



Title IX Investigator Training for K-12 Districts & COEs

**2022 Title IX Training Academy
Module 2 (Session 1)**

October 10, 2022

Presented by:

Alexandria Davidson, Partner

adavidson@aalrr.com • (949) 453-4260

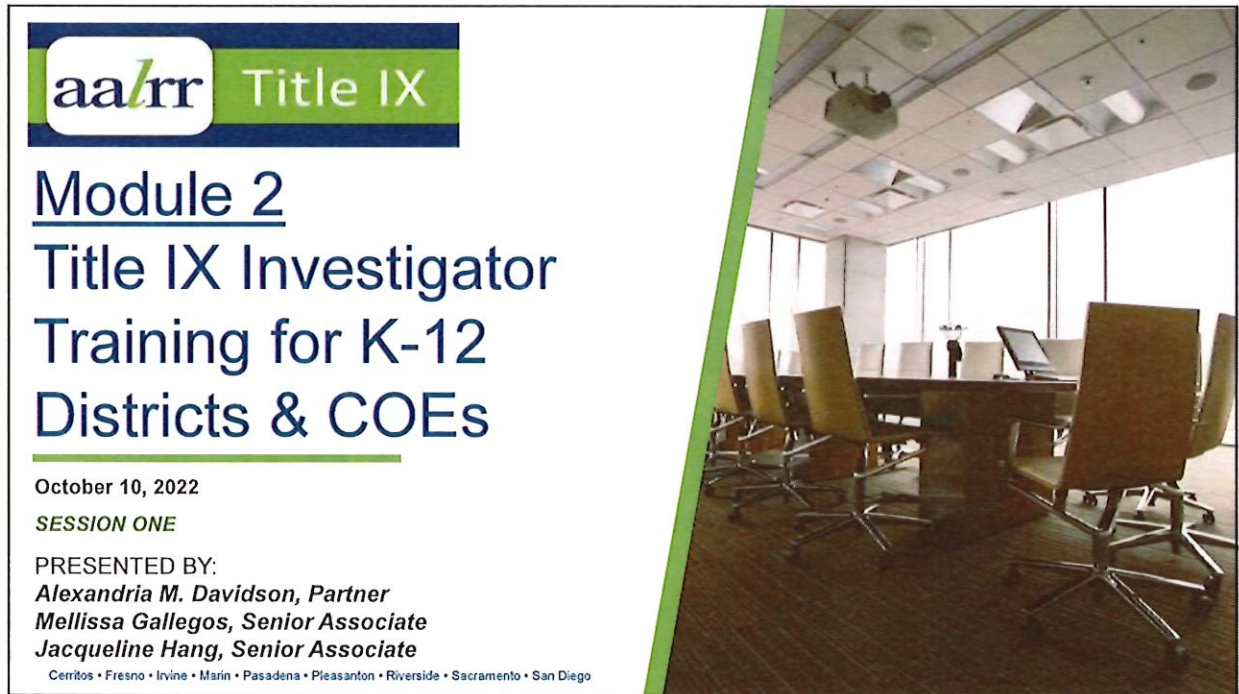
Melissa Gallegos, Senior Associate

mgallegos@aalrr.com • (562) 653-3200

Jacqueline Hang, Senior Associate

jhang@aalrr.com • (916) 923-1200

aalrr Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation




aa/rr Title IX

Module 2 Title IX Investigator Training for K-12 Districts & COEs

October 10, 2022
SESSION ONE


PRESENTED BY:
Alexandria M. Davidson, Partner
Melissa Gallegos, Senior Associate
Jacqueline Hang, Senior Associate

Cerritos • Fresno • Irvine • Marin • Pasadena • Pleasanton • Riverside • Sacramento • San Diego



Agenda

- Definitions for Training
- Review Title IX Investigator Roles
- Introduce the Hypothetical & Investigation Plan
- Plan the Investigation & Prepare for Interviews
- Interviewing Tips
- Weigh the Evidence & Determine Disputed and Undisputed Issues
- Application to Hypothetical



aa/rr 1

Definitions for Training

- Complainant
- Respondent
- Parties
- Witness
- Advisor
- Grievance Process
- Other

Review Title IX Investigator Roles

Investigator Role:

- Must be trained, knowledgeable, impartial, unbiased & free from general or specific conflicts of interest
- Reviews formal complaint & interviews parties and witnesses; gathers, reviews & synthesizes evidence
- Assesses relevance, credibility & weight of evidence
- Provides ***Draft Report of Evidence*** to Complainant/Advisor & Respondent/Advisor for review and comment; investigator revises as needed
- After considering responses, provides ***Final Investigative Report*** to parties/advisors for review and comment; report includes disputed and undisputed facts & summary of relevant evidence
- Investigator does ***not*** make decision about whether Respondent has engaged in sexual harassment

Review Title IX Investigator Roles

- Presume Respondent is *not responsible* for the alleged conduct
- Complainant and Respondent do *not* have the burden of proof or the burden to gather sufficient evidence
- Provide written notice for all interviews with sufficient time for a party to prepare to participate with advisor
- Do not give confidentiality admonishments to Complainant or Respondent; consider advising against tampering with evidence or witnesses
- Provide parties with equal opportunity to present witnesses, including expert witnesses and other inculpatory and exculpatory evidence
- Do not gather privileged information without voluntary, written consent (e.g., physician or psychiatrist records, etc.)

