



Title IX Essentials

Training for San Mateo County Community College District

Training Materials

February 1, 2023

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Biographies

Liz DeChellis is a Partner with Van Dermyden Makus Law Corporation. She is licensed to practice law in the State of California, and is certified as a Senior Professional in Human Resources (SPHR).

Prior to joining Van Dermyden Makus, Liz was employed at UC Davis where she routinely provided policy and contract interpretation to management and staff, responded to grievances and complaints, acted as the University Advocate for administrative hearings, and negotiated contracts with labor unions. Additionally, she conducted investigations and fact-findings and served as a Hearing Officer in student discipline hearings. Prior to law school, Liz worked in Human Resources for various companies, providing advice and assistance with recruitment, hiring, termination, and performance management.



Liz is also an experienced investigator in Title IX sexual misconduct claims. She has investigated cases involving underage Complainants, multiple Respondents, and allegations involving incapacitation and inability to consent. Liz understands best practices in the Title IX arena, and the challenges facing schools and parties when sexual violence allegations surface.

Liz frequently serves as an Appeal Hearing Officer for Title IX cases. In this role, Liz reviews campus responses to Title IX allegations within the framework of the individual school's appeal process. In her deliberations, she considers whether the administration's response to claims of sexual misconduct were compliant with policies meant to provide a safe campus for students. Liz has overseen cases involving dating violence, drug abuse, sexual assault, and incapacitation. She has experience questioning parties using trauma-informed techniques, making admissibility and relevance decisions, and issuing well-reasoned, thorough decisions.

Additionally, Liz has investigated matters at K-12 Districts, including allegations involving discrimination and compliance. Her investigations have included interviews of administration, classified staff, as well as paraeducators.

Liz graduated from McGeorge School of Law in 2012 and earned an undergraduate degree from UC Davis.

Jennifer Doughty is a Partner and Director of Associate Development with Van Dermyden Makus Law Corporation. Jennifer has worked as an investigator for Van Dermyden Makus since January 2012.

Jennifer's practice focuses on investigations involving the workplace, athletic teams, and Title IX complaints. Jennifer conducts investigations relating to harassment, discrimination, retaliation, and misconduct. She also conducts trainings for staff and management on how to conduct effective workplace investigations.



Trained in Trauma Informed Forensic Interviewing, Jennifer is an experienced investigator in Title IX sexual misconduct and harassment claims. She has investigated cases involving University faculty and administrators, underage complainants, multiple respondents, and complex issues involving incapacitation and consent. Jennifer also has experience serving as a Hearing Officer in Title IX cases. As a Hearing Officer, Jennifer has handled cases involving sexual assault, sexual harassment, dating violence, incapacitation, and consent.

Jennifer is admitted to practice before the courts of the State of California and the Federal District Courts of the Northern, Southern, and Eastern Districts of California. She has also been admitted to practice before the 11th Circuit Court of Appeal, the 5th Circuit Court of Appeal, and all state and federal courts of Alabama and Mississippi.


Jennifer graduated from Santa Clara University School of Law and earned an undergraduate degree from Duke University.



Title IX Essentials


T9 MASTERED
Training for Title IX Professionals


San Mateo County Community
College District
February 1, 2023
Trainers: Liz DeChellis & Jen Doughty




Today's Agenda

- Welcome and Case Scenario Introduction
- Title IX Foundations
- Intake Interview and Preliminary Steps
- Investigative Process
 - Policy Analysis
 - Planning
 - Trauma-Informed Interviewing
- Wrap-Up





**Title IX Foundations:
A Quick Overview
of the "New"
Regulations**



Title IX

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.





No person shall...be deprived of life, liberty, or property, without due process of law...

