

New Title IX Regulations: Compliance Training for California Community College Districts

LCW Webinar | July 31, 2020

Presented by: Pilar Morin & Jenny Denny



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Title IX

Title IX prohibits discrimination that is:

1. On the basis of sex
2. In education programs or activities
3. Receiving federal financial assistance
4. In the United States

20 U.S.C. § 1681 *et seq.*
34 C.F.R. § 106 *et seq.*



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Key Changes in Legal Obligations Effective August 14, 2020




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Pending Lawsuits


- *Know Your IX, et al., v. Devos* (U.S. District of Maryland)
- *New York v. U.S. Department of Education* (U.S. Southern District of New York)
- *Pennsylvania, et al. v. Devos* (U.S. District for the District of Columbia)
- *Victim Rights Law Center, et al v. Devos* (U.S. District of Massachusetts)



Preemption


- To the extent that state law already provides statutes or regulations that protect individuals from sexual harassment or discrimination, a district should comply with both the state requirements and the new regulations
- Conflicts: the Title IX regulations preempt state law
 - This preemption might affect collective bargaining agreements

34 CFR § 106.6 (a)



Case Study


- The Title IX Coordinator reviewed a surveillance video of a temporary parking lot employee, Kim, sexually assaulting an intoxicated student, Pat. Kim is an at-will employee and can be terminated without a *Skelly* or hearing. Pat refuses to file a complaint. HR wants to terminate Kim. She get a Lubey (name clearing meeting) but no other rights to challenge the termination because she is an at-will employee.



Case Study (Con't)

Kim challenges her termination arguing that she could not be terminated without a hearing. HR tells her she was employed at-will?

Is Kim correct?




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Discipline: Student & Employees

If the allegations meet the definition of Title IX sexual harassment then district can only discipline if the grievance process is followed:

- The district must treat the respondent equitably... by following the grievance process before any imposition of disciplinary sanction or actions that are not supportive

34 CFR §§ 106.44(a), 106.45(b)(1)




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When Does The Grievance Process Apply?

Required for formal complaints of sexual harassment under Title IX

- Not discrimination (adverse employment action based on sex/gender)
 - Disparate impact or disparate treatment
- Not informal complaints
- Not for sexual harassment that falls outside of the definition in the regulations



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Overall Requirement

Current	Upon notice of sexual harassment or sexual violence: Take prompt and effective action. To end the misconduct. To prevent its recurrence. To remedy its effects.	2001 Guidance 34 CFR § 106.8(b)
New	A recipient with <i>actual knowledge</i> of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond <i>in a manner that is not deliberately indifferent</i> .	34 CFR § 106.44(a)




Key Definitions: Official with Authority Notice

Current	U.S. Department of Education Office for Civil Rights (OCR) deems a school to have notice if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual harassment.	2001 Guidance and 2014 Q&A
New	Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official with authority to institute corrective measures on behalf of the recipient. (Note if the OWA is a Respondent, then the District will not be deemed to have actual notice) <ul style="list-style-type: none"> District has discretion to determine which employees will be required to make reports We recommend "supervisors" under Cal. Fair Employment and Housing Act; administrators that enforce policy and procedures 	34 CFR § 106.30



Key Definitions: Responsible Employees

Current	A responsible employee: <ul style="list-style-type: none"> Has the authority to take action to redress sexual violence; Has been given the duty of reporting incidents of sexual violence or any other misconduct. Is someone a student could reasonably believe has this authority or duty to address complaint. 	2001 Guidance and 2014 Q&A
New	<ul style="list-style-type: none"> Regulations do not include "responsible employees". District must have trained Title IX Coordinator. <p>(Note, districts may still use the term Responsible Employee but the District will only be deemed to have actual notice if Officials with Authority has knowledge)</p> <p>Suggested but not required: list Official with Authority and Confidential Resources in your procedures.</p>	34 CFR § 106.8




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Key Definitions: Sexual Harassment


Current	Unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, physical conduct of a sexual nature, or sexual violence.	2001 Guidance
New	<ul style="list-style-type: none">• Quid pro quo: An employee conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct;• Unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education program or activity; or• Sexual assault, dating violence, domestic violence, or stalking.	34 CFR § 106.30



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Key Definitions: Education Program or Activity


Current	All college operations, including academic, extra-curricular, athletic, college trips, sponsored events. Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity.	2001 Guidance, 20 USC § 1687, 34 CFR § 106.2(h)
New	Includes locations, events, or circumstances over which the College exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student org that is officially recognized by a postsecondary institution. Conduct must occur within the United States.	34 CFR § 106.44(a)



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Case Study Continued


- Because Pat was unwilling to sign and file a formal complaint, her roommate Thuy decides to file the complaint for her. Thuy learned about the assault based on what Pat told her on the way to the hospital.



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Case Study

Can Thuy file the complaint?




