TITLE IX PART II - CONDUCTING TITLE IX INVESTIGATIONS K-12

October 14, 2020

Presented by:

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Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).

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## Title IX Part II – Conducting Title IX Investigations
### K-12

**October 14, 2020**

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Title IX Part II:
Conducting Title IX Investigations
October 14, 2020

Presented by:
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Agenda

• Workshop series
• Brief overview of Title IX
• Conducting impartial investigations
• Legally compliant investigation reports
• Decision-making process
• Investigation-related issues
• Next steps

Fall 2020
Title IX Workshop Series at SCOE
• Part 1 — Title IX Coordinator Essentials, September 15, 2020
• Part 3 – Nuts and Bolts of the Roles of the Title IX Coordinator and Decision-maker, November 10, 2020
• Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 8, 2020
I. Brief Overview of Title IX

What is 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 educational program or activity receiving federal financial assistance.”


What Is Title IX?

• Title IX of the Education Amendments of 1972
• Established to combat discrimination against women in the educational system
• Two objectives:
  • Prevent use of federal resources to support discriminatory practices in education
  • Provide individuals with protection against those practices
• Title IX protects any “person” against sex discrimination – both males and females
What Is Title IX?

• Title IX applies to “recipients of Federal financial assistance.”

• Every recipient must ensure that a student is not denied or limited in the ability to participate in or benefit from a school program or activity on the basis of sex.

Title IX Legal Framework

• Federal law
• Implementing regulations
  • New TIX regulations (effective 8/14/20)
• Regulatory Guidance
  • RESCINDED - 2001 Revised Sexual Harassment Guidance
  • RESCINDED - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide
  • RESCINDED - 2017 Interim Guide: Q&A on Campus Sexual Misconduct

Where Does Title IX Apply?

• Title IX protects students in connection with all academic, educational, extracurricular, athletic, and other programs of the district.

• Programs can take place in a district facility, on a school bus, at a program sponsored by the district at another location, or on a school-sponsored field trip.
Where Does Title IX Not Apply?

• Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient will not be covered under Title IX.

• When might jurisdiction not exist?
  • When conduct occurs off campus via social media
  • When conduct occurs outside of the United States

Educational Program or Activities

• Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

• Includes any building owned or controlled by a student organization that is officially recognized by the CCD.

Defined Terms

• Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

• Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

• Recipient means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.
Sex-Based Discrimination

• Title IX prohibits sex-based discrimination
• Sex-based discrimination includes:
  • Sexual harassment
  • Sexual violence
  • Discrimination based on gender stereotypes
  • Gender-based discrimination
• Does NOT prohibit discrimination on the basis of sexual orientation (but California law does)

Title IX Sexual Harassment

(1) Unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;
(2) Quid pro quo harassment; or
(3) Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

Clery Act/VAWA Definitions

(2) Dating violence – 34 U.S.C. 12291(a)(10) – “The term “dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.”
Clery Act/VAWA Definitions

3. Domestic Violence – 34 U.S.C. 12291(a)(8) – “The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

4. Stalking – 34 U.S.C. 12291(a)(8) – “The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

General Response to Sexual Harassment

• Once a recipient has actual knowledge of sexual harassment in an education program or activity of the recipient, it must respond promptly in a manner that is not deliberately indifferent.
• A response is deliberately indifferent only if it’s response to sexual harassment is clearly unreasonable in light of the known circumstances.
• The 2001 Guidance (now rescinded) stated that recipients must take action in response to sexual harassment that is reasonably calculated to stop harassment and prevent recurrence of harassment.
• DOE has clarified that it will not unrealistically hold recipient’s responsible where the recipient took action that was not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends.

Actual Knowledge

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment…Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.”
Receiving Actual Knowledge

- **K-12:**
  - Any elementary and secondary school employee.
- **CCD:**
  - The institution’s Title IX Coordinator, or any official who has authority to institute corrective measures on behalf of the recipient.

Responding to Notice

- Title IX Coordinator is responsible to **promptly contact** the Complainant and discuss:
  - Availability of Supportive Measures,
  - Option to File Formal Complaint, and
  - Formal Complaint Process.
- Title IX Coordinator must determine whether Title IX jurisdiction exists.

Supportive Measures

“Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”
Supportive Measures

• Counseling
• Extensions of deadlines or other course-related adjustments
• Modifications of work or class schedules
• Campus escort services
• Mutual restrictions on contact between the parties
• Changes in work or housing locations
• Leaves of absence
• Increased security and monitoring of certain areas of the campus
• Other similar measures

II. Conducting Impartial Investigations

What is an Investigation?

• It is the process by which a school determines whether or not the conduct occurred based on the standard of evidence used
• The DOE used to take the position that an investigation included both the fact-finding and decision-making process (excluding appeals)
• Under the new Title IX regulations, the investigation is a separate process from the decision-making process; however, both are integral parts of the Grievance Process
Title IX Grievance Process

• Under the Title IX Grievance Process, the investigator must:
  • Treat complainants and respondents equitably.
  • Objectively evaluate all relevant evidence.
  • Possess no conflict of interest or bias.
  • Have received training on the definition of sexual harassment, scope of the recipient’s education program or activity, how to conduct an investigation.
  • Presume the respondent is innocent.
  • Be aware of supportive services available to the complainant.

Investigation Process Requirements

• Burden of gathering evidence is on the recipient – not the complainant, respondent, or witnesses.
• Complainant and Respondent are provided equal opportunity to present evidence, including witnesses.
• No “gag-orders;” either party must be allowed to discuss the allegations and gather evidence.

Investigation Process, Cont’d.

• Allow both parties to have advisor present throughout process.
• Provide notice of all proceedings to parties expected to attend.
• Both parties may review the evidence and have opportunity to meaningfully respond before final report.
• Prepare and issue a final investigation report.
Investigations Will Vary by Institution

- The specific steps in a recipient’s Title IX investigation will vary depending on:
  - Nature of the allegation(s)
  - Source of the complaint
  - Age of student(s) involved
  - Size and administrative structure of school
  - State or local legal requirements (such as mandatory reporting or Title 5 regulations)
  - Lessons learned from past experiences

Investigations May Include:

- Conducting interviews
  - Complainant
  - Respondent
  - Other witnesses
- Reviewing student and personnel files
- Reviewing law enforcement documents, if applicable
- Gathering and examining other relevant documents or evidence
- Hiring an outside investigator

Selecting the Investigator

- Manager or supervisor
- HR professional (in-house)
- HR consultant (3rd party), but only if licensed as attorney or PI
- Private investigator
- In-house counsel
- Outside counsel
Selecting the Investigator

- Factors to consider when choosing an “outside” investigator:
  - Does the complaint present a high level of potential liability for the district?
  - Must the investigation be completed in a very short time frame and district employees cannot meet the timelines?
  - Will the investigation be so complicated or involved, that district employees cannot reasonably be reassigned to handle it?
  - Is the matter extremely sensitive or must it be handled with a heightened level of confidentiality?
  - Does the matter involve many of the individuals who would normally conduct the investigation?

Investigator Qualifications

- An equitable investigation requires a trained investigator to:
  - Analyze and document available evidence
  - Develop reliable decisions
  - Objectively evaluate the credibility of parties and witnesses
  - Synthesize all available evidence
  - Take into account unique and complex circumstances of each case
  - Investigator may not rely on sex stereotypes or generalizations in conducting investigation or reaching conclusions

Investigation Fundamentals: First Steps

1. Review the applicable procedure
   - Enter the case into a complaint log
   - Map out the steps and timeline for the investigation based on the procedure
   - Make sure required notices are sent, including copies of the applicable procedure and other information required by the procedure
2. Develop an investigative strategy
   - Outline scope and breadth of investigation
   - Determine who should be interviewed and what information should be reviewed
Investigation Fundamentals: Next Steps

3. Determine who will be part of the investigation team
   - District employees
   - Outside investigators

4. Conduct the investigation
   - Begin promptly
   - Determine who should be interviewed, and in what order
   - Begin interviews with core people and broaden as needed
   - Before interviewing, outline interview questions, including elements of a particular complaint
   - Before interviewing, review related documents/records

Investigation Fundamentals, cont’d.

4. Conduct the investigation, cont’d
   - Prepare for interviews by identifying the following elements:
     - Identity of interviewer
     - Identity of person to be interviewed
     - Location, date, and time of interview
     - Conduct interview in confidential setting
     - Make arrangements to record interviews, if possible
       - California law requires informed consent of witness (632 P.C.)
     - Once recorder is on, state date, time & place of interview, name of participants and have witness confirm on tape his/her knowledge of & consent of the recording

Investigation Fundamentals, cont’d

• Should be looking for each element of the type of sexual harassment at issue
  - Hostile environment
  - Quid pro quo
  - Sexual assault, dating, domestic violence, or stalking

• Was each prong of the allegation met?
  - For example, hostile environment -
    (1) Unwelcome conduct on the basis of sex that is
    (2) Sufficiently severe, pervasive, and objectively offensive to
    (3) Effectively denies a person equal access to an education program or activity
Standard of Evidence

• There are two permissible standards of evidence for Title IX investigations:
  • Preponderance of the Evidence (>50%)
  • Clear and Convincing (>75%)
• Recipients must apply the same standard to Title IX investigations involving students as those investigations involving employees.

Written Notice of Allegations

• Title IX coordinator is responsible for providing the following information in a written notice to the parties:
  • Notice of recipient’s grievance process, including any informal resolution process; and
  • Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before an initial interview. This includes the identities of parties involved, if known, and the date and location of the alleged incident, if known.

Interviews

• Make appropriate disclosures (e.g., who you are, who you represent, why you are there)
• Explain that district is required to investigate allegations of [sexual harassment, sexual violence, sex discrimination] and take appropriate action
• State that no conclusions have been made and retaliation is prohibited
• Try to put interviewee at ease (use trauma-informed guidelines)
• Emphasize the expectation of best recollection and truthful answers
• Start with broad/overview questions
Interviews

- Have interviewee describe the incident(s)/conduct in his/her own words
- 5 W’s – who, what, when, where, why
- Ask if interviewee has told interviewer everything he/she can remember
- After each answer, ask: “is there anything else?”
- Ask follow up questions, including questions to confirm chronology of events, to fill in any gaps in the 5 W’s
- Don’t offer information or provide answers
- Ask about knowledge of any relationships between complainant & alleged wrong-doer or possible motivations for complaint or conduct at issue

Interviews

- Ask about and for copies of any relevant documents, texts, emails, photos, social media posts, etc.
- At the end of the interview:
  - Ask whether there is anyone else the interviewee thinks should be interviewed about the incident/conduct
  - Provide your contact information and advise the interviewee to contact you with any additional information
  - Give the interviewee a copy of the relevant procedure
  - Caution against retaliation
  - Remind the interviewee to maintain confidentiality
  - Advise interviewee you may need to follow-up with him/her as investigation proceeds

Interviews

- Be an active listener & critical thinker
  - “Does this make sense?”
  - “Do I understand exactly what happened?”
  - “Will someone else reading my report understand exactly what happened?”
- Use your time line to identify discrepancies between witness’ own story & that of others - challenge facts
Interviews

• Clarify basis for witness’ knowledge of a “fact”
  • How do they know?
    • Saw it? Heard it? Was involved in it?
  • Distinguish between “no” & “I cannot recall.”
  • Document carefully for later review

Interviews: Assessing Credibility

• Investigators should take into account all relevant evidence in determining witnesses’ credibility

• Should not rely solely on eye-witness accounts, tangible physical evidence, or an admission to corroborate either party’s story

Interviews: Assessing Credibility

• Factors to consider:
  • Changes in behavior of the complainant
  • Complainant telling another person about the discrimination
  • Other complaints against same respondent
  • Witnesses’ conduct during interviews, including body language, eye contact, tone, nervous behaviors, sweating
  • Consistent/inconsistent information
  • Corroboration by other witnesses, documents, or other evidence
  • How much detail did witness offer?

• Factors that aren’t as relevant: a delay in reporting, minor inconsistencies in story, that complainant and respondent once had a consensual relationship
Hot Seat

Which of the following is relevant to consider in a credibility determination?

1. Respondent says, “She was asking for it. Just look at what she was wearing!”
2. The complainant drops out of sports and drama club and starts missing school frequently.
3. Respondent’s witness says, “He’s such a good kid. I know he could never do what she’s accusing him of.” [sexual harassment investigation]
4. Respondent says, “It was an accident. I didn’t do it on purpose.” after putting his hand on a male student’s crotch.
5. Complainant writes in her journal after the assault about how the assault has impacted her.
6. Complainant tells his best friend that he’s been harassed by a football player for the past 3 months.
7. Respondent says, “We used to date. I know she’s okay with us fooling around.”
8. You’re the investigator. You diligently try to contact complainant to set up a time to interview her. She does not reply to your many overtures. When you try to approach her personally, she avoids you. When you finally get in touch with her, she says she doesn’t want to be involved.

Interviewing the Complainant

- Must be provided sufficient written notice in advance of any interview to prepare for meaningful participation
- Ask complainant specifically:
  - Has anything like this ever happened before? Use 5 W’s
  - The nature and past history of any relationship between complainant and respondent
  - Whether complainant has previously complained about the respondent, and if so, to whom
  - Whether anyone else knew of or joined in conduct complained of
  - Whether complainant is aware of other incidents by respondent toward other individuals
  - Whether any documents exist to support the allegations

Interviewing the Respondent

- Must be provided sufficient written notice (including the specific allegations) in advance of any interview to prepare for meaningful participation
- Verify that no determinations of wrongdoing have been made and that he/she will have a full opportunity to provide information
- Caution against retaliation
- The respondent (and complainant) should be allowed to have an advisor present
Interviewing the Respondent, cont’d.

• Provide respondent a copy of applicable complaint procedures and explain district’s obligation to investigate complaints
• Ascertain:
  • Whether respondent agrees with statements/allegations of complainant and other witnesses already interviewed
  • Whether any witnesses or other evidence exists that could corroborate respondent’s version of events
  • The nature and past history of any relationship between complainant and respondent
  • Whether respondent knows if complainant has previously made complaints of a similar nature about respondent or others

Interviewing Other Witnesses

• Advise witness to keep matter confidential
• Discuss prohibition against retaliation
• If witness is a minor, notify parent/guardian of need to interview minor
• Identify the relation of witnesses to the complainant and/or respondent
• Questions may include:
  • Ask them to describe event in own words
  • Does witness know of similar incidents/conduct
  • Identity of any other witnesses

Hot Seat

• Flip to Case Study
• Please review to identify:
  • Any issues you see with how the district handled this investigation
  • How you would conduct this investigation in compliance with Title IX
III. Legally Compliant Investigation Reports

Investigation Report

• Report should:
  • Fairly summarize relevant evidence, and
  • Be provided to complainant and respondent (and their advisors) for comment at least 10 days before a hearing or final determination.

Investigation Reports

• Follow your institution’s grievance procedures, and any applicable policies
• We recommend that it contain the following elements:
  • Parties
  • Incident – when was it reported, to whom; when did it take place
  • Alleged Violations – code of conduct, district policy, etc.
  • Interviews with parties
  • Additional information provided by parties
  • Summary of relevant evidence (e.g., information provided by witnesses, review of documentation, review of video footage, etc.)
  • Credibility determination
  • Findings of fact
  • Conclusion – “I conclude it is/is not more likely than not that respondent…”
Title 5 Requirements – CCD

- Written report required under Title 5 regulations
- Report must include:
  1. a description of the circumstances giving rise to the complaint;
  2. a summary of the testimony provided by each witness, including the complainant and any viable witnesses identified by the complainant in the complaint;
  3. an analysis of any relevant data or other evidence collected during the course of the investigation;
  4. a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and
  5. any other information deemed appropriate by the district.

Investigation Report Requirements (Per Cal. Law)

- **K-12 Decision** must include:
  - Findings of fact based on the evidence
  - Conclusions of law
  - Disposition of the complaint
  - Rationale for the disposition
  - Corrective actions, if any
  - Notice of appeal rights, if any
  (5 CCR 4631)

- **CCD Report** must include:
  - Description of circumstances giving rise to complaint
  - Summary of testimony provided by each witness
  - Analysis of relevant data and other evidence collected
  - Specific finding as to whether there is probable cause for each allegation
  - Any other information deemed appropriate
  (5 CCR 59334)

Findings of Fact and Conclusions

- Some evidence may not be in dispute
- Some evidence can be corroborated by the investigator
- Information from complainant or respondent may be corroborated by witnesses
- When information received from complainant and respondent differs on important points, make credibility determinations
- State what facts are determined to be true/untrue and what areas could not be determined (if any)
Findings of Fact and Conclusions, cont’d.

• Based on the facts and analysis, reach a conclusion:
  • 1) The complaint lacks merit
  • 2) The evidence was not conclusive and cannot support a determination as to the merits of the complaint
  • 3) The alleged conduct occurred, but did not meet the definition of sexual harassment under Title IX
  • 4) The alleged conduct occurred and met the definition of sexual harassment under Title IX
• Prepare a report

Interview Documentation

• Take and keep notes of interviews and the entire investigation (telephone conversations, meetings)
• Include date, time, and place of interview
• Include who attended the interview, and how long it lasted
• Note information provided by witnesses, and if it is consistent/inconsistent with information provided by other witnesses
• Note any documents/evidence provided during interview
• Note names of any potential witnesses provided by interviewee

Preserve Evidence

• Take note of when, where, and from whom an item was taken
• Store all evidence in a secure location
• If any items are surrendered to law enforcement, take a picture of the item and note when, where, and to whom it was surrendered
• Photograph physical injuries and promptly arrange for appropriate first aid/medical attention
• Title IX regulations require institutions to keep records to send to OCR for compliance reviews
• Certain records must be sent to CDE/Chancellor’s Office
Balancing Act

• The most defensible investigations will balance the rights of complainant and respondent

• Essentially, parties must be treated equally, including:
  • Equal opportunity to present witnesses and other relevant evidence
  • Same meaningful access to information used during any disciplinary meetings/hearings
  • Opportunity to respond to the investigation report in writing in advance of any decision of responsibility

IV. Decision Making

Cross-Examination Requirement

“With or without a hearing, after the recipient has sent the investigative report to the parties...and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.”
Reaching a Determination

Following a hearing, if one is held, or after the parties have had an opportunity to review the investigative report and submit questions, “[t]he decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”

Written Determination

- Must provide to parties simultaneously.
- The determination must contain:
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;

Written Determination, Cont’d.

- Conclusions regarding the application of the recipient’s code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
- The recipient’s procedures and permissible bases for the complainant and respondent to appeal.
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<th>Title 5 Requirements – CCD</th>
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<td>Administrative Determination</td>
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<td>• In any case not involving</td>
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<td>employment discrimination, within</td>
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<td>ninety (90) days of receiving a</td>
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<td>complaint, the district shall</td>
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<td>complete its investigation and</td>
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<td>investigative report to the</td>
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<td>Chancellor, a copy or summary of</td>
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<td>the report and written notice to</td>
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<td>the complainant setting forth</td>
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<td>all of the following:</td>
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<td>1. The chief executive officer’s</td>
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<td>Administrative Determination, cont’d.</td>
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<td>2. In the event a discrimination</td>
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<td>unlawful discrimination from</td>
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<td>occurring in the future;</td>
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<td>3. The proposed resolution of the</td>
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<td>4. The complainant's right to</td>
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<td>appeal to the district governing</td>
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<td>board and the Chancellor; and</td>
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<td>the respondent.</td>
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<th>Title 5 Requirements – CCD</th>
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<tr>
<td>Administrative Determination, cont’d.</td>
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<tr>
<td>• In any case involving employment</td>
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<td>discrimination, within ninety (90)</td>
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<tr>
<td>days of receiving a complaint, the</td>
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<td>district shall complete its</td>
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<td>investigation and forward a copy or</td>
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<tr>
<td>summary of the report and written</td>
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<tr>
<td>notice to the complainant setting</td>
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<td>forth all of the following:</td>
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<tr>
<td>1. The chief executive officer’s</td>
</tr>
<tr>
<td>or their designee’s determination</td>
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<tr>
<td>as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;</td>
</tr>
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</table>
Title 5 Requirements – CCD
Administrative Determination, cont’d.

2. If a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar acts of unlawful discrimination from occurring in the future;
3. The proposed resolution of the complaint; and
4. The complainant’s right to appeal to the district governing board or to file a complaint with Department of Fair Employment and Housing (DFEH).

• In any case involving unlawful discrimination, when a district provides the complainant with any information pursuant to this subdivision, the district shall also provide to the respondent the following:
  1. The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;
  2. The proposed resolution of the complaint, including any disciplinary action against the respondent; and
  3. In matters involving misconduct governed by section 59337(b) (Title IX and Student Discipline), the respondent’s right to appeal to the local governing board any disciplinary sanction imposed upon the respondent.
Title 5 Requirements – CCD
Title IX and Student Discipline Procedures (5 CCR 59337)

- In cases of student sexual misconduct subject to Title IX, district must comply with the federal DOE’s Title IX regulations.

- In cases of student sexual misconduct that are not subject to Title IX, when an accused student is subject to severe disciplinary sanctions, and the credibility of witnesses was central to the investigative findings, the district student discipline procedures must provide the following:
  1. An opportunity for the accused student to cross-examine witnesses indirectly at a live hearing, either in person or by videoconference; and
  2. A live hearing conducted by a neutral decision-maker other than the investigator.

V. Investigation-Related Issues
Confidentiality

• A complainant may no longer make a request for confidentiality in the course of an investigation
• Previously, requests for confidentiality were evaluated in light of the school’s responsibility to provide a safe and nondiscriminatory environment for all students
• The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

Retaliation

• Schools need to be cognizant of the possibility of retaliation against complainants and witnesses
• Schools must have procedures in place to protect against retaliatory harassment
• Complainants and their parents/guardians, as appropriate, should be advised how to report subsequent problems
• Any retaliation experienced by a complainant constitutes a separate Title IX violation

Hot Seat

Please work in groups to identify the issues and discuss how you would respond to this situation.

1. Complainant, Chris, tells Rocky Community College that he would like certain witnesses interviewed as part of the College’s investigation into his sexual assault. The witnesses refuse to be interviewed. College has strong reason to believe they were pressured not to participate in the investigation.
2. The alleged assailant is a star on the College’s football team. The College hires an attorney to preside over the Title IX hearing. The attorney is a former football player for the College and a regular donor to the football program.
**Parallel Criminal Investigations**

- A criminal investigation does not alleviate schools of their duty to conduct an independent Title IX investigation or respond promptly and effectively to complaints.
- Police investigations and reports are not necessarily determinative of whether harassment occurred under Title IX.
- School should not delay its investigation until the outcome of a criminal investigation or the filing of charges.

**Parallel Investigations – Coordinating with Law Enforcement**

- A school should coordinate with any other ongoing school or criminal investigations.
- Establish fact-finding roles for each investigator.
- Consider whether information can be shared among investigators to limit re-traumatizing victim.
- If applicable, consult with forensic expert to ensure evidence is correctly interpreted by school officials.
- Consider a memorandum of understanding with local law enforcement and local prosecutor’s office.

**Respondents’ Due Process Rights**

- Districts must provide due process to the respondent.
- The complaint procedure and investigation must be fair and impartial.
- The respondent may have a right under FERPA to inspect and review portions of the complaint that directly relate to him/her.
- The school must redact complainant’s name and other identifying information before allowing respondent to inspect and review sections of complaint that relate to him/her.
Pop Quiz

A college informed the respondent only that she was being investigated for “numerous nonconsensual interactions with the victim” over a 2 year period.

What issues do you see?

