Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

Title IX & BP 3205 Basic Training in Prevention of Sexual Harassment and Assault

for Title IX Coordinators, Decision Makers, Investigators, and "any person who facilitates an informal resolution process"

by Donald F. Austin, MAT, JD
Patterson Buchanan Fobes & Leitch, Inc., P.S.
February 26, 2023

I. General Rule of Law:

A. 20 U.S.C.A. § 1681(a):

1. Title IX prohibition against discrimination based on sex:

"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 ." 20 U.S.C. § 1681, originally enacted in 1972.)

a. ***Athletics:*** Parity in sports and equal access to facilities.

b. **Preventing discrimination on the basis of sex in programs or activities.** (The focus of this presentation)

c. ***Gender identity:*** Biden administration "**Executive Order No. 14021**, "Guaranteeing and Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity." (March 8, 2021.)

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

d. See also, BP 3211/3211P, RCW 28A.640.477, RCW chpt. 28A.640, and WAC chpt. 162-32.[1]

---

2. **The "teeth" in Title IX:**
   - **a.** Loss of federal funding.
   - **b.** OCR or DOJ investigations and attendant "Resolution Agreements," remedial actions, and federal oversight.
   - **c.** Potential school district liability

3. **Other applicable sexual harassment laws:**
   - **a. Title VII:** Sex discrimination in employment.
   - **b. Washington Law Against Discrimination (WLAD): RCW 49.60.030(1) --** Freedom from discrimination—Declaration of civil rights**.**

[1] See also, *Bostock v. Clayton Co*., 140 S.Ct. 1731 (U.S. 2020) [held that an employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex, by firing an individual for being homosexual or being a transgender person].

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

"The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, **sex,** honorably discharged veteran or military status, **sexual orientation**, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. . . ."

---

c. BP 3205 & 3205P – Sexual Harassment of Students. **[Ultimately, refer to your district's BP3205/P.** WSSDA Policies vary depending on whether they have been updated or whether a district inserts revisions into them before enacting them.]

Patterson Buchanan Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

II. Training Necessary

A. Title IX Trio:

1. ***Title IX Coordinator***
    a. Coordinates the district's state and federal sex discrimination and sexual harassment regulation compliance efforts. (*See **3205P***.)

2. ***Title IX Investigator***
    b. Must receive training in Title IX and parallel RCWs and in investigations; conducts Title IX investigations. (*See **3205P***.)
    c. No conflicts of interest or bias as to anything investigated.
    d. Responsible for a **prompt, thorough, fair, and accurate** investigation.
        - Unwarranted delay may violate Title IX
        - Whether an investigation is conducted and completed promptly depends on the situation
        - A rushed investigation may violate Title IX.

3. ***Title IX Decision Maker***
    e. Reaches the final determination of responsibility for alleged Title IX sexual harassment will be the Superintendent or designee. (*See **3205P***.)

B. What training is required by Title IX?

1. 3205P at Tab 9, pp. 7-8 (quoted below at II.C.)
    a. Title IX Coordinator
    b. Title IX Decision Maker
    c. Title IX Investigator
    d. People facilitating Title IX informal resolution

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

2. 34 C.F.R. § 106.45(b)(1)(iii). (Same as 3205P quoted below.)

3. ***But!!!!*** *Check out Tab 5*:
--DOJ settlement agreement training requirements.

B. **3205P** at Tab 9, p. 7**:** "Any individual designated as **Title IX Coordinator, an investigator, or decision-maker, and any person who facilitates an informal resolution process** must not have a conflict of interest or bias for or against the individual(s) who made the complaint ("complainant(s)") or the individual(s) reported to be the perpetrator of the conduct that could constitute sexual harassment ("respondent(s)") in general or individually, and **must receive training on the following:**

a) **The definition of sexual harassment under Title IX and state law**;[2]

[2] Addressed today.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

b) The scope of the District's education program or activity;

c) How to conduct an investigation and grievance process and informal resolution process;[3]

d) How to serve impartially;[4]

e) Their responsibilities chapter WAC 392-190 WAC; and

f) How to raise awareness of and eliminate bias based on sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal.

