

Regulations and Obligations: The Changing Landscape of Title IX

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Presented by: Jenny Denny



LCW LIEBERT CASSIDY WHITMORE

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Title IX

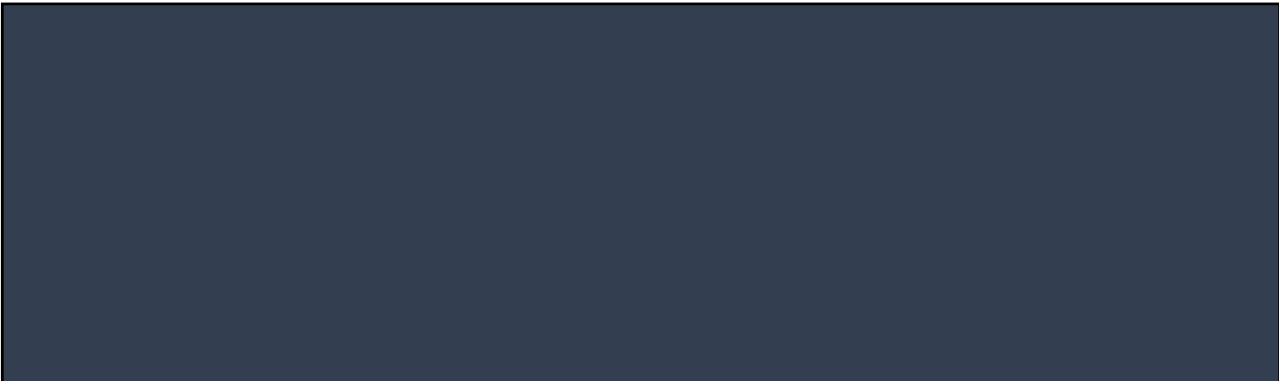
Title IX prohibits discrimination that is:

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 Definitions and Requirements
Effective August 14, 2020**



Title IX FAQ

**Should districts wait to revise policies and
procedures to comply with Title IX changes?**



Preemption

- Districts should comply with both state requirements and new regulations
- But, Title IX preempts state law
 - Might affect collective bargaining agreements

34 CFR § 106.6(a)



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Discipline

- If sexual harassment:
- Then discipline only through grievance process
 - Treat the respondent equitably

34 CFR §§ 106.44(a), 106.45(b)(1)



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Overall Requirement

If District has actual knowledge of sexual harassment in its education program or activity against a person in the United States:

Must respond in a manner that is not deliberately indifferent.

34 CFR § 106.44(a)



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Actual Notice

Notice to a Title IX Coordinator or any **official with authority** to institute corrective measures.

34 CFR § 106.30



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Case Study

The District's women's center operates a rape crisis hotline staffed by peer advocates. A student calls the hotline, provides her name, and reports she was raped at a party hosted by a student organization.

Does the District have actual notice?



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Responsible Employees

- No more “Responsible Employee”
- Must have trained Title IX Coordinator



34 CFR § 106.8



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Officials With Authority

- Responsible for reporting sexual harassment to the Title IX Coordinator
- *Tip: Make the report to the Title IX Coordinator in writing with date*



Reminder

Official With Authority under Title IX **not** the same as Mandated Reporter



Title IX FAQ

Can a district name multiple Title IX Coordinators?

34 CFR § 106.8(a)



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Sexual Harassment

- 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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Education Program or Activity

- Locations, events, or circumstances over which the District exercised substantial control over respondent and context
- Any building owned or controlled by a student org

34 CFR § 106.44(a)



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Grievance Procedures: Triggers

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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When Does the Grievance Process Apply?

- For formal complaints of sexual harassment under Title IX
 - Not for informal complaints
- Not for sexual harassment that falls outside of the definition in the regulations
- Not for discrimination



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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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Complainant

- The alleged *victim* of sexual harassment
 - Must be 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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Minor Students

- Parents' role in formal complaint:**
- If parent has legal right to act on minor's behalf, parent may sign formal complaint
 - Parent does not become the Complainant



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Application: Grievance Process

- *Employee reported student sexually harassed another student in class?*
- *Student filed formal complaint of sexual harassment against employee?*
- *Employee filed formal complaint alleging pregnancy discrimination?*
- *Student filed formal complaint of sexual harassment against employee for conduct that occurred on College trip to Mexico?*
- *Alumni reported incident of sexual harassment?*



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Interim/Supportive Measures

- Available to Complainant and Respondent
- Non-disciplinary and non-punitive
- Individualized services offered as appropriate and reasonably available without charge
- Before or after or without formal complaint

34 CFR § 106.30(a)




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Case Study

Who is entitled to supportive measures?