A Word on FERPA

• The Family Educational Rights and Privacy Act ("FERPA") prohibits educational institutions from disclosing information “maintained” in a student’s “education record"

• FERPA is implicated in two situations in the Title IX context

• Consult legal counsel with specific facts/questions

Another Word on FERPA

• FERPA permits a school to disclose to the complainant any information about the sanction imposed upon the perpetrator when the sanction directly relates to the complainant
  • Stay away order
  • Harasser is prohibited from attending school for a period of time
  • Perpetrator was transferred to another class, campus, or residence hall

• FERPA also permits community colleges to disclose to the complainant the final results of a disciplinary proceeding in certain instances*
Additional Clery Requirements

• The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to:
  • notify proper law enforcement authorities, including campus and local police,
  • be assisted by campus personnel in notifying such authorities.
• The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community.

Additional Clery Requirements

• Community colleges must provide simultaneous written notification to both parties of:
  • results of disciplinary proceeding,
  • notification of the institution’s appeal procedures, and
  • any changes to the result when it becomes final.
• Notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.

Additional Clery Requirement

• For community college districts, the Clery Act also requires districts to inform the complainant as to:
  • any final determination of the disciplinary investigation, and
  • any disciplinary sanctions imposed on the perpetrator.
• This requirement is limited to cases involving sexual assault, dating violence, domestic violence, or stalking.
• Includes all sanctions imposed on the perpetrator, not just those directly related to complainant.
Case Study – What Not To Do

- Respondent filed an OCR complaint against his school
- He was expelled after livestreaming a video of himself and a female student engaged in a sexual act without the female student’s knowledge or consent
- OCR found the school violated the respondent’s rights by:
  - Not interviewing him as part of investigation
  - Suspending him without an opportunity to be heard
  - Completing the whole investigation in 10 days
  - Deleting recordings of the hearing 10 days after conclusion of the appeal*
  - Not allowing the respondent to “cross-examine” the complainant*

The Language of Sexual Violence

- How you write your report creates the narrative of the case
- Be careful to avoid language that:
  - victim-blames (“she was passed out”)
  - deflects responsibility from the perpetrator (“the rape”)
  - talks about the act without an agent (“battered woman”)
  - makes the victim the subject of the sentence (“Chris was raped by Jamie” vs. “Jamie raped Chris”)
  - eroticizes, romanticizes, or describes sexual violence in an affectionate way (“Morgan caressed Taylor’s breasts”)
  - uses language of consensual sex (“he had sex with her” or “she performed oral sex on him”)

Hot Seat

How could you change the following statements to use more accountable language?

1. The rape occurred on Saturday, September 12 at approximately 1:15 am.
2. Robin is a rape victim.
3. This disciplinary action will impact Jordan [the harasser] for the rest of his life.
4. The allegation of sex-based harassment is sustained.
5. This is a classic “he said, she said” case.
6. The victim’s story is that the respondent drugged his drink.
7. The victim was date raped.
V. Next Steps

Our office is here to help!

Attend Parts 3 and 4 of our in-depth Title IX trainings this Fall 2020, with content specifically tailored to K-12 and community college districts.

Next Steps

### Additional Resources – K-12

- U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, [https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)
- U.S. Department of Education, Office for Civil Rights: Sexual Harassment Resources, [https://www2.ed.gov/about/offices/list/ocr/sexharassresources.html](https://www2.ed.gov/about/offices/list/ocr/sexharassresources.html)
- National Center on Safe Supportive Learning Environments, [https://safesupportivelearning.ed.gov/safe-place-to-learn-k12](https://safesupportivelearning.ed.gov/safe-place-to-learn-k12)
**Additional Resources – Community Colleges**

- U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, [https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)
- The Center for Changing Our Campus Culture, [www.changingourcampus.org](http://www.changingourcampus.org)
- California Office of the Attorney General, Campus Sexual Assault guidance and resources, [https://oag.ca.gov/campus-sexual-assault](https://oag.ca.gov/campus-sexual-assault)
- California Community Colleges Chancellor’s Office, [www.ccecco.edu](http://www.ccecco.edu)

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**Questions?**

Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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ATTACHMENTS
May 20, 2020

To: Superintendents, Member School Districts (K-12)

From: Monica D. Batanero, Sr. Assoc. General Counsel
       Kaitlyn A. Schwendeman, Schools Legal Counsel

Subject: New Title IX Regulations Effective August 14, 2020
       Memo No. 32-2020

The Department of Education on May 6, 2020, issued much-awaited final regulations on how K-12 school districts and college campuses must respond to allegations of sexual harassment. Secretary of Education Betsy DeVos said the final regulations under Title IX — which prohibits sex discrimination in federally funded educational institutions — were issued after considering various stakeholder comments and as many as 124,000 public comments made since the proposed guidelines were issued in November 2018.

The overall intent of the new Title IX regulations is to provide students accused of sexual misconduct with stronger due process protections. As a result, there are many additional requirements that include very specific grievance and investigation procedures that must be adopted by educational institutions.

The new regulations are scheduled to take effect August 14, 2020, and will require modification of current sexual harassment policies, including investigation procedures.

This office is offering a webinar, entitled “New Title IX Regulations for 2020-2021,” on June 3, 2020, from 1:00 p.m. to 4:00 p.m. where we will cover in more detail the new requirements under Title IX. You may register here: DETAILS/REGISTER.¹

¹ https://sclscal.org/workshop/new-title-ix-regulations-for-2020-2021-k-12-ccd/
Some of the more notable changes are detailed below:

**NEW TERMINOLOGY**

The regulations define the following terms to ensure consistency and clarity:

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

**DEFINITION OF SEXUAL HARASSMENT**

The new regulations provide that there are only three categories of conduct that could constitute sexual harassment under Title IX:

1. unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;

2. quid pro quo harassment;

3. sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

**What this means:** The final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party. However, when determining whether conduct meets the definition of sexual harassment, particularly under category 1 (hostile environment), the conduct must be severe, pervasive and objectively offensive. Previously, the legal standard was that the conduct has to be either severe or pervasive. This will result in a huge shift in how we analyze whether sexual conduct creates a hostile environment for a complainant and will make it more difficult for a complainant to argue that he/she has been subjected to a hostile environment due to sexual harassment. Notably, under the new regulations a single instance of harassment on the basis of sex can no longer be considered sexual harassment pursuant to the hostile environment analysis.

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2 34 CFR § 106.30
3 Quid pro quo sexual harassment is defined as “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 34 U.S.C. § 12291(a)(10)
6 34 U.S.C. § 12291(a)(8)
7 34 U.S.C. § 12291(a)(30)
It is important to note that conduct that falls under the other two categories – quid pro quo and Clery Act/VAWA offenses - do not have to meet the elements of “severe, pervasiveness, and objective offensiveness” such that a single instance of sufficiently severe harassment on the basis of sex may have the systemic effect of denying the victim equal access to an education program or activity.

Lastly, recipients may continue to address harassing conduct that does not meet the Title IX definition of sexual harassment under other provisions of the recipient’s own code of conduct.

**DESIGNATION OF A TITLE IX COORDINATOR**

The Department of Education (“DOE”) has clarified that each recipient must designate and authorize at least one employee to coordinate its efforts with its responsibilities under Title IX. The employee must be referred to as the “Title IX Coordinator” and the recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name and title, office address, electronic mail address, and telephone number of the employee designated as the Title IX Coordinator.

**What this means:** The DOE has expanded the groups of individuals/organizations that must be notified of the Title IX Coordinator’s information. The recipient must prominently display on its website, if any, of the Title IX Coordinator’s contact information and the recipient’s sexual harassment prevention policy and in each handbook catalog that it makes available to the individuals who now must be notified of the Title IX Coordinator’s information. In addition, the contact information of the Title IX Coordinator must now include either the name or title of the individual and the email address (which was not required previously).

Most importantly, the regulations clarify the independent compliance and investigatory responsibilities of the Title IX Coordinator. Title IX Coordinators must be given independent authority to monitor and implement a recipient’s compliance under Title IX. The Title IX Coordinator must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially.

**GENERAL RESPONSE TO SEXUAL HARASSMENT**

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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8 34 CFR § 106.8
9 34 CFR § 106.45(b)(1)(iii)
10 34 CFR § 106.44
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

Education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, e.g., off-campus housing, fraternity/sorority houses, etc.

These final regulations emphasize that any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient’s website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

A recipient’s response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process now required under the new Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment or deter sexual harassment.

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations,

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11 34 CFR § 106.44(a)
12 34 CFR § 106.30
leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.13

With or without a formal complaint, a recipient must comply with the requirement to offer supportive services.14

**What this means:** Previously, a recipient’s duty to investigate and remediate sexual misconduct was triggered when a “responsible employee” knew or should have known about the sexual harassment/sex discrimination. Not only do the new regulations no longer use the term “responsible employee,” the regulations also eliminated the concept of constructive notice (aka “should have known”).

For post-secondary educational institutions, notice of sexual harassment/sex discrimination only occurs when that institution’s Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the recipient receives notice of sexual harassment or allegations of sexual harassment. Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator and the filing of a formal complaint.

For K-12 educational institutions, when *any* employee receives notice from a student or employee of sexual harassment or allegations of sexual harassment, the recipient is deemed to have actual knowledge, thereby triggering the recipient’s duty to promptly respond. So, all K-12 employees are considered officials with authority to institute corrective measures and schools may not exempt any classification of employee, such as counselors or classified employees.

The new regulations also eliminated the previously-used term “interim measures” and instead use the term “supportive services.”

**JURISDICTIONAL ISSUES**15

Sexual harassment that occurs off campus and does not occur in an *education program or activity* of the recipient (as defined above) will not be covered under Title IX. Therefore, sexual harassment that occurs off campus via social media that targets a student, for example, may not fall under the provision of Title IX. However, this type of misconduct may still be in violation of the recipient’s code of conduct and so the recipient’s response would be pursuant to that policy.

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13 34 CFR § 106.30
14 34 CFR § 106.45
15 34 CFR § 106.44(a)
In addition, Title IX no longer applies for acts committed outside the United States even if the misconduct occurred in a recipient’s education program or activity, e.g., study abroad program. However, other policies may apply, e.g., a code of conduct policy, that would require a response from the recipient.

**What this means:** Recipients must be careful to first identify if they have jurisdiction over sexual misconduct in order to determine if Title IX applies. However, even if a recipient does not have jurisdiction under Title IX, it may have jurisdiction under another policy or provision. For example, for K-12 school districts, bullying via social media that occurs off campus may be within a recipient’s jurisdiction and subject the offending student to discipline. However, that same conduct may not require a recipient to investigate under Title IX.

**FORMAL COMPLAINT**

A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.

**What this means:** The definition of “formal complaint” precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. However, as mentioned earlier, any person who believes that sexual harassment may have occurred may report sexual harassment which would then trigger a recipient’s responsibility to determine if supportive services are necessary under the circumstances. Furthermore, a complainant may not submit a formal complaint anonymously, as it requires their physical or digital signature. While a Title IX Coordinator may sign a formal complaint based upon an anonymous report, the identity of the complainant will be disclosed if known.

**NOTICE OF ALLEGATIONS**

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

**What this means:** The intent of the new Title IX regulations is to provide an equitable process that affords due process to the parties involved, particularly the respondent. Providing respondents with specific details about the allegations provides them a better opportunity to defend themselves, which is central to due process.

**RESPONSE TO A FORMAL COMPLAINT**

In response to a formal complaint, a recipient must adopt and follow a grievance process that complies with the following elements:

1. Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

2. Require 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;

3. Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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19 34 CFR § 106.45(b)(1)
A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any 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 formal complaints of sexual harassment;

4. Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

5. Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

6. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

7. State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

8. Include the procedures and permissible bases for the complainant and respondent to appeal;

9. Describe the range of supportive measures available to complainants and respondents; and
10. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**What this means:** The two most notable changes are the never before required training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process and the requirement that recipients apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty. For example, if a collective bargaining agreement requires a clear and convincing standard for formal complaints against employees, then that same standard would have to be applied for formal complaints against students. The two standards of evidence that a recipient must choose from are preponderance of the evidence (more likely than not or >50%) or clear and convincing evidence (substantially more likely than not or ~75%).

Regarding the new training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, there is no minimum hourly training requirement, but instead the training must include the following components: the definition of sexual harassment, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. Decision-makers specifically must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

**DISMISSAL OF A FORMAL COMPLAINT**

The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the recipient must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

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20 34 CFR § 106.45(b)(3)
**What this means:** The Title IX regulations now specify when a recipient must dismiss a complaint under Title IX. In addition, a complainant can request to dismiss a formal complaint, but the recipient is not required to dismiss the complaint.

**EMERGENCY REMOVAL**

Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

**What this means:** A recipient may only remove a respondent from his/her education program or activity after considering several criteria in order to determine if the respondent must be removed to ensure the physical health or safety of any student. In addition, a respondent is entitled to some form of due process immediately following his/her removal from his/her education program or activity. This “due process” may be a hearing or meeting with an administrator responsible for conducting the individualized safety and risk analysis for the sole purpose of providing the respondent the opportunity to challenge the decision.

**INVESTIGATION OF A FORMAL COMPLAINT**

When investigating a formal complaint and throughout the grievance process, a recipient must—

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties. Furthermore, the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3);

2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

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21 34 CFR § 106.44(c)
22 34 CFR § 106.45(b)(5)
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

6. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

7. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

**What this means:** The investigation procedure that recipients must now adopt must be followed in order to provide the parties, particularly the respondent, with due process. The regulations make clear that it is the recipient’s responsibility, not the parties’, to gather evidence sufficient to reach a determination regarding responsibility and the burden of proof rests with the recipient.

Each party is now entitled to review, prior to the completion of the investigation report, all evidence, inculpatory and exculpatory, that is directly related to the allegations raised in the formal complaint. Practically speaking, this will be accomplished by the investigator providing a copy of the draft investigation report prior to the completion of the report and allow each party at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a

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23 34 CFR § 106.45(b)(6)(i)
hearing. With or without a hearing, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**What this means:** Postsecondary institutions are now required to conduct a live hearing conducted by a neutral decision-maker (hearing officer or panel) who will review the evidence and make a decision as to culpability. The decision-maker cannot be the Title IX Coordinator or the investigator. The hearing can be conducted via video conference and it must always be recorded. The parties must be allowed to ask relevant questions and cross-examine witnesses.

If a party does not have an advisor present at a live hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-examination on behalf of that party. A party cannot conduct questioning on their own behalf. Therefore, if a party does not have an advisor, the recipient will need to provide one, which can be an employee of the recipient; however, the recipient chooses the advisor.

Recipients that are elementary and secondary schools are not required to conduct live hearings to determine culpability. However, the parties must be given the opportunity to submit written, relevant questions they wanted asked of any party or witness after receiving the investigation report. The recipient will then provide each party with the answers to their questions and then allow for additional, limited follow-up questions from each party.

**STANDARD OF EVIDENCE**

The final regulations were revised to clearly require a recipient’s grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

**DETERMINATION REGARDING RESPONSIBILITY**

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence that it applies to all formal

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24 34 CFR § 106.45(b)(1)(vii)
25 34 CFR § 106.45(b)(7)
complaints of sexual harassment – either preponderance of the evidence or clear and convincing evidence.

The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

The Title IX Coordinator is responsible for effective implementation of any remedies.26

What this means: A recipient must now ensure that an individual, other than the Title IX Coordinator or investigator, reviews all the evidence and makes a determination regarding a respondent’s responsibility under Title IX. In small elementary and secondary districts, this will require that the Title IX Coordinator be an employee other than the chief administrative officer.

APPEALS\textsuperscript{27}

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

\textsuperscript{26} 34 CFR § 106.45(b)(7)(iv)
\textsuperscript{27} 34 CFR § 106.45(b)(8)
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

A recipient may offer an appeal equally to both parties on additional bases. As to all appeals, the recipient must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

2. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

What this means: Both parties must now be offered the opportunity to appeal a determination regarding responsibility. Previously, recipients generally only provided the complainant with an opportunity to appeal a determination regarding responsibility. Also, the decision-maker for the appeal must meet the same training requirement as the Title IX Coordinator.

INFORMAL RESOLUTION

A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

28 34 CFR § 106.45(b)(9)
However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

1. Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

2. Obtains the parties’ voluntary, written consent to the informal resolution process; and

3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**What this means:** Recipients are not required to develop and implement an informal resolution process. However, if a recipient chooses to develop an informal resolution process, it cannot be offered unless a formal complaint has been filed.

**RECORDKEEPING**

A recipient must maintain for a period of **seven (7) years** records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

**What this means:** Recipients must now maintain records regarding every phase of a sexual harassment investigation under Title IX for at least seven years. Previously, there was no express requirement on maintaining records for a specific period of time.

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29 34 CFR § 106.45(b)(10)
TRAINING MATERIALS PUBLICATION REQUIREMENT\textsuperscript{30}

Each recipient must publish on its website the training materials used to train its Title IX Coordinator.

**What this means:** If the training materials are proprietary, and thus copyrighted, we recommend you list the materials by its title, but not make them available on your website. You can further state on your website that the materials may be available for inspection with the Title IX Coordinator.

REMEDIAL ACTION\textsuperscript{31}

The DOE has clarified that it may require a recipient to take remedial action for discriminating in violation of Title IX and for violating Title IX regulations.

**What this means:** A recipient that does not follow the requirements of Title IX, such as not designating an employee as a Title IX Coordinator, failing to offer supportive services, failing to send written notice after dismissing a complainant’s allegations, or not following its grievance procedures, may be found to have violated Title IX, even if the violation does not, itself, constitute sex discrimination.

RIGHTS OF PARENTS\textsuperscript{32}

The regulations expressly recognize the legal rights of parents/guardians to act on behalf of a complainant or respondent on any Title IX matter.

**What this means:** Parents/guardians cannot be prevented from representing their child or acting on their behalf on any Title IX matter. However, once a child attains the age of majority (18), he/she holds his/her educational rights, unless he/she is conserved, and can act on their own behalf. However, an adult child can assign his/her educational rights to his/her parent/guardian so that the parent/guardian can act on their child’s behalf.

Please contact our office with questions regarding this Legal Update or any other legal matter.

\textit{The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.}

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\textsuperscript{30} 34 CFR § 106.45(b)(10)(i)(D)
\textsuperscript{31} 34 CFR § 106.3
\textsuperscript{32} 34 CFR § 106.6(g)
Sample Uniform Complaint Procedures (UCP)
Complaint Log

May 2020

THIS DOCUMENT IS TO BE USED AS GUIDANCE ONLY.

[Enter Name of your Local Education Agency (LEA)]

[Enter Street Address, City, State, Zip]

[Enter Phone number and/or electronic address]

COMPLAINT CASE LOG FOR 2020—2021 UCP COMPLAINTS

ASSIGNED CASE NUMBER:

COMPLAINANT INITIALS:

COMPLAINANT POSITION: [Enter employee, student, parent, advisory committee member, private school official, or interested party]

ALLEGATION: [Enter UCP scope only]

SCHOOL NAME:

DATE RECEIVED:

DATE DUE: [Enter 60 calendar days from above received date]

DATE CLOSED [Enter when LEA decision was issued]:

APPEALED?: [Enter final decision if appealed to the CDE]
### Uniform Complaint Procedures (UCP), Online Self-Certification Process

**SAMPLE COMPLAINT CASE LOG FOR UCP 3**

School Year: ________________________

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**Name of LEA**

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**Address**

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**Phone number of Contact Person**

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*Evidence of proper implementation of the investigation process*

<table>
<thead>
<tr>
<th>Case #</th>
<th>Complainant(s)</th>
<th>Initials</th>
<th>Title</th>
<th>Allegation</th>
<th>School</th>
<th>Date Rec’d</th>
<th>Due Date-60 days</th>
<th>Date Closed</th>
<th>Appeal</th>
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</thead>
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<tr>
<td>UCP 001</td>
<td>ND</td>
<td>Parent</td>
<td>Discrimination, Aggressive and unprofessional behavior of teacher</td>
<td>Jones</td>
<td>07/01/10</td>
<td>9/01/10</td>
<td>11/03/10</td>
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<tr>
<td>UCP 002</td>
<td>EH</td>
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<td>Not a UCP – Parent request retaining teacher at Smith ES</td>
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<td>07/09/10</td>
<td>n/a</td>
<td>07/23/10</td>
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<tr>
<td>UCP 003</td>
<td>MA</td>
<td>Community member</td>
<td>Multiple allegations regarding ELAC meeting held on 04/06/10</td>
<td>Smith</td>
<td>07/09/10</td>
<td>9/9/10</td>
<td>10/13/10</td>
<td>Appeal to CDE 11/30/10 Appeal denied</td>
<td></td>
</tr>
</tbody>
</table>

*Complaints in accordance with CCR, Title 5, Section 4610(b). Upload a completed log in CAIS, at any time **during the upload period and prior to the last day of the review**. Districts are not required to upload complaint documents in CAIS, as part of the self-certification. LEAs are not required to use this sample. Please see additional instructions for this process on the “LEA Self-Certification Form and Instructions for Completion of an Online Review for UCP 3.”

January 2012

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[INITIAL LETTER TO COMPLAINANT (K-12)]
**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

[COMPLAINANT]
[ADDRESS]
[ADDRESS]

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[DATE]

Re: Formal Complaint (Received on [DATE])

Dear [COMPLAINANT],

This letter is to confirm that the [DISTRICT] (“District”) has received the formal complaint against [RESPONDENT] (“Respondent”) that you submitted to [NAME] on [DATE]. The District will process this complaint as a Formal Complaint under the District’s grievance process pursuant to its Sexual Harassment Board Policy and Administrative Regulation [INSERT BP/AR NUMBER]. I have enclosed a copy of Board Policy and Administrative Regulation [_______] for your reference. Please contact me if you have any questions.

**Formal Complaint**

Based on your Formal Complaint, I have developed the following allegations, which will be investigated pursuant to the District’s policies and regulations. If you disagree with my understanding of your Formal Complaint, or with the allegations as I have written them, or if you wish to supplement your Formal Complaint, please let me know in writing as soon as possible.

In your complaint, you alleged that the Respondent discriminated against you [OR YOUR CHILD] on the basis of sex based on incidents that took place [ON [DATE] OR DURING THE _____ SEMESTER]. In the allegations below, you [OR YOUR CHILD] are referred to as “Complainant.”

**Allegation No. 1:**


**Allegation No. 2:**

In your Complaint, you stated that your desired resolution of this matter is that:

- [ADD DESIRED RESOLUTIONS]
Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence supporting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [______] (Sexual Harassment), enclosed with this letter.)
If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Regulation [_____] (enclosed).

Here is some information about your rights under the grievance process:

- You will not be required to confront or work out problems directly with the Respondent.
- You may file a complaint with local law enforcement.
- You may file a complaint with the United States Department of Education, Office for Civil Rights, if the complaint is not based on employment.
- You may file a complaint with the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing if the complaint is based on employment.
- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.
- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence supporting the allegation(s) and have that evidence considered as part of the District’s investigation.
- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.
- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- You are entitled to the same periodic status updates that the District provides to the respondent.
You will be given an equal opportunity as the respondent to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, for your review and written response.

Prior to reaching a determination regarding responsibility, you will be given the opportunity to submit written, relevant questions to the decision maker that you want asked of any party or witness. You are entitled to receive answers to your questions and the opportunity to submit additional, limited follow-up questions.

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Regulation [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if you withdraw your complaint.

**Informal Resolution Process [INCLUDE IF APPLICABLE]**

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

- Provides the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to
withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

- Obtains the parties’ voluntary, written consent to the informal resolution process; and
- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**Prohibition against and Protection from Retaliation**

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the respondent or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

**Next Steps**

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]

Board Policy [_____] (Sexual Harassment)
Administrative Regulation [_____] (Sexual Harassment)
Board Policy [_____] (Nondiscrimination/Harassment)
Administrative Regulation [_____] (Nondiscrimination/Harassment)
**NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)**

**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

[RESPONDENT]
[ADDRESS]
[ADDRESS]

Via U.S. Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[DATE]

Re: Notice of Allegations in Formal Complaint

Dear [RESPONDENT]:

This letter is to inform you that the [DISTRICT] (“District”) has received a formal complaint against you filed by [INSERT NAME OF COMPLAINANT] (“Complainant”). The Complainant alleged that you engaged in unlawful sex discrimination/sexual harassment in violation of District policies and regulations. In the allegations as described here, you are referred to as the “Respondent.” Please review the allegations below. Please contact me if you have any questions.

