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# Investigations and Title IX Training

Butte County Office of Education

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# Training Outline

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- Investigations Initial Intake and Planning
- Understanding the Role of and/or Right to Third-Party Representatives
- Administering Proper Admonitions and Managing Confidentiality
- Conducting and Documenting Effective Interviews
- Examining and Considering Other Evidence
- Drafting an Investigative Report
- Investigation Conclusion
- Recordkeeping
- Title IX Basics & Update

# Why we investigate – the institutional

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- The purpose of all investigations is to advise the decision-makers whether the alleged conduct occurred and help them determine whether there was a violation of law or policy.
- Allow the decision-maker to determine the appropriate response
  - exonerate or take remedial/disciplinary action?
  - determine what is necessary to prevent conduct from occurring in the future

# Why we investigate – the legal

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- Statutory duties
  - EEOC/Title VII (Federal)
    - take “all steps necessary to prevent harassment from occurring” and conduct prompt, reasonable and impartial investigations
  - FEHA (California)
    - take “all reasonable steps necessary to prevent discrimination and harassment.”
- Possible litigation defense
  - *Faragher/Ellerth* – affirmative defense
  - *McGinnis* – reduce damages
  - Investigation may become part of the litigation

# Basic Investigation Standards

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- Prompt
  - Policy dictates timeframe
  - UCP/Title IX – 60 days
  - Creates a difficult balance with thorough
- Thorough
  - Cover all issues that are relevant for determination of policy violation
  - Meet with all witnesses that provide necessary facts and provide a balanced view
- Impartial
  - Demonstrate that both sides are treated equally
  - No bias

# What we investigate, generally

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- EEO: harassment, discrimination, retaliation, hostile work environment
- Whistleblower
- Wage and hour
- Personnel: Attendance, performance
- Misconduct: bullying, ethics, substance use/sales, violence or threats of violence, code of conduct
- Title IX: sexual harassment, rape, sexual assault, stalking etc. (not going to talk about this in this training)

# Initial Intake and Planning

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# Complaint Intake

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- Type of complaint
  - verbal, written, anonymous, no complaint (rumor, graffiti)
- Who is the complainant?
  - parent, student, employee, community member, former students
- Applicable policy
- Best practice - Initial INTAKE before INVESTIGATION



# Assessment of Applicable Policy

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- Policies guide the investigation procedures and timelines
- Policies also can help determine scope (what do you need to make factual findings about)

# Know Your Policies: Complaint Policies

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- SP/AR 1312.1 – Complaints Concerning Employees
- SP/AR 1312.2 – Complaints Concerning Instructional Materials
- SP/AR 1312.3 – Uniform Complaint Procedures
- SP/AR 1312.4 – Williams Complaint
- SP/AR 4030 – Nondiscrimination in Employment
- SP/AR 4119.11 – Sexual Harassment (employee)
  - AR 4119.12 – Title IX Sexual Harassment Complaint Procedures
- SP/AR 4244/4344 – Complaint Procedure
- SP/AR 5145.7 – Sexual Harassment (student)
  - AR 4119.12 – Title IX Sexual Harassment Complaint Procedures

# Who is going to investigate?

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- Site admin
- BCOE staff
- Outside investigator

# Draft an Investigation Plan

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- Living document. Re-evaluate.
- What to include:
  - Investigation chronology:
    - Date complaint received
    - Date of initial investigator contact
    - Report due date
  - Parties
  - Relevant policies
  - Scope and issue under investigation
  - Witness list (evolving)
  - Sequence of witnesses
  - Evidence identified
  - Log of actions, communications

# Determination of Scope

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- Determined by the complaint
- But also your policies
- Example – allegation is “sexual jokes” by principal but BP/AR includes graphic and derogatory comments as well as jokes
- Scope may grow as you investigate – new allegations come up in interviews.

# Detailed Allegations

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- Be detailed in writing the allegations
- Specific with actions and timeframes: who, where, when?

