



Lozano Smith

ATTORNEYS AT LAW

Title IX Awareness For Supervisors and Managers

Presented by: Sarah E. Fama

Lozano Smith Webinar
October 25, 2023



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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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- Municipal
- Public Finance
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- Title IX

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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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AT LOZANO SMITH
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Hypothetical

7th grader Kylee comes to you and says two other girls, Jordan and Sloane, have been taunting her and teasing her. She tells you this has been going on for over 3 months and happens almost every day. Kylee describes the teasing as the girls calling her a ho. One of the girls even wrote "HO" on Kylee's backpack with a sharpie.

What do you do? **Is this Title IX?**

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Title IX – Sexual Harassment

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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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What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. **Sexual Harassment***

(34 C.F.R. Part 106)

*Regulations that have the full force and effect of law




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Why Title IX is Important

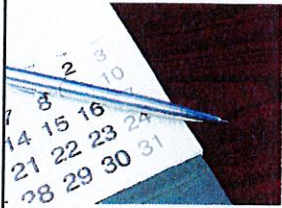


- Shame, humiliation, stress, anxiety, depression, loss of sleep
- Impaired learning/poor work performance
- Absenteeism/turnover
- Culture of discrimination
- Civil liability (monetary damages, attorney fees)
- Negative media attention and public outcry
- OCR Resolution Agreement
- Loss of federal funds

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New Title IX Regulations



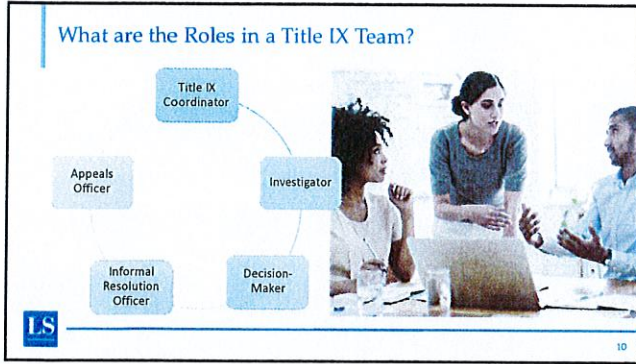
The new Title IX Regulations came into effect on August 14, 2020

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The Roles and Responsibilities of District Employees

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Responsibilities of All Employees:

Identify and Report

This does not relieve an employee of their mandated reporter duties!

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Terminology & Definitions

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2020 Title IX Terminology

Complainant

- An individual who is alleged to be the *victim of the conduct* that could constitute sexual harassment

Respondent

- An individual who has been reported to be the *perpetrator of conduct* that could constitute sexual harassment

Actual Knowledge (K-12)

- When *any employee* has notice of sexual harassment or allegations of sexual harassment

Formal Complaint

- A document filed by a *complainant* or signed by the *Title IX Coordinator* alleging sexual harassment against a respondent, and requesting that the recipient (District) investigate the allegation



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2020 Title IX Definitions – Sexual Harassment

Sexual Harassment:

Quid Pro Quo – employee;

Hostile Environment – *Severe, Pervasive, and Objectively Offensive*; or

"Sexual assault," "dating violence," "domestic violence," or "stalking."



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2020 Title IX Definitions – Sexual Harassment

Sexual Assault – Forcible Fondling:

The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will, or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.



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Prohibited Conduct Under Sexual Harassment
BP/AR 5145.7

1. Unwelcome leering, sexual flirtations, or propositions
2. Unwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments, or sexually degrading descriptions
3. Graphic verbal comments about an individual's body or overly personal conversation
4. Sexual jokes, derogatory posters, notes, stories, cartoons, drawings, pictures, obscene gestures, or computer-generated images of a sexual nature
5. Spreading sexual rumors
6. Teasing or sexual remarks about students enrolled in a predominantly single-sex class

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Prohibited Conduct Under Sexual Harassment
BP/AR 5145.7 (cont.)