The specific allegations are as follows:

**Allegation No. 1:**


**Allegation No. 2:**

Such behavior may constitute unlawful sex discrimination or sexual harassment, a violation of Board Policies and Administrative Regulations [INSERT RELEVANT BP/AR – SEXUAL HARASSMENT, NONDISCRIMINATION, ETC.] and Article ___ of the collective bargaining agreement between [UNION] (“UNION”) and the District [IF APPLICABLE]. If you are found to have engaged in misconduct, you may be subject to discipline on these or other grounds.

The District is confirming these allegations with the Complainant, and will notify you if the allegations change or are supplemented.

While no determination has been made, and the District does not presume that you have acted inappropriately, the District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation [____]. I have enclosed a copy of Administrative Regulation [____] for your reference.
Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence refuting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [______] (Sexual Harassment), enclosed with this letter.)
If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Regulation [_____] (enclosed).

Here is some information about your rights under the grievance process:

- You will be provided written notice of the allegation(s) against you with sufficient details known at the time and with sufficient time to prepare a response before any initial interview.

- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.

- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence refuting the allegation(s) against you and have that evidence considered as part of the District’s investigation.

- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

- You are entitled to a presumption that you are not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- You are entitled to the same periodic status updates that the District provides to the complainant.

- You will be given an equal opportunity as the complainant to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations.
raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, for your review and written response.

- Prior to reaching a determination regarding responsibility, you will be given the opportunity to submit written, relevant questions to the decision maker that you want asked of any party or witness. You are entitled to receive answers to your questions and the opportunity to submit additional, limited follow-up questions.

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Regulation [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant withdraws a complaint.

**Informal Resolution Process** [INCLUDE IF APPLICABLE]

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

- Provides the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the
informal resolution process, including the records that will be maintained or could be shared;

- Obtains the parties’ voluntary, written consent to the informal resolution process; and

- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Prohibition against and Protection from Retaliation

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the Complainant or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

Next Steps

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Pursuant to the [UNION]-District collective bargaining agreement, the District will notify [UNION] representative [UNION REPRESENTATIVE]) that you are the subject of a student complaint.

If you would like to be represented by your union in this matter, please contact your union representative directly.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]
[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]
**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

Board Policy [_____] (Sexual Harassment)
Administrative Regulation [_____] (Sexual Harassment)
Board Policy [_____] (Nondiscrimination/Harassment)
Administrative Regulation [_____] (Nondiscrimination/Harassment)

Cc: [GREIVANCE OFFICER], [UNION] Grievance Officer
[UNION PRESIDENT], [UNION] President
[DATE]

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[COMPLAINANT]
[ADDRESS]

Re: Determination Regarding Responsibility

Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] (“District”) to provide you with the Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint from you on [DATE], alleging the following:

Allegation No. 1:

Allegation No. 2:

The following procedural steps were taken upon the District’s receipt of the formal complaint:

- [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
- [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
- [DATE OF ANY SITE VISITS]
- [METHODS USED TO GATHER EVIDENCE]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
- [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
- [DATE OF HEARING HELD, IF REQUIRED]

The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Regulation, which is attached to this letter.
The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

Conclusion of Law

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations you made against [RESPONDENT]; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against you or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. __ was substantiated, the District will proceed with taking appropriate corrective action to address the findings. [IF CORRECTIVE ACTION IS BEING TAKEN, YOU CAN LIST THEM HERE SO LONG AS ANY CONFIDENTIALITY RULES ARE NOT VIOLATED]
The District is required to notify you of remedies offered to you to restore or preserve your equal access to the District’s education programs or activities. As such, the District is offering the following individual remedies to address the findings: [INSERT INDIVIDUAL REMEDIES]

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

APPEAL RIGHTS

Please be advised that you have the right to appeal a determination regarding responsibility (see attached AR ___). You also have the following additional appeal and other rights:

1. You have the right to appeal the District's decision to the California Department of Education (“CDE”) by filing a written appeal within 15 calendar days of receiving the District's decision;

2. You may pursue available civil law remedies outside of the District's complaint procedures, including seeking assistance from mediation centers or public/private interest attorneys, 60 calendar days after the filing of an appeal with the CDE. (Education Code § 262.3);

3. The 60 days moratorium does not apply to complaints seeking injunctive relief in state courts or to discrimination complaints based on federal law. (Education Code § 262.3); and

4. Complaints alleging discrimination based on race, color, national origin, sex, gender, disability, or age may also be filed with the U.S. Department of Education, Office for Civil Rights at www.ed.gov/ocr within 180 days of the alleged discrimination.

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures

Cc: [_______________________], Superintendent
[DATE]

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[RESPONDENT]
[ADDRESS]
[ADDRESS]

Re: Determination Regarding Responsibility

Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] (“District”) to provide you with the Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint against you from [COMPLAINANT] on [DATE], alleging the following:

**Allegation No. 1:**

**Allegation No. 2:**

The following procedural steps were taken upon the District’s receipt of the formal complaint:

- [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
- [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
- [DATE OF ANY SITE VISITS]
- [METHODS USED TO GATHER EVIDENCE]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
- [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
- [DATE OF HEARING HELD, IF REQUIRED]
The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Regulation, which is attached to this letter.

The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

Conclusion of Law

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations made against you; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against the Complainant or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. ___ was substantiated, the District will proceed with taking the following corrective action to address the findings: [SPECIFY CORRECTIVE ACTION BEING TAKEN]
It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

**APPEAL RIGHTS**

Please be advised that you have the right to appeal a determination regarding responsibility (see attached AR ___).

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures

Cc: [__________________], Superintendent
Investigation Tracking Document

Administrator to fill in information and initial each category upon completion.

1. Date Complaint Received:
2. Identify Applicable Policy/Procedure:
3. What type of investigation needs to take place?
4. Due date for completion:
5. Witnesses interviewed:
6. Factual findings:
7. Conclusions:
8. Action Taken:
9. Is follow-up necessary?
   a. If so, what?
10. Is documentation in employee file? In student records?

Process completed: _________________________ ____________

Administrator Signature  Date

c: Investigation file
Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
• How did you react? What response did you make when the incident(s) occurred or afterwards?
• How did the harassment affect you? Has your job been affected in any way?
• Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
• Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
• Are there any notes, physical evidence, or other documentation regarding the incident(s)?
• How would you like to see the situation resolved?
• Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

• What is your response to the allegations?
• If the harasser claims that the allegations are false, ask why the complainant might lie.
• Are there any persons who have relevant information?
• Are there any notes, physical evidence, or other documentation regarding the incident(s)?
• Do you know of any other relevant information?

Questions to Ask Third Parties:

• What did you see or hear? When did this occur? Describe the alleged harasser’s behavior toward the complainant and toward others in the workplace.
• What did the complainant tell you? When did s/he tell you this?
• Do you know of any other relevant information?
• Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

• Inherent plausibility: Is the testimony believable on its face? Does it make sense?
• Demeanor: Did the person seem to be telling the truth or lying?
• Motive to falsify: Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party’s testimony?

- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant’s credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

**Reaching a Determination**

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator’s report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.
INVESTIGATION NOTICE FORM

To:

From:

Date:

Re: Investigation of Possible Violation of District Policy

I am investigating a possible violation of _________________ District policy. As part of the investigation, I will be interviewing you today. The purpose of this notice is to provide some important information about what the district expects from you during the investigation.

The district appreciates your participation in this process. We expect you to cooperate fully in the investigation by, for example, answering all questions completely and honestly, providing any documents that are relevant to the investigation, and making yourself available for follow-up interviews, if necessary. You will be excused from your usual work duties for interviews and any other activities necessary to the investigation.

Retaliation against anyone involved in the investigation is strictly prohibited. If you retaliate against anyone involved in this investigation, you will be subject to discipline. If you believe you have been mistreated or otherwise retaliated against because of your participation in this investigation, please tell me immediately.

We will maintain the confidentiality of the investigation to the extent possible, revealing information only on a need-to-know basis or as otherwise required by law.

I encourage you to contact me after our interview today if you remember additional information or if you would like to change or add to your statement for any other reason.

Your signature indicates that you have received and read this notice.

Signed: ____________________________

Name: ____________________________

Date: ____________________________
CONFIDENTIAL SUMMARY INVESTIGATION REPORT

DATE:

TO:

CC:

FROM:

RE: Complaint of Sexual Harassment/Sex Discrimination – [COMPLAINANT VS. RESPONDENT]

I. INTRODUCTION

This report summarizes the investigation and findings concerning allegations made by [COMPLAINANT] (“Complainant”) against [RESPONDENT] (“Respondent”) for the [SCHOOL DISTRICT OR COMMUNITY COLLEGE DISTRICT] (“District”). The Complainant alleged that Respondent engaged in unlawful sex discrimination/sexual harassment in violation of District policies and regulations.

The specific allegations are as follows:

Allegation No. 1:

Allegation No. 2:

II. FACTUAL BACKGROUND

Complainant is an [EMPLOYEE OR STUDENT] of the District. Respondent is an [EMPLOYEE OR STUDENT] of the District. The Complainant submitted a written formal complaint (“Complaint”) to the Title IX Coordinator on [DATE], which was received by the District on [DATE].

III. INVESTIGATION

The Complaint was accepted under its Grievance Process outlined in Administrative Regulation [OR Administrative Procedure]. In addition, this complaint was investigated under Title IX of the Education Amendments of 1972, which requires recipients of federal funds to protect people from discrimination based on sex in education programs or activities.
Under Title IX, 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;

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; or

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

California Education Code section 212.5 defines sexual harassment as the following:

“Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the work or educational setting when:

1. Submission to the conduct is made explicitly or implicitly a term or condition of the individual’s employment.
2. Submission to or rejection of such conduct by the individual is used as the basis for an employment decision affecting him/her.
3. The conduct has the purpose or effect of having a negative impact upon the individual's work or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. The conduct is sufficiently severe, persistent, pervasive, or objectively offensive so as to create a hostile or abusive working environment or to limit the individual's ability to participate in or benefit from an education program or activity.
4. Submission to or rejection of the conduct by the other individual is used as the basis for any decision affecting him/her regarding benefits, services, honors, programs, or activities available at or through the district.

Other examples of actions that might constitute sexual harassment, whether committed by a supervisor, a co-worker, or a non-employee, in the work or educational setting, include, but are not limited to:

1. Unwelcome verbal conduct such as sexual flirtations or propositions; graphic comments about an individual's body; overly personal conversations or pressure for sexual activity; sexual jokes or stories; unwelcome sexual slurs, epithets, threats, innuendoes, derogatory comments, sexually degrading descriptions, or the spreading of sexual rumors.
2. Unwelcome visual conduct such as drawings, pictures, graffiti, or gestures; sexually explicit emails; displaying sexually suggestive objects.
3. Unwelcome physical conduct such as massaging, grabbing, fondling, stroking, or brushing the body; touching an individual's body or clothes in a sexual way; cornering, blocking, leaning over, or impeding normal movements.

Prohibited sexual harassment may also include any act of retaliation against an individual who reports a violation of the district's sexual harassment policy or who participates in the investigation of a sexual harassment complaint.”

The investigation was conducted by [NAME OF INVESTIGATOR], hired by the District to conduct a fair and impartial review of the facts related to this complaint.

Findings in this matter were based on a Preponderance of Evidence Standard [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]. The Preponderance of Evidence Standard is defined as reaching a finding that the alleged conduct more likely than not occurred as alleged.

In making findings of fact, this investigator applied the following standards:

- Where the investigation established by a preponderance of the evidence that the alleged conduct did not occur, the allegation is **UNFOUNDED**.
- Where there is insufficient evidence based on a preponderance of the evidence to determine whether the alleged conduct occurred, the allegation is **NOT SUSTAINED**.
- Where the investigation established by a preponderance of the evidence that the alleged conduct occurred, the allegation is **SUSTAINED**.

If an allegation was sustained, this investigator determined if the conduct was based on the Complainant’s sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.

The findings are based on this investigator’s best judgment as to whether or not a disputed event is more likely than not to have occurred, based on the available evidence. Consistent with District practice, the complaint was investigated promptly and thoroughly. In the course of the investigation, the Complainant and the Respondent were given an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. For each potential witness, this investigator made a case-by-case decision on whether or not to conduct interviews, depending upon whether this investigator believed the potential witness to have information directly relevant to the matter under investigation. This investigator instructed the Complainant, Respondent, and all witnesses regarding the confidential nature of the proceedings and the prohibitions on retaliation.

To the extent credibility determinations of witness statements were necessary in preparing my report and findings, this investigator examined the potential motives of the witnesses to fabricate or deny charges and examined circumstantial evidence such as timing or similar sustained charges. In addition, this investigator utilized principles for determining credibility as outlined in California Evidence Code Section 780, which provides:
Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to any of the following:

- His [or her] demeanor while testifying and the manner in which he [or she] testifies.
- The character of his [or her] testimony.
- The extent of his [or her] capacity to perceive, to recollect, or to communicate any matter about which he [or she] testifies.
- The extent of his [or her] opportunity to perceive any matter about which he [or she] testifies.
- His [or her] character for honesty or veracity or their opposites.
- The existence or nonexistence of a bias, interest, or other motive.
- A statement previously made by him [or her] that is consistent with his [or her] testimony at the hearing.
- A statement made by him [or her] that is inconsistent with any part of his [or her] testimony at the hearing.
- The existence or nonexistence of any fact testified to by him [or her].
- His [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony.
- His [or her] admission of untruthfulness.

**WITNESS INTERVIEWS**

The investigation included interviews of the following:

1. _____________ – Complainant
2. _____________ – Respondent
3. _____________ – Witness
4. _____________ – Witness
5. _____________ – Witness

The Complainant was asked to identify witnesses. She identified witnesses 1 and 2 as individuals who could have relevant information to provide in this investigation since they are both current students of the District.
The Respondent was asked to identify witnesses. The Respondent identified witnesses 3 and 4 as individuals who could have relevant information to provide in this investigation since they are or were employees of the District.

This investigator also determined that it was necessary to interview witnesses 5 and 6 because [PROVIDE REASONS].

DOCUMENTS

1. Complaint, dated ___________
2. Respondent’s Response to Complaint
3. [INSERT EMAILS, TEXTS, VIDEO SURVEILLANCE, ETC.]
4. [INSERT RELEVANT BOARD POLICY/ADMINISTRATIVE REGULATION (OR PROCEDURE)]

This investigator asked both parties to provide me with any relevant documentation. The following documentation was provided by Complainant:

The following documentation was provided by Respondent:

WITNESS SUMMARIES

[COMPLAINANT], Complainant

Credibility Determination [SEE BELOW FOR EXAMPLE LANGUAGE]

Complaint was interviewed by this investigator on [DATE], at the District office. Complainant was a willing participant and understood the confidential nature of the investigation. Complainant presented himself/herself in an honest and straightforward manner. This investigator specifically evaluated whether there was evidence of bias or a motive to lie about Respondent. In particular, Respondent claimed that Complainant filed the complaint in retaliation for breaking up with him/her. This investigator determined that there was no evidence of bias or motive to lie about Respondent in regards to the specific allegations that were subject of this investigation.

Interview Summary

[INSERT RELEVANT DETAILS OF INTERVIEW]

IV. SUMMARY OF ALLEGATIONS, FINDINGS & CONCLUSIONS

ALLEGATION NO. 1:
FINDINGS

CONCLUSION

Based on the above findings, this investigator has determined that the investigation established by a preponderance of the evidence that the alleged conduct occurred; therefore, the allegation is sustained. Further, this investigator determined that the conduct was based on the Complainant’s sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.
Case Study

District became aware that on ~16 occasions during a school year, there was graffiti in the girl’s bathroom calling a female student as a “slut,” a “whore” and on at least one occasion, stating “[she] should kill herself and no one would miss her.”

Vice Principal investigated by going into the bathroom to see the writings and by once interviewing a male student whom he described as a “kid who never gets in trouble” to inquire if he’d seen anything. The VP interviewed the victim about the incidents but did not interview any other witnesses who reported the graffiti. VP investigated which students had been assigned bathroom passes to try to determine perpetrator(s), even though there was evidence that the graffiti was written during recess, lunch, and other breaks where students were not required to have a bathroom pass. VP ended his investigation.

The next school year, the victim approached the District with a list of all the perpetrators and all the instances where graffiti referring to her had been written on the bathroom wall. It was at this time the District offered supportive measures. However, the District told her it could not “go back” to the last year and instead needed to focus on how to support the victim moving forward.

Following this, while OCR was at the campus investigating, it noted at least one instance of graffiti in the bathroom identifying the victim and calling her a “slut” and a “whore.” OCR notified the District.

What issues do you see?
5 CCR § 4631

§ 4631. Responsibilities of the LEA.

(a) Except for complaints regarding instructional materials, emergency or urgent facilities conditions that pose a threat to the health or safety of pupils or staff, and teacher vacancies or misassignments, which must be processed in accordance with sections 4680-4687, within 60 days from the date of the receipt of the complaint, the LEA person responsible for the investigation of the complaints or his or her designee shall conduct and complete an investigation of the complaint in accordance with the local procedures adopted pursuant to section 4621 and prepare a written LEA Decision. This time period may be extended by written agreement of the complainant.

(b) The investigation shall include an opportunity for the complainant, or the complainant's representative, or both, to present the complaint(s) and evidence or information leading to evidence to support the allegations of non-compliance with state and federal laws and/or regulations.

(c) Refusal by the complainant to provide the investigator with documents or other evidence related to the allegations in the complaint, or to otherwise fail or refuse to cooperate in the investigation or engage in any other obstruction of the investigation, may result in the dismissal of the complaint because of a lack of evidence to support the allegations.

(d) Refusal by the LEA to provide the investigator with access to records and/or other information related to the allegation in the complaint, or to otherwise fail or refuse to cooperate in the investigation or engage in any other obstruction of the investigation, may result in a finding based on evidence collected that a violation has occurred and may result in the imposition of a remedy in favor of the complainant.

(e) The LEA should issue a Decision (the Decision) based on the evidence. The Decision shall be in writing and sent to the complainant within 60 days from receipt of the complaint by the LEA. The Decision should contain:

(1) the findings of fact based on the evidence gathered,

(2) conclusion of law,

(3) disposition of the complaint,

(4) the rationale for such disposition,
(5) corrective actions, if they are warranted, including, with respect to a pupil fee complaint, a remedy that comports with Education Code section 49013(d) and section 4600(u).

(6) notice of the complainant's right to appeal the LEA Decision to the CDE, and

(7) procedures to be followed for initiating an appeal to the CDE.

(f) Nothing in this chapter shall prohibit the parties from utilizing alternative methods to resolve the allegations in the complaint, including, but not limited to, mediation.

(g) Nothing in this chapter shall prohibit an LEA from resolving complaints prior to the formal filing of a written complaint.

Note: Authority cited: Sections 221.1 and 33031, Education Code; and Section 11138, Government Code. Reference: Sections 200, 220 and 49013, Education Code; Sections 11135, 11136 and 11138, Government Code; and 34 C.F.R. Section 106.8.

HISTORY

1. New section filed 8-26-91; operative 9-25-91 (Register 92, No. 3).


3. Amendment of section heading, section and Note filed 9-17-2013; operative 1-1-2014 (Register 2013, No. 38).

This database is current through 8/18/17 Register 2017, No. 33

5 CCR § 4631, 5 CA ADC § 4631
§ 4964. Confidentiality.

All complaints or allegations of discrimination or sexual harassment will be kept confidential during any informal and/or formal complaint procedures except when disclosure is necessary during the course of an investigation, in order to take subsequent remedial action and to conduct ongoing monitoring.

Note: Authority cited: Sections 221.1 and 33031, Education Code; and Section 11138, Government Code. Reference: Section 212.5, Education Code; Sections 11135 and 12940(h), Government Code; Section 1681, Title 20, U.S. Code; Section 2000d, Title 42, U.S. Code; and Section 106, Title 34, Code of Federal Regulations.

HISTORY


This database is current through 8/18/17 Register 2017, No. 33

5 CCR § 4964. 5 CA ADC § 4964
§ 4963. Prohibitions.  

(a) No person from or in the educational or work environment of a local agency shall retaliate against a complainant, witness, or other person who supports or participates in a sexual harassment investigation.

(b) Any attempt to penalize anyone from or in the educational or employment environment for initiating a complaint through any form of retaliation shall be treated as a separate allegation of discrimination.

Note: Authority cited: Sections 221.1 and 33031 Education Code; and Section 11138, Government Code. Reference: Section 212.5, Education Code; Sections 11135 and 12940(h), Government Code; Section 1681, Title 20, U.S. Code; Section 2000d, Title 42, U.S. Code; and Section 106, Title 34, Code of Federal Regulations.

HISTORY

1. New article 8 (sections 4963-4965) and section filed 6-13-2001; operative 7-13-2001 (Register 2001, No. 24).

This database is current through 8/18/17 Register 2017, No. 33
NON-DISCLOSURE AGREEMENT FOR TITLE IX INVESTIGATION

THIS NON-DISCLOSURE AGREEMENT ("Agreement"), dated ____________ ("Effective Date"), is entered into between [NAME OF DISTRICT] ("District") and [NAME OF COMPLAINANT] ("Complainant") – OR- [NAME OF RESPONDENT] ("Respondent") (collectively referred to as the "Parties"), for the purpose of sharing evidence obtained during the course of a District investigation into a complaint filed by Complainant against Respondent ("Complaint"), in a manner consistent with controlling law, including but not limited to the Family Education Records Privacy Act of 1974 (20 U.S.C. § 1232g, et seq.), California law (Cal. Const., art. I, § 1; Ed. Code § 49060, et seq.), Title IX of the Education Amendments Act of 1972 ("Title IX") (34 C.F.R. § 106 et seq.), and Title 5 of the California Code of Regulations ("Title 5") (5 C.C.R. § 59300 et seq.).

WHEREAS, Complainant [or Respondent] is a party to an ongoing investigation pursuant to District policy, Title IX and Title 5;

WHEREAS, Complainant [or Respondent] may be provided by the District a copy of a Confidential Report of Evidence, a Final Investigation Report, and/or other evidence that relates to the District’s investigation into the Complaint, pursuant to 34 C.F.R. § 106.45(b)(5);

WHEREAS, the Parties anticipate that in being provided a copy of a Confidential Report of Evidence, a Final Investigation Report, and/or other evidence that relates to the District’s investigation into the Complaint, the District may disclose confidential and/or sensitive information concerning the Parties and other witnesses; and

WHEREAS, the Parties desire to provide for confidential treatment any Confidential Report of Evidence, Final Investigation Report, and/or other evidence that relates to the District’s investigation into the Complaint;

NOW THEREFORE, in consideration of these premises and for other good and valuable consideration, the Parties agree as follows:

1. Complainant [or Respondent] agrees that [he/she] will refrain from disseminating any evidence provided to [him/her] by the District that relates to the Complaint to anyone other than [his/her] attorney or advisor. Complainant [or Respondent] agrees that this includes evidence contained in any Confidential Report of Evidence and/or Final Investigation Report that may be issued, as well as the Reports themselves. Complainant [or Respondent] also agrees to also limit the use of the evidence provided to [him/her] by the District, including evidence contained in any Confidential Report of Evidence and/or Final Investigation Report, for purposes of the District’s Title IX investigation and/or grievance process.

