

Fremont Union HSD

Administrative Regulation

Title IX Sexual Harassment Complaint Procedures

AR 5145.71

Students

Sexual Harassment Under Title IX

The complaint procedures described in this administrative regulation shall be used to address any complaint governed by Title IX of the Education Amendments of 1972 ("Title IX") alleging that a student was subjected to one or more of the following forms of sexual harassment (34 CFR 106.30):

1. A district employee conditioning the provision of a district aid, benefit, or service on the student'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 student equal access to the district's education program or activity
3. Sexual assault, dating violence, domestic violence, or stalking as defined in 20 USC 1092 or 34 USC 12291

Sexual assault means actual or intentional physical sexual acts against a person without consent that may include: rape, rape and seduction, sodomy, lewd and lascivious acts, oral copulation, sexual penetration, sexual battery, and sexual assault, as defined under Education Code 48900(n) and Penal Code 261, 266c, 286, 288, 288a, 289 and 243.4.

Dating violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. (34 U.S.C. 12291(a)(10).)

Domestic violence means 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. (Ed. Code, 48900, subd. (n).)

Stalking means engaging in a course of conduct directed at a specific person that

would cause a reasonable person to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress. (34 U.S.C. 12291(a)(30).)

"Without consent" or "against that person's will" may include: force, duress, violence, fear of immediate harm, or one's inability to consent.

The district shall respond to allegations of sexual harassment that, if true, meet the definition of sexual harassment under Title IX, when the alleged conduct occurs in the school's education program or activity, and against a person in the United States. "Education program or activity" includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

All other sexual harassment complaints or allegations, brought by or on behalf of students, shall be investigated and resolved in accordance with AR 1312.3 - Uniform Complaint Procedures.

The determination of whether the allegations meet the definition of sexual harassment under Title IX shall be made by a district Title IX coordinator.

(cf. 1312.3 - Uniform Complaint Procedures)

Reporting and Filing a Formal Complaint of Sexual Harassment Under Title IX

Upon receiving such a report, the Title IX coordinator shall promptly meet with the complainant. The Title IX coordinator shall listen to the complainant's concerns, and inform the complainant of the process for filing a formal complaint, and their right to file or not file a formal complaint. The Title IX coordinator shall also discuss supportive measures with the complainant, and explain that supportive measures will be available regardless of whether a formal complaint is filed.

A "formal complaint" under Title IX means a document filed by a complainant (who must be the victim of the alleged conduct, or their parent/guardian) or signed by a district Title IX coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation. At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the district's educational program or activity.

A formal complaint, with the complainant's physical or digital signature, may be filed with the Title IX coordinator, using the contact information listed in AR 5145.7 - Sexual Harassment, in person, by mail, by email, or by any other method authorized by the district. (34 CFR 106.30)

(cf. 5145.7 - Sexual Harassment)

Even if the alleged victim chooses not to file a formal complaint, a Title IX

coordinator shall file a formal complaint in situations in which a safety threat exists. In addition, the Title IX coordinator may file a formal complaint in other situations, as permitted under the Title IX regulations, including as part of the district's obligation to not be deliberately indifferent to known allegations of sexual harassment. In such cases, the Title IX coordinator does not become a party to the case, and the victim will receive notices as required by the Title IX regulations at specific points in the complaint process.

The Superintendent or designee shall ensure that the Title IX coordinator, investigator, decision-maker, or a facilitator of an informal resolution process do not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, and that such persons receive training in accordance with 34 CFR 106.45. (34 CFR 106.45)

Supportive Measures

Upon receipt of a report of Title IX sexual harassment, even if a formal complaint is not filed, the Title IX coordinator shall promptly contact the complainant-victim to discuss the availability of supportive measures which are nondisciplinary, nonpunitive, and do not unreasonably burden the other party. Supportive measures shall be designed to restore or preserve equal access to the district's educational program or activity without unreasonably burdening the other party, protect the safety of all parties or the district's educational environment; and to deter sexual harassments. Such measures may include, but are not limited to, counseling, course-related adjustments, modifications of class schedules, academic support, mutual restrictions on contact, increased security, and monitoring of certain areas of the campus. The Title IX coordinator shall consider the complainant's wishes with respect to supportive measures. (34 CFR 106.30, 106.44) Supportive measures, including those detailed herein, shall also be offered to the respondent upon receipt of a formal complaint.

