- Jessica knows Mr. Thespian from outside of school.
- Mr. Thespian took pictures of her by his pool for an audition.
- Mr. Thespian has provided Jessica with marijuana on occasion.
- Jessica thinks Mr. Thespian would still help her if she did not hook up with him but is not sure.
- Jessica believes she has a special connection with Mr. Thespian.



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Case Study

1. Are there any new allegations that need to be investigated?
2. If yes, what are they?
3. Is there any other reporting that needs to be done?
4. Do the new allegations fall under the 2020 or the 2024 Regs?
5. Is the sexual encounter between Mr. Thespian and Jessica consensual if it was “100% her idea”?
6. What additional supportive measures will you take?



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Case Study: Interview Summary – Amanda

- Amanda went to Mr. Thespian’s house a few times, to take pictures by the pool for an audition.
- Amanda sent a video of herself with adult content to Mr. Thespian.
- During this last visit to his house, Mr. Thespian offered her a micro dose of mushrooms to help unlock the creative process.
- She refused the drugs and immediately called her mom and went home.
- She felt stupid about falling for Mr. Thespian’s lies.
- She also found out he is hooking up with Jessica.
- She is now uncomfortable around Mr. Thespian, and other students are making fun of her “modeling.”



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Case Study - Title IX Jurisdiction vs. Impact

Location and Impact	Is it Title IX?	Case Study
Off campus conduct with no impact on campus and the District has no jurisdiction in policy	No Title IX Jurisdiction	<ul style="list-style-type: none"> H and A “hook up” in London
Off campus conduct 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	<ul style="list-style-type: none"> J & T “hook up” at his house (look at disciplinary jx) T took pictures of A by his pool and she is now uncomfortable around him.
Off campus conduct with impact that is within Title IX (i.e., hostile environment harassment from rumors, bullying, retaliation, etc.)	Yes, Title IX jurisdiction over HEH	<ul style="list-style-type: none"> T took pictures of A by his pool and students are making fun of her.
Off campus conduct when District has jurisdiction over off campus conduct in policy	Yes, Title IX jurisdiction	<ul style="list-style-type: none"> J & T “hook up” at his house (look at disciplinary jx) T took pictures of A by his pool



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Gather and Preserve Evidence

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Case Study

What type of evidence do you expect to gather?



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Where does Evidence Come From?

Emails

Internet usage and
websites visited

Phone records

Voicemail messages

Attendance records

Pictures

Security records

Audio/Video

Computer records/files

Credit Card Receipts

Complaint

Observing Locations

***Note:** If you receive a document from a witness, make sure you note who provided the document and how it was received.



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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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Evidence –Written Statements

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



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Evidence –Written Statements

Bad Example

“I went to his house and he gave me something to loosen up so we could take the modeling pictures. I didn’t like it.”

Good Example

“On August 19, 2024, Mr. Thespian invited me to his home to take some headshots. There was a part in the Mountain Theater play that I wanted, and he said headshots would help me get the part. That Saturday, around 10am, my mom dropped me off at his house. He suggested we take the pictures by his pool, as there was good lighting. I was nervous, as I do not like taking pictures. He offered me some mushrooms, he called it “microdosing,” and said it would help loosen me up so that I would be more comfortable with the pictures. I told him I did not feel well. I went outside and called my mom to come get me. Now when I am in his class, or see him at school, I am very uncomfortable around him. I feel like he is giving me looks.”



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Respondent Interview

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Case Study: Investigator Notes – Respondent/Thespian

- Mr. Thespian has been on paid administrative leave since the Title IX scope expanded to include his sexual conduct with two female students.
- He has been provided with an updated notice of allegations.
- He has retained a criminal defense attorney and is also represented by the teacher’s union. Notices have been sent to both representatives in connection with the investigation.
- He was provided with a Lybarger/Spielbauer notice before his interview, which his attorney also requested in writing.
- Mr. Thespian denies the charges.