# ACTIVITY - Practice Drafting Scope

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# Planning Sequence of Interviews

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- There is an art and science to sequencing interviews
- Create an ideal structure but be flexible
- Circling back
- Sequence considerations when the investigation has multiple parties



# Third-Party Representatives

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# Things to Consider

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- When are Representatives Required?
  - Policy
  - Bargaining unit members
- Who
  - Union reps
  - Attorneys
  - Family members (minor students)
  - Involved parties
- How to Handle the Difficult Third Party Rep

# Confidentiality

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# Promising Confidentiality

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- What you can promise depends on the policy
- Pitfalls of overpromising

# Requesting Confidentiality

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- Why we request confidentiality
- How much confidentiality can you demand?
  - Conflicts with lawful speech and union rights
- Suggestion:
  - Request witnesses keep the contents of the interview and investigation confidential but specify that they can communicate with union

# Interviewing

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# Preparing for the Interview

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- Scripted questions vs. an interview plan
- Create an interview plan
  - Have a familiarity with the facts
  - Have a game plan not just scripted questions
  - Be flexible

# First Impressions

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- Set the tone
  - This starts before the interview, in initial communications
  - Location of the interview matters
- Establishing rapport is important
  - Strike a balance between being connected, warm and transparent AND being professional, organized and impartial



# Standard Opening/Admonitions

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1. Purpose of the investigation
2. Your role as the investigator
3. Expectations for witnesses
  - a. Honesty
  - b. Confidentiality
  - c. Retaliation
4. Different standard openings for complainant, respondent and witnesses

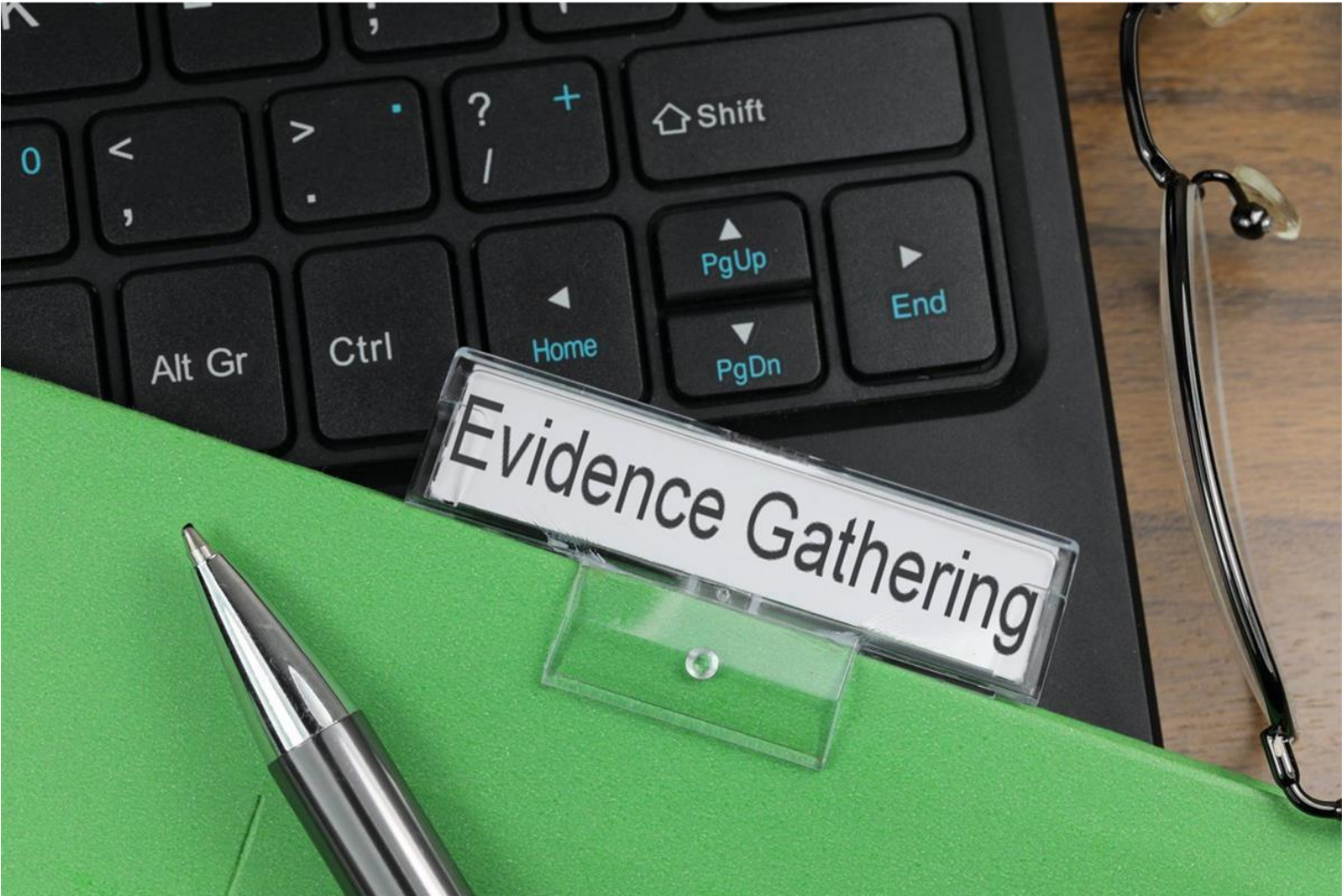
# Interviewing Techniques

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- Questions designed to elicit all the information needed for the decision-maker to make a determination of responsibility regarding each allegation
- The “funnel method”
- Silence is golden
- Reflect and ensure you covered everything
  - “Is there anything else I should be aware of?”