— Fourteenth Amendment of the U.S Constitution



What Process is Due? In Criminal Law:

When life and liberty are at stake the greatest procedural protection is required

Procedural Rights of Criminal Defendants

- Public trial
- To counsel
- To confront witnesses
- Impartial jury



What Process is Due? In Student Conduct Cases:

Due Process—A Flexible Concept that Considers Three Factors:

1. The student's interests that will be affected;
2. The risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and
3. The university's interests, including the burden that additional procedures would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976)



Enforcing Title IX

Department of Education, Office for Civil Rights

- Complaint investigations and compliance reviews resulting in voluntary resolution agreements
- Issues regulations and guidance
- Possible sanction—removal of federal funding

Private Right of Action

- Court cases brought by complainants and respondents

Cannon v. University of Chicago (1979)



Different Types of OCR Guidance

Non-Binding Guidance

Issued and withdrawn by OCR without a required formal process e.g. Dear Colleague Letters.

Binding Regulations

Requires formal rulemaking process. e.g. 2020 Regulations



New Regs Snapshot

- Effective: August 14, 2020
- Applicable to students, staff, and faculty
- Investigator and “Decision-Maker” cannot be the same person
- The Title IX Coordinator can investigate, but cannot serve as the Decision-Maker



What changed?

- Mandatory hearings
- Advisor involvement (active)
- Definition of Sexual Harassment
- School jurisdiction over conduct
- Direct questioning of the parties



What has not changed?

- Duty to provide a fair process
- Duty to provide a safe environment
- School determines the definition of consent
- Impact on the involved parties



Key Changes Overview

- Required Elements of the Grievance Process
- “Sexual Harassment” definition under 2020 Title IX Regulations

Intersection of Title IX and Code of Conduct



Grievance Process per the New Regulations

- Presumption that Respondent is not responsible
- Standard of Evidence
- Evidence Review process
- Live Hearings required



Evidence Review Process

- Both parties must have an equal opportunity to inspect, review, and respond to any evidence gathered that is directly related to the allegations, even if there is no intent to rely on it in making a determination
- This must occur *prior* to the conclusion of an investigation
- Parties have an equal opportunity to refer to this evidence during the Hearing



Live Hearing Process

- Required by the 2020 Rule for higher ed
- Each party's advisor must be permitted to ask the other party and any witnesses relevant questions, including challenges to their credibility
- Questions must be conducted "directly, orally, and in real time"
- Adjudicator can determine questions are not relevant and cannot be asked, but must provide an explanation
- Parties may choose their advisor, but must have one; School must provide an advisor if needed



Responsibilities of the Investigator

- Define the scope of the investigation based on Complainant interview / policy
- Gather evidence
- Identify and interview witnesses
- Document all steps taken
- Coordinate Evidence Review Process with parties
- Testify in Hearing (potentially)



Investigation Report Requirements

- Allegations;
- Material facts;
- Evidence presented and considered;
- Additional relevant information received and gathered during the Evidence Review period;
- Description of all material disputed and undisputed facts.



Responsibilities of the Adjudicator

- Adjudicator can rely on Investigation Report
- Ensure the Hearing is conducted in accordance with school policy
- Make credibility assessments
 - Look for inconsistency in statements, etc.
- Make a determination regarding responsibility



Hearing Decision Report Requirements

- Allegations;
- Procedural steps;
- Factual Findings;
- Policy Findings;
- Analysis for each;
- Sanctions;
- Appeal process.



Sexual Harassment Definitions



Sexual Harassment per the New Regulations

Conduct on the **basis of sex** that satisfies one or more of the following:

- Quid pro quo (employee Respondents only);
- Unwelcome conduct (full definition follows); or
- Specific defined acts (full definition follows)



Sexual Harassment: Unwelcome Conduct

Conduct on the **basis of sex** that is determined by a **reasonable person** to be so:

- Severe;
- Pervasive; **and**
- Objectively offensive
- That it effectively denies a person equal access



Sexual Harassment: Specific Acts

Conduct on the **basis of sex** that constitutes one or more of the following:

- Sexual Assault**, as defined by Clery Act;
- Dating Violence**, as defined by VAWA;
- Domestic Violence**, as defined by VAWA;
- or
- Stalking**, as defined by VAWA



Sexual Assault (per the Clery Act)

- *Rape*. The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
- *Fondling*. The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of age or permanent mental incapacity.
- *Incest*. Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- *Statutory Rape*. Sexual intercourse with a person who is under the statutory age of consent



Dating Violence (per VAWA)

Violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and,
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and,
 - The frequency of interactions between the persons involved in the relationship.