Emergency Removal from School

The district is prohibited from disciplining a student for alleged sexual harassment under Title IX until a full Title IX investigation has been completed. (106.44, subd. (a).) However, on an emergency basis, the district may remove a student from the district's education program or activity, provided that the district conducts an individualized safety and risk analysis, determines that removal is justified due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations, and provides the student with notice and an opportunity to challenge the decision immediately following the removal. This authority to remove a student cannot modify a student's rights under the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act of 1973. (34 CFR 106.44)

If a district employee is the respondent, the employee may be placed on administrative leave during the pendency of the formal complaint process. (34

CFR 106.44)

Mandatory and Discretionary Dismissals of Title IX Complaints

The Title IX Coordinator shall dismiss a formal complaint if the alleged conduct would not constitute sexual harassment as defined in 34 CFR 106.30, even if proved. The Title IX coordinator shall also dismiss any complaint wherein the alleged conduct did not occur in the district's education program or activity, did not occur against a person in the United States, or wherein the complainant was not participating or attempting to participate in the educational program at the time the complaint was filed. The Title IX coordinator may dismiss a formal complaint if the complainant notifies the district in writing that the complainant would like to withdraw the complaint or any allegations in the complaint, the respondent is no longer enrolled or employed by the district, or sufficient circumstances prevent the district from gathering evidence sufficient to reach a determination with regard to the complaint. (34 CFR 106.30(a), 34 CFR 106.45)

Upon dismissal, the Title IX coordinator shall promptly, and simultaneously to the parties, send written notice of the dismissal and the reasons for the dismissal. (34 CFR 106.45) Both parties have the right to appeal a dismissal in accordance with the appeal procedures set forth below.

If a complaint is dismissed on the grounds that the alleged conduct does not constitute sexual harassment as defined in 34 CFR 106.30, or on another appropriate basis, the allegations may still be addressed pursuant to BP/AR 1312.3 - Uniform Complaint Procedures or other district policies and procedures, as is deemed appropriate under the circumstances.

Informal Resolution Process

When a formal complaint of sexual harassment is filed, the district may offer an informal resolution process, such as mediation, at any time prior to reaching a determination regarding responsibility. The district shall not require a party to participate in the informal resolution process or to waive the right to an investigation and adjudication of a formal complaint. (34 CFR 106.45)

The district may facilitate an informal resolution process provided that the district: (34 CFR 106.45)

1. Provides the parties with written notice disclosing the allegations, the requirements of the informal resolution process, the right to withdraw from the informal process and resume the formal complaint process, and any consequences resulting from participating in the informal resolution process, including that records will be maintained or could be shared.
2. Obtains the parties' voluntary, written consent to the informal resolution process

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

Note that as part of an Informal Resolution, the Parties may agree upon discipline, including suspension or expulsion, without the need for an investigation. (Unofficial Regulations, pg. 1390.) This is an exception to the general rule, provided in 106.44 (a), that prohibiting the District from imposing discipline on a Respondent for sexual harassment until the full investigation process is completed.

Formal Complaint Process

Written Notice

If a formal complaint is filed, the Title IX coordinator shall provide the known parties (complainant and respondent) with written notice of the following: (34 CFR 106.45)

1. The district's complaint process, including any informal resolution process
2. The allegations potentially constituting sexual harassment with sufficient details known at the time, including the identity of parties involved in the incident if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident if known. Such notice shall be provided with sufficient time for the parties to prepare a response before any initial interview

If, during the course of the investigation, new Title IX allegations arise about the complainant or respondent that were not included in the initial notice, the Title IX coordinator shall provide notice of the additional allegations to the parties.

3. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the complaint process
4. That the parties may have an advisor of their choice who may be, but is not required to be, an attorney, and that the parties will have the ability to inspect and review evidence brought forth during the course of the investigation
5. That the parties are prohibited from knowingly making false statements or knowingly submitting false information during the complaint process
6. That there is a presumption that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance/complaint procedure

The above notice may also include the name of the investigator, facilitator of an

informal process, and decision-maker. If at any time a party has concerns regarding conflict of interest or bias regarding any of these persons, the party shall immediately notify a district Title IX coordinator.