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Interviewing Witnesses - Lybarger/Spielbauer Warning /Rights



- Fifth Amendment Protection Against Self-Incrimination
- Spielbauer/Lybarger Warning – Public employees may be compelled to answer potentially incriminating questions about their job performance as long as they are not required to waive their constitutional protections in a criminal matter.



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Case Study: Interview Summary – Respondent/Thespian

- Mr. Thespian denied giving preferential treatment to female students.
- He also went out of his way to help Derek who is a male student.
- Handsome was not very promising as an actor. Mr. Thespian evaluated his performance accordingly.
- Mr. Thespian denied having sex with Jessica but admitted that she came to his house with her mother's permission.
- He admitted to helping Jessica curate content to get more followers on her socials.
- Mr. Thespian denied all allegations related to Amanda.



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Confidentiality

Confidentiality cannot be promised

All evidence will be shared with the parties



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Take Notes

- Take detailed notes and/or have a second administrator or confidential employee involved to take notes.



Conduct Additional Interviews



Review your witness summaries and evidence and ask yourself if there are any holes.



Do you have all the information you need to thoroughly address each allegation?



It is OK to conduct follow-up interviews of witnesses if needed.



Drafting the Report

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Exchange of Evidence

Review the District's Administrative Regulation for your process

- Must you send a report of evidence that provides an accurate description of the relevant and permissible evidence? OR
- Are you instead providing access to the relevant and permissible evidence?

Note: if you provide a description of the evidence, you must further provide the parties an equal opportunity to access the relevant and permissible evidence.



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Report of Evidence (Best Practice)

- Provide the parties with a report of the relevant and permissible evidence to the allegations
- This should include a cover letter explaining:
 - Parties have [#] days to review and respond to the evidence.
 - Parties must send their responses to the Investigator.
- This may include:
 - Interview Summaries (Parties and Witnesses)
 - Documentary Evidence (Text messages, emails, social media, etc.)
 - Photos/Videos
 - Any other relevant evidence
 - Summary of disputed and undisputed evidence



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Report of Evidence (Recommended Content)

- Identify the date the investigation commenced
- Identify the Investigator
- Identify supportive measures offered to and accepted by the parties
- Summary of the investigation process
- Admonish the parties regarding confidentiality
- Identify the legal standard
- Identify number of/identity of witnesses
- Evidence – documents and witness statements



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Relevancy

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Relevancy

- Evidence is relevant if the information helps to prove or disprove a fact at issue and should be admitted.
- Recipients cannot exclude relevant evidence because such evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- All relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory.



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Relevancy Considerations

- Recipients have discretion governing how admissible, relevant evidence must be evaluated for weight or credibility by the Decision-maker.
- The weight assigned to evidence depends on the type of evidence and its credibility:
 - Direct evidence (personal observation or experience)
 - Real evidence (weapon)
 - Documentary evidence (emails, texts, photos, videos, etc.)
 - Circumstantial evidence (not direct observation, but compelling)
 - Hearsay evidence (something heard from another person)



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Limitations On Relevance

- Evidence protected by any legally recognized privilege
- Evidence provided to a confidential employee
- Records maintained by a physician, psychologist, or other recognized professional for treatment
- When evidence is duplicative of other evidence, it may be deemed not relevant



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Limitations on Relevance

A complainant's sexual interests or prior sexual conduct is irrelevant, unless prior sexual conduct evidence is offered to prove

that someone other than the respondent committed the conduct alleged by the complainant, or

Consent (evidence about specific incidents of complainant's prior sexual conduct with respondent)



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Case Study

1. Is evidence of Mr. Thespian inviting 3 other students to his house to take pictures relevant to the allegations by Jessica and Amanda?
2. Is evidence of Mr. Thespian inviting 3 other students to his house to take pictures relevant to the allegations by Handsome?
3. Is Mr. Thespian's alleged attempt to provide drugs to Amanda relevant to whether he raped Jessica?
4. Is evidence that Jessica is rumored to be "easy" relevant?