Domestic Violence (per VAWA)

Acts that include felony or misdemeanor crimes of violence committed by one of the following:

- A current or former spouse or intimate partner of the Complainant;
- A person with whom the Complainant shares a child in common;
- A person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the Complainant under the domestic or family violence laws of California; or,
- Any other person whose acts on an adult or youth Complainant is protected from under the domestic or family violence laws of the state of California.

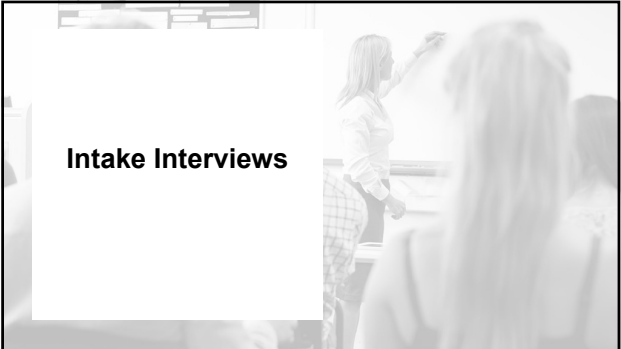


Stalking (per VAWA)

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for his or her safety or the safety of others; or,
- Suffer substantial emotional distress.





Intake Interviews

How do we get the information we need in a trauma-informed way?



What Information Do We Need?

- Who
- What
- When
- Where
- Impact
- Desired Outcomes
- Desired Next Steps



Evaluate What You Gathered

Capture the basic facts:

- Who is complainant?
- Who is respondent?
- What is alleged misconduct?
- When? Where? Other information?

Consider both policy language and how Complainant described what happened



Questions to Consider

- How do we maintain neutrality throughout the process?
- How can we be transparent about the process without coming across as discouraging from proceeding?
- Do we need to proceed if the Complainant declines to file a complaint?

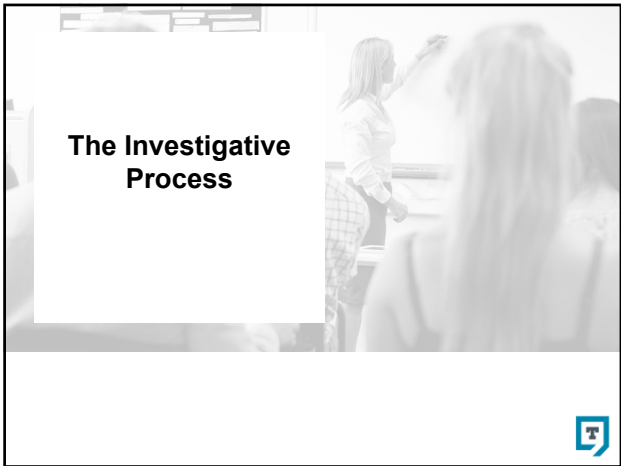


Next Steps

- Evaluate complaint
- Determine scope
- Reach out to Respondent
- Provide resources to both parties
- Explore Alternative Resolution Options with both parties
- Assign an Investigator
- Send out Notices
- Determine supportive measures









Goals

- Review your policies...
 - So you understand the elements of a claim
 - So you have time to seek guidance if unclear
 - So you conduct thorough interviews
 - So it is easier to eventually make factual findings and determinations



Common Categories in Sexual Misconduct Policies

- Sexual Violence
- Relationship Violence
- Sexual Harassment
- Stalking
- Sexual Privacy
- Retaliation



Categories in Title IX Sexual Harassment Policies

- Sexual Harassment: Quid Pro Quo
- Sexual Harassment: Hostile Environment
- Sexual Assault
 - Rape
 - Fondling
 - Incest
 - Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking



What type of claim has Cynthia raised?