# Evidence

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# Types of Evidence

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- Verbal statements through interviews
- Tangible evidence
  - Documents
  - Visual
  - Electronic
  - Physical
- Confidential documents and other special considerations

# Gathering Evidence

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- Collecting evidence – consider what, where, when and how you will collect it
- Consider what you want, need, have access to and storage issues

# Social Media Evidence

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- Familiarize yourself with platforms:
  - Facebook & Messenger
  - Instagram
  - Snapchat
  - Twitter
  - TikTok
- Stay current with social media lingo
- Tips for collecting social media evidence:
  - Consider using AirDrop
  - Be sure to verify accuracy and authorship



# Investigation Report

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# Purpose of the Report

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- Factual findings inform whether the alleged conduct did or did not occur
- Sometimes your only proof is that you did an investigation, responded as legally required
- Analysis can show impartiality
- Report informs appropriate response



# General Tips for Report Writing

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- Write as you go
- Use templates/outlines
- Opening sentences
- Keep sentences simple – three line rule
- Make effective use of tables, bullets and charts
- Active voice
- Neutral language
- Consistency in tense
- Buddy system for proofing

# Report Structure

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- A basic investigation report can consist of 5 main components
  1. Methodology/Introduction
  2. Factual Background
  3. Evidence
  4. Analysis
  5. Findings

# Component 1 – Methodology

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- Purpose: to show you did a good faith investigation by a properly planned and executed process
- Suggested contents:
  - Summary of the logistics in your investigation plan (date of complaint, summary of issues/scope, witness list, information about representation, justifications for delays if any, witness admonitions, relevant policies, standard of evidence used).

# Component 2 – Factual Background

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- Purpose – to give reader context about how the investigation got started and who the parties are
- Suggested contents: relevant background of complaint(s), employment history, job titles, reporting structure, other foundational facts

# Component 3 – Evidence

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- Purpose – include all relevant evidence
- Suggested contents: summaries of witness accounts (complainant, witnesses and respondents); other documentary evidence

# Component 4 – Analysis

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- Standard of proof (guided by policy)
  - Preponderance
  - Clear and convincing
  - Beyond a reasonable doubt
- Identify consistencies and inconsistencies
- Credibility Analysis

# Why is Credibility Assessment Important

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- Show lack of bias
- Justifies how you got to the conclusion
- Often the only proof that you did your due diligence of investigating

# Assessing Factors

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- Credibility factors to consider:
  - Corroboration/Lack of corroboration
  - Consistent/Lack of consistency
  - Knowledge or opportunity to observe
  - Inherent plausibility
  - Motive to falsify
  - Consistent past conduct
  - Demeanor (?)



# Component 5 – Findings

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- The ultimate determination
- Caution! Legal vs. factual vs. policy determinations
  - What is in your charge?

# Making Factual Findings

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- Make a factual finding regarding every material allegation in the complaint
  - Sustained or not sustained
- Sample language: “The complainant’s allegation that [insert allegation] is sustained/not sustained. The investigator finds by [a preponderance of the evidence OR clear and convincing evidence] that...”

# ACTIVITY – Draft Factual Findings

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# Possible Report Outline – Option 1

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- I. Introduction/Methodology
- II. Factual Background
- III. Issue 1 (Race)
  - a. Complainant's Allegations
  - b. Witness Accounts
  - c. Respondent's Response
  - d. Analysis and Findings
- IV. Issue 2 (Retaliation)
  - a. Complainant's Allegations
  - b. Witness Accounts
  - c. Respondent's Response
  - d. Analysis and Findings
- V. Conclusion