2. The Parties agree that if a threatened or actual breach of this Agreement occurs, then: (a) monetary damages alone will not be an adequate remedy, (b) the non-breaching party will suffer
immediate and irreparable injury and damages, and (c) the non-breaching party will be entitled to seek and obtain, from any court of competent jurisdiction, immediate injunctive and other equitable relief in addition to, and not in lieu of, any other rights or remedies that the non-breaching Party may have under applicable laws.

3. Complainant [or Respondent] shall not be liable for the inadvertent or accidental disclosure of the Confidential Report of Evidence and/or Final Investigation Report or contents thereof, if such disclosure occurs despite the exercise of the same degree of care as such person normally takes to preserve [his/her] own confidential data or information.

4. The Parties agree that neither Party shall assign this Agreement or any portion hereof to a third party without the prior written consent of the other party.

IN WITNESS WHEREOF, the Parties have entered into this Agreement as of the Effective Date.

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TITLE IX PART II - CONDUCTING TITLE IX INVESTIGATIONS COMMUNITY COLLEGE

October 14, 2020

Presented by:

Monica D. Batanero,
Senior Associate General Counsel
Monica D. Batanero  
Senior Associate General Counsel  
mbatanero@sclscal.org  

Areas of Expertise  
General Education Code & Student Issues (including student discipline, interdistrict transfers; general student issues, student’s and parent’s rights); Governance (Brown Act, Public Record Acts, conflicts); Special Education/Section 504  

Experience  
Ms. Batanero has over 14 years of experience in administrative law; over 10 years of experience in education law. Ms. Batanero’s practice touches upon myriad legal issues relating to students and school personnel. She advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law, student discipline and anti-discrimination laws. In addition to regularly participating in IEP meetings, Ms. Batanero has represented clients before the Office of Administrative Hearings, the California Department of Education and the Office for Civil Rights. Ms. Batanero also assists school districts in negotiating agreements and reaching settlements with parents regarding special education issues. Ms. Batanero also assists school districts and County Boards of Education at all levels of the student discipline process and conducts investigations on behalf of her clients of allegations of discrimination. Prior to joining SCLS, Ms. Batanero worked in education law in Southern California representing school districts in special education matters as well as addressing various legal matters as they arose. Ms. Batanero is a Member of the California State Bar and the California Council of School Attorneys.  

Education  
Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).  

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
## Title IX Part II – Conducting Title IX Investigations

### Community College Districts

### October 14, 2020

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Title IX Part II:
Conducting Title IX Investigations
October 14, 2020

Presented by:
Monica D. Batanero, Sr. Associate General Counsel
School & College Legal Services of California

Agenda

• Workshop series
• Brief overview of Title IX
• Conducting impartial investigations
• Legally compliant investigation reports
• Decision-making process
• Investigation-related issues
• Next steps

Fall 2020
Title IX Workshop Series at SCOE

• Part 1 — Title IX Coordinator Essentials, September 15, 2020
• Part 3 – Nuts and Bolts of the Roles of the Title IX Coordinator and Decision-maker, November 10, 2020
• Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 8, 2020
I. Brief Overview of Title IX

What is 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 educational program or activity receiving federal financial assistance.”


What Is Title IX?

- Title IX of the Education Amendments of 1972
- Established to combat discrimination against women in the educational system
- Two objectives:
  - Prevent use of federal resources to support discriminatory practices in education
  - Provide individuals with protection against those practices
- Title IX protects any “person” against sex discrimination – both males and females
What Is Title IX?

• Title IX applies to “recipients of Federal financial assistance.”

• Every recipient must ensure that a student is not denied or limited in the ability to participate in or benefit from a school program or activity on the basis of sex.

Title IX Legal Framework

• Federal law
• Implementing regulations
  • New Title IX regulations (effective 8/14/20)
• Regulatory Guidance
  • RESCINDED - 2001 Revised Sexual Harassment Guidance
  • RESCINDED - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide
  • RESCINDED - 2017 Interim Guide: Q&A on Campus Sexual Misconduct

Where Does Title IX Apply?

• Title IX protects students in connection with all academic, educational, extracurricular, athletic, and other programs of the district.

• Programs can take place in a district facility, on a school bus, at a program sponsored by the district at another location, or on a school-sponsored field trip.
Where Does Title IX Not Apply?

• Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient will not be covered under Title IX.
• When might jurisdiction not exist?
  • When conduct occurs off campus via social media
  • When conduct occurs outside of the United States

Educational Program or Activities

• Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.
• Includes any building owned or controlled by a student organization that is officially recognized by the CCD.

Defined Terms

• Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
• Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
• Recipient means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.
Sex-Based Discrimination

- Title IX prohibits sex-based discrimination
- Sex-based discrimination includes:
  - Sexual harassment
  - Sexual violence
  - Discrimination based on gender stereotypes
  - Gender-based discrimination
- Does NOT prohibit discrimination on the basis of sexual orientation (but California law does)

Title IX Sexual Harassment

1. Unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;
2. Quid pro quo harassment; or
3. Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

Clery Act/VAWA Definitions

2. Dating violence – 34 U.S.C. 12291(a)(10) – “The term “dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.”
**Clery Act/VAWA Definitions**

(3) Domestic Violence – 34 U.S.C. 12291(a)(8) – “The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

(4) Stalking – 34 U.S.C. 12291(a)(8) – “The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

**General Response to Sexual Harassment**

- Once a recipient has actual knowledge of sexual harassment in an education program or activity of the recipient, it must respond promptly in a manner that is not deliberately indifferent.
- A response is deliberately indifferent only if it’s response to sexual harassment is clearly unreasonable in light of the known circumstances.
- The 2001 Guidance (now rescinded) stated that recipients must take action in response to sexual harassment that is reasonably calculated to stop harassment and prevent recurrence of harassment.
- DOE has clarified that it will not unrealistically hold recipient’s responsible where the recipient took action that was not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends.

**Actual Knowledge**

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment…Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.”
Receiving Actual Knowledge

• K-12:
  • Any elementary and secondary school employee.
• CCD:
  • The institution’s Title IX Coordinator, or any official who has authority to institute corrective measures on behalf of the recipient.

Responding to Notice

• Title IX Coordinator is responsible to promptly contact the Complainant and discuss:
  • Availability of Supportive Measures,
  • Option to File Formal Complaint, and
  • Formal Complaint Process.
• Title IX Coordinator must determine whether Title IX jurisdiction exists.

Supportive Measures

“Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”
Supportive Measures

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

II. Conducting Impartial Investigations

What is an Investigation?

- It is the process by which a school determines whether or not the conduct occurred based on the standard of evidence used.
- The DOE used to take the position that an investigation included both the fact-finding and decision-making process (excluding appeals).
- Under the new Title IX regulations, the investigation is a separate process from the decision-making process; however, both are integral parts of the Grievance Process.
Title IX Grievance Process

• Under the Title IX Grievance Process, the investigator must:
  • Treat complainants and respondents equitably.
  • Objectively evaluate all relevant evidence.
  • Possess no conflict of interest or bias.
  • Have received training on the definition of sexual harassment, scope of the recipient’s education program or activity, how to conduct an investigation.
  • Presume the respondent is innocent.
  • Be aware of supportive services available to the complainant.

Investigation Process Requirements

• Burden of gathering evidence is on the recipient – not the complainant, respondent, or witnesses.
• Complainant and Respondent are provided equal opportunity to present evidence, including witnesses.
• No “gag-orders;” either party must be allowed to discuss the allegations and gather evidence.

Investigation Process, Cont’d.

• Allow both parties to have advisor present throughout process.
• Provide notice of all proceedings to parties expected to attend.
• Both parties may review the evidence and have opportunity to meaningfully respond before final report.
• Prepare and issue a final investigation report.
Investigations Will Vary by Institution

- The specific steps in a recipient’s Title IX investigation will vary depending on:
  - Nature of the allegation(s)
  - Source of the complaint
  - Age of student(s) involved
  - Size and administrative structure of school
  - State or local legal requirements (such as mandatory reporting or Title 5 regulations)
  - Lessons learned from past experiences

Investigations Will Vary by Institution

- Investigations may include:
  - Conducting interviews
    - Complainant
    - Respondent
    - Other witnesses
  - Reviewing student and personnel files
  - Reviewing law enforcement documents, if applicable
  - Gathering and examining other relevant documents or evidence
  - Hiring an outside investigator

Selecting the Investigator

- Manager or supervisor
- HR professional (in-house)
- HR consultant (3rd party), but only if licensed as attorney or PI
- Private investigator
- In-house counsel
- Outside counsel
Selecting the Investigator

Factors to consider when choosing an “outside” investigator:

- Does the complaint present a high level of potential liability for the district?
- Must the investigation be completed in a very short time frame and district employees cannot meet the timelines?
- Will the investigation be so complicated or involved, that district employees cannot reasonably be reassigned to handle it?
- Is the matter extremely sensitive or must it be handled with a heightened level of confidentiality?
- Does the matter involve many of the individuals who would normally conduct the investigation?

Investigator Qualifications

- An equitable investigation requires a trained investigator to:
  - Analyze and document available evidence
  - Develop reliable decisions
  - Objectively evaluate the credibility of parties and witnesses
  - Synthesize all available evidence
  - Take into account unique and complex circumstances of each case
  - Investigator may not rely on sex stereotypes or generalizations in conducting investigation or reaching conclusions

Investigation Fundamentals: First Steps

1. Review the applicable procedure
   - Enter the case into a complaint log
   - Map out the steps and timeline for the investigation based on the procedure
   - Make sure required notices are sent, including copies of the applicable procedure and other information required by the procedure

2. Develop an investigative strategy
   - Outline scope and breadth of investigation
   - Determine who should be interviewed and what information should be reviewed
Investigation Fundamentals:

Next Steps

3. Determine who will be part of the investigation team
   - District employees
   - Outside investigators

4. Conduct the investigation
   - Begin promptly
   - Determine who should be interviewed, and in what order
   - Begin interviews with core people and broaden as needed
   - Before interviewing, outline interview questions, including elements of a particular complaint
   - Before interviewing, review related documents/records

Investigation Fundamentals, cont’d.

4. Conduct the investigation, cont’d
   - Prepare for interviews by identifying the following elements:
     - Identity of interviewer
     - Identity of person to be interviewed
     - Location, date, and time of interview
     - Conduct interview in confidential setting
     - Make arrangements to record interviews, if possible
       - California law requires informed consent of witness (632 P.C.)
       - Once recorder is on, state date, time & place of interview, name of participants and have witness confirm on tape his/her knowledge of & consent of the recording

Investigation Fundamentals, cont’d

- Should be looking for each element of the type of sexual harassment at issue
  - Hostile environment
  - Quid pro quo
  - Sexual assault, dating, domestic violence, or stalking
- Was each prong of the allegation met?
  - For example, hostile environment -
    (1) Unwelcome conduct on the basis of sex that is
    (2) Sufficiently severe, pervasive, and objectively offensive to
    (3) Effectively denies a person equal access to an education program or activity
Standard of Evidence

- There are two permissible standards of evidence for Title IX investigations:
  - Preponderance of the Evidence (>50%)
  - Clear and Convincing (>75%)
- Recipients must apply the same standard to Title IX investigations involving students as those investigations involving employees.

Written Notice of Allegations

- Title IX coordinator is responsible for providing the following information in a written notice to the parties:
  - Notice of recipient’s grievance process, including any informal resolution process; and
  - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before an initial interview. This includes the identities of parties involved, if known, and the date and location of the alleged incident, if known.

Interviews

- Make appropriate disclosures (e.g., who you are, who you represent, why you are there)
- Explain that district is required to investigate allegations of [sexual harassment, sexual violence, sex discrimination] and take appropriate action
- State that no conclusions have been made and retaliation is prohibited
- Try to put interviewee at ease (use trauma-informed guidelines)
- Emphasize the expectation of best recollection and truthful answers
- Start with broad/overview questions
Interviews

• Have interviewee describe the incident(s)/conduct in his/her own words
  • 5 W's – who, what, when, where, why
  • Ask if interviewee has told interviewer everything he/she can remember
  • After each answer, ask: “is there anything else?”
• Ask follow up questions, including questions to confirm chronology of events, to fill in any gaps in the 5 W’s
• Don’t offer information or provide answers
• Ask about knowledge of any relationships between complainant & alleged wrong-doer or possible motivations for complaint or conduct at issue

Interviews

• Ask about and for copies of any relevant documents, texts, emails, photos, social media posts, etc.
• At the end of the interview:
  • Ask whether there is anyone else the interviewee thinks should be interviewed about the incident/conduct
  • Provide your contact information and advise the interviewee to contact you with any additional information
  • Give the interviewee a copy of the relevant procedure
  • Caution against retaliation
  • Remind the interviewee to maintain confidentiality
  • Advise interviewee you may need to follow-up with him/her as investigation proceeds

Interviews

• Be an active listener & critical thinker
  • “Does this make sense?”
  • “Do I understand exactly what happened?”
  • “Will someone else reading my report understand exactly what happened?”
• Use your time line to identify discrepancies between witness’ own story & that of others - challenge facts
Interviews

• Clarify basis for witness’ knowledge of a “fact”
  • How do they know?
    • Saw it? Heard it? Was involved in it?
  • Distinguish between “no” & “I cannot recall.”
  • Document carefully for later review

Interviews: Assessing Credibility

• Investigators should take into account all relevant evidence in determining witnesses’ credibility
  • Should not rely solely on eye-witness accounts, tangible physical evidence, or an admission to corroborate either party’s story

Factors to consider:
• Changes in behavior of the complainant
• Complainant telling another person about the discrimination
• Other complaints against same respondent
• Witnesses’ conduct during interviews, including body language, eye contact, tone, nervous behaviors, sweating
• Consistent/inconsistent information
• Corroboration by other witnesses, documents, or other evidence
• How much detail did witness offer?

Factors that aren’t as relevant: a delay in reporting, minor inconsistencies in story, that complainant and respondent once had a consensual relationship
Hot Seat

Which of the following is relevant to consider in a credibility determination?

1. Respondent says, “She was asking for it. Just look at what she was wearing!”
2. The complainant drops out of sports and drama club and starts missing school frequently.
3. Respondent’s witness says, “He’s such a good kid. I know he could never do what she’s accusing him of.” [sexual harassment investigation]
4. Respondent says, “It was an accident. I didn’t do it on purpose.” after putting his hand on a male student’s crotch.
5. Complainant writes in her journal after the assault about how the assault has impacted her.
6. Complainant tells his best friend that he’s been harassed by a football player for the past 3 months.
7. Respondent says, “We used to date. I know she’s okay with us fooling around.”
8. You’re the investigator. You diligently try to contact complainant to set up a time to interview her. She does not reply to your many overtures. When you try to approach her personally, she avoids you. When you finally get in touch with her, she says she doesn’t want to be involved.

Interviewing the Complainant

• Must be provided sufficient written notice in advance of any interview to prepare for meaningful participation
• Ask complainant specifically:
  • Has anything like this ever happened before? Use 5 W’s
  • The nature and past history of any relationship between complainant and respondent
  • Whether complainant has previously complained about the respondent, and if so, to whom
  • Whether anyone else knew of or joined in conduct complained of
  • Whether complainant is aware of other incidents by respondent toward other individuals
  • Whether any documents exist to support the allegations

Interviewing the Respondent

• Must be provided sufficient written notice (including the specific allegations) in advance of any interview to prepare for meaningful participation
• Verify that no determinations of wrongdoing have been made and that he/she will have a full opportunity to provide information
• Caution against retaliation
• The respondent (and complainant) should be allowed to have an advisor present
Interviewing the Respondent, cont’d.

- Provide respondent a copy of applicable complaint procedures and explain district’s obligation to investigate complaints
- Ascertain:
  - Whether respondent agrees with statements/allegations of complainant and other witnesses already interviewed
  - Whether any witnesses or other evidence exists that could corroborate respondent’s version of events
  - The nature and past history of any relationship between complainant and respondent
  - Whether respondent knows if complainant has previously made complaints of a similar nature about respondent or others

Interviewing Other Witnesses

- Advise witness to keep matter confidential
- Discuss prohibition against retaliation
- If witness is a minor, notify parent/guardian of need to interview minor
- Identify the relation of witnesses to the complainant and/or respondent
- Questions may include:
  - Ask them to describe event in own words
  - Does witness know of similar incidents/conduct
  - Identity of any other witnesses

Hot Seat

- Flip to Case Study
- Please review to identify:
  - Any issues you see with how the district handled this investigation
  - How you would conduct this investigation in compliance with Title IX
III. Legally Compliant Investigation Reports

Investigation Report

• Report should:
  • Fairly summarize relevant evidence, and
  • Be provided to complainant and respondent (and their advisors) for comment at least 10 days before a hearing or final determination.

Investigation Reports

• Follow your institution’s grievance procedures, and any applicable policies
• We recommend that it contain the following elements:
  • Parties
  • Incident – when was it reported, to whom; when did it take place
  • Alleged Violations – code of conduct, district policy, etc.
  • Interviews with parties
  • Additional information provided by parties
  • Summary of relevant evidence (e.g., information provided by witnesses, review of documentation, review of video footage, etc.)
  • Credibility determination
  • Findings of fact
  • Conclusion – “I conclude it is/is not more likely than not that respondent…”
Title 5 Requirements – CCD

- Written report required under Title 5 regulations
- Report must include:
  1. a description of the circumstances giving rise to the complaint;
  2. a summary of the testimony provided by each witness, including the complainant and any viable witnesses identified by the complainant in the complaint;
  3. an analysis of any relevant data or other evidence collected during the course of the investigation;
  4. a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and
  5. any other information deemed appropriate by the district.

Investigation Report Requirements (Per Cal. Law)

- K-12 Decision must include:
  - Findings of fact based on the evidence
  - Conclusions of law
  - Disposition of the complaint
  - Rationale for the disposition
  - Corrective actions, if any
  - Notice of appeal rights, if any (5 CCR 4631)

- CCD Report must include:
  - Description of circumstances giving rise to complaint
  - Summary of testimony provided by each witness
  - Analysis of relevant data and other evidence collected
  - Specific finding as to whether there is probable cause for each allegation
  - Any other information deemed appropriate (5 CCR 59334)

Findings of Fact and Conclusions

- Some evidence may not be in dispute
- Some evidence can be corroborated by the investigator
- Information from complainant or respondent may be corroborated by witnesses
- When information received from complainant and respondent differs on important points, make credibility determinations
- State what facts are determined to be true/false and what areas could not be determined (if any)
Findings of Fact and Conclusions, cont’d.

- Based on the facts and analysis, reach a conclusion:
  1) The complaint lacks merit
  2) The evidence was not conclusive and cannot support a determination as to the merits of the complaint
  3) The alleged conduct occurred, but did not meet the definition of sexual harassment under Title IX
  4) The alleged conduct occurred and met the definition of sexual harassment under Title IX
- Prepare a report

Interview Documentation

- Take and keep notes of interviews and the entire investigation (telephone conversations, meetings)
- Include date, time, and place of interview
- Include who attended the interview, and how long it lasted
- Note information provided by witnesses, and if it is consistent/inconsistent with information provided by other witnesses
- Note any documents/evidence provided during interview
- Note names of any potential witnesses provided by interviewee

Preserve Evidence

- Take note of when, where, and from whom an item was taken
- Store all evidence in a secure location
- If any items are surrendered to law enforcement, take a picture of the item and note when, where, and to whom it was surrendered
- Photograph physical injuries and promptly arrange for appropriate first aid/medical attention
- Title IX regulations require institutions to keep records to send to OCR for compliance reviews
- Certain records must be sent to CDE/Chancellor’s Office
Balancing Act

- The most defensible investigations will balance the rights of complainant and respondent
- Essentially, parties must be treated equally, including:
  - Equal opportunity to present witnesses and other relevant evidence
  - Same meaningful access to information used during any disciplinary meetings/hearings
  - Opportunity to respond to the investigation report in writing in advance of any decision of responsibility

IV. Decision Making

Cross-Examination Requirement

“With or without a hearing, after the recipient has sent the investigative report to the parties...and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.”
Reaching a Determination

Following a hearing, if one is held, or after the parties have had an opportunity to review the investigative report and submit questions, “[t]he decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a **written determination** regarding responsibility.”

Written Determination

- Must provide to parties simultaneously.
- The determination must contain:
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;

Written Determination, Cont’d.

- Conclusions regarding the application of the recipient’s code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
- The recipient’s procedures and permissible bases for the complainant and respondent to appeal.
Title 5 Requirements – CCD
Administrative Determination

• In any case not involving employment discrimination, within ninety (90) days of receiving a complaint, the district shall complete its investigation and forward a copy of the investigative report to the Chancellor, a copy or summary of the report and written notice to the complainant setting forth all of the following:
  1. The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;

Title 5 Requirements – CCD
Administrative Determination, cont’d.

  2. In the event a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar acts of unlawful discrimination from occurring in the future;
  3. The proposed resolution of the complaint;
  4. The complainant’s right to appeal to the district governing board and the Chancellor; and
  5. In matters involving student sexual misconduct, the respondent’s right to appeal to the district governing board any disciplinary sanction imposed upon the respondent.

Title 5 Requirements – CCD
Administrative Determination, cont’d.

• In any case involving employment discrimination, within ninety (90) days of receiving a complaint, the district shall complete its investigation and forward a copy or summary of the report and written notice to the complainant setting forth all of the following:
  1. The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;
Title 5 Requirements – CCD
Administrative Determination, cont’d.

2. If a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar acts of unlawful discrimination from occurring in the future;
3. The proposed resolution of the complaint; and
4. The complainant's right to appeal to the district governing board or to file a complaint with Department of Fair Employment and Housing (DFEH).

* In any case involving unlawful discrimination, when a district provides the complainant with any information pursuant to this subdivision, the district shall also provide to the respondent the following:
1. The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of evidence standard;
2. The proposed resolution of the complaint, including any disciplinary action against the respondent; and
3. In matters involving misconduct governed by section 59337(b) (Title IX and Student Discipline), the respondent’s right to appeal to the local governing board any disciplinary sanction imposed upon the respondent.
Title 5 Requirements – CCD
Title IX and Student Discipline Procedures (5 CCR 59337)

• In cases of student sexual misconduct subject to Title IX, district must comply with the federal DOE’s Title IX regulations.

• In cases of student sexual misconduct that are not subject to Title IX, when an accused student is subject to severe disciplinary sanctions, and the credibility of witnesses was central to the investigative findings, the district student discipline procedures must provide the following:
  1. An opportunity for the accused student to cross-examine witnesses indirectly at a live hearing, either in person or by videoconference; and
  2. A live hearing conducted by a neutral decision-maker other than the investigator.

V. Investigation-Related Issues
Confidentiality

- A complainant may no longer make a request for confidentiality in the course of an investigation.
- Previously, requests for confidentiality were evaluated in light of the school’s responsibility to provide a safe and nondiscriminatory environment for all students.
- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

Retaliation

- Schools need to be cognizant of the possibility of retaliation against complainants and witnesses.
- Schools must have procedures in place to protect against retaliatory harassment.
- Complainants and their parents/guardians, as appropriate, should be advised how to report subsequent problems.
- Any retaliation experienced by a complainant constitutes a separate Title IX violation.

Hot Seat

Please work in groups to identify the issues and discuss how you would respond to this situation.

1. Complainant, Chris, tells Rocky Community College that he would like certain witnesses interviewed as part of the College’s investigation into his sexual assault. The witnesses refuse to be interviewed. College has strong reason to believe they were pressured not to participate in the investigation.
2. The alleged assailant is a star on the College’s football team. The College hires an attorney to preside over the Title IX hearing. The attorney is a former football player for the College and a regular donor to the football program.
Parallel Criminal Investigations

• A criminal investigation does not alleviate schools of their duty to conduct an independent Title IX investigation or respond promptly and effectively to complaints

• Police investigations and reports are not necessarily determinative of whether harassment occurred under Title IX

• School should not delay its investigation until the outcome of a criminal investigation or the filing of charges

Parallel Investigations – Coordinating with Law Enforcement

• A school should coordinate with any other ongoing school or criminal investigations

• Establish fact-finding roles for each investigator

• Consider whether information can be shared among investigators to limit re-traumatizing victim

• If applicable, consult with forensic expert to ensure evidence is correctly interpreted by school officials

• Consider a memorandum of understanding with local law enforcement and local prosecutor’s office

Respondents’ Due Process Rights

• Districts must provide due process to the respondent.