Cynthia complains that a fellow classmate, Marie, sits outside her Tuesday and Thursday biology courses and waits for her. Marie follows her to her car. Marie sits outside until Cynthia finishes her soccer practice, and then follows Cynthia to the locker room. At the cafeteria, Marie sits across from Cynthia and stares at her. Sometimes when Cynthia looks up, Marie makes a kissing gesture towards her. This has been going on after every class for several weeks, and Cynthia reports feeling fearful on campus.



What type of claim has Tammy raised?

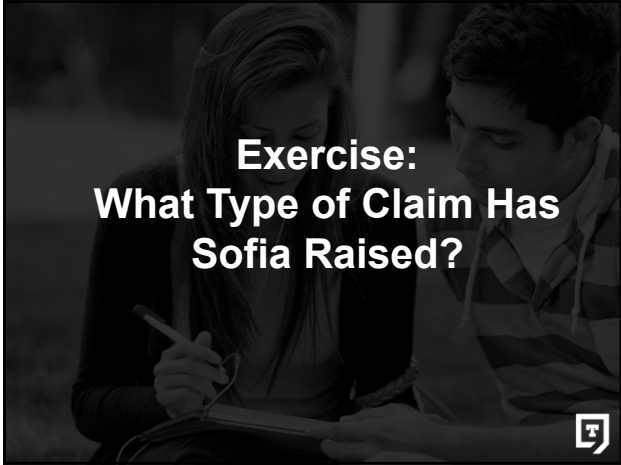
Tammy alleges that Karl, who she studied with during the last quarter, started sending her sexually explicit texts after she told him she did not want to date him. He sent her twenty texts in the course of one night. The texts included statements that he wanted to spread her legs and touch her p—y, and that he had dreamed of having sex many times with her, as examples.



What type of claim has Kurt raised?

Kurt met Katie at a fraternity party. The two danced all night and “hooked up.” Later, Kurt told Katie he did not have enough time for her because of his studies. Kurt complains to the campus that Katie slashed the wheels of his car, almost resulting in a car accident.





**Exercise:
What Type of Claim Has
Sofia Raised?**



**Planning the
Investigation**

Investigative Plan

A frequently updated document to track an investigation. IP might include:

- List of allegations
- Witness list, dates interviewed
- Documents, videos, physical evidence
- Relevant policies; jurisdiction issues
- Other info (i.e., change in scope, unsuccessful attempts to contact witnesses, etc.)

Investigative Plan

Helps with:

- Keeping track of details for interviews and collecting other evidence
- Report writing
- Managing large caseloads
- Re-assigning cases. A roadmap if the case needs to be transferred to a different investigator
- Preparing for hearing or deposition



Initial Steps

- Review Complaint/Intake forms
- Review campus policies/procedures
 - Jurisdiction
 - Anticipated timeline for completion
- Possible witnesses (how to prioritize?)
- Think broadly about other evidence
 - Video evidence –Police report –Photos/texts
 - Social media –Incident report –Floor plan
 - Uber receipts –Key card swipes –journal/diary



The Investigative Steps

Things to consider when planning interviews

- Trauma-informed approach on zoom and/or in-person
- Wording of emails to parties and witnesses
- Role of the advisor
- Note-taking methods



The Investigative Steps

Sequence of Interviews

- Start with complainant
- Issues with witness availability, willingness to participate
- When do you interview Respondent?
 - Are police involved?
- Circling back to parties



Possible Sources of Evidence

Documents

- Emails/Texts
- Performance Evals
- Journals
- Incident reports
- Relevant statistics

Physical evidence

- Hand-written notes
- Receipts

Visual

- Photos/videos
- Diagrams
- Security camera footage

Electronic

- Computers, phones, tablets
- Social media posts/messages, on-line chats
- Key card access



Working with campus police or other law enforcement agencies

Campus investigations may overlap with criminal

- Sexual assault
- Workplace violence, stalking
- Theft, fraud, bribery
- Narcotic sales

Relevant Sources of Information

- Police report
- Transcript or summary of pretext call
- Computer forensics of laptop, tablet, phone



Medical Records

DOE's Final Rule

- Protects the privacy of medical, psychological and similar treatment records.
- Requires schools to obtain party's voluntary, written consent to access or use these records



May Become Part of the Investigation

Other considerations

- Additional complainants or respondents
- Different versions of Title IX policy
- Cross-complaints
- Respondent's exposure to criminal charges; Get familiar with *Lybarger Admonition*
- Chain of custody/Storing physical evidence



Scope Creep

Beware of Scope Creep

Consult with Title IX coordinator before adding allegations

Impacts your timeframe and ability to complete the investigation

Conduct may extend beyond Title IX



When do you have enough information?

