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## LIEBERT CASSIDY WHITMORE

# Introduction to the New Title IX Regulations for California Community Colleges

6/10/2020

*PRESENTED BY:*

Pilar Morin & Jenny Denny

# Introduction to the New Title IX Regulations for California Community Colleges

LCW Webinar | June 10, 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

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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## 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 if 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 in the United States, must respond in a manner that is not deliberately indifferent.	34 CFR § 106.44(a)
California	CCDs must ensure its programs and activities are available to all persons without regard to sex or gender, sexual orientation, etc. CCDs must investigate a properly filed complaint. [section 59334] CCDs must seek to resolve those complaints in accordance with the provisions of [sections 59300 et seq.]	Title 5, California Code of Regulations (CCR) § 59320



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# Introduction to the New Title IX Regulations for California Community Colleges

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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 a recipient's Title IX Coordinator or any <b>official with authority</b> 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)	34 CFR § 106.30
California	"Therefore, each community college district shall investigate complaints of unlawful discrimination in its programs or activities, and seek to resolve those complaints in accordance with the provisions of this subchapter."	5 CCR § 59320



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## Case Study

**Do these reports to Michelle constitute notice that triggers the district's Title IX obligations?  
Is Michelle an Official with Authority?**



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## Key Definitions: Responsible Employees

Current	A responsible employee: <ul style="list-style-type: none"><li>has the authority to take action to redress sexual violence;</li><li>has been given the duty of reporting incidents of sexual violence or any other misconduct.</li><li>Is someone a student could reasonably believe has this authority or duty to address complaint.</li></ul>	2001 Guidance and 2014 Q&A
New	No "responsible employee," but recipients must have trained Title IX Coordinator. (Note, you may still use this term, and designate these employees but the District will be deemed to have actual notice only if Officials with Authority has knowledge)	34 CFR § 106.8
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 § 59324



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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"><li>Quid pro quo: An employee conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct;</li><li>Unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education program or activity; or</li><li>Sexual assault, dating violence, domestic violence, or stalking.</li></ul>	34 CFR § 106.30
California	Unwelcome conduct of a sexual nature, made by someone from or in the work or educational setting. <ul style="list-style-type: none"><li>Includes unwelcome sexual advances, requests for sexual favors, and other nonverbal or physical conduct of a sexual nature.</li><li>Quid pro quo or hostile environment.</li></ul>	



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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)
California	In the work or educational setting.	Education Code § 212.5



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## Key Changes in Grievance Procedures



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## Grievance Procedures: 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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## Case Study

Who is entitled to supportive measures?

- a. Jake's mother
- b. Jake
- c. Benicio
- d. The basketball coach
- e. Raven
- f. Carl



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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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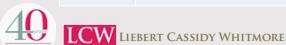
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## Grievance Procedures: Triggers

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 <b>formal complaint</b> .	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 under Section 59334.	5 CCR §§ 59327-59328



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## Grievance Procedures

### 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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## Grievance Procedures

### 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 3<sup>rd</sup> party complaints

34 CFR 106.30(a)



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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?*

*Does the district have a Title IX formal complaint regarding Raven?*



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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 Jake?*



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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 . . . [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, 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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## Case Study

Michelle received the reports regarding Jake, Benicio, and Raven 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 § 59327



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## Case Study

***Can the district offer the informal resolution process to Benicio?***

***Can the district offer the informal resolution process to Raven?***



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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 begins an investigation into Raven's complaint. The investigator completed her interviews of Raven and two other witnesses. Michelle receives a call from Raven who states she wants to engage in the informal resolution process. Has Raven waived her right to participate in the informal resolution process by completing the investigative interview?*



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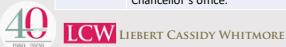
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## Grievance Procedures: Reviewing Evidence

Current	Must provide notice to the parties of the outcome of the complaint.	2001 Guidance
New	Complainant and respondent: <ul style="list-style-type: none"><li>Right to inspect and review evidence, including evidence on which recipient does not intend to rely.</li><li>Right to submit written response to evidence that the investigator will consider prior to report completion.</li><li>Must provide final investigative report at least 10 days prior to hearing.</li></ul>	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 basketball coach to review the evidence prior to finalizing the investigative report.*



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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)



## Hearing Procedures

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

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



## 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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## 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 Dept. of Fair Employment and Housing (DFEH).	5 CCR § 59336



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## Case Study

***What final documentation should the district give the complainants?***



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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	<b>Must</b> 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. <b>May</b> 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 CCCCO (non-employment complaints) or DFEH (employment complaints).	5 CCR § 59336



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## Case Study

*Can the basketball coach appeal the district's Administrative Determination regarding Jake's complaint?*

*Can the basketball coach appeal the district's determination regarding responsibility regarding Benicio's complaint?*



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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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## Next Steps



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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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## 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
- Districts should review their policies and procedures in light of the new Title IX regulations
  - Community College League's Model Policy and Procedures update coming in July



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## Questions?



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