REVIEW HYPOTHETICAL & INVESTIGATION PLAN

Promptly Review the Complaint

- Review **Hypothetical Complaint** and **Notice of Allegations**
 1. Who are the **parties**?
 2. Who are potential **witnesses**?
 3. Identify other potential **evidence**?
 4. What general **claims** are asserted or described?
 5. What **policies** are potentially violated?
 6. What **allegations** should you ask questions about?
 7. What's the **chronology**?
- Create an **Investigation Plan**

PLAN THE INVESTIGATION & PREPARE FOR INTERVIEWS

Create an Investigation File

- Paper file, binder with tabs, electronic file, etc.
 - Section for Formal Complaint, Supportive Measures, Notice of Allegations, Policies/Regulations, Definitions, etc.
 - Section for Investigation Plan and updates
 - Section for communication with Complainant/Advisor, Respondent/Advisor, Witnesses, Title IX Coordinator
 - Phone/email log
 - Notice of Interview for parties/advisors
 - Notice to extend timelines
 - Section for each party and witness with interview notes, draft witness summary, final witness summary, and list of evidence submitted
- Create a timeline for investigation, calendar important dates, and foresee holidays, office closures, and busy times

Create a Timeline for the Hypothetical

- Looking at a calendar, assume you have **45 calendar days from October 6, 2020**, to complete your investigation, exchange evidence (10 days), and deliver the Final Investigative Report to the parties and their advisors (if any) to review and provide written responses (10 days)
- Calendar your goals to complete the following tasks:
 - Date to complete all interviews and gather evidence
 - Date to complete witness statements (signed statement process optional)
 - Date to send Draft Report of Evidence to the parties and their advisors
 - Date to send Final Investigative Report to parties and their advisors
 - Date to send Final Investigative Report with attached written responses to Title IX Coordinator & Decision-Maker

Prepare Interview Environment

- General Location or Platform (school office, county office, district office, Zoom?)
- Waiting Area
- Interview Room
 - Private
 - No distractions
 - Choices
 - Easy access to exit
 - Enough room for more than one advisor
 - Clear visual of interviewee
 - Water, tissues, paper, and pencil
- Exiting considerations

aa/rr

10

Prepare Notice of Interview

- Provide written notice of the investigative interview to each **party** with sufficient time for the party to prepare to participate.
 - Query: Will Title IX Coordinator or Investigator prepare and/or send notice?
- The Notice shall include:
 - Date
 - Time
 - Location
 - Participants
 - Purpose
 - A party may bring advisor of choice
- Consider reiterating what evidence to bring, if any

aa/rr

11

Prepare Interview Introduction & Advisements

- Sample Introductory **Comments by Investigator**
 - Introduce yourself and your role:
 - Review the complaint and relevant policies
 - Interview witnesses
 - Gather and review relevant and directly related evidence on all sides
 - Ask follow-up questions, as needed
 - Weigh the evidence and determine what is undisputed or in dispute
 - Maintain confidentiality **outside** of the complaint process
 - **For Complainant and Respondent:** Provide the parties and advisors with a Draft Report of Evidence and then a Final Investigative Report which fairly summarizes the relevant evidence, both for review and comment

Prepare Interview Introduction & Advisements

- Sample **Introductory Instructions** for Parties and Witnesses
 - Listen carefully to questions, answer truthfully, and be forthcoming with relevant information
 - We want evidence in its best, most original form, so do not tamper with any evidence (give examples of tampering)
 - Retaliation is against the law and policy. Please report retaliation to Title IX Coordinator or Supt and do not retaliate against anyone involved in this process
 - **For witnesses only:** Maintain confidentiality about the identities of the parties or witnesses and the information revealed during the interview
 - **For advisors only:** Discuss protocols established by educational institution, such as not answering for a party, not interrupting questions or answers, asking for a break after an answer and before next question, confidentiality, etc.

Prepare Scope of Questions

- For Complainant, prepare for the interview by outlining subjects to cover and/or questions to ask
 - Review Hypothetical
- After interview with Complainant, prepare an outline or list of questions for each Witness based on their likely scope of knowledge
- After interviews with Complainant and Witnesses, prepare an outline of subjects to cover, general questions, *and* specific questions for the Respondent
- Provide Respondent with a full and fair opportunity to respond to all of the allegations
- Prepare specific follow-up questions as needed

INTERVIEWING TIPS

Trauma-Informed Interviewing Tips

- Complainant, Respondent, and/or Witnesses may experience some type of discomfort or trauma related to the allegations or involvement in a Title IX complaint and investigation
- Consider the tone of your communications and questions
 - Are you showing respect to all people involved in the investigation?
 - Are you empathetic about the difficulty of this process?
 - Are you compassionate about what it's like to be in this situation?
 - Are you exhibiting patience?
- Investigator's ***goal is to objectively and thoroughly gather relevant evidence with a respectful and compassionate demeanor***

Initial Questions

- After the introduction and advisements, consider asking routine **questions to “warm-up”** and provide an opportunity to observe any baseline communication patterns. Sample questions:
 - What grade/year are you? What are you studying? What class are you missing right now? What are your plans after graduation?
 - What is your job title? How long have you worked in that position? Who is your supervisor? What are your general job responsibilities?