Investigation Procedures

During the investigation process, the district and/or the district's designated investigator shall: (34 CFR 106.45)

1. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
2. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence
3. Provide the parties with the same opportunities to have others present during any grievance/complaint proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney
4. Not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance/complaint proceeding, although the district may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties
5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all investigative interviews or other meetings, with sufficient time for the party to prepare to participate
6. Send in an electronic format or hard copy to both parties and their advisors, if any, any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, and provide the parties at least 10 days to submit a written response for the investigator to consider prior to the completion of the investigative report
7. Objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and determine credibility in a manner that is not based on a person's status as a complainant, respondent, or witness
8. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to the determination of responsibility, send to the parties and their advisors, if any, the investigative report in an electronic format or a hard copy, for their review and written response

After sending the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker, who will not be the

Title IX coordinator or investigator assigned to the matter, shall afford each party the opportunity to submit written, relevant questions that the 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

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

Privacy rights of all parties to the complaint shall be maintained in accordance with applicable state and federal laws.

If the complaint is against an employee, rights conferred under an applicable collective bargaining agreement shall be applied to the extent they do not conflict with the Title IX requirements.

Written Decision

The decision-maker shall issue, and simultaneously provide to both parties, a written decision as to whether the respondent is responsible for the alleged conduct. (34 CFR 106.45)

The written decision shall be issued within 60 calendar days of the receipt of the complaint. The timeline may be temporarily extended for good cause with written notice to the complainant and respondent of the extension and the reasons for the action. (34 CFR 106.45)

In making this determination, the decision-maker shall use the "preponderance of the evidence" standard for all formal complaints of sexual harassment. The same standard of evidence shall be used for formal complaints against students as for complaints against employees. (34 CFR 106.45)

The written decision shall include the following: (34 CFR 106.45)

1. Identification of the allegations potentially constituting sexual harassment as defined in 34 CFR 106.30
2. A description of the procedural steps taken from receipt of the formal complaint through the written decision, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held if the district includes hearings as part of the grievance/complaint process
3. Findings of fact supporting the determination

4. Conclusions regarding the application of the district's code of conduct to the facts

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

6. The district's procedures and permissible bases for the complainant and respondent to appeal

The written decision shall also comply with the requirements outlined in the uniform complaint procedures for the issuance of an investigation report and appeal rights, as is necessary and required under the law.

Appeals

Either party may appeal the district's decision or dismissal of a formal complaint or any allegation in the complaint, if the party believes that a procedural irregularity affected the outcome, new evidence is available that could affect the outcome, or a conflict of interest or bias by the Title IX coordinator, investigator(s), or decision-maker(s) affected the outcome. If an appeal is filed, the district shall: (34 CFR 106.45)

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
2. Ensure that the decision-maker(s) for the appeal is trained in accordance with 34 CFR 106.45 and is not the same decision-maker(s) who reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
4. Issue a written decision describing the result of the appeal and the rationale for the result
5. Provide the written decision simultaneously to both parties

An appeal must be filed in writing within 10 calendar days of receiving the notice of dismissal of a Title IX complaint or a written determination, stating the grounds for the appeal and including any relevant documentation in support of the appeal. Appeals submitted after this deadline are not timely and shall not be considered. A written decision on the appeal shall be provided to the parties within 20

calendar days from the receipt of the appeal.

Either party has the right to file a complaint with the U.S. Department of Education's Office for Civil Rights.

Remedies

When a determination of responsibility for sexual harassment has been made against the respondent, the district shall provide remedies to the complainant. Such remedies may include the same individualized services described above in the section "Supportive Measures," but need not be nondisciplinary or nonpunitive and need not avoid burdening the respondent. (34 CFR 106.45)

Corrective/Disciplinary Actions

The district shall not impose any disciplinary sanctions or other actions against a respondent, other than supportive measures as described above in the section "Supportive Measures," until the complaint procedure has been completed and a determination of responsibility has been made. (34 CFR 106.44)

For students in grades 4-12, discipline for sexual harassment may include suspension and/or expulsion. After the completion of the complaint procedure, if it is determined that a student at any grade level has committed sexual assault or sexual battery at school or at a school activity off school grounds, the principal or Superintendent shall immediately suspend the student and shall recommend expulsion. (Education Code 48900.2, 48915)

(cf. 5144 - Discipline)

(cf. 5144.1 - Suspension and Expulsion/Due Process)

Other actions that may be taken with a student who is determined to be responsible for sexual harassment include, but are not limited to:

1. Transfer from a class or school as permitted by law
2. Parent/guardian conference
3. Education of the student regarding the impact of the conduct on others
4. Positive behavior support
5. Referral of the student to a student success team

(cf. 6164.5 - Student Success Teams)

6. Denial of participation in extracurricular or cocurricular activities or other privileges as permitted by law

(cf. 6145 - Extracurricular and Cocurricular Activities)

When an employee is found to have committed sexual harassment or retaliation, the district shall take appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement.