• The complaint procedure and investigation must be fair and impartial

• The respondent may have a right under FERPA to inspect and review portions of the complaint that directly relate to him/her

• The school must redact complainant’s name and other identifying information before allowing respondent to inspect and review sections of complaint that relate to him/her

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Pop Quiz

A college informed the respondent only that she was being investigated for "numerous nonconsensual interactions with the victim" over a 2 year period.

What issues do you see?

A Word on FERPA

- The Family Educational Rights and Privacy Act ("FERPA") prohibits educational institutions from disclosing information "maintained" in a student’s "education record"
- FERPA is implicated in two situations in the Title IX context
- Consult legal counsel with specific facts/questions

Another Word on FERPA

- FERPA permits a school to disclose to the complainant any information about the sanction imposed upon the perpetrator when the sanction directly relates to the complainant
  - Stay away order
  - Harasser is prohibited from attending school for a period of time
  - Perpetrator was transferred to another class, campus, or residence hall
- FERPA also permits community colleges to disclose to the complainant the final results of a disciplinary proceeding in certain instances*
Additional Clery Requirements

- The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to:
  - notify proper law enforcement authorities, including campus and local police,
  - be assisted by campus personnel in notifying such authorities.
- The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community.

Additional Clery Requirements

- Community colleges must provide simultaneous written notification to both parties of:
  - results of disciplinary proceeding,
  - notification of the institution’s appeal procedures, and
  - any changes to the result when it becomes final.
- Notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.

Additional Clery Requirement

- For community college districts, the Clery Act also requires districts to inform the complainant as to:
  - any final determination of the disciplinary investigation, and
  - any disciplinary sanctions imposed on the perpetrator.
- This requirement is limited to cases involving sexual assault, dating violence, domestic violence, or stalking.
- Includes all sanctions imposed on the perpetrator, not just those directly related to complainant.
Case Study – What Not To Do

- Respondent filed an OCR complaint against his school
- He was expelled after livestreaming a video of himself and a female student engaged in a sexual act without the female student’s knowledge or consent
- OCR found the school violated the respondent’s rights by:
  - Not interviewing him as part of investigation
  - Suspending him without an opportunity to be heard
  - Completing the whole investigation in 10 days
  - Deleting recordings of the hearing 10 days after conclusion of the appeal*
  - Not allowing the respondent to “cross-examine” the complainant*

The Language of Sexual Violence

- How you write your report creates the narrative of the case
- Be careful to avoid language that:
  - victim-blames (“she was passed out”)
  - deflects responsibility from the perpetrator (“the rape”)
  - talks about the act without an agent (“battered woman”)
  - makes the victim the subject of the sentence (“Chris was raped by Jamie” vs. “Jamie raped Chris”)
  - eroticizes, romanticizes, or describes sexual violence in an affectionate way (“Morgan caressed Taylor’s breasts”)
  - uses language of consensual sex (“he had sex with her” or “she performed oral sex on him”)

Hot Seat

1. The rape occurred on Saturday, September 12 at approximately 1:15 am.
2. Robin is a rape victim.
3. This disciplinary action will impact Jordan [the harasser] for the rest of his life.
4. The allegation of sex-based harassment is sustained.
5. This is a classic “he said, she said” case.
6. The victim’s story is that the respondent drugged his drink.
7. The victim was date raped.
V. Next Steps

Next Steps

• Our office is here to help!
• Attend Parts 3 and 4 of our in-depth Title IX trainings this Fall 2020, with content specifically tailored to K-12 and community college districts.

Additional Resources – K-12

• U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
• U.S. Department of Education, Office for Civil Rights: Sexual Harassment Resources, https://www2.ed.gov/about/offices/list/ocr/sexharassresources.html
• National Center on Safe Supportive Learning Environments, https://safesupportivelearning.ed.gov/safe-place-to-learn-k12
Additional Resources – Community Colleges

• U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
• The Center for Changing Our Campus Culture, www.changingourcampus.org
• California Office of the Attorney General, Campus Sexual Assault guidance and resources, https://oag.ca.gov/campus-sexual-assault
• California Community Colleges Chancellor’s Office, www.cccco.edu

Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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May 20, 2020

To: Superintendents/Presidents/Chancellors, Member Community College Districts

From: Monica D. Batanero, Sr. Assoc. General Counsel
Kaitlyn A. Schwendeman, Schools Legal Counsel

Subject: New Title IX Regulations Effective August 14, 2020
Memo No. 18-2020(CC)

The Department of Education on May 6, 2020, issued much-awaited final regulations on how K-12 school districts and college campuses must respond to allegations of sexual harassment. Secretary of Education Betsy DeVos said the final regulations under Title IX — which prohibits sex discrimination in federally funded educational institutions — were issued after considering various stakeholder comments and as many as 124,000 public comments made since the proposed guidelines were issued in November 2018.

The overall intent of the new Title IX regulations is to provide students accused of sexual misconduct with stronger due process protections. As a result, there are many additional requirements that include very specific grievance and investigation procedures that must be adopted by educational institutions.

The new regulations are scheduled to take effect August 14, 2020, and will require modification of current sexual harassment policies, including investigation procedures.

This office is offering a webinar, entitled “New Title IX Regulations for 2020-2021,” on June 3, 2020, from 1:00 p.m. to 4:00 p.m. where we will cover in more detail the new requirements under Title IX. You may register here:

 DETAILS/REGISTER

1 https://sclscal.org/workshop/new-title-ix-regulations-for-2020-2021-k-12-ccd/
Some of the more notable changes are detailed below:

**NEW TERMINOLOGY**

The regulations define the following terms to ensure consistency and clarity:

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

**DEFINITION OF SEXUAL HARASSMENT**

The new regulations provide that there are only three categories of conduct that could constitute sexual harassment under Title IX:

1. unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;
2. quid pro quo harassment; or
3. sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

What this means: The final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party. However, when determining whether conduct meets the definition of sexual harassment, particularly under category 1 (hostile environment), the conduct must be severe, pervasive and objectively offensive. Previously, the legal standard was that the conduct has to be either severe or pervasive. This will result in a huge shift in how we analyze whether sexual conduct creates a hostile environment for a complainant and will make it more difficult for a complainant to argue that he/she has been subjected to a hostile environment due to sexual harassment. Notably, under the new regulations a single instance of harassment on the basis of sex can no longer be considered sexual harassment pursuant to the hostile environment analysis.

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2 34 CFR § 106.30
3 Quid pro quo sexual harassment is defined as “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 34 U.S.C. § 12291(a)(10)
6 34 U.S.C. § 12291(a)(8)
7 34 U.S.C. § 12291(a)(30)
It is important to note that conduct that falls under the other two categories – quid pro quo and Clery Act/VAWA offenses - do not have to meet the elements of “severe, pervasiveness, and objective offensiveness” such that a single instance of sufficiently severe harassment on the basis of sex may have the systemic effect of denying the victim equal access to an education program or activity.

Lastly, recipients may continue to address harassing conduct that does not meet the Title IX definition of sexual harassment under other provisions of the recipient’s own code of conduct.

**DESIGNATION OF A TITLE IX COORDINATOR**

The Department of Education ("DOE") has clarified that each recipient must designate and authorize at least one employee to coordinate its efforts with its responsibilities under Title IX. The employee must be referred to as the “Title IX Coordinator” and the recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name and title, office address, electronic mail address, and telephone number of the employee designated as the Title IX Coordinator.

**What this means:** The DOE has expanded the groups of individuals/organizations that must be notified of the Title IX Coordinator’s information. The recipient must prominently display on its website, if any, of the Title IX Coordinator’s contact information and the recipient’s sexual harassment prevention policy and in each handbook catalog that it makes available to the individuals who now must be notified of the Title IX Coordinator’s information. In addition, the contact information of the Title IX Coordinator must now include either the name or title of the individual and the email address (which was not required previously).

Most importantly, the regulations clarify the independent compliance and investigatory responsibilities of the Title IX Coordinator. Title IX Coordinators must be given independent authority to monitor and implement a recipient’s compliance under Title IX. The Title IX Coordinator must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially.

**GENERAL RESPONSE TO SEXUAL HARASSMENT**

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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8 34 CFR § 106.8
9 34 CFR § 106.45(b)(1)(iii)
10 34 CFR § 106.44
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

Education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, e.g., off-campus housing, fraternity/sorority houses, etc.

These final regulations emphasize that any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient’s website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

A recipient’s response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process now required under the new Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment or deter sexual harassment.

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations,

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11 34 CFR § 106.44(a)
12 34 CFR § 106.30
leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.\(^\text{13}\)

With or without a formal complaint, a recipient must comply with the requirement to offer supportive services.\(^\text{14}\)

**What this means:** Previously, a recipient’s duty to investigate and remediate sexual misconduct was triggered when a “responsible employee” knew or should have known about the sexual harassment/sex discrimination. Not only do the new regulations no longer use the term “responsible employee,” the regulations also eliminated the concept of constructive notice (aka “should have known”).

For post-secondary educational institutions, notice of sexual harassment/sex discrimination only occurs when that institution’s Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the recipient receives notice of sexual harassment or allegations of sexual harassment. Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator and the filing of a formal complaint.

For K-12 educational institutions, when any employee receives notice from a student or employee of sexual harassment or allegations of sexual harassment, the recipient is deemed to have actual knowledge, thereby triggering the recipient’s duty to promptly respond. So, all K-12 employees are considered officials with authority to institute corrective measures and schools may not exempt any classification of employee, such as counselors or classified employees.

The new regulations also eliminated the previously-used term “interim measures” and instead use the term “supportive services.”

**JURISDICTIONAL ISSUES**\(^\text{15}\)

Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient (as defined above) will not be covered under Title IX. Therefore, sexual harassment that occurs off campus via social media that targets a student, for example, may not fall under the provision of Title IX. However, this type of misconduct may still be in violation of the recipient’s code of conduct and so the recipient’s response would be pursuant to that policy.

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\(^\text{13}\) 34 CFR § 106.30
\(^\text{14}\) 34 CFR § 106.45
\(^\text{15}\) 34 CFR § 106.44(a)
In addition, Title IX no longer applies for acts committed outside the United States even if the misconduct occurred in a recipient’s education program or activity, e.g., study abroad program. However, other policies may apply, e.g., a code of conduct policy, that would require a response from the recipient.

**What this means:** Recipients must be careful to first identify if they have jurisdiction over sexual misconduct in order to determine if Title IX applies. However, even if a recipient does not have jurisdiction under Title IX, it may have jurisdiction under another policy or provision. For example, for K-12 school districts, bullying via social media that occurs off campus may be within a recipient’s jurisdiction and subject the offending student to discipline. However, that same conduct may not require a recipient to investigate under Title IX.

**FORMAL COMPLAINT**

A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.

**What this means:** The definition of “formal complaint” precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. However, as mentioned earlier, any person who believes that sexual harassment may have occurred may report sexual harassment which would then trigger a recipient’s responsibility to determine if supportive services are necessary under the circumstances. Furthermore, a complainant may not submit a formal complaint anonymously, as it requires their physical or digital signature. While a Title IX Coordinator may sign a formal complaint based upon an anonymous report, the identity of the complainant will be disclosed if known.

**NOTICE OF ALLEGATIONS**

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the

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16 34 CFR § 106.8(d)
17 34 CFR § 106.30
18 34 CFR § 106.45(b)(2)
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

**What this means:** The intent of the new Title IX regulations is to provide an equitable process that affords due process to the parties involved, particularly the respondent. Providing respondents with specific details about the allegations provides them a better opportunity to defend themselves, which is central to due process.

**RESPONSE TO A FORMAL COMPLAINT**

In response to a formal complaint, a recipient must adopt and follow a grievance process that complies with the following elements:

1. Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

2. Require 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;

3. Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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19 34 CFR § 106.45(b)(1)
A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any 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 formal complaints of sexual harassment;

4. Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

5. Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

6. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

7. State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

8. Include the procedures and permissible bases for the complainant and respondent to appeal;

9. Describe the range of supportive measures available to complainants and respondents; and
10. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**What this means:** The two most notable changes are the never before required training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process and the requirement that recipients apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty. For example, if a collective bargaining agreement requires a clear and convincing standard for formal complaints against employees, then that same standard would have to be applied for formal complaints against students. The two standards of evidence that a recipient must choose from are preponderance of the evidence (more likely than not or >50%) or clear and convincing evidence (substantially more likely than not or ~75%).

Regarding the new training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, there is no minimum hourly training requirement, but instead the training must include the following components: the definition of sexual harassment, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. Decision-makers specifically must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

**DISMISSAL OF A FORMAL COMPLAINT**

The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the recipient must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

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20 34 CFR § 106.45(b)(3)
What this means: The Title IX regulations now specify when a recipient must dismiss a complaint under Title IX. In addition, a complainant can request to dismiss a formal complaint, but the recipient is not required to dismiss the complaint.

**EMERGENCY REMOVAL**

Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

What this means: A recipient may only remove a respondent from his/her education program or activity after considering several criteria in order to determine if the respondent must be removed to ensure the physical health or safety of any student. In addition, a respondent is entitled to some form of due process immediately following his/her removal from his/her education program or activity. This “due process” may be a hearing or meeting with an administrator responsible for conducting the individualized safety and risk analysis for the sole purpose of providing the respondent the opportunity to challenge the decision.

**INVESTIGATION OF A FORMAL ComPLAINT**

When investigating a formal complaint and throughout the grievance process, a recipient must—

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties. Furthermore, the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3);

2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

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21 34 CFR § 106.44(c)
22 34 CFR § 106.45(b)(5)
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

6. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

7. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

**What this means:** The investigation procedure that recipients must now adopt must be followed in order to provide the parties, particularly the respondent, with due process. The regulations make clear that it is the recipient’s responsibility, not the parties’, to gather evidence sufficient to reach a determination regarding responsibility and the burden of proof rests with the recipient.

Each party is now entitled to review, prior to the completion of the investigation report, all evidence, inculpatory and exculpatory, that is directly related to the allegations raised in the formal complaint. Practically speaking, this will be accomplished by the investigator providing a copy of the draft investigation report prior to the completion of the report and allow each party at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a

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23 34 CFR § 106.45(b)(6)(i)
hearing. With or without a hearing, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**What this means:** Postsecondary institutions are now required to conduct a live hearing conducted by a neutral decision-maker (hearing officer or panel) who will review the evidence and make a decision as to culpability. The decision-maker cannot be the Title IX Coordinator or the investigator. The hearing can be conducted via video conference and it must always be recorded. The parties must be allowed to ask relevant questions and cross-examine witnesses.

If a party does not have an advisor present at a live hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-examination on behalf of that party. A party cannot conduct questioning on their own behalf. Therefore, if a party does not have an advisor, the recipient will need to provide one, which can be an employee of the recipient; however, the recipient chooses the advisor.

Recipients that are elementary and secondary schools are not required to conduct live hearings to determine culpability. However, the parties must be given the opportunity to submit written, relevant questions they wanted asked of any party or witness after receiving the investigation report. The recipient will then provide each party with the answers to their questions and then allow for additional, limited follow-up questions from each party.

**STANDARD OF EVIDENCE**

The final regulations were revised to clearly require a recipient’s grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

**DETERMINATION REGARDING RESPONSIBILITY**

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence that it applies to all formal

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24 34 CFR § 106.45(b)(1)(vii)
25 34 CFR § 106.45(b)(7)
complaints of sexual harassment – either preponderance of the evidence or clear and convincing evidence.

The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

The Title IX Coordinator is responsible for effective implementation of any remedies.26

**What this means:** A recipient must now ensure that an individual, other than the Title IX Coordinator or investigator, reviews all the evidence and makes a determination regarding a respondent’s responsibility under Title IX. In small elementary and secondary districts, this will require that the Title IX Coordinator be an employee other than the chief administrative officer.

**APPEALS**27

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

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26 34 CFR § 106.45(b)(7)(iv)
27 34 CFR § 106.45(b)(8)
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

A recipient may offer an appeal equally to both parties on additional bases. As to all appeals, the recipient must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

2. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

**What this means:** Both parties must now be offered the opportunity to appeal a determination regarding responsibility. Previously, recipients generally only provided the complainant with an opportunity to appeal a determination regarding responsibility. Also, the decision-maker for the appeal must meet the same training requirement as the Title IX Coordinator.

**INFORMAL RESOLUTION**

A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

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28 34 CFR § 106.45(b)(9)
However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

1. Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

2. Obtains the parties’ voluntary, written consent to the informal resolution process; and

3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

What this means: Recipients are not required to develop and implement an informal resolution process. However, if a recipient chooses to develop an informal resolution process, it cannot be offered unless a formal complaint has been filed.

**RECORDKEEPING**

A recipient must maintain for a period of seven (7) years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

What this means: Recipients must now maintain records regarding every phase of a sexual harassment investigation under Title IX for at least seven years. Previously, there was no express requirement on maintaining records for a specific period of time.

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29 34 CFR § 106.45(b)(10)
TRAINING MATERIALS PUBLICATION REQUIREMENT

Each recipient must publish on its website the training materials used to train its Title IX Coordinator.

What this means: If the training materials are proprietary, and thus copyrighted, we recommend you list the materials by its title, but not make them available on your website. You can further state on your website that the materials may be available for inspection with the Title IX Coordinator.

REMEDIAL ACTION

The DOE has clarified that it may require a recipient to take remedial action for discriminating in violation of Title IX and for violating Title IX regulations.

What this means: A recipient that does not follow the requirements of Title IX, such as not designating an employee as a Title IX Coordinator, failing to offer supportive services, failing to send written notice after dismissing a complainant’s allegations, or not following its grievance procedures, may be found to have violated Title IX, even if the violation does not, itself, constitute sex discrimination.

RIGHTS OF PARENTS

The regulations expressly recognize the legal rights of parents/guardians to act on behalf of a complainant or respondent on any Title IX matter.

What this means: Parents/guardians cannot be prevented from representing their child or acting on their behalf on any Title IX matter. However, once a child attains the age of majority (18), he/she holds his/her educational rights, unless he/she is conserved, and can act on their own behalf. However, an adult child can assign his/her educational rights to his/her parent/guardian so that the parent/guardian can act on their child’s behalf.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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30 34 CFR § 106.45(b)(10)(i)(D)
31 34 CFR § 106.3
32 34 CFR § 106.6(g)
Board of Governors of the California Community Colleges

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE
   N/A

2. NOTICE TYPE
   Regulatory Action

3. NOTICE USE ONLY
   Approved as Submitted

4. AGENCY FILE NUMBER
   Z-

5. AGENCY CONTACT PERSON
   N/A

6. TELEPHONE NUMBER
   N/A

7. FAX NUMBER (Optional)
   N/A

8. NOTICE REGISTER NUMBER
   N/A

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)
   Unlawful Discrimination Regulation

2. SECTION(S) AFFECTED
   59330, 59332, 59334, 59335, 59336, 59338, 59339, 59340, 59342, 59350

3. TYPE OF FILING
   Regular Rulemaking (Gov. Code § 11346)

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(b); Cal. Code Regs., title 1, §44)
   Effective January 1, April 1, July 1, or October 1 (Gov. Code § 11346.4(3))

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY
   Department of Finance (Form STD. 399) (SAM S6640)

7. CONTACT PERSON
   Tanya Bosch - Regulations Coordinator

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

Marc A. LeForestier, General Counsel

For use by Office of Administrative Law (OAL) only
Final Text of Regulatory Action, Unlawful Discrimination,

Board of Governors of the California Community Colleges
Final Revisions to Title 5 Regulations Concerning Unlawful Discrimination

**TITLE 5, SECTION 59300**
Section 59300 of article 1 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59300. Purpose.
The purpose of this subchapter is to implement provisions of state and federal law which together prohibit discrimination or retaliation: the provisions of California Government Code sections 11135 through 11139.5, the Sex Equity in Education Act (Ed. Code § 66250 et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12100 et seq.) and the Age Discrimination Act (42 U.S.C. § 6101), to the end that no person in the State of California shall, in whole or in part, against persons or groups, or those associated with them on the basis of an actual or perceived characteristic related to ethnic group identification, national origin, immigration status, religion, age, sex, or gender, gender identification, gender expression, military and veteran status, marital status, medical condition, race, color, ancestry, sexual orientation, or physical or mental disability, or any other characteristic protected under applicable federal or state law, or on the basis of these perceived characteristics or based on association with a person or group with one or more of these actual or perceived characteristics, be unlawfully subjected to discrimination under any program or activity that is administered by, funded directly by, or that receives any financial assistance from, the Chancellor or Board of Governors of the California Community Colleges, based upon an actual or perceived characteristic listed in this section.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; Sections 11135, 11136, 11137, 11139 and 11139.5, 11139.8, Government Code; Sections 422.6 and 422.55, Penal Code; Title 20, United States Code, Section 1681; Title 29, United States Code, Section 794; and Title 42, United States Code, Sections 2000d, 6101, 12101, 12112 and 12132, and 12100, et seq.

**TITLE 5, SECTION 59311**
Section 59311 of article 2 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:
§ 59311. Definitions.
For purposes of this subchapter, the following definitions shall apply:
(a) “Appeal” means a request by a complainant made in writing to a community college district governing board pursuant to section 59338 and/or to the Chancellor’s Office pursuant to section 59339 to review the administrative determination of a community college district regarding a complaint of discrimination.
(b) “Complaint” means a written or verbal and signed statement meeting the requirements of section 59328 that alleges unlawful discrimination in violation of this subchapter.
(c) “Days” means calendar days.
(d) “Unlawful discrimination” means unfair or unequal treatment of an individual (or group) based upon an actual or perceived characteristic related to ethnic group identification, national origin, immigration status, religion, age, sex, gender, gender identification, gender expression, military and veteran status, marital status, medical condition, race, color, ancestry, sexual orientation, physical or mental disability, or any other characteristic protected under applicable federal or state law.
(d) Except for purposes of section 59306, “disability” means any mental or physical disability as defined in Government Code section 12926.
(e) “Discrimination on the basis of sex” means sexual harassment or discrimination on the basis of gender.
(f) “Gender” means sex, and includes a person’s gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.
(g) “Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person’s gender, as defined in section 422.56 of the Penal Code. Discrimination on the basis of sex or gender also includes sexual harassment.
(h) “Sexual orientation” means heterosexuality, homosexuality, or bisexuality.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; Sections 11135 and 12926, Government Code; and Sections 422.6 and 422.55, Penal Code.

TITLE 5, SECTION 59320
Section 59320 of article 3 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59320. District Responsibilities.
Each community college district has primary responsibility to ensure that its programs and activities are available to all persons without unlawful discrimination, regarding their actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, or physical or mental disability, or to their association with a person or group with one or more of these actual or perceived characteristics. Therefore, each community college district shall
investigate complaints of unlawful discrimination in their programs and activities, and seek to resolve those complaints in accordance with the provisions of this subchapter.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; Sections 11135 and 12926, Government Code; and Sections 422.6 and 422.55, Penal Code.