Narrative Questions

Explain you have reviewed the Complaint and the NOA

- Tell me what happened on August 21, 2020, with Respondent
 - Allow for a narrative and, generally, do not interrupt
 - Take copious notes and identify areas for follow-up questions
- Acknowledge their story (e.g., “Thank you for explaining this to me.”)
- Explain you will now go back and ask follow-up questions for additional information and/or a better understanding
- Ask all relevant follow-up questions

Open-ended Questions

- Ask **Who, What, Where, When, Why, and How** questions for **every allegation**, as well as any follow-up questions to understand the alleged incidents
- If there are multiple allegations, consider asking the Complainant to start from the first incident or start with the most recent incident and work in chronological order. *Caveat:* Some witnesses do not recall or think in a chronological fashion; follow witness’s lead
- For each allegation, start broad but circle back for additional details

Listen Closely & Follow-up

Example:

- Q: When did it happen? A: Yesterday.
- Q: What time yesterday? A: Fourth period.
- Q: What time of day was that exactly? A: About 11:50 a.m.
- Q: Where did it happen? A: At school.
- Q: Where at school? A: On the yard.
- Q: Where on the yard? A: Right by the hopscotch court.
- Q: Who was there? A: My friends.
- Q: What are your friends' names? A: Quentin and Jeremy.
- Q: What are their last names? A: Quentin James and Jeremy Brown.

Listen Closely & Follow-up

- When you listen closely, you may notice gaps in the Party's or Witness's statements. Ask follow-up questions to fill in those gaps. Some examples:
 - “**Before I knew it**, Respondent was fondling my breast.”
 - “**Eventually**, Respondent told me what I was supposed to do.”
 - “**After a while**, I knew what Complainant wanted.”
 - “**One thing led to another**, and Respondent touched my private area.”
- Ask questions to elicit additional information

Listen Closely & Follow-up

- When you hear conclusory language, ask more questions:
 - ***“It happens all the time.”***
 - Ask, “How often?”
 - “Over what time period?”
 - ***“Sam never made that statement.”***
 - Ask, “How much time do you work together during the day and over the week?”
 - “How long have you been in the same classes?”
 - “Is it possible Sam said something like that?”
 - ***“Sam can’t stand me.”***
 - Reply, “Tell me more about that.”
 - “How did you come to know that?”
 - “Can you give me some examples?”

Do Not Avoid Difficult Questions

- Learn to note and address the following:
 - Repetitive use of “I don’t remember” or “I don’t recall”
 - Evasive, rambling responses
 - Refusals to answer
 - Answers that are self-contradictory or obviously false
- Ask questions about authenticity of electronic evidence
 - Are texts, videos, photos, or screenshots altered?
 - Ask for properties information for photos, date taken, etc.
- May need to explain potential effect of editing their testimony or changing a written witness summary after interview

Types of Questions for Investigator to Avoid

- Avoid **leading** questions
 - “You felt helpless, didn’t you?”
 - “You wanted to be there, didn’t you?”
 - “They are treating you this way because of your gender and skin color, right?”
- Avoid **negative** questions
 - “You don’t know the password, do you?”
- Avoid **compound** questions
 - “What time did you arrive, and how long were you there?”
- Avoid **vague** questions
 - “Why is that?”

Summary: How to Get the Most Out of an Interview



Problem Solving Common Issues

- Unavailable Witness
 - Document attempts to contact; use various methods (e.g., phone message, email, text, etc.)
- Reluctant Witness or Witness Refusal to Participate
 - Acknowledge, answer questions, explain role in process, explain not likely only witness
- Difficult Advisors
 - Remind of protocols
 - Answer or refer questions
 - Give warning
 - Stop interview and notify Title IX Coordinator
- Recover from change in direction of interview
- Capture electronic evidence in best form

aa/rr

26

Close the Interview

- Ask closing questions:
 - “Is there anything else you think I **should know**?”
 - “Is there anything else I should have **asked** you?”
- Explain your **follow-up** process:
 - “I may need to ask you follow-up questions at some point during the investigation. How would you like me to contact you?”
 - “Are there any times of the day that are off-limits to call or text you?”
 - “Do you want your advisor present for any further communications?”
- Consider acknowledging the difficulties of this important process, especially if you observed stress during the interview
- **Thank** each and every person for their participation

aa/rr

27

Prepare Interview Notes and/or Summaries

- **Review interview notes** as soon as possible
 - Schedule time after each interview to review notes
 - Fill-in abbreviated words & sentences, correct spelling & grammar, clarify vague pronouns, add correct names, note your relevant observations
 - Do not add or embellish information that was not discussed
 - Make a list of any questions missed or areas needing clarification; seek follow-up information
- **OPTIONAL:** Create a typed, double-spaced witness summary for Complainant, each Witness, and Respondent; consider using a format with numbered lines in margin
 - Send Draft Witness Summary to Complainant/Advisor, each Witness, and Respondent/Advisor with directions to review, edit mistakes, sign, and return
 - Keep track of any substantive changes and/or comments

**WEIGH THE EVIDENCE &
DETERMINE DISPUTED AND
UNDISPUTED ISSUES**

Review All of the Evidence Gathered

- Review the formal complaint, NOA, and policies again to refresh your memory of allegations and the policy definitions for the type of sexual harassment allegations
- Review all documents, photos, texts, videos, or other evidence gathered
 - Determine and set aside any evidence provided to you which is irrelevant and will not be considered