- *Reporting Party*
- *Student Complainant*
- *Employee Complainant*
- *Employee Respondent*
- *Student Respondent*
- *Witness*



Key Changes in Legal Obligations Effective August 14, 2020



Grievance Procedures

- Grievance process must:
 - Provide remedies on finding of Title IX violation
 - Presume Respondent is not responsible
 - Require 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
 - Include reasonably prompt time frames
 - Describe the range of possible remedies and disciplinary sanctions
 - Identify the evidentiary standard
 - Not use privileged info
 - Unless privilege waived

34 CFR § 106.45(b)(1)



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Title IX FAQ

What if the Complainant withdraws because of sexual harassment then files a complaint?

- Consider whether Complainant is still “attempting to participate” in the district's education program or activity



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Case Study

You are the Title IX Coordinator at Sun College in Four Seasons CCD:

- *Raven (they/them) filed a written complaint alleging the following and requested an investigation:*
 - *A fellow student, Jonathan, sexually assaulted them on a College trip to a student leadership conference in Los Angeles, and*
 - *Jonathan also verbally harassed them once based on their status as a transgender student while on campus*



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Case Study, cont'd

During your intake interview with Raven, they also shared verbal complaints against an instructor. Raven alleged the instructor was biased against them in class because Raven is transgender. Raven refused to file a formal complaint against the instructor because they are concerned about their grade in the class.



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Case Study

Does the District have a Title IX formal complaint regarding Jonathan?

Does the District have a Title IX formal complaint regarding the instructor?



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Case Study

Can the District commence a Title IX investigation into the sexual assault allegation?

Can the District commence a Title IX investigation into the verbal harassment allegation?



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Case Study

Does the District have a Title IX formal complaint regarding the instructor?

Can the District initiate any investigation into the allegations against the instructor?



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Notice of Allegations – Form

Must provide written notice to the parties:

- Notice of the grievance process
- Presumption that Respondent is not responsible
- Statement that determination occurs at end of grievance process
- Notice of the allegations (date, location if known)
- Sufficient time to prepare before interview
- Right to advisor
- Right to Evidence Review
- Code of conduct provisions re: false statements and false information

34 CFR § 106.45(b)(2)(i)



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Emergency Removal

- Possible after an individualized analysis
- Appropriate when non-employee Respondent poses immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment

34 CFR § 106.44(c)



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Case Study

The District provided Jonathan notice of the allegations. He became very angry and visited the Student Senate office, which was empty. While there, he caused physical damage to the computers and desk.

May the District place Jonathan on an emergency removal as a result?



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Retaliation

- Protects everyone who participates in the Title IX process
- Cannot intimidate, threaten, coerce, or discriminate
- Cannot take action against anyone for refusing to participate or refusing to testify

34 CFR § 106.71(a)



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Timeline

- Must be reasonably prompt
- Can delay for good cause
 - Must provide written notice to the Parties

34 CFR § 106.45(b)(1)(v)



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Case Study

Because you learned the details of Raven's allegations against Jonathan and the instructor at the same intake meeting, the deadlines for the District to complete the investigations are the same.

True or False?



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Informal Resolution

- Does not involve a full investigation and adjudication
 - Possible at any time prior to determination regarding responsibility
 - Cannot use for student against employee
- 34 CFR § 106.45(b)(9)



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Case Study

Can the District offer the informal resolution process to Raven regarding their allegations against Jonathan?

Can the District offer the informal resolution process to Raven regarding their allegations against the instructor?



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Case Study

The District began an investigation into Raven's complaint of sexual assault by Jonathan. The investigator completed her interviews of Raven and two other witnesses. Raven called you and stated they want to engage in the informal resolution process.

Has Raven waived their right to participate in the informal resolution process by completing the investigative interview?