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Key Definition: Complainant

Complainant

- An individual alleged to be the *victim* of conduct
 - Must be an individual participating in or attempting to participate in the district's education program or activity
 - No 3rd party complaints


34 CFR 106.30(a)



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Case Study?

If not, what options does the district have to discipline Kim due to the sexual assault recorded on the surveillance camera in the parking lot?



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Key Definitions: Formal Complaint

Formal Complaint


- Document filed by the **complainant** OR signed by the Title IX Coordinator
- Alleging sexual harassment AND requesting investigation

34 CFR §106.30(a)




Key Definition: Interim/Supportive Measures

Withdrawn	Interim Measures: Individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.	2011 DCL, 2014 Q&A
New	Supportive Measures: "Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed."	34 CFR § 106.30(a)



Key Changes in Grievance Procedures




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Grievance Procedures: Triggers


Current	When a College knows or should know of possible sexual violence, it must investigate or determine what occurred.	2001 Guidance and 2014 Q&A
New	A recipient must follow procedures consistent with section 106.45 in response to a formal complaint .	34 CFR § 106.44(b)(1)

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Grievance Procedures

- **Grievance process must:**
 - Provide remedies on finding of Title IX violation
 - Presume the respondent is not responsible for a Title IX violation
 - Only on a finding that respondent violated Title IX;
 - Require an objective evaluation of all relevant evidence
 - Avoid credibility determinations based on a person's status as a complainant, respondent, or witness
 - No "Complainants never lie" or "Respondents never tell the truth"


34 CFR § 106.45(b)(1)

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Grievance Procedures

- **Grievance process must: (cont'd)**
 - Require Title IX personnel to receive training
 - Be free from conflicts of interest or bias
 - Post Title IX training materials on district's website
 - Include reasonably prompt time frames
 - Describe the range of possible remedies and disciplinary sanctions
 - Identify the evidentiary standard
 - Either "preponderance of the evidence" or "clear and convincing evidence"
 - Not use privileged info
 - Unless privilege waived

34 CFR § 106.45(b)(1)

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Case Study

Student at San Gabriel CCD:

- Jake alleges a marine biology professor sexually assaulted him during a science trip in Baja California, Mexico. Jake files a CCD title 5 complaint.
- Benicio alleges the marine biology professor sexually assaulted him after a lab session. Benicio send an email to the Title IX Officer requesting an investigation.



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Case Study

Does the district have a Title IX formal complaint regarding Jake?

No

Does the district have a Title IX formal complaint regarding Benicio?

Yes, quid pro quo



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Case Study

Can the district commence a Title IX investigation into the incident involving Jake?

No. It all appears to have occurred in Mexico. But the District should process this under Cal. Law.

Can the district commence any investigation into the incident involving Benicio?

Yes.



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Grievance Procedures: Notice of Allegations – Form

- Upon receipt of a formal complaint, the district must provide the following written notice to the parties:
 - Notice of the grievance process
 - Respondent presumed not responsible
 - Notice of the allegations (date, location if known)
 - Sufficient detail and sufficient time to prepare before interview
 - Statement that determination about responsibility takes place after the grievance process
 - Parties may have an advisor
 - May inspect and review evidence
 - Must inform parties of code of conduct provisions about false statements and submitting false information

34 CFR § 106.45(b)(2)(i)

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Grievance Procedures: Timeline

Withdrawn	• ...a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment.	2011 DCL
New	"Grievance procedures must ...[]include reasonably prompt timeframes for the conclusion of the grievance process... and a process that allows for a temporary delay... for good cause with written notice to the complainant and the respondent..."	34 CFR § 106.45 (b)(1)(v)
California	In response to a formal complaint, District must complete the investigation, forward a copy of the investigative report summary and an administrative determination to the complainant and the Chancellor's Office within 90 days of receiving the complaint, unless an extension is provided.	5 CCR § 59336

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Grievance Procedures: Informal Resolution


Withdrawn	Mediation not appropriate for cases involving sexual assault.	2001 Guidance, 2011 DCL
New	May facilitate an informal resolution process that does not involve a full investigation and adjudication any time prior to determination regarding responsibility. <i>(Cannot use for student against employee or condition on a waiver)</i>	34 CFR § 106.45(b)(9)
California	Allowed for informal complaints, but complainants may file formal complaint.	5 CCR § 59327

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Case Study

Can the district offer the informal resolution process to Benicio?

No




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Investigations

- Gag Orders no longer permitted.
- Both parties must receive opportunity to review evidence before investigation concluded.
- Both parties have at least ten (10) days to respond to evidence after receiving it. Both parties receive investigative report.