Identify Undisputed and Disputed Issues

- **Common Undisputed Issues**
 - Nature of relationship, age, how met, prior communications
 - Date, general time, location, who was present
 - Sexual or intimate relationship
- **Common Disputed Issues**
 - Sexual activity
 - Consent
 - Force, duress, or threats
 - Incapacitation
 - Intent
 - Words
 - Tone

Important Definitions Regarding Evidence

- **Direct Evidence**

- Evidence in the form of testimony from a **witness who actually saw, heard, touched, tasted, or smelled the subject of questioning**. Evidence, which if believed, proves existence of a fact in issue without inference or presumption.

- **Circumstantial Evidence**

- Testimony which is *not* based on actual personal knowledge or observation of the facts in dispute, but testimony of **other facts from which deductions are drawn, showing indirectly the facts sought to be proved**. Inferences drawn from facts proved.

- **Corroborating Evidence**

- Evidence **supplementary** to that already given and **tending to strengthen or confirm it**. Additional evidence of a different character to the same point.

Credibility Factors to Weigh Disputed Evidence

- Actual Knowledge/Opportunity to Observe or not Observe
- Inherently Plausible or Implausible
- Direct or Indirect Corroboration
- Consistent or Inconsistent Statements
- Material Omission or Material Admissions

APPLICATION TO HYPOTHETICAL

Undisputed and Disputed Material Evidence

- Review the hypothetical and compare Complainant's version of events (1-7) with Respondent's version of events (A-I)
 - What material information is *not* in dispute or **UNDISPUTED**?
 - Example: The Parties both attend pull-out speech sessions at the same time.
 - Example: The Complainant and Respondent went to the library after school on August 21, 2020, and the Librarian was present when the parties were there.
 - What material information is in dispute or **DISPUTED**?
 - Example: Respondent was flirting vs. Respondent was friendly like a sibling.
 - Example: Respondent chose a table far away from the Librarian to avoid bothering the Librarian vs. Respondent did not want the Librarian to observe/hear them.
 - Create a list of **UNDISPUTED** and **DISPUTED** evidence.....*for Session Two.*

Question & Answer Session

Disclaimer

This AALRR presentation is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR presentation/publication does not create an attorney-client relationship. The firm is not responsible for inadvertent errors that may occur in the publishing process.



© 2022 Atkinson, Andelson, Loya, Ruud & Romo

Melissa E. Gallegos

Senior Associate
562-653-3200
mgallegos@aalrr.com



Melissa Gallegos represents and advises California school districts, community college districts, and county offices of education in all education and employment law matters, including employee evaluation, discipline and dismissal, reasonable accommodation, interactive meetings, and restraining orders. She also assists with Uniform Complaint investigations and responses; California Public Records Act responses; collective bargaining issues; and defending employers against allegations of discrimination with the Department of Fair Employment and Housing and the Equal Employment Opportunity Commission. Ms. Gallegos also has significant experience in conducting prompt, thorough, and effective investigations.

While in law school, Ms. Gallegos was Networking Co-Chair and Co-President with La Raza de Loyola, Treasurer of the Immigration Law Society, and a member of the Public Interest Law Foundation. Ms. Gallegos also served as Production Editor of the *Loyola of Los Angeles International and Comparative Law Review*. Ms. Gallegos was awarded scholarships from Loyola Law School, the Mexican American Bar Foundation, the Latina Lawyers Bar Association, and the Loyola Marymount Jesuit Community.

Events & Speaking Engagements

Ms. Gallegos has co-presented on topics such as sexual harassment, mandated reporting, and workplace investigations. She has spoken before an audience of over 400 staff and administrators at a district-wide meeting and has presented at ACSA (Association of California School Administrators) Personnel Academy.

Publications

Ms. Gallegos contributes to the firm's publications.

OFFICE

12800 Center Court Drive
Suite 300
Cerritos, CA 90703

INDUSTRIES

Technology

EDUCATION

J.D., Loyola Law School
B.A., University of California, Los Angeles

CLERKSHIPS

California Department of Justice,
Office of the Attorney General
Equal Employment Opportunity
Commission
Legal Aid Foundation of Los Angeles

ADMISSIONS

2015, California
U.S. District Court, Central District of
California

PRACTICE AREAS

Education

LANGUAGES

Ms. Gallegos is proficient in Spanish.

Jacqueline D. Hang

Senior Associate
916-923-1200
jhang@aalrr.com



Through the power of teamwork, diverse minds can achieve greatness together.

Jacqueline Hang represents California public school districts, community college districts, and county offices of education in all areas of general education law; employment matters such as discrimination, harassment, dismissal, and reasonable accommodation requirements; student discipline issues such as harassment and bullying charges; and First Amendment rights. Ms. Hang conducts workplace investigations for public school districts, and provides legal counsel on matters involving human resources and student services. She is also a member of the firm's Title IX group. In addition, she provides counsel for a full range of legal issues relating to charter schools, including operational compliance review and monitoring, complaint investigations, petitions and appeals, and operating agreements.

Publications

Ms. Hang contributes to the firm's school law publications.