4. BP 3205 at Tab 9, p. 4 and **3205P** at Tab 9, p. 7**:**

- The superintendent will develop procedures to provide age-appropriate information and education to **District staff, students, parents and volunteers** regarding this policy and the recognition and prevention of sexual harassment. **At a minimum** sexual harassment recognition and prevention and the elements of this policy will be included **in staff, student, and regular volunteer orientation**. This policy and the procedure, which includes the complaint process, will be posted in each District building in a place available to staff, students, parents, volunteers, and visitors. Information about the policy and procedure will be clearly stated and **conspicuously posted** throughout each school building,

[3] Introduced today.
[4] Addressed today.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

provided to each employee and reproduced in each student, staff, volunteer, and parent handbook. Such notices will identify the District's Title IX coordinator and provide contact information, including the coordinator's email address.

- District **investigators** must also receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

- District **decision-makers** must also receive training on any technology to be used during hearings if the District provides for a hearing, and on issues of relevance of questions and evidence, including the requirement that questions and evidence about a complainant's sexual predisposition or prior sexual conduct are not relevant unless 1) such questions and evidence is offered to prove that someone other than the respondent committed the alleged conduct or 2) questions and evidence concerning specific incidents of the complainant's prior sexual behavior with respect to the respondent is offered to prove consent.

- Any **training materials** used to train **Title IX** Coordinators, investigators, decision-makers, and **any person who facilitates an informal resolution process** must **not rely on sex stereotypes** and must promote **impartial investigations** and **adjudications** of complaints. The District shall **maintain** for a period of **seven years records of any informal resolution and the result**; and all **materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, and make such materials **available on the District's website**.

C. Highly Recommended Training:

---BP 5253 Professional Boundaries.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

III. Definitions of Sexual Harassment:

A. ***Title IX definition***: 34 C.F.R. § 106.30(a).

> ***Sexual harassment*** means conduct on the basis of sex that satisfies one or more of the following:
>
> (1) An **employee** of the recipient **conditioning** the provision of an aid, **benefit**, or service of the recipient on an individual's **participation in unwelcome sexual conduct**;[5]
>
> (2) **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 recipient's education program or activity;[6] or
>
> (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

B. WAC 392-190-056:

> **WAC 392-190-056: Sexual harassment—Definitions.**
>
> (1) As used in this chapter, "sexual harassment" means **unwelcome sexual advances**, requests for sexual favors, sexually motivated physical contact, **or other verbal or physical conduct or communication of a sexual nature** between two or more individuals if:

[5] Quid pro quo sexual harassment.
[6] Hostile educational environment sexual harassment. (**HEE**.)

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

(a) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;[7]

(b) Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or

(c) That conduct or communication has the purpose or effect of **substantially interfering** with an individual's educational or work performance, or of **creating an intimidating, hostile, or offensive educational or work environment**.

(2) For the purpose of this definition, sexual harassment may include conduct or communication that involves adult to student, student to adult, student to student, adult to adult, male to female, female to male, male to male, and female to female.

_____

_____

_____

_____

_____

7 Subsections (a) and (b) here are quid pro quo (this for that) sexual harassment.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

C. Board Policy 3205 definition:

For purposes of this policy, sexual harassment means **unwelcome conduct** or communication of a **sexual nature**. Sexual harassment can occur adult to student, student to student or can be carried out by a group of students or adults and will be investigated by the District even if the alleged harasser is not a part of the school staff or student body. The District prohibits sexual harassment of students by other students, employees, or third parties involved in District activities. The term "sexual harassment" **may include**:

1) acts of sexual violence;

2) unwelcome sexual or gender-directed conduct or communication that interferes with an individual's educational performance or creates an intimidating, hostile, or offensive environment;

3) unwelcome sexual advances;

4) unwelcome requests for sexual favors;

5) sexual demands when submission is a stated or implied condition of obtaining an educational benefit;

6) sexual demands where submission or rejection is a factor in an academic, or other school-related decision affecting an individual.

The WAC and BP 3205/P both include quid pro quo and HEE sexual harassment. Title IX mentions the reasonable person standard which is in case law.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

D. Which definition applies in with a Title IX complaint?

1. All three. Consider them to be congruent.

- There is no evidence that the legislature, OSPI, or WSSDA aimed at coming up with a definition different from the definition in federal law.

5. Sexual harassment and sexism.

1. Is sexism sexual harassment?

2. What guidance is there determining when boorish behavior becomes discrimination?

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

IV. Generally---Title IX and the Law of Sexual Harassment

A. Historical Context of Title IX and Discrimination Law:

1. ***Federal Civil Rights Acts***: 1866, 1871, 1875, 1957, 1960, 1964.

