



Lozano Smith
ATTORNEYS AT LAW

The Future is Here: Non-Binary Individuals in the Workplace

Presented by:
Michelle L. Cannon
Stephanie M. White

ACHRO 2019 Fall Training Institute
October 23, 2019

WHO WE ARE & WHAT WE DO

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

AREAS OF EXPERTISE

- Charter Schools
- Community Colleges
- Facilities and Business
- Labor and Employment
- Litigation
- Local Government / Municipal Law
- Public Finance
- Public Safety
- Special Education
- Students
- Technology and Innovation

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

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

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

MICHELLE L. CANNON

PARTNER

mcannon@lozanosmith.com

One Capitol Mall, Suite 640

Sacramento, CA 95814

T 916.329.7433 | F 916.329.9050



OVERVIEW

Michelle L. Cannon is a Partner in Lozano Smith's Sacramento office who works closely with school districts, county offices of education and community colleges in all areas of education law. She is an active member in the Labor & Employment, Students, Community Colleges, Charter Schools and Litigation Practice Groups. Ms. Cannon represents clients in all areas of education law, and has extensive experience in board governance, labor and personnel-related matters, student discipline, and charter school facilities. She was named a Northern California Super Lawyer each year from 2013 to 2017.

Ms. Cannon's practice focuses on representing public entity clients in the following areas:

- > General governance
 - Brown Act issues
 - Conflicts of interest
 - Public Records Act
- > Labor and personnel-related matters
 - Employee discipline and dismissal
 - Collective bargaining
 - First Amendment issues
 - Investigation of discrimination and harassment complaints
 - Certificated and classified employee issues
- > Student issues
 - Student discipline
 - First Amendment issues
 - Search and seizure related to students
- > Charter school issues
 - Review of charter petitions
 - Revocation of charters
 - Charter school facilities.
- > Litigation
 - Sexual discrimination
 - Sexual harassment
 - Wrongful termination

EDUCATION

J.D., University of the Pacific,
McGeorge School of Law

B.A., St. Mary's College of
California

PRACTICE AREAS

Labor & Employment
Students
Litigation
Community Colleges
Charter Schools

BAR ADMISSION

California

- First Amendment issues
- 42 U.S.C. section 1983 claims
- Contract disputes
- Writs and appeals in both state and federal courts

Her litigation experience includes bench and jury trials in both state and federal courts as well as writs and appeals before state and federal appellate courts. She has also successfully handled numerous administrative trials, arbitrations, and mediations on behalf of various public entities before PERB and OAH. She is highly successful in litigation involving student issues, First Amendment issues, wrongful termination, sexual discrimination and sexual harassment, as well as contract disputes.

ADDITIONAL EXPERIENCE

Michelle has worked extensively in the collective bargaining arena in various roles. These roles include, but are not limited to, working as a facilitator in Interest Based Bargaining, acting as lead negotiator in the creation of new contracts, and advising clients through impasse proceedings.

Ms. Cannon has also prosecuted numerous successful permanent certificated and classified termination proceedings.

SIGNIFICANT CASES

- > *Cole v. Oroville Union High School District* (9th Cir. 2000) 228 F.3d 1092 - Assisted in the successful defense of a Northern California school district's decision not to allow graduates to deliver a sectarian invocation and proselytizing co-valedictorian speech.
- > *PLANS, Inc. v. Sacramento City Unified School District* (9th Cir. 2003) 319 F.3d 504 - Successfully defended the school district's innovative Waldorf Methods instruction in public schools.

PRESENTER EXPERIENCE

Ms. Cannon is a frequent speaker at workshops and CSBA and ACSA conferences. She regularly presents on topics such as sexual harassment prevention training, board issues, including the Brown Act and conflicts of interest, collective bargaining, discrimination, employee discipline and dismissals, student discipline, certificated employee lay off procedures, First Amendment issues, and charter schools.

PROFESSIONAL AFFILIATIONS

- > Board Member, Roseville Chamber of Commerce
- > Board Member, Roseville City School District Foundation
- > Member, California School Boards Association
- > Member, California Council of School Attorneys
- > Member, Placer County Bar Association
- > Member, Sacramento County Bar Association
- > Member, California State Bar Association
- > Member, Animal Legal Defense Fund

EDUCATION

Ms. Cannon received her law degree from the University of the Pacific, McGeorge School of Law. She earned a B.A. from St. Mary's College of California.