Community & Professional

- Sacramento County Bar Association, Member
- Asian Pacific Bar Association of Sacramento, Member
- National Asian Pacific American Bar Association, Member

OFFICE

2151 River Plaza Drive
Suite 300
Sacramento, CA 95833

EDUCATION

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

ADMISSIONS

2015, California

PRACTICE AREAS

Board Governance
Charter Schools
Discrimination & Harassment
Education
Employee Performance & Evaluation
Equity in Education/Office for Civil Rights
Investigations
Student Discipline

Hypothetical for Title IX Investigators' Training

The Title IX Coordinator asked you to conduct a Title IX investigation. The **Complainant is a 9th grade student** and the **Respondent is a 10th grade student**. They know each other from attending the alternative high school, and they both receive pull-out speech services in a small group setting. You reviewed the **Notice of Allegations** sent to the parties, and the summary of allegations states:

On or about August 21, 2020, Respondent tutored Complainant after school in the library. Respondent put a hand on Complainant's knee, made comments about sexual acts, and then touched Complainant's groin area. When Complainant moved away, Respondent moved towards Complainant. Complainant immediately left the library.

The Title IX Coordinator provided you with **Complainant's allegations** from the formal complaint:

1. During the 2020-21 school year, Respondent and Complainant were friendly during speech sessions, and Complainant felt like Respondent flirted by looking and smiling at Complainant a lot. Respondent often waited for Complainant after speech so they could walk back to towards their classrooms.
2. On August 17, 2020, Respondent asked for Complainant's Snap, and Complainant provided it to Respondent. Later that day, Respondent sent Complainant a message saying, "you slay." Complainant responded "you extra."
3. Complainant struggled in algebra. Respondent heard Complainant complain about math and offered to tutor Complainant after school in the library. Complainant said yes. Respondent helped Complainant with math homework on August 20th for about 20 minutes. They decided to meet again on August 21st because there was a quiz scheduled for August 24th.
4. On August 21, 2020, Complainant and Respondent went to the library after school. The library was empty, and the librarian was working on the computer. Respondent chose a table far away from the librarian. After they sat down and started looking at a review sheet, Respondent said that algebra was "messed-up." Complainant agreed and laughed. Respondent placed a hand on Complainant's right knee and said they should "smash." When Complainant looked confused, Respondent's hand quickly moved up Complainant's leg, and Respondent's hand grabbed Complainant's groin area on the outside of Complainant's jean shorts. Respondent said, "You know, *smash*." Complainant moved away from Respondent by shuffling the chair away, but Respondent leaned towards Complainant and kept a hand on Complainant's upper inner thigh. Respondent said, "You'll like it, I promise." Complainant stood up, faltered while moving the chair, and quickly left without taking the review sheet. Complainant walked home.
5. Complainant failed the Algebra quiz on August 24, 2020, and was absent due to illness for the next 4 days. While Complainant was home sick, Complainant's parents asked what was wrong, but Complainant did not want to talk about it.
6. Complainant told a friend, Riley, on August 31, 2020 that Respondent was shady. Riley asked questions, but Complainant refused to answer, even though Complainant seemed upset.
7. On September 28, 2020, Complainant saw Respondent standing really close to Riley. That night Complainant told Complainant's parents more about what happened on August 21, 2020 in the

Hypothetical for Title IX Investigators' Training

library. Complainant's parents called the Principal, and the Principal put them in touch with the Title IX Coordinator. On October 1, 2020, Complainant and Complainant's parents met with the Title IX Coordinator and filed a formal Title IX complaint.

The Title IX Coordinator provided you with *Respondent's* voluntary *Written Response* after Respondent received the Notice of Allegations:

- A. I met Complainant at the beginning of the school year during our speech services. I smiled at Complainant maybe once. One time after speech, I walked with Complainant back towards our classrooms.
- B. I was friendly with Complainant, but not flirty. Complainant is like a younger sibling to me.
- C. I asked for Complainant's Snap and sent a message the same day saying, "You slay," because Complainant did well in speech. Complainant responded, "You extra."
- D. I touched Complainant's knee in the library because Complainant was bouncing it up and down, which shook the table. I must have used my left hand.
- E. I did not purposefully touch Complainant's lap or crotch, but that might have happened on accident. I doubt the librarian saw anything because I chose a table far away from the librarian so we could talk about math.
- F. I whispered in Complainant's ear because the librarian was walking around, but I don't remember what I said. It was probably about math.
- G. Complainant did not move Complainant's chair away from me during our tutoring session.
- H. Complainant did not leave in a rush, and I don't remember seeing whether Complainant left the review sheet in the library.
- I. Complainant is making this up.

Note: The Title IX Coordinator also informed you that the *Librarian* was in the library after school on August 21, 2020 when Complainant and Respondent were there.