TITLE 5, SECTION 59327
Section 59327 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59327. Informal Resolution.
(a) Whenever any person brings charges of unlawful discrimination are brought to the attention of the responsible district officer, the district may designated pursuant to section 59324, that officer shall: undertake efforts to informally resolve the charges with the complainant's consent. The district must advise complainants that they need not participate in informal resolution.
(1) undertake efforts to informally resolve the charges;
(2) advise the complainant that he or she need not participate in informal resolution;
(3) notify the person bringing the charges of his or her right to file a complaint, as defined in section 59311, and of the procedure for filing such a complaint pursuant to section 59328;
(4) advise the complainant that he or she may file his or her nonemployment-based complaint with the Office for Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction; and
(5) advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies.
(b) Efforts at informal resolution pursuant to subdivision (a)(1) may, but need not include any investigation, unless the responsible district officer determines that when an investigation is warranted, by the seriousness of the charges.
(c) Efforts at informal resolution may continue after the filing of a formal written or verbal complaint is made, but after a complaint is filed an investigation is required to be conducted pursuant to section 59334 and The investigation must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint, or the complaint is filed with the DFEH and the Chancellor elects not to require further investigation pursuant to section 59328(f)(2). The district may proceed with an investigation notwithstanding an informal resolution.
(d) Any efforts at informal resolution after the filing of a written or verbal complaint is made shall not exceed the completed within ninety (90) days period for rendering the administrative determination pursuant to section 59336.
Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59328
Section 59328 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:


An investigation of alleged unlawful discrimination prohibited by this subchapter will be initiated by filing a complaint that meets the following requirements:

(a) The complaint of unlawful discrimination may be written or verbal, and shall be made by a student, an employee, a parent of a minor, or an individual with legal authority on behalf of a student or employee, who alleges that the student or employee has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his or her official capacity as a faculty member or administrator.

(b) Any complaints to a responsible employee under California law or Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688, shall be forwarded to the responsible district officer or designee.

(c) Written complaints shall be provided to the Chancellor of the California Community Colleges or with the responsible district officer or designee designated pursuant to section 59324 by the appropriate community college district.

(d) The complainant shall be in any case requested, but shall not be required, to submit the complaint on a form prescribed by the Chancellor or the community college district.

(e) Verbal complaints shall be lodged with the responsible district officer or designee. The responsible district officer or designee shall record the verbal complaint in writing. The district shall take appropriate steps to ensure the writing accurately reflects the facts alleged by the complainant.

(f) In any complaint not involving employment, the complaint shall be filed within one year of the date of the alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts underlying the allegation of unlawful discrimination.

(1) the complaint shall be filed within one year of the date of the alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts underlying the allegation of unlawful discrimination;

(2) districts shall advise student complainants that they may file their nonemployment-based complaint with the Office for Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction.

(g) In any complaint alleging discrimination in employment, the complaint shall be filed within 180 days of the date the alleged unlawful discrimination occurred, except that this period should be extended by no more than 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged violation after the expiration of the 180 days.
(1) the complaint shall be filed within 180 days of the date the alleged unlawful
discrimination occurred, except that this period should be extended by no more than 90
days following the expiration of the 180 days if the complainant first obtained knowledge
of the facts of the alleged violation after the expiration of the 180 days;
(2) advise complainants that they may file the complaint with the U.S. Equal Employment
Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing
(DFEH) where the complaint is within the jurisdiction of those agencies.
(f) In any complaint alleging discrimination in employment, the district shall:
(1) advise the complainant that he or she may file the complaint with the U.S. Equal
Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment
and Housing (DFEH) where the complaint is within the jurisdiction of those agencies; and
(2) forward a copy of any filing by the complainant with the DFEH or the EEOC to the
Chancellor's Office for a determination of whether the issues presented require an
independent investigation of the matter under the provisions of this subchapter.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section
11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and
72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59330
Section 59330 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the
California Code of Regulations is repealed:

§ 59330. Notice to Chancellor.
Immediately upon receiving a complaint filed in accordance with section 59328,
regardless of whether the complaint is brought by a student or by an employee, the
district shall forward a copy of the complaint to the Chancellor.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section

TITLE 5, SECTION 59334
Section 59334 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the
California Code of Regulations is amended to read:

§ 59334. District Investigation.
(a) Upon receiving a complaint that is properly made filed in accordance with section
59328, the district will notify the complainant that the district will commence an
impartial fact-finding investigation of the allegations contained in the complaint and
notify the complainant and Chancellor that it is doing so.
(b) The results of the investigation shall be set forth in a written report that shall include
at least all of the following:
(a1) a description of the circumstances giving rise to the complaint;
(b) a summary of the testimony provided by each witness, including the complainant and any available viable witnesses identified by the complainant in the complaint;
(c) an analysis of any relevant data or other evidence collected during the course of the investigation;
(d) a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each factual allegation in the complaint occurred based on the preponderance of the evidence standard; and
(e) any other information deemed appropriate by the district.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270, et seq. 67386 and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59336
Section 59336 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59336. Administrative Determination.
(a) In any case not involving employment discrimination, within ninety (90) days of receiving a complaint, the district shall complete its investigation and forward a copy of the investigative report required pursuant to section 59334 to the Chancellor, a copy or summary of the report to the complainant, and written notice to the complainant setting forth all of the following to both the complainant and the Chancellor:
(1) the determination of the chief executive officer's or his/her designee's determination as to whether there is probable cause to believe unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;
(2) in the event a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar problems from occurring in the future;
(3) the proposed resolution of the complaint; and
(4) the complainant's right to appeal to the district governing board and the Chancellor pursuant to sections 59338 and 59339; and
(5) in matters involving student sexual misconduct, the respondent's right to appeal to the district governing board any disciplinary sanction imposed upon the respondent.
(b) In any case involving employment discrimination, within 90 days of receiving a complaint, the district shall complete its investigation and forward a copy or summary of the report to the complainant, and written notice to the complainant setting forth all the following to the complainant:
(1) the determination of the chief executive officer's or his/her designee's determination as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;
(2) if a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar problems from occurring in the future;
(3) the proposed resolution of the complaint; and
(4) the complainant’s right to appeal to the district governing board and to file a complaint with Department of Fair Employment and Housing.

(c) In any case involving unlawful discrimination, when a district provides the complainant with any information pursuant to this subdivision, the district shall also provide to the respondent the following:

(1) The chief executive officer’s or their designee’s determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;

(2) The proposed resolution of the complaint, including any disciplinary action against the respondent; and

(3) In matters involving misconduct governed by section 59337, subdivision (b), the respondent’s right to appeal to the local governing board any disciplinary sanction imposed upon the respondent.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270, et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59337
Section 59337 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is added to read:

§ 59337. Title IX and Student Discipline Procedures.
(a) In cases of student sexual misconduct subject to Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688, districts must comply with the federal Department of Education’s Title IX regulations, 34 C.F.R. Part 106.

(b) In cases of student sexual misconduct that are not subject to Title IX, when an accused student is subject to severe disciplinary sanctions, and the credibility of witnesses was central to the investigative findings, district student discipline procedures must provide the following:

(1) An opportunity for the accused student to cross-examine witnesses indirectly at a live hearing, either in person or by videoconference; and

(2) A live hearing conducted by a neutral decision-maker other than the investigator.

(c) For purposes of this section, “indirect” cross-examination shall be conducted as follows:

(1) Any question to the witness shall be asked by a neutral party appointed by the district for the sole purpose of asking questions. The neutral party shall not be the accused student, the accused student’s representative, or a member of the hearing panel; and

(2) The accused student may submit written questions before and during the cross-examination, including any follow-up questions. The neutral party asking questions shall not exclude any questions unless there is an objection to the question by the hearing panel.
(d) Nothing in this section shall prohibit a district from providing a live hearing or neutral decision-maker for other student discipline proceedings, including for other forms of discrimination.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code. Reference: Sections 66271.6 and 66271.7, Education Code; Title 20, United States Code, Section 1681; Title 34, Code of Federal Regulations, Section 106.31.

**TITLE 5, SECTION 59338**

Section 59338 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59338. Final District Decision; Appeals to Local Governing Board.

(a) If the complainant is not satisfied with the results of the administrative determination rendered pursuant to section 59336, the complainant may submit a written appeal to the district governing board within fifteen (15) thirty (30) days from the date of the notice required by section 59336 that sets forth the administrative determination and the complainant's appeal rights. The governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision in the matter within forty-five (45) days after receiving the appeal.

(b) If the governing board does not act within forty-five (45) days, the administrative determination shall be deemed approved and shall become the final district decision. The district shall promptly notify the complainant and the respondent of the board's action, or if the board took no action that the administrative determination is deemed approved.

(c) In any case not involving employment discrimination, the district shall promptly forward to the complainant, and the respondent, and to the Chancellor a copy of the final district decision rendered by the governing board, if any, that includes notice of the complainant's right to appeal the district's decision to the Chancellor pursuant to section 59339.

(d) In any case involving employment discrimination, the district shall promptly forward to the complainant a copy of the final district decision rendered by the governing board that includes the complainant's right to file a complaint with the Department of Fair Employment and Housing (DFEH), where the case is within the jurisdiction of that agency.

(e) If the governing board does not act within forty-five (45) days the administrative determination shall be deemed approved and shall become the final district decision in the matter.
The district shall promptly notify the complainant and, in any case not involving employment discrimination, the Chancellor, that the board took no action and the administrative determination is deemed approved pursuant to this section.

(2) In any case not involving employment discrimination, the complainant shall also be notified of his or her right to appeal the district's decision to the Chancellor pursuant to section 59339.

(3) In any case involving employment discrimination, the complainant shall also be notified of his or her right to file a complaint with the Department of Fair Employment and Housing (DFEH), where the case is within the jurisdiction of that agency.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq.; and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59339
Section 59339 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

§ 59339. Appeal to the Chancellor.
(a) In any case not involving employment discrimination, the complainant may have the right to file a written appeal with the Chancellor within thirty (30) days from the date of that the governing board issues the district's notice of final district decision, or permits the administrative determination to become final pursuant to section 59338, or from the date of the notice provided pursuant to section 59338(b) or (d), whichever is later. Such appeals shall be processed pursuant to the provisions of article 4 (commencing with section 59350) of this subchapter. The appeal must be accompanied by a copy of the complaint, the decision of the governing board, and the notice of final decision or evidence showing the date on which the complainant filed an appeal with the governing board and a statement under penalty of perjury that no response was received from the governing board within forty-five (45) days from that date.
(b) In any case involving employment discrimination, the complainant may, at any time before or after the final district decision is rendered, file a complaint with the Department of Fair Employment and Housing (DFEH), where the complaint is within the jurisdiction of that agency.
(c) For any appeal under subdivision (a), the district shall provide all relevant, non-privileged documents upon request of the Chancellor.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq.; and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59340
Section 59340 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

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§ 59340. Provision of Information Disclosures to the Chancellor.

(a) Within 150 days of receiving a complaint which does not involve employment discrimination, the district will either:

Upon request of the Chancellor, a district shall provide copies of all documents related to a discrimination complaint, including the following:

1. The complaint forward the following to the Chancellor;
2. Any investigative report, unless subject to the attorney-client privilege;
3. A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to section 59338(a) or (d);
4. A copy of the notice to the complainant required by pursuant to section 59338(a) or (d);
5. A copy of the complainant's appeal of the district's administrative determination pursuant to section 59338(a); and
6. Such any other non-privileged documents or information as the Chancellor requests, may require; or

(b) Districts shall provide to the Chancellor an annual report with the following information:

1. The number of employment and non-employment discrimination complaints and informal charges received in the previous academic year.
2. The number of complaints and informal charges resolved in the previous academic year.
3. The number of complaints of unlawful discrimination received in the previous academic year, and the number of those complaints that were sustained in whole or in part.
4. Any other information requested by the Chancellor.

(bc) Districts shall retain all records arising from informal discrimination charges and formal discrimination complaints for a period of at least five years after closing a case, including a case involving employment discrimination, the district shall retain and make available to the Chancellor upon request the original complaint, the documents referenced in sections 59336 and 59338, and the documents identified in subdivision (a) of this section.


TITLE 5, SECTION 59342

Section 59342 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:
§ 59342. Extensions; Failure to Comply.

(a) If a district, for reasons beyond its control, is unable to comply with the 90-day or 150-day deadline pursuant to specified in sections 59327 and 59336 or 59340, the district may file a written request that the Chancellor grant an extension to extend the time to respond by up to 45 additional days. An extension may be taken only once without permission from the Chancellor's Office, and must be necessary for one of the following reasons: the deadline. Where an extension is deemed necessary by the district, it must be requested from the Chancellor regardless of whether or not the case involves employment discrimination. The request shall be submitted no later than ten (10) days prior to the expiration of the deadline established pursuant to sections 59336 or 59340 and shall set forth the reasons for the request and the date by which the district expects to be able to submit the required materials.

(1) a need to interview a party or witness who has been unavailable;
(2) a need to review or analyze additional evidence, new allegations, or new complaints related to the matter; or
(3) to prepare and finalize an administrative determination.

(b) Districts shall send a written notice to the complainant, and to a respondent who is aware of an investigation, indicating the necessity of an extension, the justification for the extension, and the number of days the deadline will be extended.

(c) Notice of an extension shall be sent to the complainant, and to a respondent who is aware of an investigation, no later than 10 days prior to the initial time to respond pursuant to section 59336.

(bd) Districts may request additional extensions from the Chancellor after the initial 45-day extension. A copy of the extension request for an extension shall be sent to the complainant, and to a respondent who is aware of an investigation, who shall be notified that he or she The complainant and respondent may each file a written objections with the Chancellor within five (5) days of receipt.

(ee) The Chancellor may grant the extension for good cause request unless delay would be unduly prejudicial to the complainant or investigation. If the Chancellor grants an extension of the 90-day deadline, the 150-day deadline is automatically extended by an equal amount.

(df) If a district fails to comply with the requirements of this section or sections 59336 or 59340 by the required deadline, including any extension granted pursuant to this section, the Chancellor may proceed to review the case as provided in article 4 (commencing with section 59350) of this subchapter based on the original complaint and any other relevant information then available.

Note: Authority cited: Sections 66271.7, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59350
Section 59350 of article 4 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:
(a) The Chancellor shall review the materials submitted by the district pursuant to sections 59336 and 59340, together with the complainant's appeal, and determine whether there is reasonable cause to believe the district has violated the requirements of this subchapter. The Chancellor's review on appeal is limited to the following issues:
(1) whether there was a procedural error in violation of this subchapter;
(2) whether there was a defect in the investigation;
(3) whether new evidence unavailable during the investigation despite the complainant's due diligence would substantially impact the outcome of the investigation;
(4) whether correct legal standards were applied; and
(5) whether the district's determination was an abuse of discretion.
(b) Failure by the complainant to file an appeal pursuant to section 59339 shall not preclude the Chancellor from finding reasonable cause to believe the district has violated the requirements of this subchapter. The Chancellor shall issue a determination within ninety (90) days of receiving the appeal and appellate file from the appropriate district. The Chancellor shall send the determination to both the complainant and the district.
(c) If the Chancellor finds there is no reasonable cause to believe a violation has occurred, the Chancellor shall immediately notify both the complainant and the district.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250, 66251, 66252, 66270 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59352
Section 59352 of article 4 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is repealed and adopted to read:

§ 59352. Investigation.
If the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

§ 59352. Remand.
(a) The Chancellor may remand any matter to the originating district for any of the following reasons:
(1) to cure defects in the investigation or in procedural compliance;
(2) to consider new evidence not available during the investigation despite the complainant's due diligence that would substantially impact the outcome of the investigation; or
(3) to modify or reverse a decision of the local governing board based upon misapplication of an applicable legal standard or an abuse of discretion.
(b) If a matter is remanded to the district, the district shall take necessary action and issue a decision after remand within sixty (60) days.
(c) In any case not involving employment discrimination, the complainant may appeal the district’s amended determination to the Chancellor within thirty (30) days pursuant to section 59339.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code. Reference: Sections 66250, 66251, 66252, 66270 and 72011, Education Code; and Sections 11135 and 11136, Government Code.

TITLE 5, SECTION 59356
Section 59356 of article 4 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is repealed:

§ 59356. Formal Resolution.
Within 120 days of initiating the investigation, the Chancellor shall take one of the following actions:
(a) Notify the district and the complainant that there is probable cause to believe the district has violated the provisions of this subchapter. The Chancellor shall allow the district to acquiesce in this finding prior to filing an accusation against the district.
(b) Notify the district and the complainant that there is no probable cause to believe the district has violated the provisions of this subchapter.

Note: Authority cited: Sections 66271.7, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.
Dear [COMPLAINANT],

This letter is to confirm that the [COMMUNITY COLLEGE DISTRICT] (“District”) has received the formal complaint against [RESPONDENT] (“Respondent”) that you submitted to [NAME] on [DATE]. The District will process this complaint as a Formal Complaint under the District’s grievance process pursuant to its Sexual Harassment Board Policy and Administrative Procedure [INSERT BP/AP NUMBER]. I have enclosed a copy of Board Policy and Administrative Procedure [_______] for your reference. Please contact me if you have any questions.

Formal Complaint

Based on your Formal Complaint, I have developed the following allegations, which will be investigated pursuant to the District’s policies and regulations. If you disagree with my understanding of your Formal Complaint, or with the allegations as I have written them, or if you wish to supplement your Formal Complaint, please let me know in writing as soon as possible.

In your complaint, you alleged that the Respondent committed unlawful sexual harassment/sex discrimination against you based on incidents that took place [ON [DATE] OR DURING THE ________ SEMESTER]. In the allegations below, you are referred to as “Complainant.”

In the complaint, the following allegations are made:

**Allegation No. 1:**

Allegation No. 2:

In your Complaint, you stated that your desired resolution of this matter is that:

- [ADD DESIRED RESOLUTIONS]

Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Procedure [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence supporting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.
Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [________] (Sexual Harassment), enclosed with this letter.)

If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Procedure [________] (enclosed).

Here is some information about your rights under the grievance process:

- You will not be required to confront or work out problems directly with the Respondent.
- You may file a complaint with local law enforcement.
- You may file a complaint with the United States Department of Education, Office for Civil Rights, if the complaint is not based on employment.
- You may file a complaint with the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing if the complaint is based on employment.
- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.
- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence supporting the allegation(s) and have that evidence considered as part of the District’s investigation.
- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.
- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any individual designated by the District as a Title IX Coordinator, investigator,
decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- You are entitled to the same periodic status updates that the District provides to the Respondent.

- You will be given an equal opportunity as the Respondent to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The District will make all such evidence subject to the parties’ inspection and review available at any hearing to give each part equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing where a determination regarding responsibility is made, for your review and written response.

- You are entitled to a live hearing where the decision maker must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

- If a party does not have an advisor present at a live hearing, the District must provide one to that party without fee or charge to conduct cross-examination on behalf of that party. The advisor may be an attorney, but is not required to be, and is chosen by the District.

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Procedure [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant (or alleged victim) withdraws a complaint.
Informal Resolution Process [INCLUDE IF APPLICABLE]

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

- Provides the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

- Obtains the parties’ voluntary, written consent to the informal resolution process; and

- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Prohibition against and Protection from Retaliation

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the Respondent or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

Next Steps

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,
[INITIAL LETTER TO COMPLAINANT (CCD)]

** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE **

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]

Administrative Procedure [_____] (Discrimination and Harassment Complaint Procedures)
Board Policy [_____] (Nondiscrimination)
Administrative Procedure [_____] (Nondiscrimination)
Board Policy [_____] (Prohibition of Harassment)
Administrative Procedure [_____] (Prohibition of Harassment)
Re: Notice of Allegations in Formal Complaint

Dear [RESPONDENT]:

This letter is to inform you that the [COMMUNITY COLLEGE DISTRICT] (“District”) has received a complaint against you filed by [INSERT NAME OF COMPLAINANT] (“Complainant”). The Complainant alleged that you engaged in unlawful sex discrimination/sexual harassment in violation of District policies and procedures. In the allegations as described here, you are referred to as the “Respondent.” Please review the revised allegations below. Please contact me if you have any questions.

In the complaint, the following allegations are made:

Allegation No. 1:


Allegation No. 2:

Such behavior may constitute unlawful sex discrimination or sexual harassment, a violation of Board Policies and Administrative Procedures [INSERT RELEVANT BP/AP – SEXUAL HARASSMENT, NONDISCRIMINATION, ETC.] and Article [ ] of the collective bargaining agreement between [UNION] (“UNION”) and the District [IF APPLICABLE]. If you are found to have engaged in misconduct, you may be subject to discipline on these or other grounds.

The District is confirming these allegations with the Complainant, and will notify you if the allegations change or are supplemented.

While no determination has been made, and the District does not presume that you have acted inappropriately, the District will investigate the allegations in accordance with the grievance process set forth in Administrative Procedure [ ]. I have enclosed a copy of Administrative Procedure [ ] for your reference.
**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

**INVESTIGATION OF THE COMPLAINT UNDER THE GRIEVANCE PROCESS**

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

[INCLUDE IF APPLICABLE] The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Procedure [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence refuting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

**INFORMATION ABOUT THE GRIEVANCE PROCESS AND YOUR RIGHTS**

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [______] (Sexual Harassment), enclosed with this letter.)
If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Procedure [_____] (enclosed).

Here is some information about your rights under the grievance process:

- You will be provided written notice of the allegation(s) against you with sufficient details known at the time and with sufficient time to prepare a response before any initial interview.

- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.

- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence refuting the allegation(s) against you and have that evidence considered as part of the District’s investigation.

- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

- You are entitled to a presumption that you are not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- You are entitled to the same periodic status updates that the District provides to the complainant.

- You will be given an equal opportunity as the complainant to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations.
[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (CCD)]

**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The District will make all such evidence subject to the parties’ inspection and review available at any hearing to give each part equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing where a determination regarding responsibility is made, for your review and written response.

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

- At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant (or alleged victim) withdraws a complaint.

- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Procedure [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant (or alleged victim) withdraws a complaint.

**Informal Resolution Process [INCLUDE IF APPLICABLE]**

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

- Provides the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with
respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared:

- Obtains the parties’ voluntary, written consent to the informal resolution process; and
- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**Prohibition against and Protection from Retaliation**

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the Complainant or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

**Next Steps**

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Pursuant to the [UNION]-District collective bargaining agreement, the District will notify [UNION] representative [UNION REPRESENTATIVE] that you are the subject of a student complaint.

If you would like to be represented by your union in this matter, please contact your union representative directly.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]
NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (CCD)
** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE **

Administrative Procedure [_____] (Discrimination and Harassment Complaint Procedures)
Board Policy [_____] (Nondiscrimination)
Administrative Procedure [_____] (Nondiscrimination)
Board Policy [_____] (Prohibition of Harassment)
Administrative Procedure [_____] (Prohibition of Harassment)

Cc: [GREIVANCE OFFICER], [UNION] Grievance Officer
[UNION PRESIDENT], [UNION] President
Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] (“District”) to provide you with the Administrative Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint from you on [DATE], alleging the following:

**Allegation No. 1:**

**Allegation No. 2:**

The following procedural steps were taken upon the District’s receipt of the formal complaint:

- [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
- [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
- [DATE OF ANY SITE VISITS]
- [METHODS USED TO GATHER EVIDENCE]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
- [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
- [DATE OF HEARING HELD]

The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Procedure, which is attached to this letter.
The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

Conclusion of Law

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations you made against [RESPONDENT]; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against you or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. __ was substantiated, the District will proceed with taking appropriate corrective action to address the findings. [IF CORRECTIVE ACTION IS BEING TAKEN, YOU CAN LIST THEM HERE SO LONG AS ANY CONFIDENTIALITY RULES ARE NOT VIOLATED]

PROPOSED RESOLUTION OF THE COMPLAINT

For all the reasons above, the District will resolve the complaint by proceeding with disciplinary action against [RESPONDENT]. Student disciplinary matters such as this are confidential. However, as a victim of sexual assault, the District is required to notify you of the
results of any disciplinary proceedings taken against [RESPONDENT].