STEPHANIE M. WHITE

SENIOR COUNSEL
swhite@lozanosmith.com

2001 North Main Street, Suite 500
Walnut Creek, CA 94596
T 925.953.1620 | F 925.953.1625



OVERVIEW

Stephanie White is Senior Counsel in Lozano Smith's Walnut Creek Office and co-chair of the firm's Community College practice area. Ms. White represents California public school districts, county offices of education and community college districts in all aspects of education law. She specializes in Labor and Employment and student issues.

EXPERIENCE

Ms. White has extensive experience advising and representing clients with regard to certificated and classified discipline and dismissal proceedings. She also has experience in advising clients on FERPA and student confidentiality issues, student discipline and expulsion proceedings, the Public Records Act, and the Americans with Disability Act. Ms. White's practice includes investigating and responding to unlawful discrimination complaints filed against employers with the Equal Employment Opportunity Commission and Department of Fair Employment and Housing. She also routinely conducts complex, internal investigations on behalf of school districts and community colleges relating to claims of sexual harassment, discrimination and retaliation.

Ms. White has additional experience defending school districts against unfair practice charges brought before the Public Employment Relations Board. She also provides training to school district employees in the areas of sexual harassment (AB 1825), Title IX and employee leaves.

EDUCATION

Ms. White received her Juris Doctor from Golden Gate University School of Law, and earned a Bachelor of Arts in Sociology from the University of California, Los Angeles. While in law school, Ms. White taught practical legal classes to inner-city high school students in San Francisco.

EDUCATION

J.D., Golden Gate University
School of Law

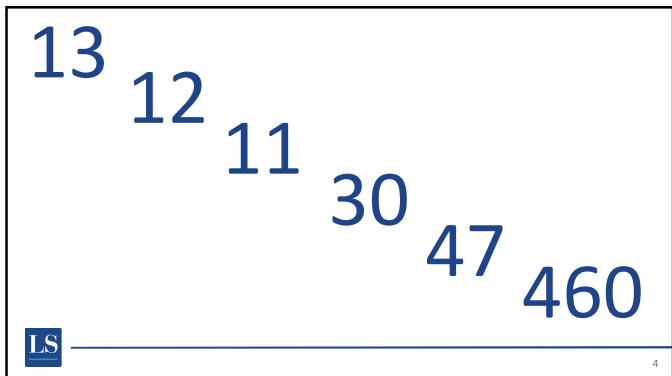
B.A., University of California,
Los Angeles

PRACTICE AREAS

Labor & Employment
Students
Community Colleges

BAR ADMISSION

California





LS

What We Will Cover

- Laws and Policies Related to Transgender Employees
- Common Issues in the Workplace
- Employer Obligations
- Best Practices

5

Impact of Gender Identity Harassment on Employees

- Shame
- Humiliation
- Stress
- Loss of sleep
- Severe anxiety
- Depression



LS

6

Impact of Gender Identity Harassment on Employers



LS

- Reduced productivity/creativity
- Reduced morale
- Absenteeism/turnover
- Increased medical claims
- Civil liability
- Negative media attention

7

Employer and Potential Employee Liability

- Intentional discrimination
- Failing to stop
- Deliberate indifference



LS

8

Standards to Consider



LS

9

Lozano Smith



Roadmap: Remember, Reflect, React

Remember: Laws and Policies

Reflect: Ensure Employees are Training

React: Best Practices

LS

10

Terminology

NON-BINARY

adj: non·bi·na·ry | \ nän-bē-nə-rē

relating to or being a person who identifies with or expresses a gender identity that is neither entirely male nor entirely female

LS

13

Key Terminology

Sex Assigned at Birth Sexual Orientation Gender Expression

Gender Identity

Transgender



LS

14

Terminology Cont. – Gender Identity vs. Sexual Orientation



LS

15

Terminology Cont. – Transgender

- Umbrella term
- Non-binary or gender nonconforming
- Gender fluid



LS

16

Pronouns

Non-binary people often use they/them

Other pronouns:

- Ze/Zir
- Xe/Xem/Xyr
- Co/Cose

LS

17

Laws and Guidance

Gender Non-Discrimination Act (AB 877)



LS

19

Current Status of the Law and Guidance

AB 1732—Addition to California Law: Unisex Single-Use Restrooms

Single-user bathrooms in public buildings are now gender neutral and must have signage on point



Required Symbol

ALL-GENDER RESTROOM RESTROOM UNISEX RESTROOM

Room Signage Options

LS

20

Gender Recognition Act



SB 179 provides a “nonbinary” gender option for state-issued identification documents.