Is the fact-gathering done?

**Have you collected –
and given the parties had an opportunity
to review –
all the relevant evidence?**



**Exercise:
Planning Your
Investigation**



Interviewing



Trauma-Informed Interviews

The interview is where it all happens; it is ground zero in the investigation.

Strong interview skills:

- Increase the amount of detail collected
- Reduce the risk of re-traumatizing
- Result in a better understanding of the events

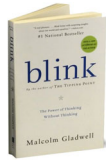


First Impressions

“There can be as much value in the blink of an eye as in months of rational analysis.”

– Malcolm Gladwell

Do not underestimate the first 90 seconds

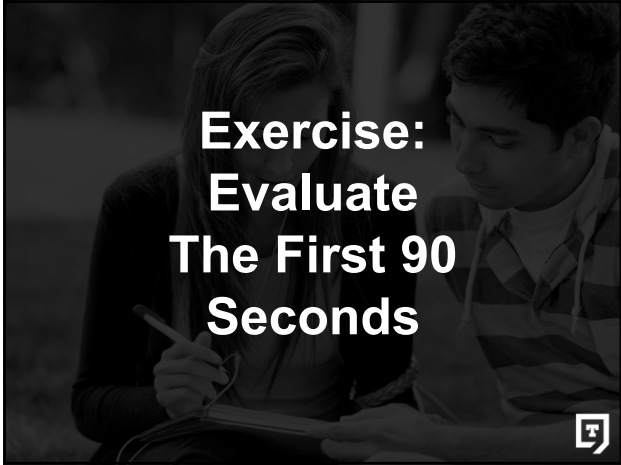




I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.”

- Dr. Maya Angelou





Exercise: Evaluate The First 90 Seconds

Beginnings Matter

Greet the witness (and support person)

Be organized and ready to start

Project the appropriate manner

- Warm yet professional
- Ready to listen

Remember: Talking to an investigator is nerve-wracking.

Trauma-Informed Approach
Opening Minutes

- **In-person interviews**
 - Comfortable room
 - Allow Complainant/Respondent to choose where to sit
 - Offer water
 - Have tissues and fidget objects nearby
 - Do your best to put them at ease

Trauma-Informed Approach

Opening Minutes

On Zoom or other remote platforms:

- Optimize your lighting; Think about what background screen to use
- Discuss a plan if either of you are interrupted or need a break
- Address how you'll handle technical problems
- Have documents you plan to screen share queued up
- Do your best to put the person at ease



Trauma-Informed Approach

Opening minutes

For every interview

- Prepare some introductory comments about who you are and the process. Discuss your neutral role.
- Be transparent
- Address issues of retaliation, privacy, recording, notetaking, amnesty for drinking/drugs, etc.
- Allow time for questions from witness or advisor



The Title IX Interview

Different from other interviews

- College-aged witnesses
- May have experienced trauma
- Parent, attorney, or other advisor may be present
- Covering intimate and sensitive topics



College-aged Witnesses

- Age, gender and power dynamic
 - Investigator may be much older than witness
 - Male investigator interviewing female witness, or vice versa
 - Established professional vs. college student
- Unfamiliar expressions or jargon that lead to miscommunications
- Lack of sophistication: understanding *process* is important



Complainant Not Be Forthcoming For Several Reasons

Fearful of the process

Traumatized

Shy or cautious

Embarrassed to say what took place

Fractured memories

Angry with campus



Reluctant Complainant

Listen for why she/he is reluctant

- Respond to the issues if you can
- Check if supportive measures were made available

Acknowledge difficulty of the process

- Offer to take breaks as needed
- Check in with support person

If needed, suggest rescheduling interview



Reluctant Witnesses

- Explain the process/policy
- Be transparent
- Encourage participation by explaining why their help is important
- What leverage does the campus use if student declines to participate?