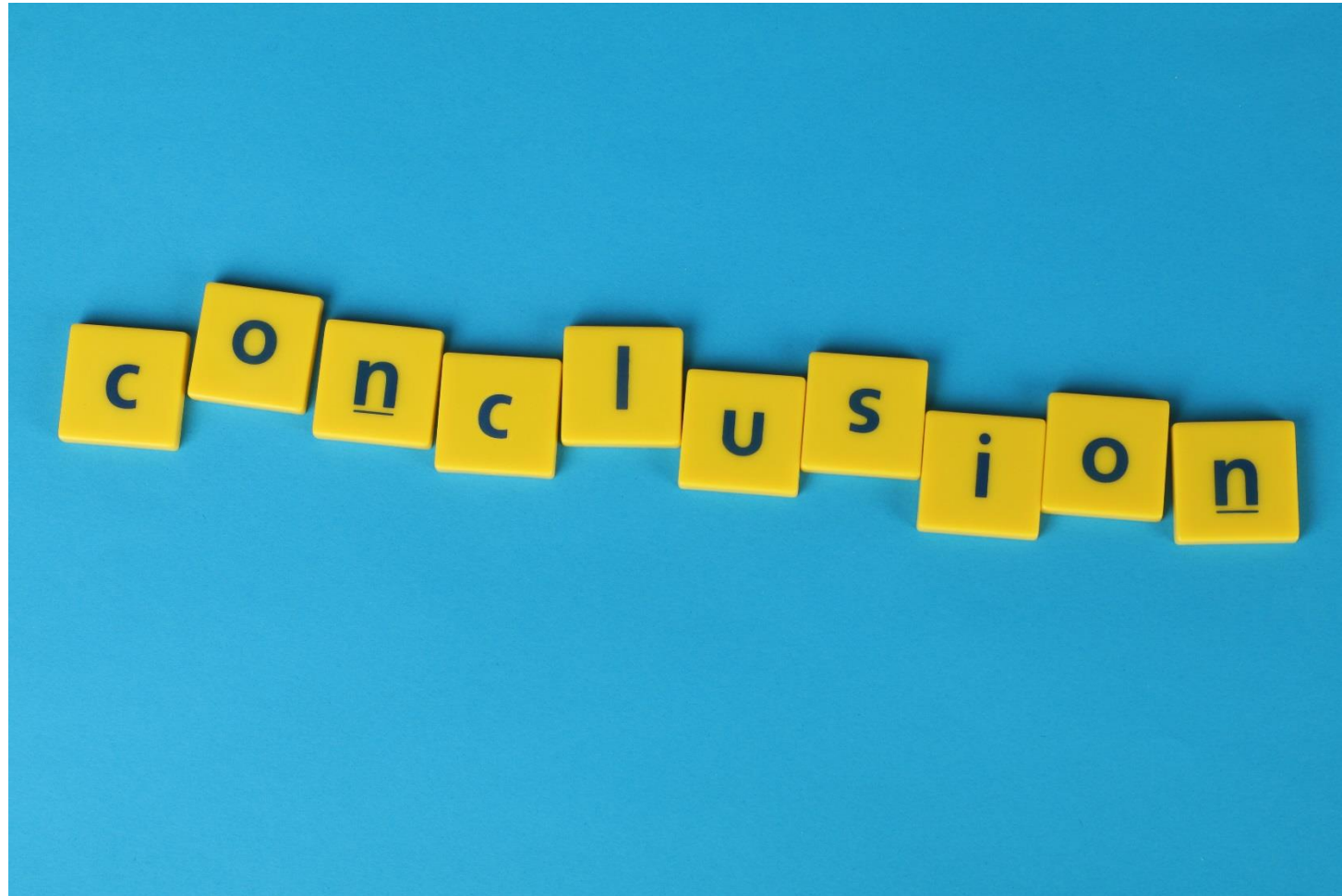
# Possible Report Outline – Option 2

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- I. Introduction/Methodology
- II. Factual Background
- III. Complainant's Allegations
  - a. Issue 1 (Race)
  - b. Issue 2 (Retaliation)
- IV. Evidence
  - a. Issue 1 (Race)
    - 1. Respondent's Response
    - 2. Witness Accounts
  - b. Issue 2 (Retaliation)
    - 1. Respondent's Response
    - 2. Witness Accounts
- V. Analysis and Findings
  - a. Issue 1 (Race)
  - b. Issue 2 (Retaliation)
- VI. Conclusion

# Investigation Conclusion

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# Communicate Outcome

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- What to give and to whom?
  - Written summaries
  - Uniform Complaint Final Notice Requirements
  - Other conclusion letters

# Retaliation

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- Be aware/monitor for retaliation
- How to respond to claims of retaliation post-investigation



# Anticipating Litigation

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- Every investigation may end up in litigation
- Investigators may be involved in discovery process

# Recordkeeping

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# Document retention

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- Mandated by your policies and California/Federal Law
- An organized, central location for document storage is important for compliant retention
  - Maintained at school sites? DO?