LS

21

Federal Law and EEOC Guidance

Title VII

- Three cases were heard on October 8 to determine whether Title VII’s prohibitions around sex-based discrimination cover sexual orientation-based discrimination.

EEO-1 Forms

- FAQs address non-binary employees

LS

22

FEHA/DFEH Guidance

FEHA has released new regulations

Addresses:

- Bathrooms
- Dress code
- Name and identity
- Gender inquiries

DFEH posting requirement (Jan. 1, 2018)



LS

23

Ensure Rights Are Afforded to All by Training Employees

Required Trainings

SB 396

SB 1343/SB 778



LS

The Bystander Effect



LS

The Bystander Effect – What Can You Do?

If you see something, intervene

Trust your gut

Be direct

Draw attention to the situation or separate the involved parties

Talk to the harasser

Report harassing behavior!

LS

27

Best Practices

Best Practice: Names and Pronouns



LS

29

Best Practice: Documentation

PRONOUNS

LS

31

Best Practice: Disclosure

- To other staff members?
- To the Title IX Coordinator?
- To students?



LS

32

Best Practice: Facilities Use



LS

33

Best Practice: Interview and Hiring



- Job application forms
- Interview questions

LS

34

Best Practice: Dress Code



LS

35

Employer Obligations

- Have strong policies in place for handling complaints
 - CCR § 59300 et seq.
- Implement the policies consistently and effectively
- Encourage employees to report

LS

36

Employee Handbook and Forms



LS

37

“Think Before You Speak”

LS

38

Take-Aways



Remember:

- Just because conduct isn't illegal, doesn't mean it is professional
- Train employees to be active bystanders
- Address issues before they become problems
- Lead by example

LS

39

Questions



LS

40

Presenter

Michelle L. Cannon

AT LOZANO SMITH

Michelle L. Cannon is a Partner in Lozano Smith's Sacramento office who works closely with school districts, county offices of education and community colleges in all areas of education law. She is an active member in the Labor & Employment, Students, Community Colleges, Charter Schools and Litigation Practice Groups. Ms. Cannon represents clients in all areas of education law, and has extensive experience in board governance, labor and personnel-related matters, student discipline, and charter school facilities.



CONNECT

mcannon@lozanosmith.com
916.329.7433

LS

41

Presenter

Stephanie M. White

AT LOZANO SMITH

Stephanie White is a Senior Counsel in Lozano Smith's Walnut Creek Office and co-chair of the firm's Community College practice area. Ms. White represents California public school districts, county offices of education and community college districts in all aspects of education law. She specializes in Labor and Employment and student issues.



CONNECT

swhite@lozanosmith.com
925.953.1620

LS

42



**Lozano Smith
Podcast**

**Episode 1: California Adds
“Nonbinary” Gender Option
to Identification Documents**

Listen and download today.

LS



Subscribe on your
favorite app or device.

Stay informed on your time.

Lozano Smith Podcast

lozanosmith.com/podcast

LS



**Thank you from
Lozano Smith.**

Together with you, we're impacting
communities and lives through:

- Professional development
- Volunteer projects
- Sponsorships and award programs
- Scholarships

#BlueHatProject
#LozanoSmithFoundation

LS

45



ATTACHMENTS

CLIENT NEWS BRIEF

#MeToo Movement Leads to Increased Harassment Prevention Training and Related Requirements for California Employers

Effective January 1, 2019, California employers, including public agencies, will be required to comply with new requirements aimed at preventing sexual harassment in the workplace as a result of the #MeToo movement that began in 2017. On September 30, 2018, Governor Jerry Brown approved Senate Bill (SB) 1300 and SB 1343, which both make significant changes to the California Fair Employment and Housing Act (FEHA).

December 2018
Number 86

Background

Under FEHA, it is unlawful to harass persons based on their sex or other protected characteristics in the workplace, and employers must take immediate and appropriate corrective action when such harassment occurs. An employer's liability for sexual harassment under FEHA extends to the conduct of non-employees towards its employees, applicants, unpaid interns, volunteers, and certain contractors. In addition, employers with 50 or more employees are required to provide at least two hours of training and education regarding sexual harassment, abusive conduct, and harassment based on gender identity, gender expression, and sexual orientation, to all its supervisors every two years.