2. ***The 1964 act*** prohibits discrimination based on race, color, religion, **sex**, and national origin; sexual orientation and gender identity later added.

3. ***Title IX of the Education Amendments Act of 1972***: augmented the 1964 act, **prohibiting sex-based discrimination in any school** or any other education program receiving federal funding.

4. ***The Washington Law Against Discrimination***, RCW chpt. 49.60 (WLAD) enacted in 1949 and augmented many times since then:

    a. ***Protected categories as of 2020:*** prohibits discrimination in places of public accommodation on the basis of: "race, creed, color, national origin, citizenship or immigration status, **sex**, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability . . . ." (RCW 49.60.030(1).)

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

b. ***Schools are places of public accommodation***: *WH v. Olympia SD*, 195 Wash.2d 779 (2020).

5. ***Meritor Savings Bank v. Vinson***, 477 U.S. 57 (1986) (19 yo bank teller sexually harassed and rated by a supervisor; recognizing for the first time that sexual harassment is a violation of Title VII of the Civil Rights Act of 1964.)

_____

_____

6. ***Ellison v. Brady***, 924 F.2d 872 (9th Cir. 1990) (rejected the "reasonable person" standard for determining whether actions constituted sexual harassment, replacing it with the "reasonable woman" standard).

_____

_____

7. ***Davis v. Monroe County Board of Education***, 526 U.S. 629 (1999) (alleged that a 5th grade boy was repeatedly attempting to fondle, touching, and directing offensive language toward a female classmate; holding that a school district may be liable for damages under Title IX.)

   •for failing to stop student-to-student sexual harassment where the school has been **deliberately indifferent** to known acts of harassment, and

Patterson Buchanan Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

- the court also required that the harassment be "serious enough to have the systemic effect of **denying the victim equal access to an education program or activity**."

B. **Liability burden of proof difference between Title IX and WLAD:**

1. ***Title IX burden of proof:*** The discrimination must be **"intentional."** Deliberate indifference to known acts of harassment or discrimination effectively depriving the victim of access to education. (*Davis v. Monroe Co. SD.*)

   - This is the standard for proving liability in a monetary damages case.

   - ***Note, OCR & DOJ lower standard:*** DOJ and OCR will follow a lower, **preponderance** of the evidence standard, as they are not looking to find a school district liable, but are looking to see whether the school district has taken proper actions with board policies, trainings, investigations, and response to harassment complaints.

2. ***WLAD burden of proof:*** Unnecessary to show intentional discrimination. (*SL-M v. Dieringer SD*, 614 F.Supp.2d 1152 (Wash. D.C. 2008). A preponderance of the evidence standard is applied. This is akin to deciding whether the school district was negligent in protecting kids from sexual harassment.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

3. **Example of burden of proof** for Title IX and WLAD differing in monetary damages cases:

----***Patel v. Kent School District***, 648 F.3d 965 (2011).

- ***Facts:***
  - SpEd female student had a safety plan for one-one supervision going to the restroom
  - Fears she would be taken advantage of due to cognitive functioning
  - SpEd class next door to rest room
  - Teacher allowed girl to use restroom unaccompanied
  - Raped on a number of occasions by other students
- ***Held:*** No violation of Title IX or Davis v. Monroe Co. Bd. of Educ. since the teacher did not know that rapes were taking place
  - Therefore, the teacher was not "deliberately indifferent" to know acts of discrimination.
  - Therefore, the federal claims were dismissed.

- ***But:*** there was a negligence and WLAD claim too. The case would have proceeded on the negligent and WLAD claims with the prevailing plaintiff recovering attorney fees.

C. **Burden of proof in a DOJ or OCR Title IX investigation:** Preponderance of the evidence.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

V. *General Principles:* School Legal Duties in Situations Requiring Investigation.

1. Potential claims or lawsuits should be **referred to your insurance promptly**.

2. **Train staff** in discrimination policies and procedures and what their responsibilities are.

    - ***Recommendation:*** Do not rely entirely on on-line trainings.

3. **Train students and employees** in what to do when HIB or unlawful harassment occurs.

4. **Protect the complainant and respondent** from retaliation.
    - Institute **supportive measures** for the complainant and respondent. (Title IX, 34 CFR § 106.44(a).)

        - ***Practice Tip:*** *Welfare checks* and *retaliation warnings* are key.