7. Massaging, grabbing, fondling, stroking, or brushing the body
8. Touching an individual's body or clothes in a sexual way
9. Impeding or blocking movements or any physical interference with school activities when directed at an individual on the basis of sex
10. Displaying sexually suggestive objects
11. Sexual assault, sexual battery, or sexual coercion
12. Electronic communications containing comments, words, or images described above

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Hypothetical

Which of the following is considered "Sexual Harassment" under Title IX?

- 1 Student A offering to help Student B with their homework, if the Student B performs oral sex on Student A
- 2 An employee offering a student more time to complete a test, if the student goes on a date with the employee
- 3 Unwelcome conduct determined by a reasonable person to be severe and objectively offensive

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Hypothetical

Steven, a sixth grader, has come to you to tell you that Ellie, an eighth grader, has been harassing him at school. Steven tells you that Ellie has started to grab and smack his buttocks while walking to class. He feels very uncomfortable, and no longer wants to come to school or walk alone.

Is this Title IX? What supportive measures would you offer Steven?

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Hypothetical

Does your answer change if Steven and Ellie are 1st graders?

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Title IX Jurisdiction

Conduct occurred *in the United States*.

District exercised *substantial control* over both: 1) the *respondent* and 2) the *context*; and

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

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Hypothetical

Over the summer, a teacher had ongoing communications with a District student via Instagram. The communications were of a personal and sexual nature. Classes have now resumed, and the student currently takes a class with the teacher.

Is this Title IX?



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First Steps

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Even if it is NOT Title IX,
Do NOT Stop There!

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



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Implicated Policies and Procedures

BP/AR 1312.3 – Uniform Complaint Procedures

BP 4030 – Nondiscrimination in Employment

AR 4031 – Complaints Concerning Discrimination in Employment

BP/AR 4119.11 – Sexual Harassment (Employees)

AR 4119.12 – Title IX Sexual Harassment Complaint Procedures (Employees)

BP/AR 5145.7 – Sexual Harassment (Students)

AR 5145.71 – Title IX Sexual Harassment Complaint Procedures (Students)

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Receiving Complaints (In General)

WHERE COMPLAINTS COME FROM	FORM OF COMPLAINTS
Student	Verbal
Parent	
Employee	Written
Member of Public	
Anonymous Person	No Complaint (Rumor or Observation)

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Contact the Victim/Complainant

Initial discussion
with
complainant

- Gather facts
- Supportive measures
- Explain options for filing
- Discuss the District's policy that prohibits retaliation

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Hypothetical

While on recess duty, you overhear a group of 8th graders calling James, a flamboyant male 8th grader, homophobic slurs. You later confront James about it, and James confirms that the boys have been "messing with him" for months, but he would rather not draw more attention to it and asks you not to tell anyone. Nonetheless, you can tell that it is affecting James negatively.

Can you "do nothing"?



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What if the Complainant says, "Do Nothing"?



- Mandated reporting obligations
- Duty to respond in a manner that is not deliberately indifferent.
- Must report to Title IX Coordinator
 - Offer Supportive Measures
 - Title IX Coordinator may file a complaint on their behalf



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Supportive Measures

Designed to restore or preserve equal access to the educational program

Cannot be disciplinary/punitive

Cannot be retaliatory

Offered to complainant and respondent

Determined on a case-by-case basis



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Supportive/Protective Measures for both parties

Examples:

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

DOCUMENT

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Hypothetical


Over winter break, a junior in high school, Ryder, begins sending his classmate, Audrey, snapchat messages. He sends her a picture of himself coming out of the shower and a picture of his genitalia. When the students return after break, Ryder moves to an open seat next to Audrey in U.S. History. Ryder begins touching Audrey's thigh; she pushes his hand away, but he continues. This goes on for a few weeks. Ryder places his hand inside the cargo pocket of Audrey's pants, and she reports the conduct.

Is this Title IX? **What supportive measures do you offer Audrey?**

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STOP before you discipline



Title IX contemplates that the Formal Grievance procedure be complete prior to discipline being imposed.