Respondent Interview

- Treat Respondent the same as you do Complainant
- Manage the Respondent's stress
- Interview is Respondent's chance to understand the allegations and respond
- Respondent may bring forth new evidence

Useful statement: "Before you leave here today, you'll fully understand the allegations."



Create a Trauma-Informed Atmosphere During Interview

- **Show Empathy**
 - Acknowledge difficulty of addressing questions
- **Be Aware**
 - Moderate pace of the interview based on demeanor of the interviewee
 - Watch for stress or fatigue and offer a break
- **Dignity:**
 - Display appropriate level of seriousness



Challenges to Trauma-Informed Interviewing

- Investigator **cannot** tell the Complainant:
 - “I am so sorry this happened to you.”
 - “What they did to you was wrong.”
- **Alternative statements:**
 - “I’m sorry you’re going through this.”
 - “I can see it’s hard for you to talk about this.”
 - “It sounds like this was a very difficult experience.”
 - “I know this process is hard.”



Parent or Other Non-Legal Advisor

- Be prepared for:
 - Mom, Dad, other close relative
- You will need to read the situation.
 - Some parents/advisors are disruptive; some never speak.
- Know the school’s policies and plan how you will respond if parent/advisor interrupts.

***Practice tip:** At the outset, give parent/advisor opportunity to ask you questions.*



Trauma-Informed Questions

Possible Questions:

- Start where you feel comfortable.
- What else do you remember?
- What was the most difficult part of the experience?
- Questions about sensory details



Attorney Advisor

- Attorney has the same role as advisor/support person.
- Again, know **the** policy and what attorneys are told about their role in interviews.
- Remind the attorney that their role is to offer support.
- Politely cite from the policy, if needed
- If problems develop:
 - **Keep your cool**
 - Discuss consequences of refusing to answer
 - Be pleasant and patient, but firm and persistent
 - Be prepared to shut down the interview



Anonymous Witnesses



- Be prepared for this and know campus policies.
- Find out why the witness wants to be anonymous.
- Discuss fear of retaliation or other reasons for anonymity
- Explain that weight of evidence is weakened if the parties don't know who made the statement



Collect policy-based information

Areas that you need information on:

- Jurisdiction—Where did events take place?
- Affirmative consent and factors that would invalidate consent
 - Incapacitation from sleep/alcohol, force and/or coercion
- Other allegations that violate policy
 - Sexual images, stalking, retaliation
- Specific impacts of the incident



Potential minefields

Be mindful of:

- Leading questions
- Asking about information you don't really need
 - Not every detail is necessary
- Questions that suggest you have made a judgment
- Large reactions to witness statements



Strategies for Interviewing

- The funnel method
 - Start broad and keep narrowing
- Ask witness to quantify: “Sometimes” or “lots.”
- **No need to fill the silences.** Let witness answer.
- Be careful to clarify speculation vs. facts

Be prepared for witnesses with secondary trauma



Strategies for Interviewing

Dealing with answers that are unexpected

- Guard your reactions, remain neutral
- Ask follow-up questions to clarify
- Consider possible reasons for why the witness said this
- Provide more transparency and reframe the question, if that approach makes sense
- Circle back later and rephrase the question



Strategies for Interviewing

Other challenges

- Witness gives one or two-word answers
- Witness dodges the question
- Witness is defensive, mistrusting of the process
- Response is jumbled, ill-logical, or off-topic



Closing the Interview

- Wrap up questions, always ask:
 - Is there anything else I should know or be aware of?
 - Is there anyone else you think I should talk to?
- Possible end-of-interview revelations
- Find out best method of contact for follow-up and availability



Exercise: Interviewing Respondent and Witness