The District is required to notify you of remedies offered to you to restore or preserve your equal access to the District’s education programs or activities. As such, the District is offering the following individual remedies to address the findings:  [INSERT INDIVIDUAL REMEDIES]

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

DESCRIPTION OF ACTIONS TAKEN, IF ANY, TO PREVENT SIMILAR PROBLEMS FROM OCCURRING IN THE FUTURE

[INCLUDE PROACTIVE STEPS TO BE TAKEN IN THE FUTURE TO PREVENT SIMILAR PROBLEMS FROM OCCURRING, PARTICULARLY IF A SYSTEMIC ISSUE IS DISCOVERED. OTHERWISE, DELETE IF NOT APPLICABLE]

COMPLAINANT'S RIGHT TO APPEAL

If you are not satisfied with the results of this investigation, you may submit a written appeal to the District Governing Board within fifteen (15) days from the date of this letter. The Board shall review the original complaint, the Administrative Determination, and the appeal and issue a final decision within 45 days after receipt of the appeal. If the Board elects to take no action, the Administrative Determination shall be deemed approved and become final on the 45th day.

[IN ANY CASE NOT INVOLVING EMPLOYMENT DISCRIMINATION] You also have the right to file a written appeal of this Administrative Determination with the Chancellor within 30 days after the Administrative Determination becomes final (by board action or elapse of 45 days from Board's receipt of appeal) or the date the College notifies the Chancellor of the final decision, whichever is later.

[IN ANY CASE INVOLVING EMPLOYMENT DISCRIMINATION] You also have the right to file a complaint with the Department of Fair Employment and Housing.

Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures

Cc: State Chancellor's Office
CONFIDENTIAL

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[RESPONDENT]
[ADDRESS]
[ADDRESS]

Re: Summary of Investigation Findings and Administrative Determination Regarding Responsibility

Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] (“District”) to provide you with the Administrative Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint against you on [DATE], alleging the following:

Allegation No. 1:

Allegation No. 2:

The following procedural steps were taken upon the District’s receipt of the formal complaint:

• [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
• [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
• [DATE OF ANY SITE VISITS]
• [METHODS USED TO GATHER EVIDENCE]
• [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
• [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
• [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
• [DATE OF HEARING HELD]

The District conducted an impartial investigation under its grievance process pursuant to its Sexual
Harassment Administrative Procedure, which is attached to this letter.

The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

Conclusion of Law

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations made against you; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against the Complainant or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. __ was substantiated, the District will proceed with taking the following corrective action to address the findings: [SPECIFY CORRECTIVE ACTION BEING TAKEN]

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

APPEAL RIGHTS
If you are not satisfied with the results of this investigation, you may submit a written appeal to the District Governing Board within fifteen (15) days from the date of this letter. The Board shall review the original complaint, the Administrative Determination, and the appeal and issue a final decision within 45 days after receipt of the appeal. If the Board elects to take no action, the Administrative Determination shall be deemed approved and become final on the 45th day.

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures
Investigation Tracking Document

Administrator to fill in information and initial each category upon completion.

1. Date Complaint Received:

2. Identify Applicable Policy/Procedure:

3. What type of investigation needs to take place?

4. Due date for completion:

5. Witnesses interviewed:

6. Factual findings:

7. Conclusions:

8. Action Taken:

9. Is follow-up necessary?
   a. If so, what?

10. Is documentation in employee file? In student records?

Process completed: _________________________ ____________

Administrator Signature  Date

c: Investigation file
Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
• How did you react? What response did you make when the incident(s) occurred or afterwards?
• How did the harassment affect you? Has your job been affected in any way?
• Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
• Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
• Are there any notes, physical evidence, or other documentation regarding the incident(s)?
• How would you like to see the situation resolved?
• Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

• What is your response to the allegations?
• If the harasser claims that the allegations are false, ask why the complainant might lie.
• Are there any persons who have relevant information?
• Are there any notes, physical evidence, or other documentation regarding the incident(s)?
• Do you know of any other relevant information?

Questions to Ask Third Parties:

• What did you see or hear? When did this occur? Describe the alleged harasser’s behavior toward the complainant and toward others in the workplace.
• What did the complainant tell you? When did s/he tell you this?
• Do you know of any other relevant information?
• Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

• **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
• **Demeanor**: Did the person seem to be telling the truth or lying?
• **Motive to falsify**: Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party’s testimony?

- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant’s credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

### Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator’s report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.
INVESTIGATION NOTICE FORM

To: 
From: 
Date: 
Re: Investigation of Possible Violation of District Policy

I am investigating a possible violation of ________________ District policy. As part of the investigation, I will be interviewing you today. The purpose of this notice is to provide some important information about what the district expects from you during the investigation.

The district appreciates your participation in this process. We expect you to cooperate fully in the investigation by, for example, answering all questions completely and honestly, providing any documents that are relevant to the investigation, and making yourself available for follow-up interviews, if necessary. You will be excused from your usual work duties for interviews and any other activities necessary to the investigation.

Retaliation against anyone involved in the investigation is strictly prohibited. If you retaliate against anyone involved in this investigation, you will be subject to discipline. If you believe you have been mistreated or otherwise retaliated against because of your participation in this investigation, please tell me immediately.

We will maintain the confidentiality of the investigation to the extent possible, revealing information only on a need-to-know basis or as otherwise required by law.

I encourage you to contact me after our interview today if you remember additional information or if you would like to change or add to your statement for any other reason.

Your signature indicates that you have received and read this notice.

Signed: ____________________________
Name: ____________________________
Date: _____________________________
CONFIDENTIAL SUMMARY INVESTIGATION REPORT

DATE:

TO:

CC:

FROM:

RE: Complaint of Sexual Harassment/Sex Discrimination – [COMPLAINANT VS. RESPONDENT]

I. INTRODUCTION

This report summarizes the investigation and findings concerning allegations made by [COMPLAINANT] (“Complainant”) against [RESPONDENT] (“Respondent”) for the [SCHOOL DISTRICT OR COMMUNITY COLLEGE DISTRICT] (“District”). The Complainant alleged that Respondent engaged in unlawful sex discrimination/sexual harassment in violation of District policies and regulations.

The specific allegations are as follows:

Allegation No. 1:

Allegation No. 2:

II. FACTUAL BACKGROUND

Complainant is an [EMPLOYEE OR STUDENT] of the District. Respondent is an [EMPLOYEE OR STUDENT] of the District. The Complainant submitted a written formal complaint (“Complaint”) to the Title IX Coordinator on [DATE], which was received by the District on [DATE].

III. INVESTIGATION

The Complaint was accepted under its Grievance Process outlined in Administrative Regulation [OR Administrative Procedure]. In addition, this complaint was investigated under Title IX of the Education Amendments of 1972, which requires recipients of federal funds to protect people from discrimination based on sex in education programs or activities.
Under Title IX, 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;

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; or

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

California Education Code section 212.5 defines sexual harassment as the following:

“Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the work or educational setting when:

1. Submission to the conduct is made explicitly or implicitly a term or condition of the individual’s employment.

2. Submission to or rejection of such conduct by the individual is used as the basis for an employment decision affecting him/her.

3. The conduct has the purpose or effect of having a negative impact upon the individual's work or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. The conduct is sufficiently severe, persistent, pervasive, or objectively offensive so as to create a hostile or abusive working environment or to limit the individual's ability to participate in or benefit from an education program or activity.

4. Submission to or rejection of the conduct by the other individual is used as the basis for any decision affecting him/her regarding benefits, services, honors, programs, or activities available at or through the district.

Other examples of actions that might constitute sexual harassment, whether committed by a supervisor, a co-worker, or a non-employee, in the work or educational setting, include, but are not limited to:

1. Unwelcome verbal conduct such as sexual flirtations or propositions; graphic comments about an individual's body; overly personal conversations or pressure for sexual activity; sexual jokes or stories; unwelcome sexual slurs, epithets, threats, innuendoes, derogatory comments, sexually degrading descriptions, or the spreading of sexual rumors.

2. Unwelcome visual conduct such as drawings, pictures, graffiti, or gestures; sexually explicit emails; displaying sexually suggestive objects.
3. Unwelcome physical conduct such as massaging, grabbing, fondling, stroking, or brushing the body; touching an individual's body or clothes in a sexual way; cornering, blocking, leaning over, or impeding normal movements.

Prohibited sexual harassment may also include any act of retaliation against an individual who reports a violation of the district's sexual harassment policy or who participates in the investigation of a sexual harassment complaint.”

The investigation was conducted by [NAME OF INVESTIGATOR], hired by the District to conduct a fair and impartial review of the facts related to this complaint.

Findings in this matter were based on a Preponderance of Evidence Standard [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]. The Preponderance of Evidence Standard is defined as reaching a finding that the alleged conduct more likely than not occurred as alleged.

In making findings of fact, this investigator applied the following standards:

- Where the investigation established by a preponderance of the evidence that the alleged conduct did not occur, the allegation is **UNFOUNDED**.
- Where there is insufficient evidence based on a preponderance of the evidence to determine whether the alleged conduct occurred, the allegation is **NOT SUSTAINED**.
- Where the investigation established by a preponderance of the evidence that the alleged conduct occurred, the allegation is **SUSTAINED**.

If an allegation was sustained, this investigator determined if the conduct was based on the Complainant’s sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.

The findings are based on this investigator’s best judgment as to whether or not a disputed event is more likely than not to have occurred, based on the available evidence. Consistent with District practice, the complaint was investigated promptly and thoroughly. In the course of the investigation, the Complainant and the Respondent were given an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. For each potential witness, this investigator made a case-by-case decision on whether or not to conduct interviews, depending upon whether this investigator believed the potential witness to have information directly relevant to the matter under investigation. This investigator instructed the Complainant, Respondent, and all witnesses regarding the confidential nature of the proceedings and the prohibitions on retaliation.

To the extent credibility determinations of witness statements were necessary in preparing my report and findings, this investigator examined the potential motives of the witnesses to fabricate or deny charges and examined circumstantial evidence such as timing or similar sustained charges. In addition, this investigator utilized principles for determining credibility as outlined in California Evidence Code Section 780, which provides:
Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to any of the following:

- His [or her] demeanor while testifying and the manner in which he [or she] testifies.
- The character of his [or her] testimony.
- The extent of his [or her] capacity to perceive, to recollect, or to communicate any matter about which he [or she] testifies.
- The extent of his [or her] opportunity to perceive any matter about which he [or she] testifies.
- His [or her] character for honesty or veracity or their opposites.
- The existence or nonexistence of a bias, interest, or other motive.
- A statement previously made by him [or her] that is consistent with his [or her] testimony at the hearing.
- A statement made by him [or her] that is inconsistent with any part of his [or her] testimony at the hearing.
- The existence or nonexistence of any fact testified to by him [or her].
- His [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony.
- His [or her] admission of untruthfulness.

**WITNESS INTERVIEWS**

The investigation included interviews of the following:

1. _____________ – Complainant
2. _____________ – Respondent
3. _____________ – Witness
4. _____________ – Witness
5. _____________ – Witness

The Complainant was asked to identify witnesses. She identified witnesses 1 and 2 as individuals who could have relevant information to provide in this investigation since they are both current students of the District.
The Respondent was asked to identify witnesses. The Respondent identified witnesses 3 and 4 as individuals who could have relevant information to provide in this investigation since they are or were employees of the District.

This investigator also determined that it was necessary to interview witnesses 5 and 6 because [PROVIDE REASONS].

**DOCUMENTS**

1. Complaint, dated ___________
2. Respondent’s Response to Complaint
3. [INSERT EMAILS, TEXTS, VIDEO SURVEILLANCE, ETC.]
4. [INSERT RELEVANT BOARD POLICY/ADMINISTRATIVE REGULATION (OR PROCEDURE)]

This investigator asked both parties to provide me with any relevant documentation. The following documentation was provided by Complainant:

The following documentation was provided by Respondent:

**WITNESS SUMMARIES**

[COMPLAINANT], Complainant

**Credibility Determination [SEE BELOW FOR EXAMPLE LANGUAGE]**

Complaint was interviewed by this investigator on [DATE], at the District office. Complainant was a willing participant and understood the confidential nature of the investigation. Complainant presented himself/herself in an honest and straightforward manner. This investigator specifically evaluated whether there was evidence of bias or a motive to lie about Respondent. In particular, Respondent claimed that Complainant filed the complaint in retaliation for breaking up with him/her. This investigator determined that there was no evidence of bias or motive to lie about Respondent in regards to the specific allegations that were subject of this investigation.

**Interview Summary**

[INSERT RELEVANT DETAILS OF INTERVIEW]

**IV. SUMMARY OF ALLEGATIONS, FINDINGS & CONCLUSIONS**

**ALLEGATION NO. 1:**
FINDINGS

CONCLUSION

Based on the above findings, this investigator has determined that the investigation established by a preponderance of the evidence that the alleged conduct occurred; therefore, the allegation is sustained. Further, this investigator determined that the conduct was based on the Complainant’s sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.
Case Study

You are the Title IX Coordinator at your community college. Your campus has a bookstore, which employs both students and non-students.

A number of students made a report to the bookstore manager (a non-student) that another bookstore employee, Jason, who has been employed by the bookstore for 5 years, holds his cellphone under the skirts and shorts of female student customers to secretly take their pictures and/or video tape them. The students also alleged that Jason would stand near female students and pretend to either stock items on the shelves or kneel down to tie his shoelaces and hold his cellphone under the skirts and shorts of female students to take their pictures. One student stated that Jason used his cellphone to take pictures under the skirts of foreign language students who were as young as nine to 13 years old.

Some of the female students also reported that they were scared and nervous around Jason because he touched them inappropriately (on the thigh, pulling bra straps, touching their bare skin and hair). The students also stated that they warned new female student employees not to wear skirts, shorts or tank tops when they come to work. The students further stated that they were not comfortable being around Jason and that it was stressful trying to find ways to avoid him during their shift at the bookstore.

Some of the female students, who reported being inappropriately touched by Jason, told the bookstore manager that they did not know that Jason’s behavior was sexual harassment, only that what he did shocked them, made them feel uncomfortable and scared.

The bookstore manager did not report the complaints, because he and Jason are friends.

Months after the employees made the report to the bookstore manager, you, the Title IX Coordinator, receive an email from one of the female student’s boyfriends, explaining that the student could not get out of bed to go to class and go to work because she is suffering from such bad anxiety on account of Jason.

What do you do?

Adapted from: Citrus Community College, OCR Case No. 09-16-2079
§ 59334. District Investigation.

Upon receiving a complaint that is properly filed in accordance with section 59328, the district will commence an impartial fact-finding investigation of that complaint and notify the complainant and Chancellor that it is doing so. The results of the investigation shall be set forth in a written report that shall include at least all of the following:

(a) a description of the circumstances giving rise to the complaint;

(b) a summary of the testimony provided by each witness, including the complainant and any viable witnesses identified by the complainant in the complaint;

(c) an analysis of any relevant data or other evidence collected during the course of the investigation;

(d) a specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and

(e) any other information deemed appropriate by the district.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and Sections 11135 and 11136, Government Code.

HISTORY

1. Amendment of existing paragraph and NOTE and adoption of subsections (a)-(e) filed 3-26-92; operative 4-24-92 (Register 92, No. 17).


3. Change without regulatory effect amending NOTE filed 3-15-2006 pursuant to section 100, title 1, California Code of Regulations. Submitted to OAL for printing only pursuant to Education Code section 70901.5 (Register 2006, No. 17).
This database is current through 9/25/20 Register 2020, No. 39

§ 59334, 5 CCR § 59334, 5 CA ADC § 59334

End of Document
§ 67381.1. Police or security services; governing board of each community college district; rules for entering into written agreements with local law enforcement agencies for investigations of violent crime; written agreement conditions and requirements

Effective: January 1, 2016

Currentness

(a) The Legislature reaffirms that campus law enforcement agencies have the primary authority for providing police or security services, including the investigation of criminal activity, to their campuses.

(b) The governing board of each community college district shall adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of Part 1 violent crimes occurring on each campus.

(c) Local law enforcement agencies shall enter into written agreements with community college campus law enforcement agencies if there are community college campuses located in the jurisdictions of the local law enforcement agencies.

(d) Each written agreement entered into pursuant to this section shall designate which law enforcement agency shall have operational responsibility for the investigation of each Part 1 violent crime and delineate the specific geographical boundaries of each agency's operational responsibility, including maps as necessary.

(e) Written agreements regarding community college law enforcement agencies entered into pursuant to this section or pursuant to Section 67381 as that section read before January 1, 2016, shall be available for public viewing.

(f) Each agency shall be responsible for its own costs of investigation unless otherwise specified in a written agreement.

(g) Nothing in this section shall affect existing written agreements between community college campus law enforcement agencies and local law enforcement agencies that otherwise meet the standards contained in subdivision (d) or any existing mutual aid procedures established pursuant to state or federal law.

(h) Nothing in this section shall be construed to limit the authority of community college campus law enforcement agencies to provide police services to their campuses.
(i) As used in this section, the following terms have the following meanings:

(1) “Local law enforcement agencies” means city or county law enforcement agencies with operational responsibilities for police services in the community in which a campus is located.

(2) “Part 1 violent crimes” means willful homicide, forcible rape, robbery, and aggravated assault, as defined in the Uniform Crime Reporting Handbook of the Federal Bureau of Investigation.

(j) It is the intent of the Legislature by enacting this section to provide the public with clear information regarding the operational responsibilities for the investigation of crimes occurring on community college campuses by setting minimum standards for written agreements to be entered into by community college campus law enforcement agencies and local law enforcement agencies.

(k)(1) Upon the governing board of a community college district adopting a rule requiring each of its campuses to update an agreement entered into pursuant to this section or pursuant to Section 67381 as that section read before January 1, 2016, the governing board of the community college district shall be treated as a governing entity specified in subdivision (b) of Section 67381 and the community college district and its campuses shall be subject to the requirements of Section 67381 instead of this section.

(2) The Legislature encourages the governing board of each community college district to adopt a rule requiring each of its respective campuses to update these agreements.

Credits
(Added by Stats.2015, c. 701 (A.B.913), § 2, eff. Jan. 1, 2016.)
2019 Cal. Legis. Serv. Ch. 87 (A.B. 381) (WEST)

CALIFORNIA 2019 LEGISLATIVE SERVICE

2019 Portion of 2019-2020 Regular Session

Additions are indicated by Text; deletions by * * *

Vetoes are indicated by Text; stricken material by Text.

CHAPTER 87
A.B. No. 381

COLLEGES AND UNIVERSITIES—DOMESTIC VIOLENCE—PREVENTION—TRAINING

AN ACT to amend Section 67386 of the Education Code, relating to postsecondary education.

[Filed with Secretary of State July 12, 2019.]

LEGISLATIVE COUNSEL’S DIGEST

AB 381, Reyes. Postsecondary education: sexual assault and sexual violence prevention training: intimate partner and dating violence.

Existing law requires the governing boards of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions, in order to receive state funds for student financial assistance, to enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, to the extent feasible, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.

This bill would identify domestic violence centers as an eligible type of on-campus or community-based organization for this purpose.

Existing law also conditions receipt of those state financial aid funds on those governing entities adopting, among other things, detailed and victim-centered policies and protocols, and outreach programs, regarding sexual assault, domestic violence, dating violence, and stalking involving a student that comport with best practices and current professional standards, covering specified topics, including a comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases.

This bill would provide that the outreach programming required by this provision would include informing students about specified topics relating to intimate partner and dating violence, and would specify that incoming graduate, international, and transfer students are included in the definition of incoming students for the purposes of who is provided outreach programming.
The people of the State of California do enact as follows:

SECTION 1. Section 67386 of the Education Code is amended to read:

<< CA EDUC § 67386 >>

67386. (a) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, as defined in the federal Higher Education Act of 1965 (20 U.S.C. Sec. 1092(f)), involving a student, both on and off campus. The policy shall include all of the following:

(1) An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that the person has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

(2) A policy that, in the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:

(A) The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused.

(B) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.

(3) A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.

(4) A policy that, in the evaluation of complaints in the disciplinary process, it shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or reasonably should have known that the complainant was unable to consent to the sexual activity under any of the following circumstances:

(A) The complainant was asleep or unconscious.

(B) The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.

(C) The complainant was unable to communicate due to a mental or physical condition.

(b) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt detailed and victim-centered policies and protocols regarding sexual assault, domestic violence, dating violence, and stalking involving a student that comport with best practices and current professional standards. At a minimum, the policies and protocols shall cover all of the following:

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(1) A policy statement on how the institution will provide appropriate protections for the privacy of individuals involved, including confidentiality.

(2) Initial response by the institution's personnel to a report of an incident, including requirements specific to assisting the victim, providing information in writing about the importance of preserving evidence, and the identification and location of witnesses.

(3) Response to stranger and nonstranger sexual assault.

(4) The preliminary victim interview, including the development of a victim interview protocol, and a comprehensive followup victim interview, as appropriate.

(5) Contacting and interviewing the accused.

(6) Seeking the identification and location of witnesses.

(7) Providing written notification to the victim about the availability of, and contact information for, on- and off-campus resources and services, and coordination with law enforcement, as appropriate.

(8) Participation of victim advocates and other supporting people.

(9) Investigating allegations that alcohol or drugs were involved in the incident.

(10) Providing that an individual who participates as a complainant or witness in an investigation of sexual assault, domestic violence, dating violence, or stalking will not be subject to disciplinary sanctions for a violation of the institution's student conduct policy at or near the time of the incident, unless the institution determines that the violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk or involves plagiarism, cheating, or academic dishonesty.

(11) The role of the institutional staff supervision.

(12) A comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases.

(13) Procedures for confidential reporting by victims and third parties.

(c) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall, to the extent feasible, enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers and domestic violence centers, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.

(d) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall implement comprehensive prevention and outreach programs addressing sexual violence, domestic violence, dating violence, and stalking. A comprehensive prevention program shall include a range of prevention strategies, including, but not limited to, empowerment programming for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction. Outreach programs shall be provided to make students aware of the institution's policy on sexual assault, domestic violence, dating violence, and stalking. At a minimum, an outreach program
shall include a process for contacting and informing the student body, campus organizations, athletic programs, and student
groups about the institution's overall sexual assault policy, the practical implications of an affirmative consent standard, and the
rights and responsibilities of students under the policy.

(e) Outreach programming shall be included as part of every incoming student's orientation.

(1) For purposes of this section, “outreach programming” includes, but is not necessarily limited to, informing students
about all of the following:

(A) The warning signs of intimate partner and dating violence.

(B) Campus policies and resources relating to intimate partner and dating violence.

(C) Off–campus resources and centers relating to intimate partner and dating violence.

(D) A focus on prevention and bystander intervention training as it relates to intimate partner and dating violence.

(2) For purposes of this subdivision, informing students about “intimate partner and dating violence” includes, but is not
necessarily limited to, providing information about violence that occurs between individuals with a current or previous
intimate or dating relationship.

(3) For purposes of this subdivision, “incoming students” includes, but is not necessarily limited to, graduate, transfer,
and international students, with a special consideration of their different needs, interactions, and engagements with
their campuses.
Date: May 18, 2016

To: District Officers for Unlawful Discrimination Complaints
   Chief Human Resources Officers
   Equal Employment Opportunity Officers
   Community College Attorneys

From: Thuy Thi Nguyen
   Interim General Counsel/Vice Chancellor

Re: Student and Employment Discrimination Complaint Procedures
   Legal Opinion 16-03

The Chancellor’s Office handles appeals of unlawful discrimination complaints under California Code of Regulations, title 5 sections 59300 et seq. The purpose of this legal opinion is to explain the discrimination process and describe how the Chancellor’s Office handles appeals. This legal opinion will serve as a guide on the steps that local districts need to follow to ensure compliance with the pertinent regulations. The opinion will point out the differences between employment and non-employment (student) matters and provide clarity on the role of the district, local governing board, and the Chancellor’s Office throughout the process.