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Ensuring Safety

- Supportive Measure
- Administrative Leave
- Emergency Removal

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Emergency Removal from School (Student)

- A student shall not be disciplined for alleged sexual harassment under Title IX until the investigation has been completed.
- However, on an emergency basis, the District may remove a student from the District's education program or activity, provided that the District:
 1. Conducts an *individualized safety and risk analysis* and determines that removal is justified due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations; and
 2. Provides the student with notice and an opportunity to challenge the decision immediately following the removal.

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Administrative Leave (Employee)



Placing an employee on Administrative Leave is not disciplinary

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Hypothetical

Recall: Ryder and Audrey. Ryder sent Audrey pictures over break, and when they returned he began touching her leg. You now learn that Ryder forcefully penetrated Audrey behind the bleachers at the JV game last week. He has been texting her that "he did not get his fix" and is "looking for his next chance."

Is Emergency Removal necessary?

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Hypothetical

Frank is a new office assistant at the Junior High School. He comes to you (Principal) to let you know that is he uncomfortable around the VP, Stacy. He tells you Stacy has been making dirty jokes for the last few weeks, sometimes when students are in the office and he is concerned the students might hear. He tells you Stacy has made comments about how one student dresses like a whore, and probably "gives great blowjobs." Frank is uncomfortable with Stacy's conduct, and does not want to be alone with her.

What do you do with Stacy? What supportive measures would you offer Frank? Is this Title IX?

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Contacting Law Enforcement

Was a crime potentially committed?

Title IX does not alleviate employees of their mandated reporting obligations.

Police investigation does not alleviate the District of its duty to investigate.



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Title IX Procedures

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Do You Have a "Formal" Title IX Complaint?

Document filed by a complainant **OR** Signed by Title IX Coordinator

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Does it Meet the Tests?

Definition of Title IX Sexual Harassment **AND** Title IX Jurisdiction

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How to Process a Formal Title IX Complaint

Formal Grievance Procedure

Informal Resolution

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Informal Resolution

Formal Title IX complaint;

Written notice of allegations;

No written determination; and

Voluntary, written consent.

Can include stipulated discipline in the resolution agreement.

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Informal Resolution

Right to withdraw.

Cannot be used for employee v. student.

Sexual Assault?

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Formal Grievance Procedure

- Investigator gathers evidence and interviews parties/witnesses
- Investigator shares evidence with the parties
- Parties have 10 days to respond to the evidence
- Investigator conducts any necessary follow up
- Investigator prepares Investigation Report
- Investigation Report is sent to the parties
- Parties have 10 days to respond to the Investigation Report and/or submit written, relevant questions to the other party or any witness (K-12) or Parties appear at a Live Hearing (Higher Education)
- Decision-maker makes decision and prepares a Written Determination
- Both parties have right to appeal

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**Title IX and
Student/Employee
Discipline**

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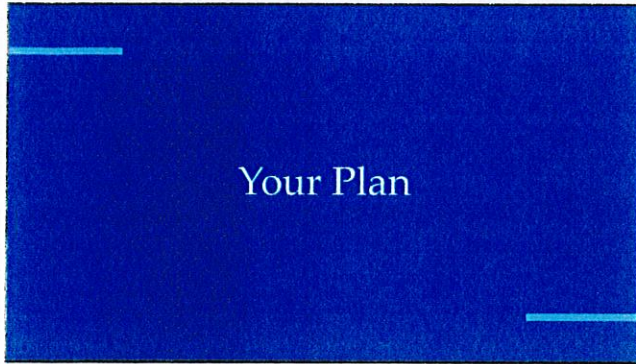
Student/Employee Discipline

Discipline after the formal grievance procedure is complete.



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Step 1: If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

- Employee – Quid Pro Quo;
- Severe, pervasive, and objectively offensive; or
- Sexual assault, dating violence, domestic violence or stalking.

If the answer is yes, move to Step 2. If the answer is no, proceed under other District policies.