Hypothetical for Title IX Investigators' Training

Investigation Planning

Identify Witnesses. Review the hypothetical. Identify the Complainant, Respondent and potential Witnesses. List potential witnesses and the subjects you would discuss with those witnesses:

Identify Other Evidence. List other tangible, potential evidence:

Identify Relevant Policy Language. Review the potential policy violations listed in the NOA and review the Title IX definitions. (For this exercise, describe the Title IX elements of sexual harassment and fondling):

Elements of Title IX Sexual Harassment:

Elements of Title IX Fondling:

Identify Allegations. List specific allegations with date and location (Consider whether there are physical, verbal, or visual behaviors on the basis of sex or touching of private body parts for sexual gratification without consent):

Create a Chronology of Events. List dates or time periods set forth in the Complainant and Respondent statements:

Hypothetical for Title IX Investigators' Training

CONFIDENTIAL
Delivered in Person

October 6, 2020

Re: Notice of Allegations

Dear Respondent and Parents of Respondent:

On October 1, 2020, the County Office of Education (COE) received a formal complaint against you, Respondent, alleging that you sexually harassed Complainant on August 21, 2020 while in the school library. The purpose of this letter is to notify you of the allegations against you, the relevant policies, your supportive measures, your rights and responsibilities, and the COE's complaint process.

Allegations. The Complainant alleges that Respondent engaged in the following conduct:

On or about August 21, 2020, Respondent tutored Complainant after school in the library. Respondent put a hand on Complainant's knee, made comments about sexual acts, and then touched Complainant's groin area. When Complainant moved away, Respondent moved towards Complainant. Complainant immediately left the library.

As a Respondent, you are presumed *not* to be responsible for the alleged misconduct listed above unless and until a trained, impartial, non-biased decision-maker reaches a different determination. If additional allegations are revealed during the investigation, this office will provide Complainant and Respondent with an additional written notice.

Potential Policy Violations, Corrective Action and/or Sanctions. These allegations, if found to have occurred, may violate the policies listed below:

- ***Sexual harassment in the form of unwelcome physical and verbal conduct on the basis of sex*** as defined in Administrative Regulation (AR) 5145.71 and Title IX regulations 34 CFR Part 106, §106.30(a). ***Sexual Harassment Definition-*** Unwelcome conduct

Hypothetical for Title IX Investigators' Training

determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies Complainant equal access to the COE's education program or activity

- ***Sexual harassment in the form of fondling*** as defined in AR 5145.71, Title IX regulations 34 CFR Part 106, §106.30(a) and the FBI Uniform Crime Reporting (UCR) Program NIBRS Offense definitions. ***Fondling Definition-*** The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- ***Sexual harassment in the form of unwelcome sexual advances, requests for sexual favors, and other physical and verbal conduct of a sexual nature*** as defined in school rules, BP/AR 5179 (COE) or BP/AR 5144.1 (District) and California Education Code §§48900.2 and 212.5. ***Sexual Harassment Definition-*** Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting under one of four described conditions. (AR 5145.7) For purposes of suspension or expulsion, the conduct must be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. (AR 5144.1)
- ***Sexual battery*** as defined in school rules, BP/AR 5179 (COE), BP/AR 5144.1, California Education Code §48900(n), and California Penal Code §243.4(e). ***Sexual Battery Definition:*** Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.
- ***Bullying*** as defined in school rules, BP/AR 5131.2, BP/AR 5144.1 and California Education Code §48900(r)

If found responsible for the alleged misconduct, Respondent may be subject to corrective action and sanctions up to and including a behavior contract, no contact orders, suspension, expulsion, involuntary transfer and/or other disciplinary or corrective measures.

Hypothetical for Title IX Investigators' Training

Supportive Measures. As discussed on the telephone, we agreed to provide you with supportive measures during the complaint process, including your request for a two-week extension of your Spanish project deadline, a weekly check-in with your counselor, a referral to off-campus counseling options for your family to explore at their own cost, and a change in the time of your pull-out speech services. If at any time, these supportive measures need adjustment or you feel you need additional support, please speak with your counselor or contact my office as soon as possible.

Rights and Responsibilities. As noted above, during this complaint process, the Respondent is presumed *not* to be responsible for the alleged misconduct unless and until a trained, impartial, non-biased decision-maker reaches a different determination. The decision-maker, Principal Jones¹, will not make a determination of responsibility until after an investigation where the Complainant and Respondent will be given an opportunity during the review and comment period to review all directly related and/or relevant evidence obtained during the investigation.

The Complainant and Respondent may each have an advisor of their choice, who may be, but is not required to be, an attorney. The advisor may be present for any meeting, interview, or hearing during this complaint process, and the advisor may inspect and review any evidence obtained as part of the investigation. The advisor may assist with any written question and/or written cross-examination process.

The COE prohibits the Complainant, Respondent and any witness from knowingly making false statements or knowingly submitting false information during the complaint process. (See AR 5145.71.)

Investigation Process. The COE has assigned an Investigator, Assistant Principal Lee², to investigate the sexual harassment allegations reported by Complainant.

¹ If you believe Principal Jones has a general or specific conflict of interest or bias related to this complaint process, please contact me to discuss within 3 school days after receiving this letter.

² If you believe Assistant Principal Lee has a general or specific conflict of interest or bias, please contact me to discuss within 3 school days after receiving this letter.

Hypothetical for Title IX Investigators' Training

This investigation will be conducted in a prompt, thorough and impartial manner. The Investigator intends to interview the Complainant, relevant witnesses, and Respondent in a discrete and confidential manner. Disclosure of facts and allegations by the Investigator to persons interviewed will be limited to what is reasonably necessary to complete a fair and thorough investigation. You may bring an advisor of your choice, such as a parent, support person, or attorney to your interview or related meetings. The Investigator will keep Complainant and Respondent informed of the progress of this investigation.