34 CFR 106.45(b)(5)



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Grievance Procedures: Reviewing Evidence

Current	Must provide notice to the parties of the outcome of the complaint.	2001 Guidance
New	<ul style="list-style-type: none">• Complainant and respondent:• Right to inspect and review evidence, including evidence on which recipient does not intend to rely.• Right to submit written response to evidence that the investigator will consider prior to report completion.• Must provide final investigative report at least 10 days prior to hearing.	34 CFR §106.45 (b)(5)(vi) and (vii)
California	District must provide a copy or summary of the report and administrative determination to the complainant and the Chancellor's office.	5 CCR § 59336




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Case Study

The district's investigators are nearing completion of their investigations into Jake's and Benicio's complaints. **True or False:** Because their complaints involve the same Respondent, the district should allow Jake, Benicio, and the professor to review the evidence prior to finalizing the investigative reports.

False since Jake is not being processed under Title IX




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Grievance Procedures

Mandatory dismissal when:

- Conduct would not constitute sexual harassment;
- Conduct did not occur within the education program or activity; or
- Conduct did not occur against a person in the United States.

34 CFR § 106.45(b)(3)(i)




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Grievance Procedures

Discretionary Dismissal:

- If the complainant withdraws the complaint
- If the respondent is no longer enrolled or employed
- Specific circumstances prevent the institution from gathering sufficient evidence to reach a determination regarding the allegations

34 CFR § 106.45(b)(3)(ii)




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Grievance Procedures

Dismissals:
Must provide prompt:

- Simultaneous notice of dismissal to the parties
- Include reasons for dismissal
- Appeal Process for dismissal

34 CFR §§ 106.45(b)(3)(iii),
106.45(b)(8)(i).




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Hearing Procedures

- Elementary and secondary schools are not required to hold hearings
- But must allow for parties to submit written questions to each other before determination

34 CFR § 106.45(b)(6)(ii)




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Hearing Procedures

- Live cross examination by party's advisor of choice
 - If party doesn't have advisor, district must provide an advisor free of cost for *cross-examination*; not necessarily an attorney
- Decision-maker must explain why question excluded
- Can cross examine virtually

34 CFR 106.45(b)(6)(i)



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Hearing Procedures

- If a party or witness does not submit to cross-examination, cannot rely on his/her/their statement
 - Decision-maker(s) cannot draw an inference based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions


34 CFR 106.45(b)(6)(i)



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Case Study


Kim participates in a zoom investigation that is recorded by the district's investigator. She confesses to everything on the recording. However, on the day of the hearing, Kim arrives with a high powered criminal defense lawyer, Marcy Klark, who informs the district Kim will not be testifying, and that the district cannot use either the video confession or the surveillance film under Title IX law. *Is she correct?*



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Answer

- Marcy Klark is only partially correct:
 - The zoom video and any transcript of the confession cannot be used because she will not testify at the grievance hearing
 - The surveillance video is a recording of an "act" and can be used




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Case Study

Can the district Lybarger Kim if she refuses to testify in hearing?

No




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Retaliation

- Protects everyone who participates in the complaint, investigation, and hearing from retaliation
 - Such as intimidation, threats, coercion, or discrimination
- Cannot take action against anyone for refusing to participate or refusing to testify
 - FLAGGED ISSUE: We now cannot direct employees to participate under the threat of discipline for insubordination


34 CFR § 106.71(a)



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Grievance Procedures: Determinations

Withdrawn	Must inform complainant if finds conduct occurred, remedies offered or provided complainant, or sanctions imposed on respondent, and other steps the school took.	2014 Q&A
New	To both parties: (1) identify allegations, (2) procedural steps, (3) findings of fact, (4) conclusions, (5) rationale, including sanctions and remedies provided to complainant, and (6) appeal procedures for complainants and respondents.	34 CFR § 106.45 (b)(7)(ii)
California	Provide administrative determination: (1) determination regarding probable cause to believe discrimination occurred for each allegation, (2) actions taken to prevent recurrence, (3) proposed resolution, and (4) complainant's right to appeal to Board of Trustees and CCCCO or Dep't. of Fair Employment and Housing (DFEH).	5 CCR § 59336



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Grievance Procedures: Appeals


Withdrawn	Not required, but recommend where procedural error or previously unavailable evidence could impact the outcome of a case, or sanction is disproportionate to the findings. If provided, must allow for both parties.	2014 Q&A
New	Must offer both parties an appeal, and from dismissal of a formal complaint/allegations, based on: (1) procedural irregularity, (2) newly discovered evidence, or (3) a conflict of interest or bias by Title IX personnel. May offer appeal to both parties on additional bases.	34 CFR §106.45 (b)(8)(i) and (ii)
California	Complainant may appeal to Board of Trustees and CCCCCO (non-employment complaints) or DFEH (employment complaints).	5 CCR § 59336



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Next Steps

- Adopt not only grievance process but forms
 - Sample complaint form;
 - Letters re supportive measures, emergency removal and administrative leave pending grievance process;
 - Letters re notice of allegations/investigation, dismissal of formal complaint, conclusion of investigation, investigative reports, comment periods, request to participate in hearing, informal resolution;
 - Information sheet on role of advisors;
 - Hearing checklist;
 - Template for written determination;
 - Sample appeal form and template for response to appeal;
 - AND MORE!



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Questions?



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