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Step 2: Is there Title IX Jurisdiction Over the Conduct?

- Within the United States.
- The District exercised substantial control over
 - The respondent; and
 - The context.
- Participation at time of filing.


If the answer is yes, move to Step 3. If the answer is no, proceed under other District policies.

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Step 3: Moving Forward under Title IX

- ✓ Do NOT discipline
- ✓ Contact Title IX Coordinator
- ✓ Offer supportive measures



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Hypothetical

A 1st grade female student comes to your office with allegations that another female student slapped her on the butt at recess.

Is this Title IX?

Is Informal Resolution an option?

What if these are high school students?

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Hypothetical

Back to 1st grade: In your initial conversation with the 1st grader, she also tells you that the other female student touched her between the legs, touching her genitalia over her pants.

What do you do?


Is this Title IX?

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Questions



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*For more information, questions and
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Sexual Harassment Complaint Intake and Title IX Assessment



I, _____, as a District administrator performed a preliminary assessment of the attached/below complaint. In doing so, I ascertained the following information:

Name of Complaining Party and Victim (if different): _____

Complainant/Victim is a: Student Employee

Date of Complaint: _____ Date of Incident: _____

Name of Respondent(s): _____

Respondent is a: Student Employee Other (specify): _____

I offered Complainant the following supportive measures¹: _____

The following supportive measures were implemented: _____

Step 1: Definition of Sexual Harassment under Title IX

The alleged conduct *may* meet the definition of sexual harassment under Title IX. If this box is checked, move to **Step 2: Jurisdiction**.

➤ Only one box below needs to be checked, but check all that apply.

- A District employee conditioning the provision of a District aid, benefit, or service on a person's participation in unwelcome sexual conduct.
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity.
- Sexual assault:** Any sexual act including Rape², Sodomy³, Sexual Assault with an Object⁴, or Fondling⁵ directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent; also unlawful sexual intercourse. 20 U.S.C. § 1092(f)(6)(A)(v)

¹ Schedule change, no contact order, counseling, academic support, voluntary home instruction, voluntary transfer, campus safety escort, increased security, and monitoring of certain areas on campus.

² Rape is the carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.

³ Sodomy is oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

⁴ Sexual Assault with an Object is to use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

⁵ Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

- Dating violence: Violence committed by an individual who is or has been in a social relationship of a romantic or intimate nature with the victim. *34 U.S.C. § 12291(a)(10)*
- Domestic violence: Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by an individual with whom the victim shares a child in common, by an individual who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by an individual similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other individual against an adult or youth victim who is protected from that individual's acts under the domestic or family violence laws. *34 U.S.C. § 12291(a)(8)*
- Stalking: Engaging in a course of conduct directed at a specific individual that would cause a reasonable individual to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress. *34 U.S.C. § 12291(a)(30)*
- The alleged conduct does not meet any of the above definitions of sexual harassment under Title IX. (If this box is checked move to Step 3b, proceed under appropriate BP/AR and you may proceed with discipline.)

Step 2: Jurisdiction under Title IX

Check all that apply.

- If all boxes are checked, move to Step 3a.
- If not all boxes are checked, move to Step 3b.
- The District had substantial control over the respondent at the time of the alleged harassment.
- The District had substantial control over the context in which the alleged harassment occurred.
- The conduct occurred against a person in the United States.
- The complainant was participating/attempting to participate in the educational program at the time the complaint was filed.

Step 3a: Moving Forward under Title IX

If the accused is a student, do NOT suspend the student until you have spoken to the Title IX Coordinator or designee.

Call and e-mail the District's Title IX Coordinator and let them know you have a potential Title IX matter.

Complete this form, and attach all notes, statements and evidence you have gathered regarding the incident. Provide a copy of this form and all attachments to the District's Title IX Coordinator.

Step 3b: Non-Title IX Sexual Harassment

If the alleged conduct does not meet the definition of sexual harassment or the jurisdictional requirements, the school site can move forward with discipline, and an investigation under the appropriate BP/AR.

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