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# TITLE IX

# Title IX Federal Law

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- Title IX of the Education Amendments of 1972 guarantees equality in access to education without regard to sex and gender
- Revised regulations issued on May 6, 2020
  - Codified in 34 CFR Part 106
  - Effective August 14, 2020
- General obligation is the same, but the definitions and grievance process is drastically different

# Impending Overhaul

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- Proposed changes announced in June 2022
- Will change much of how we process Title IX cases when final
- In the meantime, the 2020 revision is the law, failure to follow can result in liability

# NEW: Title IX Definition of Sexual Harassment

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- Significantly narrowed definition
- Sexual harassment is defined as
  - (1) any quid pro quo harassment by a school's employee;
  - (2) “any unwelcome conduct that a reasonable person would find so severe, pervasive, **and** objectively offensive” that it “**denies**” a person equal educational access;
  - (3) sexual assault;
  - (4) dating violence;
  - (5) domestic violence; or
  - (6) stalking. (34 C.F.R. § 106.30)

# California Law Prohibiting Sexual Harassment

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- All persons, regardless of their gender, should enjoy freedom from discrimination of any kind in the educational institution of the state.
- “Sex Equity in Education Act” is codified in California Education Code § § 221.5-231.5



# CA Definition of Sexual Harassment

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- Education Code 212.5

“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 any of the following conditions:

- (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual’s employment, academic status, or progress.
- (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.
- (c) **The conduct has the purpose or effect of having a negative impact upon the individual’s work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.**
- (d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

# Who Is Responsible for Knowing About and Reporting Sexual Harassment?

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- Who is responsible for being aware of reports of sexual harassment?:
- Under Federal law (Title IX):
  - Title IX Coordinator
  - “any official of the recipient who has the authority to institute corrective measures”; OR
  - any Employee of an elementary and secondary school
- In short: everyone!
- Actual knowledge triggers further action in the form of supportive measures and information re. Title IX

# Verbal, Written, Anonymous: Does the Type of Complaint Matter?

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- The way the complaint comes to you matters a lot
  - Title IX requires a written complaint that complies with strict parameters
  - Verbal or anonymous complaints trigger the offer of supportive measures and possibly an investigation according to your policies.
- However, the manner the complaint is submitted does not change BCOE obligation to respond to prevent sexual harassment.
- In short, you can never burry your head in the sand if you have knowledge of possible harassment.

# Offering Supporting Measures, Discussing Title IX & Preliminary Fact Gathering

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When you become aware of conduct that might amount to sexual harassment under either CA law or Title IX you should:

1. Meet with alleged victim (and parent if minor student)
  - a) Offer supportive measures
  - b) Discuss the availability of filing a Title IX complaint and point them to the policy
  - c) Gather some additional facts about allegations if necessary
2. Document!
3. Determine if you need to alert law enforcement.
4. Consider consulting with Title IX Coordinator, depending on severity of allegations

# When to Involve Admin

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- How severe and pervasive are the allegations?
  - Are parents or lawyers already involved?
  - Does the complaint involve only students or are allegations against teachers/staff?
  - How public is the complaint?
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- **This is all about risk management and working as a team!**

# Time to Investigate

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- For Title IX: Actual knowledge + formal complaint + sexual harassment + education program or activity + in the united states = INVESTIGATION and/or informal resolution
- For other sexual harassment investigations: know and follow your policy

# Sexual Harassment Investigation General Considerations

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- Who will conduct the investigation?
- Who will be present in interviews?
- How will the investigation file (notes, documents, etc.) be maintained?
- Promises of confidentiality?
- Who will write the investigation report?

# NEW: Title IX Complaint Process

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- Significantly more due process required in the investigation process
  - Written notice of allegation to parties (no anonymous complaints) and opportunity to obtain and advisor
  - Two-Step Evidence Inspection Process:
    - Step 1: Inspection and Review of Evidence before investigation report finalized
    - Step 2: Obligation to give parties the opportunity to submit questions after report is finalized but before a determination of responsibility is made
  - Investigative Report
  - Written determination of responsibility



# After the Investigation

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- Communication with complainant(s) and respondent(s)
- Discipline
  - Education Code 48900 et. seq.
  - Issues with Title IX due process protections – don't jump the gun on discipline if you have a Title IX complaint
  - Emergency removal

# Questions

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