

Allegations and Reports of Sexual Misconduct: Effective Institutional Compliance with Title IX and Related Statutes

Ventura County Schools - SFA Webinar | September 22, 2020

Presented by: Jenny Denny

 LIEBERT CASSIDY WHITMORE



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Jenny Denny

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

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

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Key Changes in Definitions and Requirements Effective August 14, 2020



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
- If a conflict, the Title IX regulations preempt state law
 - This preemption might affect collective bargaining agreements

34 CFR § 106.6 (a)



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Discipline

If the definition of sexual harassment is met then district can only discipline if 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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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 <i>in the United States</i> , must respond in a manner that is not deliberately indifferent.	34 CFR § 106.44(a)
California	Districts must ensure its programs and activities are available to all persons without regard to sex or gender, sexual orientation, etc. Districts must investigate a properly filed complaint. Districts must seek to resolve those complaints in accordance with the provisions of sections 4900 et seq.	Title 5, California Code of Regulations (CCR) § 4900 et seq



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Key Definitions: 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 any employee of an elementary and secondary school.	34 CFR § 106.30
California	"Each local agency shall investigate complaints of unlawful discrimination in its programs or activities."	5 CCR § 4960



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Key Definitions: All Employees Have Duty to Report

Current	A responsible employee: • 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	Schools have "actual knowledge" of sexual harassment if any employee of the district has notice of an incident or allegation of sexual harassment; knowledge is imputed to the school district (similar to supervisor knowledge under Cal. Fair Employment and Housing Act for employees).	34 CFR § 106.30
California	No "responsible employee," but a district must identify a single person as the district officer responsible for receiving unlawful discrimination complaints. Note: Nothing prohibits a district from identifying employees as "responsible employees."	5 CCR § 4961



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Employee Notice

Employee Notice = School Notice



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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	• 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
California	Unwelcome conduct of a sexual nature, made by someone from or in the work or educational setting. • Includes unwelcome sexual advances, requests for sexual favors, and other nonverbal or physical conduct of a sexual nature. • Quid pro quo or hostile environment.	5 CCR § 4916 & FEHA



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Key Definitions: Education Program or Activity

Current	All school operations, including academic, extra-curricular, athletic, school 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 district exercised substantial control over both the respondent and the context in which the sexual harassment occurs. Conduct must occur within the United States.	34 CFR § 106.44(a)
California	In the work or educational setting.	Education Code § 212.5



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Key Definitions: 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)
California	No state guidance.	



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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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Key Definitions: 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)



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Key Definitions: Complainant

- An individual alleged to be the *victim* of conduct
 - Must be an individual participating in or attempting to participate in the school's education program or activity
 - No 3rd party complaints
 - If parent has legal right to act on child's behalf, parent may sign formal complaint
 - Parent does not become the complainant

34 CFR 106.30(a)



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Key Changes in Legal Obligations Effective August 14, 2020



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Grievance Procedures: Triggers

Current	When a district 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)
California	If a district receives charges of unlawful discrimination, it is required to assess the complaint, and a formal complaint triggers a district investigation.	5 CCR §§ 4960 & 4962



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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

Students at Green Tree HS in Desert and Sun USD:

- Jake alleges a marine biology teacher sexually assaulted him during a science trip in Baja California, Mexico. Jake's mother sent an email to the district's Title IX Officer about the incident and requested an investigation.
- Benicio alleges the marine biology teacher sexually assaulted him after a lab session. Benicio filed a UCP Form with the district.



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Case Study

Who is entitled to supportive measures?

- a. Jake
- b. Jake's mother
- c. Benicio
- d. The teacher



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Case Study

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

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



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Case Study

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

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



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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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Case Study

The biology teacher refuses to cooperate in the investigation. Can the school direct him to cooperate in the investigation or face discipline for insubordination?



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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: 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 . . . [i]nclude 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 and prepare a written LEA Investigation Report within 60 days of receiving the complaint, unless an extension is provided.	5 CCR § 4631



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Case Study

The Title IX Coordinator received the reports regarding Jake and Benicio on the same day.

True or False: The deadlines for the district to complete the investigations are the same.



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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 § 4931



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Case Study

Can the district offer the informal resolution process to Benicio and his parents?



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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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Case Study

The district received a Title IX formal complaint from a student named Raven alleging another student sexually harassed her. The district's investigator completed her interviews of Raven and two other witnesses and prepared the investigative report. Raven then called the Title IX Coordinator and stated she wanted to engage in the informal resolution process.

Did Raven waive her right to participate in the informal resolution process by completing the investigative interview?



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Grievance Procedures: Reviewing Evidence

Current	Must provide notice to the parties of the outcome of the complaint.	2001 Guidance
New	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 time of determination regarding responsibility.	34 CFR §106.45 (b)(5)(vi) and (vii)
California	District must provide LEA Investigation Report based on the evidence.	5 CCR § 4631



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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 must allow Jake, Benicio, and the teacher to review all of the evidence prior to finalizing the investigative reports.



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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 district 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; and
- Appeal process for dismissal.

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



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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 LEA Investigation Report: (1) findings of fact based, (2) conclusion providing a clear determination for each allegation, (3) corrective actions and remedies, (4) complainant's right to appeal to the CDE, and (5) procedures for an appeal to the CDE.	5 CCR § 4631



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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 CDE (non-employment complaints) or DFEH (employment complaints).	5 CCR § 4631 & DFEH



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Case Study

Can the teacher appeal the district's LEA Investigation Report Determination regarding Jake's complaint?

Can the teacher appeal the district's determination regarding responsibility regarding Benicio's complaint?



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Next Steps



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;



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Next Steps

- Remember: a district's obligation to address sex- and gender-based harassment and discrimination stem from a variety of sources under federal and state law for students and employees
- Districts should review their policies and procedures in light of the new Title IX regulations



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Questions?



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Thank You!

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