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Additional Requirements

- Written notice of allegations
- If Complainant withdraws, must be in writing
- Written notice of interview
- Right to advisor
- May allow experts
- Live hearings are optional



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Decision-maker questioning

Must allow decision-maker to question parties and witnesses to assess credibility

No Live Hearing

- Investigator or decision-maker asks questions during individual meetings
- Allow parties to propose questions
- Provide each party with a transcript

Live Hearing

- Allow parties to propose questions to decision-maker
- Allow advisor to ask questions (parties cannot ask questions)
- Must create audio or audiovisual recording or transcript



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Written Determination

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Writing the Analysis

Summarize Complainant's version of events (address credibility)

Summarize Respondent's version of events (address credibility)

Summarize independent evidence (witness statements, documents, etc.) and explain how it corroborates or contradicts the parties' version of events.

Address the not so good facts.

Factual Finding (i.e., sustained, not sustained, partially sustained.)



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Legal Framework

Preponderance of the Evidence



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Factual Findings v. Legal Conclusions

- Focus on whether or not the alleged conduct occurred.
- Avoid legal conclusions
- **Examples:**
 - **Bad example:** Mr. Thespian sexually harassed Jessica and committed statutory rape.
 - **Good example:** Mr. Thespian had a sexual relationship with Jessica. He conditioned helping her with her acting career on her continuing to have sexual relations with him.
 - **Bad example:** Mr. Thespian did not discriminate against the male students in his class.
 - **Good example:** Mr. Thespian provided the same level of educational services to male and female students. He helped Derek in connection with a church play and conducted a photoshoot for a male student who needed headshots for an audition.



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Drafting Recommended Findings – Sample Language (Handsome)

Allegation 1: Respondent provided preferential treatment to female students. He helped them rehearse for non-school plays and photographed them to create headshots for auditions.

Finding 1: *Not Sustained.*

Complainant (Handsome) alleged that Respondent (Mr. Thespian) provided preferential treatment to female students, by helping them rehearse for non-school plays and photographing them for headshots. Respondent denied the allegation, saying he provided the same level of educational services to male and female students. Respondent and one male student (MS1), said Respondent helped MS1 in connection with a church play. Respondent and a second male student (MS2) said Respondent conducted a photoshoot for MS2 who needed headshots for an audition. MS2 did not believe that Respondent treated them differently and both MS1 and MS2 reported having a positive experience in Respondent's class.



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Drafting Recommended Findings – Sample Language (Handsome) (Cont.)

Respondent said, and the documentary evidence showed, that Complainant was truant for over 15 days during the months of August and September, never requesting any additional services.

The preponderance of the evidence does not support a finding that Respondent provided preferential treatment to female students.



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Credibility and Corroboration Considerations

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Credibility Factors

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?



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Credibility Factors (cont.)

- **Past record:** Did the alleged harasser have a history of similar behavior in the past?
- **Opportunity and capacity to observe/actual knowledge:** Did the person see it themselves, or are they recounting what someone else told them?
- **Consistent or inconsistent statements:** Is the person changing their story? Did the person say the same thing to three other witnesses?
- **Reputation for veracity or deceit:** Does this person have a reputation of lying, cheating, etc.?
- **Bias:** Is this person the Complainant's best friend? Does the person have their own complaint against Respondent?



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Common Questions and Issues

What if the witness is underage?

What if the witness is biased or lies?

Do all witnesses get a union representative or support person?

What if the witness refuses to be interviewed or wants their identity to remain confidential?

What if the police are investigating?



Common Challenges to Complainant's Credibility



Incomplete, inconsistent and untrue statements

Lack of physical resistance

Delayed reporting



Credibility Challenge: 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 Challenge: 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:

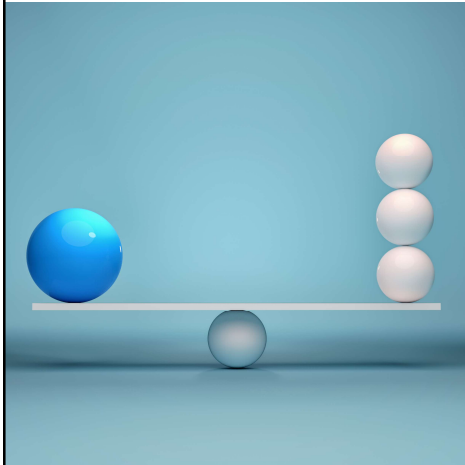
- What did you do next?
- Can you tell me what you were thinking at that time?
- Can you tell me what you were feeling when they did that?