Summary of Changes to FEHA

SB 1300 and SB 1343 make the following changes to FEHA:

- **Supervisor Training.** Now, employers with 5 or more employees, including temporary or seasonal employees, must provide two hours of specific training and education regarding sexual harassment, abusive conduct, and harassment based on gender identity, gender expression, and sexual orientation, to all its supervisors. The training must occur within six months of initial employment in a supervisory position and every two years thereafter.
- **Nonsupervisory Employee Training.** Employers must also provide one hour of training to all nonsupervisory employees. Employers have until January 1, 2020 to provide the required training. The Department of Fair Employment and Housing (DFEH), which enforces the FEHA, is required to develop online training courses on the prevention of sexual harassment and post them on its website, as well as develop related resources. Again, the training must occur within six months of initial employment and every two years thereafter.
- **Bystander Training.** Further, an employer may, but is not required to, provide "bystander intervention training" that includes information and practical guidance to help bystanders recognize potentially problematic behaviors and to motivate them to take action.
- **Release and Non-Disparagement Agreements.** An employer cannot require an employee to release his or her claims under the FEHA or



Thomas E. Gauthier
Partner
Sacramento Office
tgauthier@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

December 2018
Number 86

sign a document that limits the employee from disclosing information about unlawful acts in the workplace, including, but not limited to sexual harassment, as a condition for a raise, bonus, employment, or continued employment. However, this new part of the law does not apply to a settlement agreement resolving a claim an employee has already filed in court or before an administrative agency, or is being resolved or handled through alternative dispute resolution or through an employer's internal complaint process. The settlement agreement must be voluntary, deliberate, and informed, and it must provide consideration of value to the employee. The employee must be given notice and an opportunity to retain an attorney.

- **Heightened Legal Standards.** The California Legislature approved of three court decisions regarding harassment in the workplace that ruled as follows. First, an employee does not have to prove his or her productivity declined as a result of harassment, but rather, the harassment made it more difficult for an employee to do his or her job. Second, a discriminatory remark, even if it was not made by a decision maker or directly in the context of an employment decision, may still be relevant, circumstantial evidence of discrimination. Third, it is "rarely appropriate" to dispose of harassment cases at the summary judgment stage of litigation. The Legislature also rejected two court decisions to the extent they decided a single incident of harassing conduct could not establish the existence of a hostile working environment and that the legal standard for sexual harassment may vary by the type of workplace.
- **Conduct of Non-Employees.** Employers are now liable for the unlawful harassment of its employees, applicants, unpaid interns, volunteers, and certain contractors by non-employees. An employer's liability for such conduct of non-employees is no longer limited to "sexual" harassment but can include any basis of unlawful harassment such as race, ethnicity, disability, etc.

These changes to FEHA serve as a reminder that taking steps to prevent sexual harassment in the workplace is critical. These steps include, but are not limited to, implementing effective trainings and policies and promptly addressing any inappropriate conduct in the workplace. Employers should consult with an attorney before entering into any agreement with an employee that may waive their rights and claims under FEHA.

For more information about SB 1300, SB 1343, or best practices related to the prevention of and addressing sexual harassment in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

CLIENT NEWS BRIEF

California Adds “Nonbinary” Gender Option to Identification Documents, Impacting All Public Entities

On October 15, 2017, Governor Jerry Brown signed Senate Bill (SB) 179, known as the “Gender Recognition Act,” which adds a “nonbinary” gender option to state driver’s licenses, identification cards, and birth certificates. Most of this bill’s provisions are set to take effect on September 1, 2018, including a provision allowing an individual to petition a California court to recognize their gender as nonbinary, which would then allow them to subsequently request a new birth certificate reflecting their gender identity.

Public entities will need to address the nonbinary gender option now available to employees and students on official documents. Job application forms will likely require revision to allow the indication of nonbinary gender. Training may be necessary to inform employees about the new law and to re-instruct them about responding appropriately to new job applicants or existing employees who identify with a nonbinary gender, which could be included as part of a public entity’s sexual harassment training. SB 396, also passed in 2017, requires employers with 50 or more employees to conduct training on harassment based on gender identity, gender expression, and sexual orientation. Further, school employees will likely need guidance on how to address potential issues that may arise on campus regarding nonbinary persons.