This legal opinion incorporates the previous advisory, Legal Advisory 11-01 on certain discrimination complaint issues, but addresses the unlawful discrimination process in chronological order and opines on certain legal areas. The opinion is organized in the following manner:

I. General Overview (page 2)
II. Investigation, Extension Requests, and Administrative Determination (page 5)
III. Appeal Rights in Employment and Student Matters (page 8)
IV. Student Appeals to the Chancellor’s Office (page 10)
V. Resolution (page 11)
VI. Frequently Asked Questions (page 12)

1 All regulatory references are to Title 5 of the California Code of Regulations unless otherwise noted.
I. General Overview

Under state regulations, California community college districts must follow the procedures outlined in Sections 59300 et seq. when responding to both student and employment discrimination complaints on the basis of actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, or physical or mental disability, or on the basis of an individual’s association with a person or group with one or more of these actual or perceived characteristics.

Responsible district officer’s role and informal resolution

Section 59324 requires that each district identify a single person serving as the district officer responsible for receiving complaints. The responsible district officer’s information shall be made public on the college and district’s website. Additionally, Section 59324 charges the responsible district officer with the duty of overseeing the informal resolution process.

The informal resolution regulations are set forth in Section 59327. This section requires that the district officer attempt to informally resolve matters and advise the complainant of its right to file with other agencies if the unlawful discrimination allegations are brought informally - that is, not filed on the unlawful discrimination form created by the Chancellor’s Office. This situation can arise when the complainant verbally tells the responsible officer about a problem and seeks a quick resolution.

One important distinction to note is that the effect of informally resolving complaints that lack a prescribed form is contrary to the requirements of the Office of Civil Rights (OCR). OCR does not require that complainants file a complaint on a specific form as required by Section 59328(c). OCR advises that any complaint of unlawful discrimination shall be investigated pursuant to federal law. This would effectively rule out the informal resolution requirements of the responsible district officer to resolve matters informally if the complaint is not on the prescribed form.

Complaints filed with the district or Chancellor’s Office

Student and employee complainants may file an unlawful discrimination complaint with the Chancellor’s Office and/or the responsible district officer (Cal. Code Regs., tit. 5 § 59328(b)). The Complainant has the option. The regulations require that the Chancellor’s Office and the district immediately forward a copy of the complaint to the other upon receipt. Thus, districts must send a copy of the complaint along with an acknowledgement letter to the Chancellor’s Office immediately. If a complaint is filed with the Chancellor’s Office, the same procedure will take place – that is, an acknowledgment letter and copy of the complaint will be forwarded to the district’s responsible officer.
When forwarding the complaint, the Chancellor’s Office recommends sending a corresponding copy of the acknowledgement letter and complaint to the complainant for record keeping purposes, and to notify the complainant that the complaint has been received.

Complainants may also send the same complaint to both the Chancellor’s Office and the district at the same time. When this occurs, the Chancellor’s Office and the district should continue to forward a copy of the complaint as required under the regulations.

A unique situation may arise when complainants send an initial complaint to the district and a second amended complaint regarding the same matter, but with additional information, to the Chancellor’s Office, or vice versa. In such situations, following the forwarding procedures set forth in the regulations ensures that both the district and Chancellor’s Office are in possession of the most recent correspondence and any important amendments. Additionally, the district and Chancellor’s Office should send a corresponding copy of any forwarded letter to the complainant.

Advising complainant of his/her right to file with other entities

Districts are required to notify the complainant of the right to file an additional complaint with certain entities, depending on the type of complaint. The district should send an acknowledgement letter to the complainant upon receipt of a new complaint, notifying the complainant the receipt, that a copy of the complaint was forwarded to the Chancellor’s Office, an investigation and determination will be rendered within the given time period, and that the complainant has rights to pursue other claims.

Under Section 59328(f), any complainant alleging employment discrimination shall be notified that he or she may file the same complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing (DFEH). If the complainant has filed such a complaint with the EEOC or DFEH, the district should forward a copy of the complaint to the Chancellor’s Office immediately.

For student matters, Section 59327(4) requires that the complainant be advised that he or she may file the same complaint with the Office of Civil Rights (OCR) where such a complaint is within the jurisdiction of that agency.

Regulatory timeline

The regulatory timelines for discrimination complaints differ depending on the type of alleged discrimination. The timelines for filing are set forth in Section 59328.

Section 59328(e) requires that employment complaints “shall be filed within 180 days of the date the alleged unlawful discrimination occurred.” This period shall be extended by 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged discrimination after the 180 days. It is important to note that employment
complaints are not limited to discriminatory practices in hiring, but include all facets of employment, including but not limited to: harassment by a supervisor or fellow employee, failure to provide reasonable accommodations, or discrimination in awarding compensation and benefits.

For student complaints, Section 59328(d) requires that complaints “shall be filed within one year of the date of alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts...”

A complainant may often file more than one complaint regarding the same matter which may pose procedural issues. For example, a complainant may file an initial complaint, then file a second amended complaint with additional information two months later. In such situations, all subsequent or amended complaints involving the same matter must be filed within the timelines set forth above unless the subsequent complaints involve new allegations.

3rd party standing

Section 59328(a) requires that the complaint be filed by the person who suffered unlawful discrimination or by a faculty member or administrator who has learned of such discrimination through his or her official capacity.

It is important to note that Legal Advisory 11-01 also clarifies OCR’s stance on complaints filed by individuals who have not personally suffered unlawful discrimination. OCR requires districts to investigate 3rd party complaints under federal regulations and allows the district to follow the Title 5 procedures and timelines. However, complainants that lack standing under Title 5 do not have appeal rights to the Chancellor’s Office.

Defective complaints

In light of the procedural timelines set forth in the regulations, Section 59332 requires the district to immediately notify the complainant and the Chancellor’s Office of any complaint that was not filed within the applicable regulatory timelines.

As previously mentioned, 3rd party complaints (except for discrimination complaints made by faculty or administrators) and complaints lacking a prescribed form may be deemed defective; however, OCR still requires the district to investigate the matter under federal regulations.
II. Investigation, Extension Requests, and Administrative Determination

This aspect of the unlawful discrimination process requires the most attention, as districts often fail to follow these regulations after a complaint has been filed.

**District investigation**

A properly filed complaint triggers a district investigation under Section 59334. This section requires the district to commence an impartial fact-finding investigation and the completion of an investigative report that includes all of the following elements:

1. A factual description of the matter,
2. A summary of the testimony provided by each witness, including testimony made by the complainant, respondent, and any “viable witnesses,”
3. An analysis of the data or evidence collected during the investigation,
4. A probable cause determination on whether the alleged discrimination occurred with respect to each allegation in the complaint, and
5. Any other appropriate information.

A common question regarding this section is whether the Title 5 regulations require an outside investigator to meet the “impartial fact finding investigation” standard. The regulations do not require that the district hire an outside investigator; thus a district employee may be designated to investigate, so long as the investigation is impartial and fair, and all parties are interviewed pursuant to Section 59334(b).

Since the regulations require that *all* parties and witnesses be interviewed, a best practice is to document every attempt to interview throughout the investigation and highlighting the failed attempts in the investigative report. This is essential because investigations may involve witnesses that are protected by Family Education Rights and Privacy Act (FERPA), collective bargaining laws or witnesses bound by rules of non-disclosure such as the Health Insurance Portability and Accountability Act (HIPAA). In such situations, witnesses may be unavailable. Nonetheless, at the onset, if the witness is deemed “viable,” the investigator must make an effort to interview and document every attempt. When conducting interviews, the investigator must afford each witness the opportunity to present their testimony and/or any evidence regarding the allegations.

In addition to interviews, an investigation should properly document and analyze any correspondence regarding the matter. This documentation should include the original complaint, any corresponding documents such as letters and e-mails to and from the district and the complainant and/or the respondent, and any investigative notes. Such documentation is critical in formulating a complete administrative determination, and allows for a thorough review of the record in the event of an appeal.
Lastly, Section 59334 requires that the district complete its investigation within ninety (90) days of receiving a complaint unless the district is granted an extension. Completion of the investigation requires that the district issue an administrative determination along with an investigative report to both the complainant and the Chancellor’s Office within 90 calendar days.

**Title IX investigations**

Title IX of the Education Amendments of 1972 ("Title IX") is a federal civil rights law that prohibits sex/gender discrimination in federally funded education programs and activities. The Office of Civil Rights at the U.S. Department of Education has issued guidelines on the requirements and standards of such claims. For purposes of our Title 5 discrimination process, there may be situations when a Title 5 investigation overlaps with a Title IX investigation. This situation can occur when a district encounters a sex/gender discrimination, harassment or sexual violence claim that falls under both sets of laws.

The U.S. Department of Education has made it clear that when investigating incidents that fall within Title IX, districts should coordinate with other ongoing school or criminal investigations, including any unlawful discrimination claims. In doing so, districts should consider whether certain information may be shared to expedite the process and to prevent complainants from unnecessarily providing multiple statements about the allegations.

The U.S. Department of Education emphasizes that a district does not need to conduct two separate investigations – that is, a Title 5 investigation and a Title IX investigation, if a district’s own procedures to resolve sex/gender discrimination complaints meets all of the Title IX obligations. These obligations include: responding promptly and effectively to the discrimination, ending the discrimination, eliminating any hostile environment, and preventing future discrimination.

In regards to timeliness of the investigation, the Office of Civil Rights has indicated in their “Dear Colleague Letter” and “Questions and Answers on Title IX and Sexual Violence” that a typical Title IX investigation should be concluded within 60 calendar days. This is shorter than the 90-day requirement under Title 5 because Title IX claims, especially sexual violence allegations, may require immediate attention and resolution for the safety and protection of the complainants. The Chancellor’s Office does not evaluate whether a Title 5 investigation meets the requirements of Title IX on appeal.

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2 This Legal Opinion does not discuss every requirement of Title IX in detail. Districts should consult with legal counsel and/or Title IX coordinator regarding the requirements not mentioned in this opinion.
3 The U.S. Department of Education’s “Revised Sexual Harassment Guidance” can be found at: http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf
4 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf
5 http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
Extension requests

A district may request up to a 90-day extension from the Chancellor’s Office to submit an administrative determination (Cal. Code Regs., tit. 5 § 59342). The district must send a written request to the Chancellor’s Office no later than ten (10) days prior to the expiration of the original deadline. Additionally, the extension request must contain the following:

1. The reason why an extension is necessary,
2. The date by which the district expects the determination to be completed,
3. Notice that a corresponding copy was sent to the complainant,
4. Notice to the complainant that he or she has the right to send a written objection to the Chancellor’s Office within five (5) days of receipt.

Failure to include any of the four aspects above will result in a denial of the extension. The Chancellor’s Office may grant the extension unless any delay would be prejudicial to the investigation (Cal. Code Regs., tit. 5 § 59342(c)). Examples of prejudice may include loss of witness testimony through delay or utilizing an extension to prevent the complainant from seeking remedies through other outlets in a timely manner.

Administrative determination

Within 90 days of the complaint (unless an extension has been granted), a copy or summary of the investigative report and an administrative determination must be forwarded to the complainant and the Chancellor’s Office. The administrative determination letter should attach the investigative report (or a summary of the report) and both documents are required to be sent by the district within 90 days.

The administrative determination letter shall include all the pertinent information listed in Section 59336, including:

1. The ultimate determination on probable cause,
2. A description of any actions taken to prevent similar allegations in the future (if applicable),
3. The proposed resolution of the complaint (if any), and
4. The complainant’s right to appeal.

The complainant’s right to appeal hinges on whether the matter involves employment or non-employment allegations. Both are discussed in detail below.
III. Appeal Rights in Employment and Student Matters

Every administrative determination letter, regardless of the alleged discrimination, must contain the information mentioned above. However, Section 59336 requires that the determination must also advise the complainant of certain appeal rights. The appeal rights of employment versus student matters differ and districts must correctly advise complainants of their appeal options.

Employment complaints

Section 59336(b) requires that in cases involving alleged employment discrimination, the district shall notify the complainant of its right to appeal to the district’s local governing board and/or to file the same complaint with the Department of Fair Employment and Housing (DFEH). This notice must be in the administrative determination letter.

Any appeal to the local governing board must be filed within fifteen (15) days from the date of the district’s administrative determination. The governing board shall review the original complaint, the investigative report, the administrative determination and the appeal, before issuing a final district decision within forty-five (45) days of receiving the appeal.

Additionally, the district is required to promptly forward a copy of the final district decision rendered by the local governing board to the complainant and notify the complainant of his or her right to file a complaint with DFEH. Please be aware that the Title 5 regulations do not afford employment complainants the right to appeal to the Chancellor’s Office. Section 59339 (“Appeal to the Chancellor”) explicitly states that cases involving employment discrimination may be filed with DFEH where the complaint is within the jurisdiction of that agency, but does not grant appeal rights to the Chancellor’s Office.

Appeals to the Chancellor’s Office are strictly reserved for student complaints. As such, the Chancellor’s Office is not in a position to render any decisions on employment appeals. When an employment appeal is sent to the Chancellor’s Office, the appeal will be sent back to the complainant with instructions to file with the appropriate federal entities.

Student complaints

For student complaints, the district is required to apprise the complainant that he or she may appeal the administrative determination to the local governing board and the Chancellor’s Office (Cal. Code Regs., tit. 5 § 59336(a)). The time limitation for student appeals to the local governing board is the same as in employment matters. The complainant is allowed fifteen (15) days from the date of the determination to appeal to the local governing board, and the board shall review all pertinent documents and render a final decision within forty-five (45) days after receiving an appeal.
After the board’s final decision, a copy of the decision shall be forwarded to the complainant and the Chancellor, along with notice that the complainant may now directly appeal the district’s decision to the Chancellor’s Office within thirty (30) days from the date the governing board issues the final decision or from the date the district provides notice to the complainant of such a decision (Cal. Code Regs., tit. 5 § 59339(a)).

An appeal to the Chancellor’s Office must be accompanied by a copy of the local governing board’s decision or evidence that the complainant filed an appeal with the governing board and that no response was received within forty-five (45) days.
IV. Student Appeals to the Chancellor’s Office

The Title 5 regulations only authorize the Chancellor’s Office to review student (non-employment) matters. Pursuant to Section 59350, once a student appeal reaches the Chancellor’s Office, the appeal will be reviewed to determine if there is reasonable cause to believe the district has violated any requirements of Title 5. If there is evidence of a violation, then the Chancellor’s Office will launch its own probable cause investigation to determine the validity of the allegations.

Reasonable cause review

A timely appeal to the Chancellor’s Office initiates a reasonable cause review to examine the complainant’s issues raised on appeal. This review is limited to an examination of the district’s actions to determine if the procedures were adequately followed. Such a review does not look at the substance of the allegations, but instead focuses on the district’s role throughout the process. In the event the complainant raises new facts or issues on appeal, Section 59351 allows the Chancellor’s Office to remand new issues to the district to provide the district a reasonable opportunity to respond.

The Chancellor’s Office will provide a reasonable cause determination after reviewing all the pertinent documents. The determination will provide a review of the applicable Title 5 requirements and an analysis of the district’s actions, along with an ultimate decision on whether every applicable regulation was followed. If a violation of a procedure occurred, then the Chancellor’s Office will launch its own probable cause investigation to determine the validity and merits of the allegations.

Probable cause investigation

Section 59352 requires that “if the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred.” A probable cause investigation requires the Chancellor’s Office to look at the allegations and interview all parties, including the complainant, respondent(s), and any witnesses concerning the matter. The Chancellor’s Office will reach out to the responsible district officer to gather any information regard the parties before conducting separate interviews.
V. Resolution

A probable cause violation may be resolved through informal resolution with a written conciliation agreement or through formal resolution via a probable cause determination.

Informal resolution

Section 59354 allows the Chancellor’s Office the option of informally resolving the alleged violation(s) if possible. When attempting to informally resolve the matter, the “resolution shall be set forth in a written conciliation agreement” and “a copy of the written agreement shall be sent to the complainant.”

Informal resolution may occur when there is a probable cause violation (i.e. a finding that the discrimination allegations did occur) and the proposed remedy may be easily awarded without contest. Such situations may include providing confirmation of a violation to a student who has already obtained what they initially sought in the complaint, or allowing the district an opportunity to resolve the complaint if the factual circumstances have changed since the original filing.

Formal resolution

If informal resolution is not an option, then Section 59356 requires that the Chancellor’s Office complete its probable cause investigation within 120 days of the reasonable cause finding by notifying the district and the complainant.

Section 59356(a) allows the district to acquiesce to the findings prior to the Chancellor’s Office filing an accusation against the district, should the complainant’s allegations be found to have merit. In such situations, the Chancellor’s Office will send a written notice to the district that it has violated certain regulations and allow the district a reasonable time to respond to the findings. Should the district fail to acquiesce to the probable cause finding, the Title 5 regulations provide the Chancellor’s Office with the authority to hold a hearing pursuant to the Government Code to determine if the violation did occur (Cal. Code Regs., tit. 5 § 59358).

Enforcement

Section 59360 provides the Chancellor’s Office with enforcement tools to ensure that the districts follow the Title 5 regulations. These means to effect compliance include:

1. Withholding all or part of the district’s state support;
2. Making eligibility for future state support conditioned on compliance with specific conditions regarding the violations; or
3. Proceeding in a court of competent jurisdiction for an appropriate order to compel compliance.
VI. Frequently Asked Questions

Multiple complaints

**Q:** A Complainant has filed numerous complaints regarding the same matter, but different incidents. Typically, the latter complaints just provide new facts and allegations. Should I treat all the complaints as one complaint? Or should every complaint be treated as its own separate complaint?

**A:** Generally, if all the complaints involve the same matter – that is, facts that relate to the same underlying type of discrimination or facts that stem from the initial allegation, then the complaints may be treated as one complaint. This may occur when a complainant files subsequent complaints due to ongoing discrimination from the first incident.

However, if the subsequent complaints involve a different type of discrimination that is separate from the initial allegation, then the complaints should be treated separately. The key here is whether an investigation of the complaints as one matter would be appropriate. If the answer is no, then the complaints should be separated so each matter should be properly investigated and resolved individually.

Employee v. non-employee/student complaints

**Q:** An employee has filed an unlawful discrimination complaint against another fellow employee. Would this be a non-employment complaint since it doesn’t involve discrimination in the hiring, compensation/benefits or post-hiring process?

**A:** No, any employment complaint, including those brought by employees against a fellow employee, should be treated as an employment complaint. The Title 5 regulations require that the district notify employment complainants of the right to file the same complaint with the Department of Fair Employment and Housing (DFEH). If the complaint is a matter that the DFEH would normally handle, such as workplace hostility or harassment, then the matter should be considered as an employment complaint.

Multiple extension requests

**Q:** Can a district request multiple extensions to complete an investigation and render the administrative determination?

**A:** Yes, a district may request for multiple extensions because the Title 5 regulations do not expressly limit the number of extension requests a district may make. However, when presented with a second 90-day extension request, the Chancellor’s Office must review the
reasoning for the request to determine if a second extension would be prejudicial to the investigation.

Interviewing witnesses

**Q:** Will the Chancellor’s Office find a reasonable cause violation if a witness is not interviewed?

**A:** Possibly, depending on whether the witness is viable. The regulations require that a district interview all “viable witnesses” during its investigation. In determining whether this requirement is met, the Chancellor’s Office will look at the witnesses mentioned in the complaint and determine whether each witnesses would be deemed viable – that is, would the witness be able available and willing to provide substantive and valuable information on the matter, and would it be practical to interview the witness?

The viability analysis is threefold. First, the district must ask whether a witness is available to provide testimony. Is the district privy to the witness’ information and can the witness be located to give testimony? If a witness cannot be located, then the witness is unavailable and thus not viable.

Secondly, if the witness is available, would the witness be able to provide relevant and material information? If the answer is no, then districts should not be required to interview the witness because investigations should be prompt and help promote resolution.

Lastly, investigators need to determine if it is practical to interview the witness. As previously mentioned, witnesses may be protected by certain employment or non-disclosure laws. When dealing with a protected witness, the Title 5 regulations do not grant districts subpoena power, nor do the regulations require districts to invoke the judicial process to comply with this requirement.

Districts should list all witnesses in their investigative report and notate if the witnesses were interviewed or not, along with the justification for not interviewing a particular witness.

Local governing board’s decision

**Q:** Does the local governing board need to give a justification for its acceptance or denial of the district’s administrative determination?

**A:** No, the local governing board’s role is to review all the necessary documents regarding the matter and render a decision to either uphold or reverse the district’s determination. Title 5 does not require the board to provide its justification or reasoning.
NON-DISCLOSURE AGREEMENT FOR TITLE IX INVESTIGATION

THIS NON-DISCLOSURE AGREEMENT (“Agreement”), dated ____________ (“Effective Date”), is entered into between [NAME OF DISTRICT] (“District”) and [NAME OF COMPLAINANT] (“Complainant”) – OR- [NAME OF RESPONDENT] (“Respondent”), (collectively referred to as the “Parties”), for the purpose of sharing evidence obtained during the course of a District investigation into a complaint filed by Complainant against Respondent (“Complaint”), in a manner consistent with controlling law, including but not limited to the Family Education Records Privacy Act of 1974 (20 U.S.C. § 1232g, et seq.), California law (Cal. Const., art. I, § 1; Ed. Code § 49060, et seq.), Title IX of the Education Amendments Act of 1972 (“Title IX”) (34 C.F.R. § 106 et seq.), and Title 5 of the California Code of Regulations (“Title 5”) (5 C.C.R. § 59300 et seq.).

WHEREAS, Complainant [or Respondent] is a party to an ongoing investigation pursuant to District policy, Title IX and Title 5;

WHEREAS, Complainant [or Respondent] may be provided by the District a copy of a Confidential Report of Evidence, a Final Investigation Report, and/or other evidence that relates to the District’s investigation into the Complaint, pursuant to 34 C.F.R. § 106.45(b)(5);

WHEREAS, the Parties anticipate that in being provided a copy of a Confidential Report of Evidence, a Final Investigation Report, and/or other evidence that relates to the District’s investigation into the Complaint, the District may disclose confidential and/or sensitive information concerning the Parties and other witnesses; and

WHEREAS, the Parties desire to provide for confidential treatment any Confidential Report of Evidence, Final Investigation Report, and/or other evidence that relates to the District’s investigation into the Complaint;

NOW THEREFORE, in consideration of these premises and for other good and valuable consideration, the Parties agree as follows:

1. Complainant [or Respondent] agrees that [he/she] will refrain from disseminating any evidence provided to [him/her] by the District that relates to the Complaint to anyone other than [his/her] attorney or advisor. Complainant [or Respondent] agrees that this includes evidence contained in any Confidential Report of Evidence and/or Final Investigation Report that may be issued, as well as the Reports themselves. Complainant [or Respondent] also agrees to also limit the use of the evidence provided to [him/her] by the District, including evidence contained in any Confidential Report of Evidence and/or Final Investigation Report, for purposes of the District’s Title IX investigation and/or grievance process.

2. The Parties agree that if a threatened or actual breach of this Agreement occurs, then: (a) monetary damages alone will not be an adequate remedy, (b) the non-breaching party will suffer
immediate and irreparable injury and damages, and (c) the non-breaching party will be entitled to seek and obtain, from any court of competent jurisdiction, immediate injunctive and other equitable relief in addition to, and not in lieu of, any other rights or remedies that the non-breaching Party may have under applicable laws.

3. **Complainant [or Respondent]** shall not be liable for the inadvertent or accidental disclosure of the Confidential Report of Evidence and/or Final Investigation Report or contents thereof, if such disclosure occurs despite the exercise of the same degree of care as such person normally takes to preserve [his/her] own confidential data or information.

4. The Parties agree that neither Party shall assign this Agreement or any portion hereof to a third party without the prior written consent of the other party.

IN WITNESS WHEREOF, the Parties have entered into this Agreement as of the Effective Date.

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