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Credibility Challenge: Delayed Reporting



Victims need time to process what has happened to them

Perpetrators of sexual assault are often known to victims

Fear

Self-blame



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Drafting Recommended Findings – Sample Language (Jessica)

Allegation 1: Respondent had a sexual relationship with Complainant while she was a student and under the age of 18.

Finding 1: *Sustained.*

Complainant said that she had a sexual relationship with Respondent when she was 17, which she said was consensual. Respondent denied having a sexual relationship with Complainant. He admitted inviting and hosting Jessica at his house, as well as photographing her for social media posts. He explained this was to help with her acting career. As a teacher, it is not a part of Respondent's job to host students at his house, or provide services such as taking photographs to post on social media accounts. Complainant was reluctant to disclose that she had a sexual relationship with Respondent, and said that she had an understanding that Respondent could get in trouble for having a sexual relationship with her. This supported her credibility.



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Drafting Recommended Findings – Sample Language (Jessica) (Cont.)

Respondent on the other hand had a strong motive to conceal his sexual relationship with Complainant. As the adult and an educator, he was likely aware that having a sexual relationship with a minor student violates District policy and the law. Respondent admitted to inviting one minor female student to his house to take photos in addition to Jessica, but denied any others. This negatively impacts Respondent’s credibility and corroborates Complainant’s account that she went to his home, and he took photographs of her.

Two other female students said they also went to Respondent’s home under the guise of a photoshoot. One male student also said he went to Respondent’s home for a photoshoot. While this corroborates Respondent’s version that he assisted students with headshots, the fact that Respondent did not admit to having the third female student at his home goes against his credibility.



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Drafting Recommended Findings – Sample Language (Jessica) (Cont.)

The documentary evidence shows photographs of one student taken by a pool, which look consistent with the pool in Respondent’s backyard.

The preponderance of the evidence supports a finding that Respondent engaged in a sexual relationship with Complainant.

The Investigator finds the Complainant’s version of events to be more credible and therefore this allegation is sustained.

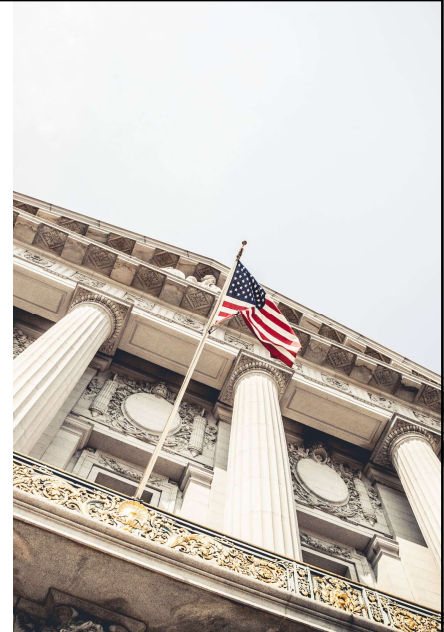


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Takeaways

- Doing nothing is not an option, if there is suspected harassment or discrimination you must act.
- Even if conduct does not fall under Title IX, it will still need to be addressed.
- 2020 regulations are still in place for conduct which occurred before August 1, 2024.
- Ask for help! Don't go at it alone, seek help from your Title IX response team.



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WE WANT
YOUR
FEEDBACK!

SURVEY LINK:

<https://www.surveymonkey.com/r/TitleIX82224>



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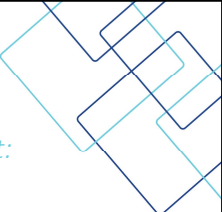
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Contact

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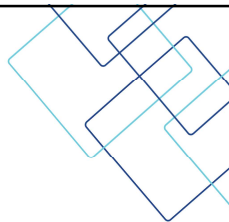
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