SB 179 follows Assembly Bill (AB) 1266, made effective January 1, 2014, which allows students to participate in school programs and activities and use facilities consistent with their gender identity. While AB 1266 is often considered in relation to transgender students, the law itself refers to gender identity, which includes those identifying as nonbinary.

School districts, community college districts, and charter schools should update student forms to ensure the indication of nonbinary gender is available for the 2018-2019 school year. The California Department of Education, in its [guidance](#) on AB 1266, states, “when a school district receives documentation that a legal name or gender has been changed, the district must update the student’s official record accordingly.” This would apply to all official student records including a gender designation, including but not limited to enrollment and registrations forms, IEPs, 504 plans, report cards, and transcripts. Districts should also contact their electronic student information system providers to ensure electronic systems are updated accordingly in advance of the 2018-2019 school year.

If you have any questions about the implementation of SB 179, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

March 2018
Number 13



Dulcinea A. Grantham
Partner and Co-Chair
Labor & Employment Practice Group
Walnut Creek Office
dgrantham@lozanosmith.com



Sarah L. Garcia
Partner and Co-Chair
Student Practice Group
Walnut Creek Office
sgarcia@lozanosmith.com



Joshua Whiteside
Associate
Fresno Office
jwhiteside@lozanosmith.com

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

OCR Issues New Instructions on Transgender Student Complaints

The U.S. Department of Education's Office for Civil Rights (OCR) has issued new instructions to its regional directors regarding how to handle complaints involving transgender students. The document is intended to offer OCR staff additional guidance in light of recent court developments and the Trump Administration's withdrawal of the Obama Administration's guidance on transgender students. ([See 2017 Client News Brief No. 9.](#))

July 2017
Number 36

The instructions affirm that transgender students still have federal protections against discrimination, bullying and harassment and urge OCR investigators to "approach each case with great care and individualized attention" before dismissing and to look for a permissible jurisdictional basis for OCR to retain and pursue a complaint. They direct OCR staff to rely on Title IX regulations, federal court decisions and other OCR guidance in evaluating complaints of sex discrimination, whether or not an individual is transgender.

The instructions describe five scenarios in which OCR has jurisdiction over complaints involving transgender students, including:

- Failure to promptly and equitably resolve a transgender student's complaint of sex discrimination;
- Failure to assess whether sexual harassment or gender-based harassment of a transgender student created a hostile environment;
- Failure to take steps reasonably calculated to address sexual or gender-based harassment that creates a hostile environment;
- Retaliation against a transgender student after concerns about possible sex discrimination were brought to the recipient's attention; and
- Different treatment based on sex stereotyping.

Notably, failure to allow students to use the restroom consistent with their gender is not on the list. In fact, the instructions offer restroom access as an example of a type of case that might be dismissed. This is a clear shift in the approach set out in the Obama Administration's guidance, which required schools to allow transgender students access to bathrooms and locker rooms according to their gender identity.

Regardless of whether the instructions clarify the federal government's stance on transgender students' rights, pending a final judicial opinion interpreting federal laws, California school districts must continue to comply with the state's heightened anti-discrimination restrictions under California law. Since January 1, 2014, California's Assembly Bill (AB) 1266 has required that students be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity, irrespective of the gender listed on a student's records. ([See 2014 Client News Brief No. 14.](#)) Other California laws additionally prohibit discrimination against students based on their gender identities.

Schools and local education agencies should ensure they have board policies and regulations which are designed to address the needs and legal rights of



Sloan R. Simmons
Partner and Co-Chair
Litigation Practice Group
Sacramento Office
ssimmons@lozanosmith.com



Sara E. Santoyo
Associate
Fresno Office
ssantoyo@lozanosmith.com

LS Lozano Smith
ATTORNEYS AT LAW

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

July 2017
Number 36

both transgender and non-transgender students. For further guidance on best practices with regard to transgender student issues, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

DFEH Releases Guidelines on Anti-Harassment Policies, Training and Notice Regulations

The Department of Fair Employment and Housing (DFEH) recently released a [Workplace Harassment Guide](#) that includes recommended practices to enable employers to comply with California Fair Employment and Housing Act (FEHA) regulations aimed at preventing, investigating and addressing workplace harassment. DFEH also issued [guidance](#) and a [poster](#) related to identifying and addressing sexual harassment in the workplace.