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Evidence Review

Complainant and Respondent:

- Right to inspect and review evidence
- Right to submit written response to evidence
- Must provide final investigative report at least 10 days prior to hearing

34 CFR §106.45 (b)(5)(vi) and (vii)



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Case Study

The District's investigators are nearing completion of the investigations into Raven's complaints.

True or False: *Because the investigations involve the same Complainant, the District should allow Raven, Jonathan, and the instructor to review the evidence regarding their respective allegations prior to the investigators finalizing the investigative reports.*



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Mandatory Dismissal

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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Discretionary Dismissal

Discretionary dismissal when:

- Complainant withdraws complaint;
- Respondent no longer enrolled or employed; or
- Specific circumstances prevent district from gathering sufficient evidence to reach a determination

34 CFR § 106.45(b)(3)(ii)



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Dismissals

Must provide prompt:

- Simultaneous notice of dismissal to the Parties;
- Include reasons for dismissal; and
- Appeal process

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



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Title IX FAQ

Can Title IX personnel review Title 5 complaints?

- Yes. Title IX regulations do not preclude a district from using the same Title IX personnel to review and investigate allegations of misconduct that fall outside the scope of Title IX.



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Hearing Procedures

- Live cross examination by Party's Advisor
 - If party doesn't have Advisor, district must provide
 - 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, Decision-Maker cannot rely on his/her/their statement
 - 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

Two students, Matt and Shayna were newly dating. One night Matt secretly video taped them having sex. Shayna was unaware of the taping. Matt shared the video via text with his friends. Shayna learned of the video and filed a formal complaint. The District conducted a Title IX investigation and held a hearing. Matt refused to participate in the hearing because he heard the Decision-Maker cannot rely on his statements if he didn't appear. Matt considered the video he made his statement, and concluded the Decision-Maker cannot watch it.

Is Matt correct?



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Case Study

The District completed a fact-finding investigation with interviews of both the Complainant, Respondent, and other witnesses then scheduled a Title IX hearing. The Respondent is a football player. He is accused of raping another student at a party. There is no corresponding criminal investigation but the District's investigation found substantial evidence. However, the Complainant is scared and refuses to testify at the hearing and now says nothing happened. Accordingly, the District must dismiss the complaint.

True or False?



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Title IX FAQ

Do decision-makers have the flexibility to request witnesses as they deem necessary?

- Title IX regulations do not require all witnesses to appear at a hearing, but Parties have an equal right to present witnesses.



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Determinations

To both parties:


- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;
- Rationale, including sanctions and remedies provided to complainant; and
- Appeal procedures for Complainants and Respondents.

34 CFR § 106.45 (b)(7)(ii)



Title IX FAQ

May the district bifurcate the hearings between a “responsibility” phase and a “sanctions” phase?



Standard of Evidence

- Title IX regulations require “preponderance of the evidence” or “clear and convincing evidence standard” (34 CFR § 106.45(b)(7)(i))
- California law requires “preponderance of the evidence” (Education Code, § 67386)



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Case Study

What final documentation should the District give Raven, Jonathan, and the instructor?



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Appeals

- Must offer both parties an appeal from dismissal of a formal complaint/allegations based on:
 - Procedural irregularity;
 - Newly discovered evidence; or
 - 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)



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Case Study

Can the instructor appeal the District's Administrative Determination regarding Raven's complaint?

Can Jonathan appeal the district's determination regarding responsibility regarding Raven's complaint?



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Record Retention

Retain for at least seven years after closing the case:

- (1) original report or complaint; (2) actions taken in response to the complaint; (3) investigative report including all evidence and responses from the Parties; (4) determination regarding responsibility; (5) audio or audiovisual recording or transcript from hearing; (6) records of any disciplinary sanctions; (7) records of remedies provided to the Complainant; (8) any appeal and the result; (9) any informal resolution and the result; and (10) materials used to train Title IX personnel.

34 CFR §106.45(c)(10)




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Next Steps



Next Steps

- Remember obligations under federal and state law
- Review policies and procedures
 - Community College League’s Model Policy and Procedure Service
- Adopt not only grievance process but forms
- Use new Dean of Educational Services and Support at State Chancellor’s Office



Questions?



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Thank You!

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