(cf. 4118 - Dismissal/Suspension/Disciplinary Action)

(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)

(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

Record-Keeping

The Superintendent or designee shall maintain for a period of seven years a record of the following:

For formal complaints, the district shall maintain record of each Title IX investigations of sexual harassment, including any determinations of responsibility, any audio or audiovisual recording and transcript if applicable, any disciplinary sanctions imposed, any remedies provided to the complainant, any appeal or informal resolution and the results therefrom, and responses made pursuant to 34 CFR 106.44. (34 CFR 106.45)

Where a Title IX allegation was reported, regardless of whether or not a formal complaint was filed, the district shall maintain a record of any actions, including supportive measures, taken in response to a report or formal complaint, or why it is reasonable that no supportive actions were taken, why the district's response was not deliberately indifferent, and the measures taken that were designed to restore or preserve equal access to the education program or activity.

The Superintendent or designee shall also maintain for a period of seven years all materials used to train the Title IX Coordinator, investigator(s), decision-maker(s), and any person who facilitates an informal resolution process. The district shall make such training materials publicly available on its web site, or if the district does not maintain a web site, available upon request by members of the public. (34 CFR 106.45)

(cf. 3580 - District Records)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

48900 Grounds for suspension or expulsion

48900.2 Additional grounds for suspension or expulsion; sexual harassment

48985 Notices, report, statements and records in primary language
CIVIL CODE
51.9 Liability for sexual harassment; business, service and professional relationships
1714.1 Liability of parents/guardians for willful misconduct of minor
GOVERNMENT CODE
12950.1 Sexual harassment training
CODE OF REGULATIONS, TITLE 5
4600-4670 Uniform complaint procedures
4900-4965 Nondiscrimination in elementary and secondary education programs
UNITED STATES CODE, TITLE 20
1092 Definition of sexual assault
1221 Application of laws
1232g Family Educational Rights and Privacy Act
1681-1688 Title IX of the Education Amendments of 1972
UNITED STATES CODE, TITLE 34
12291 Definition of dating violence, domestic violence, and stalking
UNITED STATES CODE, TITLE 42
1983 Civil action for deprivation of rights
2000d-2000d-7 Title VI, Civil Rights Act of 1964
2000e-2000e-17 Title VII, Civil Rights Act of 1964 as amended
CODE OF FEDERAL REGULATIONS, TITLE 34
99.1-99.67 Family Educational Rights and Privacy
106.1-106.82 Nondiscrimination on the basis of sex in education programs
COURT DECISIONS
Donovan v. Poway Unified School District, (2008) 167 Cal.App.4th 567
Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130
Reese v. Jefferson School District, (2000, 9th Cir.) 208 F.3d 736
Davis v. Monroe County Board of Education, (1999) 526 U.S. 629
Gebser v. Lago Vista Independent School District, (1998) 524 U.S. 274
Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473
Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:

CSBA PUBLICATIONS

Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014

Safe Schools: Strategies for Governing Boards to Ensure Student Success, 2011

U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS

Q&A on Campus Sexual Misconduct, September 2017

Examples of Policies and Emerging Practices for Supporting Transgender Students, May 2016

Dear Colleague Letter: Title IX Coordinators, April 2015

Sexual Harassment: It's Not Academic, September 2008

Revised Sexual Harassment Guidance: Harassment of Students by School

Employees, Other Students, or Third Parties, January 2001

WEB SITES

CSBA: <http://www.csba.org>

California Department of Education: <http://www.cde.ca.gov>

U.S. Department of Education, Office for Civil Rights: <http://www.ed.gov/about/offices/list/ocr>

Regulation FREMONT UNION HIGH SCHOOL DISTRICT

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