June 2017
Number 33

Effective April 1, 2016, California employers became subject to new regulations under FEHA which prohibit workplace discrimination and harassment. The new anti-harassment regulations require employers to adopt and distribute written policies on unlawful harassment, including how complaints of prohibited conduct should be filed. The new regulations also require employers to provide trainings on prohibited harassment, discrimination, and abusive conduct. (For more details regarding these FEHA regulations, [see 2016 Client News Brief No. 30](#).)

DFEH's Workplace Harassment Guide provides valuable guidance on what employers can do to ensure an effective anti-harassment program and provides recommended practices for conducting workplace investigations. The guide's recommendations include:

- If an employer receives a report of harassment, including an anonymous complaint, the employer should give the complaint "top priority" and determine if the complaint may be resolved informally or if a formal investigation is necessary.
- Investigations should be fair and should include:
 - A thorough interview with the complainant, preferably in person;
 - An opportunity for the accused to respond and tell his/her side of the story;
 - Interviews of relevant witnesses and a review of relevant documents; and
 - A conclusion based on the information collected, reviewed and analyzed.
- Employers can only promise *limited* confidentiality of the complaint, in part because the identity of the complainant can often be determined based on the allegations. Also, it is rarely appropriate for an employer to fail to investigate a complaint because an employee asks their employer to keep the complaint confidential.
- Whether employers may direct employees to not discuss a pending investigation is a complicated issue. Employers should consult with legal counsel prior to giving such a directive. (For the Public Employment Relations Board's determination on "no contact" admonitions, [see 2015 Client News Brief No. 3](#).)



Marisa R. Lincoln
Partner

Sacramento Office

mlincoln@lozanosmith.com



Stephanie M. White
Associate

Walnut Creek Office

swhite@lozanosmith.com

LS Lozano Smith
ATTORNEYS AT LAW

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

June 2017
Number 33

- Investigations should be started and conducted promptly. Further, investigations should be fair, thorough, and conducted by a neutral investigator. Employers should also consider whether the investigator will be publicly perceived as unbiased.
- An investigator can reach a reasonable conclusion in a "he said/she said" situation based on an assessment of witness credibility.
- Investigators should document witness interviews, steps taken in the investigation and findings made.
- Investigators should make findings of fact (not legal conclusions) based on a "preponderance of the evidence" standard. "Preponderance of the evidence" means that it is more likely than not that the alleged conduct occurred.
- Misconduct should be addressed through remedial measures. Remedial measures recommended by DFEH include training, verbal counseling and discipline.
- Retaliation can occur at any time, and complainants and witnesses must be protected from retaliation.

In addition to DFEH's guidance, school and community college districts should be mindful of their own policies and procedures for conducting investigations, which may include specific timelines and investigation procedures, as well as applicable collective bargaining agreements.

Lozano Smith has a team of attorneys experienced in conducting investigations of complaints, including employee and student complaints alleging discrimination and harassment. For more information, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

CLIENT NEWS BRIEF

A Recent Federal Court Ruling Clarifies that Discrimination Claims Based on Sexual Orientation Are Covered Under Title IX as Sex Discrimination Claims

The United States District Court in *Videckis v. Pepperdine University*, (C.D. Cal., December 15, 2015) 2015 U.S. Dist. Lexis 167672, recently addressed the question of whether discrimination on the basis of sexual orientation is actionable under Title IX of the Education Amendments of 1972 (Title IX). In its decision, the court denounced any distinction prior courts have made between "sex discrimination" and "sexual orientation discrimination," and ruled that such a distinction is "illusory," "artificial" and "does not exist." The court held that sexual orientation discrimination is sexual harassment and thus covered under Title IX.

In *Videckis*, two female, student athletes, Layana White and Haley Videckis (jointly referred to as "Plaintiffs") filed suit against Pepperdine University, alleging that their basketball coach, Coach Ryan, and other staff members harassed and discriminated against them after concluding that Ms. White and Ms. Videckis were lesbians and were in a relationship. Specifically, Ms. White and Ms. Videckis claimed they were repeatedly interrogated by Coach Ryan and asked, among other things, how close they were to each other, whether they took vacations together, where they slept, whether they went on dates, and whether they would live together. Plaintiffs claimed they were also told by Coach Ryan that lesbianism was a big concern for him and for women's basketball, that it was a reason why teams lose, and that it would not be tolerated on the team.

