SCLS SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

TITLE IX PART II – CONDUCTING TITLE IX INVESTIGATIONS

February 24, 2022

Presented by:

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Title IX Part II – Conducting Title IX Investigations

February 24, 2022

Page

Presentation Slides 1

1. CDE Sample Uniform Complaint Procedures Complaint Log, May 2020 29

2. A. Initial Letter to Complainant 30
   B. Notice of Allegations in Formal Complaint to Respondent 35

3. A. Letter to Complainant Re Determination Regarding Responsibility 41
   B. Letter to Respondent Re Determination Regarding Responsibility 44

4. Investigation Tracking Document 47

5. EEOC Enforcement Guidance 48

6. Investigation Notice Form 51

7. Confidential Summary Investigation Report 52

8. Case Study 58

9. 5 CCR § 4631 – Responsibilities of the LEA 59

10. 5 CCR § 4964 – Confidentiality 61

11. 5 CCR § 4963 – Prohibitions 62

12. Non-Disclosure Agreement for Title IX Investigation 63

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Title IX Part II: Conducting Title IX Investigations

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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

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I. Brief Overview of Title IX

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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."

20 U.S.C. § 1681 and 34 C.F.R. Part 106

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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 male, female, non-binary

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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.

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Title IX Legal Framework

- Federal law
- Implementing regulations
  - TIX regulations (effective 8/14/20)
- Regulatory Guidance
  - 1997 Guidance on Sexual Harassment
  - 2001 Revised Sexual Harassment Guidance
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide
  - 2017 Interim Guide: Q&A on Campus Sexual Violence

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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.

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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

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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.

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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.

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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
  - Sexual Orientation
  - Gender Identity

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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").

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Clery Act/VAWA Definitions

(1) **Sexual assault** – 20 U.S.C. 1096(f)(6)(A)(v) – "The term "sexual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation."

(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."

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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"

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Affirmative Consent (Sexual Assault)

- The regulations specifically note that schools are not required to adopt any particular definition of consent with regard to sexual assault.
- Note: Effective 1/1/20, colleges that receive state funding must adopt a sexual assault policy that includes an affirmative consent standard in the determination of whether consent was given by both parties to sexual activity.
- "Affirmative consent" must be defined as "affirmative, conscious, and voluntary agreement to engage in sexual activity."

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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 its 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.

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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."

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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.

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II. Why Are We Here?

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Title IX Training

"A recipient must ensure that ***Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process***, receive training on **[1]** the definition of sexual harassment in § 106.30, **[2]** the scope of the recipient's education program or activity, **[3]** how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and **[4]** how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

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Title IX Training, Cont'd.

"A recipient must ensure that **decision-makers** receive training on **[1]** any technology to be used at a live hearing and on **[2]** 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, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that **investigators** receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence."

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III. Conducting Impartial Investigations

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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

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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 measures available to the complainant.

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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.

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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 (at least 10 days).
- Prepare and issue a final investigation report.

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Investigations Will Vary

- 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

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Investigations Will Vary

- 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

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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

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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?

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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

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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/policy
   - Make sure required notices are sent, including copies of the applicable procedure/policy and other information required by the procedure/policy
2. Develop an investigative strategy
   - Outline scope and breadth of investigation
   - Determine who should be interviewed and what information should be reviewed

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Investigation Fundamentals: Next Steps

3. Determine who will be the investigator
   - 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

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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 their knowledge of & consent of the recording

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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 that it

    (3) Effectively denies a person equal access to an education program or activity

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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.

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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.

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Interviews

- Make appropriate disclosures (e.g., who you are, who you represent, why you are there)
- Ask for consent to record
- 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

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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 they 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 & respondent or possible motivations for complaint or conduct at issue

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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 them as investigation proceeds

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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

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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

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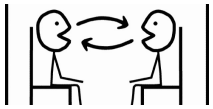
Interviews: Assessing Credibility

- 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



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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

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Trauma-Informed Approach

- https://www2.ed.gov/about/offices/list/ocr/docs/ocr-tix-webinar-bci.pdf
  - "As stated in the Preamble to the Title IX regulations, the Department [of Education] notes that while there is no uniform list of trauma-informed techniques, many practitioners and experts believe that application of trauma-informed techniques is possible – albeit challenging – to apply in a truly impartial, non-biased manner.

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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.

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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
  - Whether complainant is aware of other incidents by respondent toward other individuals
  - Whether any documents exist to support the allegations

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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 they will have a full opportunity to provide information
- Caution against retaliation
- The respondent (and complainant) should be allowed to have an advisor present

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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

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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

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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?