The Investigator will also review any documents and other information relevant to the allegations. If you have any materials that you believe may be relevant to this investigation that you have not already submitted to the COE, please send those to me or give copies to the Investigator during your upcoming interview, (e.g., emails, texts, instant messages, photos, social media postings, videos, notes or other documents). However, if you have photos or videos involving nudity or sexual activity of minors, please do not forward those to us at this time. The COE may need to take certain precautions before viewing such materials. The Investigator may, however, ask you to recount what you observed to be contained in the relevant photo or video material. During the investigation, Investigator will inspect the evidence and assess the relevance, weight and credibility of the information provided. Please note, you must not tamper with or alter any evidence, and you must not tamper with or attempt to alter any witness testimony.

Prior to completing the investigation report, the Investigator will send to the Complainant and Respondent (and their respective advisors, if any) the evidence that has been gathered, likely in the form of a confidential Draft Report of Evidence. You and your advisor may inspect and review evidence and will have at least 10 days to submit a written response.

After reviewing any written responses, the Investigator will prepare a confidential Final Investigative Report that fairly summarizes the relevant evidence, and the Final Investigative Report will be forwarded to the Complainant and Respondent (and their respective advisors, if any.) Complainant and Respondent will both have at least 10 days to submit another written response regarding the Investigative Report.

Hypothetical for Title IX Investigators' Training

Decision-Maker and Determination of Responsibility. After the parties' review and comment period, the COE will provide the Final Investigative Report to Principal Jones, the Decision-Maker. Before the Decision-Maker reaches a determination regarding responsibility, the Complainant and Respondent will have the opportunity to submit written, relevant questions that a party wants the Decision-Maker to ask of another party or witness. The Decision-Maker will provide Complainant and Respondent with the answers, and allow for additional, limited follow-up questions from Complainant and Respondent. The Decision-Maker must explain any decision to exclude a question as not relevant.

After considering the Final Investigative Report and the answers to the written questions, the Decision-Maker will issue a written determination regarding responsibility. The Decision-Maker will make findings of fact, reach conclusions, explain the rationale, and determine whether policy has been violated based on a preponderance of the evidence standard (i.e. "it is more likely than not the allegation occurred or did not occur"). The Decision-Maker may also determine sanctions against the Respondent or remedies for the Complainant, if applicable. The COE will send the Complainant and Respondent a written decision, sometimes called a Notice of Outcome. The Notice of Outcome will explain how each party can file an appeal.

If a finding is made that Respondent has not violated the COE's policies, then the investigation will be closed, but the Complainant may still receive Supportive Measures. If a finding is made that Respondent violated COE policy, the matter will be referred to the applicable administrator, who will review the Decision-Maker's decision and applicable corrective or disciplinary sanctions to be implemented against Respondent for violation of the policy and remedies for the Complainant. Regardless of the outcome of the investigation, the COE shall determine whether additional actions are needed to prevent or address any issues discovered during the investigation. After exhausting any appeal procedure, the COE will implement the sanctions for Respondent and remedies for Complainant, if any.

Timelines. The COE endeavors to complete the investigation and complaint process within reasonably prompt time frames, typically within 45-90 calendar days from date the formal complaint was filed. If the COE has good cause to extend the time lines, the COE will provide

Hypothetical for Title IX Investigators' Training

written notice to the Complainant and Respondent explaining the reasons for the delay and the needed extension.

Informal Resolution Process. You are not required to participate in an informal resolution process. However, at any time prior to the Decision-Maker's determination regarding responsibility, you may request an informal resolution process that does not involve a full investigation and adjudication. Please contact me to discuss informal resolution options. An informal resolution process will be initiated only upon written consent from all parties. If the matter is resolved through an informal resolution process, then the complaint will be dismissed. At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the complaint process.

Confidentiality. The COE will keep the identity of the Complainant, Respondent and witness(es) confidential unless required by law or as necessary to carry out this complaint process. As such, the COE will, to the extent possible, maintain your privacy and/or confidentiality during the complaint process. However, the Complainant and Respondent are not restricted from discussing the allegations under investigation or from gathering and presenting relevant evidence during the investigation process needed to support your case, unless each party has signed a written agreement restricting the release of confidential information. We do not have such an agreement at this time.

No Retaliation. The COE or other person may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in an investigation, proceeding, or hearing. If you believe you have been retaliated against, please contact this office immediately.



Hypothetical for Title IX Investigators' Training

If you have any additional questions during the complaint process, please do not hesitate to contact me at (916) 923-1200 during school hours or send me an email at cbbaxterTIXC@COE.edu.

Sincerely,

CB Baxter
Title IX Coordinator

Conclusion: Seek Assistance When Needed

- The Title IX regulations and the Office for Civil Rights' commentary on the regulations include extensive, complex, and legalistic principles
- When in doubt, consider seeking:
 - Additional training opportunities
 - Advice from legal counsel
 - Opportunities to shadow an experienced investigator, or
 - Legal counsel review of your Draft Report of Evidence or your Final Investigative Report
 - Outside, trained professionals to investigate for your educational entity

Question & Answer
Session

Disclaimer

This AALRR presentation is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR presentation/publication does not create an attorney-client relationship. The firm is not responsible for inadvertent errors that may occur in the publishing process.