5. **Investigate** with an **experienced and/or trained investigator** to accurately determine **what happened.**

6. **Document what happened.** *(Via report or ESIS[8].)*

7. **Take appropriate**, often corrective, **action** based on your investigation.

[8] Electronic Student Information System.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

VI. A Deep Dive into Title IX Regulations *(Tabs 2 & 3)*

A. ***Schadenfreude:*** *Mercer Island v. OSPI* (Tab 16.)

B. **Overview of the Title IX Process**: (Tabs 2 & 3.)

1. **Policy adopted (BP 3205) and kept up to date.**
2. **Assign** Title IX Coordinator, Investigator(s), and Decision Maker.
3. **Training:** Staff, students, parents.
4. **Response** to situations, generally:

a. **First report** of the situation

- **Supportive measures**

b. **Inform District Office** (Title IX Coordinator)

- Title IX issue?
- If so, oversee the process.
- If not, District applies other policies[9]

c. Follow the **Grievance Process** for Title IX issues:

i. Written notices to complainant and respondent
ii. Investigation of the complaint
iii. Investigation report provided to the parties
iv. Written determination of responsibility
v. Hearing after investigation (if BP 3205 requires)
vi. Appeals.

d. Recordkeeping
e. Retaliation

C. **Additional definitions** -- 34 C.F.R. § 106.30 & .31 at Tab 3.

[9] *I.e.*, BP 3207/P, BP 5253/P, BP 320/P, BP 3211/P.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

D. **Responding to a complaint** -- 34 C.F.R. § 106.44, .45, and .71 (Tab 2).

VII. Have In Place Before Investigations

A. **Maintain an updated version of BP 3205/P**.

1. Title IX Coordinator should be in charge of reviewing any WSSDA updates to BP 3205/P.

B. Select the Title IX Coordinator, Investigator(s), and Decision Maker.

1. Title IX Coordinator and Site Administration should also be aware of other Board Policies requiring investigations (Tab 10).

C. **Understand bias and understand yourself.**

1. A **bias is a tendency to favor or disfavor** a group, an individual, or something. It may or may not amount to inappropriate prejudice. It may or may not affect the way one behaves. It may or may not be something of which one is aware.

2. Anyone dealing with Title IX situations needs to be reflective or their personal tendencies to favor or disfavor groups, individuals, or things.

3. Contemplate your reaction to "them"/"outsider" groups.
    a. Where does it come from?
    b. Does it make sense in the context of the situation?

Patterson Buchanan Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

c. Does it affect the way I interact with "them"?
d. Understanding that there may be a bias, are you able to deal objectively with a situation and make an "objective evaluation of the evidence"?

_____

_____

_____

_____

D. ***DFA note: Caution concerning implicit bias, evidence, and Title IX investigations***:

1. ***Background:*** This information on implicit bias was learned in working with a social psychologist in a case where the plaintiff was accusing her employer of not promoting her based on implicit bias against women.

    a. There was no direct evidence, no smoking gun action which illustrated such bias by the employer.
    b. A Snohomish County jury found in favor of the employer.

2. ***Implicit bias:*** "An implicit bias is [defined as] **an unconscious association, belief, or attitude toward any social group**." Due to implicit biases, some social psychologists believe that "people may often attribute certain qualities or characteristics to all members of a particular group, a phenomenon known as stereotyping." ("Explanations and Impacts of Unconscious Bias," by

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

Kendra Cherry, M.S. 9/18/20.)

3. However, other social psychologists are skeptical about the state of the research on implicit bias, including whether there is evidence that it truly exists or if it does exist, whether it causes people to behave in biased ways. ("Six Lessons for a Cogent Science of Implicit Bias and Its Criticism," by Bertram Gawronski, Ph.D. article published in *Perspectives on Psychological Science* (2019).)

4. Some studies have found flaws in assessments which supposedly measure a person's implicit bias. For instance, after taking a test on whether individuals are implicitly biased about a particular class of people, **post-testing also shows those same people are able to accurately predict their scores on implicit measures**. (See, e.g., Hahn & Gawronoski, 2019, Hah, Judd, Hirsch, & Blair, 2014.) Ergo, if someone can tell you what their implicit biases are, are those biases unconscious?

5. Whether implicit bias exists, whether it can be measured with assessment tools, and whether it affects one's actions unconsciously are question for social psychologists to answer through continued research.