Plaintiffs further alleged they were not cleared to play basketball because of Pepperdine University's discriminatory views. Ms. White's request that an appeal be filed with the NCAA to allow her to play basketball as a transfer student was ignored. Similarly, Ms. Videckis who had previously sustained a tailbone injury, was not cleared by the staff to play basketball even after she submitted her medical records, which verified she had no physical restrictions or limitations. Ms. White claimed the stress of discrimination caused her to suffer from severe depression and even attempt suicide.

Nevertheless, Pepperdine University requested that the court dismiss three of Plaintiffs' seven claims and argued that Title IX did not apply to claims based on sexual orientation. Plaintiffs argued that they had an actionable Title IX claim because Title IX covers sexual orientation discrimination, even if Title IX does not explicitly state so.

Title IX provides, in relevant part, that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." (20 U.S.C. § 1681(a)) In interpreting Title IX, courts often look to Title VII of the Civil Rights Act of 1964 (Title VII) because the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." (*Videckis*, 2015 U.S. Dist. Lexis 167672 at 14, citing *Emeldi v. Univ. of Oregon* (9th Cir. 2012) 698 F.3d 715, 724.) Title VII protects individuals against employment discrimination on the basis of race, color, national origin, sex, and religion. (Title VII, 42 U.S.C. § 2000e et. seq.)

February 2016
Number 7



Michelle L. Cannon
Senior Counsel
Sacramento Office
mcannon@lozanosmith.com



Stephanie M. White
Associate
Walnut Creek Office
swhite@lozanosmith.com

LS Lozano Smith
ATTORNEYS AT LAW

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

February 2016
Number 7

Prior court decisions have found that "sex" for purposes of Title IX and Title VII means "gender," applies "in the biological sense," and includes "discrimination based on gender stereotypes." (*Videckis*, 2015 U.S. Dist. Lexis 167672 at 14 (9th Cir. 2001).)

Considering past precedent, including a recent ruling under Title VII by the [Equal Employment Opportunity Commission](#) (EEOC), the *Videckis* court denied Pepperdine University's motion to dismiss Plaintiffs' Title IX claims based on sexual orientation discrimination. The court ruled "that sexual orientation discrimination is not a category distinct from sex or gender discrimination." (*Id.* at 23.) The court noted that "the "actual" sexual orientation of a plaintiff is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis." (*Id.* at 17.) The court went on to state:

Here, Plaintiffs allege that they were told that 'lesbianism' would not be tolerated on the team. If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment. Plaintiffs have stated a straightforward claim of sex discrimination under Title IX. (*Id.* at 22.)

While *Videckis* is non-precedential since it is a trial court decision, it is significant because it is the first time a federal court in California has ruled that allegations of discrimination based on sexuality states a Title IX claim on the basis of sex or gender. This holding likely expands the ability of gay and lesbian plaintiffs to successfully bring forth discrimination claims based on sexual orientation alone in the Title IX context. Plaintiffs will no longer be limited to challenging sexual orientation discrimination under Title IX as "gender nonconformity" (i.e., on the basis of one's appearance or mannerisms).

The law already prohibits discrimination based on sexual orientation. Now this prohibited form of discrimination may be actionable under Title IX as well. If you have any questions regarding this decision, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).



Lozano Smith
ATTORNEYS AT LAW

Disclaimer:

These materials and all discussions of these materials are for instructional purposes only and do not constitute legal advice. **If you need legal advice, you should contact your local counsel or an attorney at Lozano Smith.** If you are interested in having other in-service programs presented, please contact clientservices@lozanosmith.com or call (559) 431-5600.

Copyright © 2019 Lozano Smith All rights reserved.

No portion of this work may be copied, distributed, sold or used for any commercial advantage or private gain, nor any derivative work prepared therefrom, nor shall any sub-license be granted, without the express prior written permission of Lozano Smith through its Managing Partner. The Managing Partner of Lozano Smith hereby grants permission to any client of Lozano Smith to whom Lozano Smith provides a copy to use such copy intact and solely for the internal purposes of such client. By accepting this product, recipient agrees it shall not use the work except consistent with the terms of this limited license.