

# Regulations and Obligations: The Changing Landscape of Title IX

Santa Clarita Community College District | June 11, 2021

Presented By: Jenny Denny

**LCW** LIEBERT CASSIDY WHITMORE

## Regulations and Obligations: The Changing Landscape of Title IX

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Jenny Denny / June 11, 2021

### Agenda

- Assessing Initial Obligations
- Triggering the Grievance Process
- Issues before the Investigation
- Informal Resolution and Investigation
- Hearing and Determination
- Dismissals and Appeals
- Questions?

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## Changes Are Coming...

- April 2021: OCR announced comprehensive review
  - Forthcoming: Q&A guidance, formal rulemaking process
- Now scheduled: public hearing
  - June 7-11, 2021

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## Title IX

### **Title IX prohibits discrimination that is:**

- On the basis of sex
- In education programs or activities
- Receiving federal financial assistance

20 U.S.C. § 1681 *et seq.*

34 C.F.R. § 106 *et seq.*

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## Title IX Protections

- Title IX protection applies to **all** students and employees
- Protects students and employees from sexual harassment committed by:
  - Students
  - District employees
  - Third-parties

## 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

34 CFR § 106.6 (a)

## Assessing Reports of Sexual Harassment & Determining Title IX Obligations



### 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

An **official with authority** has the power to institute corrective measures on behalf of the institution.

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## Case Study: Actual Knowledge

James is the Director of Information Technology. Celia, a student who works in IT, confides in him that she has been sexually assaulted by a coach. The District's policy says that all supervisors have a duty to report sexual harassment in the workplace. **Does District now have actual notice of a potential Title IX matter?**

**Yes, No, or Maybe**

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## Sexual Harassment: Three Categories

- 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

## 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 organization
- Must occur against the complainant **in the United States**
  - Title IX not triggered by incidents outside the U.S.

34 CFR § 106.44(a)

## Supportive Measures

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

34 CFR § 106.30(a)

## Examples of Supportive Measures

- Medical/mental health services (or referral)
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual no-contact orders
- Transportation accommodations
- Changes in work/housing locations
- Leaves of absence
- Increased security

# Triggering the Grievance Process



## Overview of Grievance Process



\* Potential need for mandatory dismissal



## 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 waived)

34 CFR § 106.45(b)(1)



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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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## 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
  - 3<sup>rd</sup> parties can report, but no 3<sup>rd</sup> party complaints
    - Except if Complainant is a minor or under conservatorship

34 CFR 106.30(a)



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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: treating individual differently/unfavorably because of that person's sex



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## The Grievance Process – Issues Before the Investigation



### Notice of Allegations

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

- Available at any point in grievance process
- 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
- Must provide notice to Respondent & appeal
- Can be used to remove from class or campus

34 CFR § 106.44(c)



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## Administrative Leave

- District has authority to place **employee** Respondents on administrative leave during Title IX grievance process



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## Role of Advisors Before Hearing

- Not required before hearing
  - May attend investigative interview(s), participate in evidence review, help Party prepare response to investigative report
- May not obstruct interview or disrupt grievance process
- District may require confidentiality agreement



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## The Grievance Process – Informal Resolution and Formal Investigation



## Informal Resolution

- Does not involve a full investigation and adjudication
- Possible at any time prior to determination regarding responsibility
- Cannot use for student complaint against employee

34 CFR § 106.45(b)(9)



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## Informal Resolution

- Only after Formal Complaint
- Not required, totally voluntary
  - May not be appropriate for all formal complaints
  - Title IX Coordinator should determine if Informal Resolution is appropriate
  - Requires both Parties' voluntary, written consent
- Title IX Coordinator should not be facilitator
- Understand pros and cons



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## Case Study: Informal Resolution

Carlos reports to the Title IX Coordinator that he broke up with Rudy last semester. At the time of the breakup, Rudy was a student at the District, but he is no longer enrolled. Carlos recently realized Rudy was stalking him on campus and filed a formal complaint. Rudy is now an adjunct employee at the District. The District initiated its grievance process. **Can the District offer the Parties informal resolution?**

**Yes, No, or Maybe?**



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## The Investigator

The investigator must:

- Be free of biases and conflicts of interest
- Conduct the investigation– gather inculpatory and exculpatory evidence
- Be trained on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Write the report



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## 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” Ed. Code, § 67386
  - It is more likely than not that the fact occurred

## Evidence Review

- Complainant and Respondent:
- At least 10 days time
  - Right to inspect and review evidence *directly related to the allegations*
  - Right to submit written response to evidence
  - Investigator must consider response before completing report

34 CFR §106.45 (b)(5)(vi)

## Case Study: Witnesses

After reviewing the evidence, a Respondent's advisor, who is a lawyer, requests that the investigator interview an expert—a medical doctor, who will provide his opinion that medication taken by the Complainant affects memory.

**Are parties allowed to produce expert witnesses to provide evidence?**

**Yes, No, or Maybe**



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## Investigative Report

- Must provide final investigative report to Parties at least 10 days prior to hearing
- Parties must have opportunity to review and provide written response

34 CFR §106.45 (b)(5)(vi) and (vii)



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## The Grievance Process – The Hearing and Determination Regarding Responsibility



### Hearing

- Opportunity for Parties to respond to the evidence gathered before a Decision-Maker
- Neither Party may waive the right to a live hearing
  - Can choose whether to participate in the hearing and whether to answer cross-examination questions
- Must presume Respondent is not responsible for alleged conduct



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## Case Study: The Hearing

After the District provided the Parties notice of the hearing, the employee Respondent contacted the Decision-Maker and stated he accepted responsibility and wanted to bypass the hearing in order to expedite the disciplinary decision. Because the Respondent admitted responsibility, can the Decision-Maker issue the determination regarding responsibility without the hearing?

**Yes, No, or Maybe?**



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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)

## Case Study: Evidence

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?**

## Determination Regarding Responsibility

### To both parties simultaneously:

- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;
- Statement and rationale for each determination regarding responsibility;
- Statement regarding whether district will provide remedies for Complainant;
- Appeal procedures for Complainants and Respondents.

34 CFR § 106.45 (b)(7)(ii)



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## The Grievance Process – Dismissals and Appeals



## 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)

## 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)

## Notice of Dismissal

### 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)

## 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)



## Related Issues



## Retaliation

- Protects everyone who participates from retaliation
  - Such as intimidation, threats, coercion, or discrimination
- Cannot take action against anyone for refusing to participate
  - No threats of discipline for insubordination
- No additional charges for code of conduct violations that arise out of the same circumstances as Title IX report or complaint

34 CFR § 106.71



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## Confidentiality

- The District must keep confidential the identity of
  - The Complainant, Respondent, or witness
    - Except as may be permitted by FERPA; or
    - As required by law

## Record Retention

### Retain for at least 7 years:

- Report or complaint
  - Actions taken in response
  - Investigative report including all evidence and responses from the Parties
  - Determination regarding responsibility
  - Recording or transcript from hearing
  - Records of sanctions and remedies
  - Any appeal and result
  - Any informal resolution and result
  - Materials used to train Title IX personnel
- 34 CFR §106.45(c)(10)

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Questions?



Thank you!

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