© 2022 Atkinson, Andelson, Loya, Ruud & Romo



24

Thank You

For questions or comments, please contact:



Melissa Gallegos
(562) 653-3200
mgallegos@aalrr.com



Jacqueline Hang
(916) 923-1200
jhang@aalrr.com



Melissa E. Gallegos

Senior Associate
562-653-3200
mgallegos@aalrr.com



Melissa Gallegos represents and advises California school districts, community college districts, and county offices of education in all education and employment law matters, including employee evaluation, discipline and dismissal, reasonable accommodation, interactive meetings, and restraining orders. She also assists with Uniform Complaint investigations and responses; California Public Records Act responses; collective bargaining issues; and defending employers against allegations of discrimination with the Department of Fair Employment and Housing and the Equal Employment Opportunity Commission. Ms. Gallegos also has significant experience in conducting prompt, thorough, and effective investigations.

While in law school, Ms. Gallegos was Networking Co-Chair and Co-President with La Raza de Loyola, Treasurer of the Immigration Law Society, and a member of the Public Interest Law Foundation. Ms. Gallegos also served as Production Editor of the *Loyola of Los Angeles International and Comparative Law Review*. Ms. Gallegos was awarded scholarships from Loyola Law School, the Mexican American Bar Foundation, the Latina Lawyers Bar Association, and the Loyola Marymount Jesuit Community.

Events & Speaking Engagements

Ms. Gallegos has co-presented on topics such as sexual harassment, mandated reporting, and workplace investigations. She has spoken before an audience of over 400 staff and administrators at a district-wide meeting and has presented at ACSA (Association of California School Administrators) Personnel Academy.

Publications

Ms. Gallegos contributes to the firm's publications.

OFFICE

12800 Center Court Drive
Suite 300
Cerritos, CA 90703

INDUSTRIES

Technology

EDUCATION

J.D., Loyola Law School
B.A., University of California, Los Angeles

CLERKSHIPS

California Department of Justice,
Office of the Attorney General
Equal Employment Opportunity
Commission
Legal Aid Foundation of Los Angeles

ADMISSIONS

2015, California
U.S. District Court, Central District of
California

PRACTICE AREAS

Education

LANGUAGES

Ms. Gallegos is proficient in Spanish.

Jacqueline D. Hang

Senior Associate
916-923-1200
jhang@aalrr.com



Through the power of teamwork, diverse minds can achieve greatness together.

Jacqueline Hang represents California public school districts, community college districts, and county offices of education in all areas of general education law; employment matters such as discrimination, harassment, dismissal, and reasonable accommodation requirements; student discipline issues such as harassment and bullying charges; and First Amendment rights. Ms. Hang conducts workplace investigations for public school districts, and provides legal counsel on matters involving human resources and student services. She is also a member of the firm's Title IX group. In addition, she provides counsel for a full range of legal issues relating to charter schools, including operational compliance review and monitoring, complaint investigations, petitions and appeals, and operating agreements.

Publications

Ms. Hang contributes to the firm's school law publications.

Community & Professional

- Sacramento County Bar Association, Member
- Asian Pacific Bar Association of Sacramento, Member
- National Asian Pacific American Bar Association, Member

OFFICE

2151 River Plaza Drive
Suite 300
Sacramento, CA 95833

EDUCATION

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

ADMISSIONS

2015, California

PRACTICE AREAS

Board Governance
Charter Schools
Discrimination & Harassment
Education
Employee Performance & Evaluation
Equity in Education/Office for Civil
Rights
Investigations
Student Discipline

Prepare Interview Introduction & Advisements

- Sample Introductory **Comments by Investigator**

- Introduce yourself and your role:
 - Review the complaint and relevant policies
 - Interview witnesses
 - Gather and review relevant and directly related evidence on all sides
 - Ask follow-up questions, as needed
 - Weigh the evidence and determine what is undisputed or in dispute
 - Maintain confidentiality **outside** of the complaint process
 - **For Complainant and Respondent:** Provide the parties and advisors with a Draft Report of Evidence and then a Final Investigative Report which fairly summarizes the relevant evidence, both for review and comment

Prepare Interview Introduction & Advisements

- Sample **Introductory Instructions** for Parties and Witnesses

- Listen carefully to questions, answer truthfully, and be forthcoming with relevant information
- We want evidence in its best, most original form, so do not tamper with any evidence (give examples of tampering)
- Retaliation is against the law and policy. Please report retaliation to Title IX Coordinator or Supt and do not retaliate against anyone involved in this process
- **For witnesses only:** Maintain confidentiality about the identities of the parties or witnesses and the information revealed during the interview
- **For advisors only:** Discuss protocols established by educational institution, such as not answering for a party, not interrupting questions or answers, asking for a break after an answer and before next question, confidentiality, etc.

Prepare Scope of Questions

- For Complainant, prepare for the interview by outlining subjects to cover and/or questions to ask
 - Review Hypothetical
- After interview with Complainant, prepare an outline or list of questions for each Witness based on their likely scope of knowledge
- After interviews with Complainant and Witnesses, prepare an outline of subjects to cover, general questions, *and* specific questions for the Respondent
- Provide Respondent with a full and fair opportunity to respond to all of the allegations
- Prepare specific follow-up questions as needed

INTERVIEWING TIPS