_____

_____

_____

6. **Layers of potential implicit bias -- illustrative scenario:**

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

Query: A 30 year old white, male sexual harassment investigator concludes that a 65 year old white, male construction site supervisor was implicitly biased against women and sexually harassing two younger women construction workers. The investigator believed that implicit bias was in play when the older male would refer to female workers as "the girls" and would unfairly criticize them when they did not work as quickly as male workers.

Question: Is implicit bias at play in this scenario? If so, how?

Key take-aways on current research regarding implicit bias and Title IX investigations:[10]

1) **Title IX investigation conclusions must be objectively based on the evidence.** (34 C.F.R. § 106.45(b)(1)(ii) states: The investigation must "[r]equire an **objective evaluation of all relevant evidence**—including both inculpatory and exculpatory evidence—and provide that **credibility determinations** may not be based on a person's status as a complainant, respondent, or witness."

   --Nor should they depend on whether the respondent is a middle aged white male or a 20 year old Duke lacrosse player.)

2) **Pay attention to behaviors**, not your impressions which are not based on evidence. Unless your impressions are supported by articulable evidence, they should not be the basis of any conclusions. (Extensive conversations with Prof. Hart Blanton, Ph.D., social-psychologist and researcher at Texas A & M.)

[10] *E.g.,* B. Gawronski, A. Ledgerwood, and P. Eastwick, "Implicit Bias and Antidiscrimination Policy," in *Behavioral and Brain Science,* Vol. 7(2) 99-106 (2020).

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

3) The investigator in the "Query" scenario above may have been exercising his own implicit bias about older, white males with his conclusion. Or he may have been right. But whether it was implicit bias or outright bias made no difference to the finding. It was a red herring.

4) The investigator in the scenario actually had concrete, though limited, evidence of some degree of bias in the 70 year old supervisor which the investigator could base opinions on: calling the women "girls" and unfairly criticizing them.

Second query: Might interjecting implicit bias into an investigation's evaluation of evidence create a trap for decision makers in that attributing an implicit bias to someone else may be an exercise of the decision maker's own implicit bias?

Take-aways: Whatever the answer, **stick to an objective evaluation of the evidence.**

Whatever the answer, **as enlightened individuals who care about people, we can come to know and understand our own biases so that you are not trapped into acting upon them.**

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

E. General Counsel or other counsel to confer with.

F. Role of the investigator:

1. Find out the facts and accurately document them.
2. Make credibility determinations where necessary.[11]
3. As witness to tell about your investigation and possibly to defend its conclusions.

G. Be aware in selecting investigators of the eventual hearing or trial cross-examination of the investigator will be aimed at showing:

1. Untrained investigator
2. Inexperienced investigator
3. Incomplete investigation
4. Biased investigation or investigator
5. Preconceived result
6. Conclusions were not supported by evidence

H. Title IX Investigator attributes:

1. **Title IX trained**

2. **Experienced or trained** in conducting investigations (DCL 4/4/2011).

[11] See 6/18/99 EEOC Guidelines re credibility determinations.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com

3. **Unbiased and without conflicts of interest** (34 C.F.R. § 106.45(b)(1)(iii).)

4. Goes where the facts take him/her.

5. ***Bird-walk*** on some other biases:
   a. **Famous last words** of site administration leading to sexual abuse claims: ***"I never saw it coming."***

   b. Sex Offender Treatment Providers tell us this is in part because the of following biases.

- ***Confirmation bias*** _______
- ***Authority bias*** _____
- ***Conformity bias*** _____
- ***Affinity bias*** _____

6. Be aware of ***how these biases can cause blind spots in one's objectivity*** and thereby hopefully avoid decision making based on such biases.

Practice tip: **How long should an investigation take?**:

- Title IX requires a process which provides for a "**prompt and equitable resolution"** of Title IX complaints. (34 C.F.R. § 106.8(c).) DOJ says sexual assault investigations are normally completed within 60 days.

Patterson Buchanan
Fobes & Leitch INC. P.S.

SEATTLE
1000 Second Ave., 30th Floor
SEATTLE, WA 98104
P 206.462.6700 |F 206.462.6701

PORTLAND
1001 SW FIFTH, Suite 1100
PORTLAND, OR 97204
P 503.200.5400 |F 503.200.5401

Donald F. Austin, MAT, JD
O: 206.462.6708 C: 206.245.5819
dfa@pattersonbuchanan.com