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IV. Legally Compliant Investigation Reports

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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.

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Investigation Reports

- Follow your institution's grievance procedures, and any applicable policies
- It must 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…"

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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)

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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)

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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

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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

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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

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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

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V. Decision Making

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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."

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Determining Relevancy

- Relevant:
  - Having significant and demonstrable bearing on the matter at hand
  - Affording evidence tending to prove or disprove the matter at issue or under discussion
- "Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant's prior sexual behavior are not relevant, subject to certain limitations. The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive."

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Determining Relevancy

- "The 2020 amendments state that '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' or 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.'"

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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."

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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;

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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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V. Investigation-Related Issues

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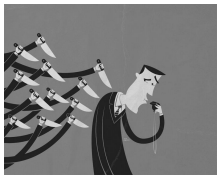
Confidentiality

- 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.

SCLS

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

SCLS

Hot Seat

Let's 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.

SCLS

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

SCLS

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

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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 them
  - The school must redact complainant's name and other identifying information before allowing respondent to inspect and review sections of complaint that relate to them

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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

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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*

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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*

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The Language of Sexual Violence

- How you write your report creates the narrative of the case
- Take care 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")

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V. Next Steps

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Next Steps

- Review your policies and timelines, recommend revisions for consideration by Board, as appropriate
- Our office is here to help!
- Attend Parts 3 and 4 of our in-depth Title IX trainings, with content specifically tailored to K-12 and community college districts.

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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
- White House Task Force to Protect Students from Sexual Assault, Considerations for School District Sexual Misconduct Policies, https://www.justice.gov/ovw/file/900716/download
- National Center on Safe Supportive Learning Environments, https://safesupportivelearning.ed.gov/safe-place-to-learn-k12

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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.

Leah M. Smith Associate General Counsel
lsmith@sclscal.org

School & College Legal Services of California
5350 Skylane Boulevard
Santa Rosa, CA 95403
(707) 524-2690
www.sclscal.org

California Department of Education

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]*

[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:

[INCLUDE SUFFICIENT DETAILS SUCH AS 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]

Allegation No. 2:

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

- [ADD DESIRED RESOLUTIONS]

[INITIAL LETTER TO COMPLAINANT (K-12)]
**** 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 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.)

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

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:

[INCLUDE SUFFICIENT DETAILS SUCH AS 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]

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.

[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]
**** 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 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.)

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

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

[LETTER TO COMPLAINANT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

CONFIDENTIAL

[DATE]

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

[COMPLAINANT]
[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 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.

[LETTER TO COMPLAINANT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

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]

[LETTER TO COMPLAINANT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

REMEDIES [IF APPLICABLE]

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

[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

CONFIDENTIAL

[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]

[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

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]

[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

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

FROM: EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

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.[68] 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.

SCLS

SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

A Joint Powers Authority serving school and college districts throughout the state.

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Patrick C. Wilson
Frank Zotter, Jr.

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?

Barclays Official California Code of Regulations Currentness
Title 5. Education
Division 1. California Department of Education
Chapter 5.1. Uniform Complaint Procedures
Subchapter 1. Complaint Procedures
Article 4. Local Complaint Procedures

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,

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(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).

2. Amendment of section heading, section and Note filed 12-29-2005; operative 12-29-2005 pursuant to Government Code section 11343.4 (Register 2005, No. 52).

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

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Barclays Official California Code of Regulations Currentness
Title 5. Education
Division 1. California Department of Education
Chapter 5.3. Nondiscrimination and Educational Equity
Subchapter 1. Nondiscrimination in Elementary and Secondary Educational Programs Receiving State or Federal Financial Assistance
Article 8. Complaint Process Safeguards

5 CCR § **4964**

§ **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

1. New 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

5 CCR § **4964**, 5 CA ADC § **4964**

End of Document

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Barclays Official California Code of Regulations Currentness
Title 5. Education
Division 1. California Department of Education
Chapter 5.3. Nondiscrimination and Educational Equity
Subchapter 1. Nondiscrimination in Elementary and Secondary Educational Programs Receiving State or Federal Financial Assistance
Article 8. Complaint Process Safeguards

5 CCR § 4963

§ 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

5 CCR § 4963, 5 CA ADC § 4963

End of Document

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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.

[NAME OF PARTY]	**[NAME OF DISTRICT]**
By: _____ Name:_____	By: _____ Name: _____ Title: _____