

New Title IX Regulations: What It Means For California's Independent K-12 Schools

LCW Webinar | August 12, 2020

Presented by: Jenny Denny

LCW LIEBERT CASSIDY WHITMORE



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Key Changes in Definitions 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 school should comply with both the state requirements and the new regulations
- If a conflict, the Title IX regulations preempt state law

34 CFR § 106.6 (a)



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Religious Schools – Assurance of Exemption

A religious school is exempt to the extent that the regulations are inconsistent with its religious tenets

- Need not submit a written statement to the Assistant Secretary for Civil Rights to qualify
- During OCR investigation, the school can assert exemption by submitting to the Assistant Secretary a written statement from the highest-ranking official of the school, identifying the conflict with a specific tenet of the religious organization

34 C.F.R. § 106.12, subd. (b).



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Overall Requirement

- A recipient with actual knowledge 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)



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Key Definitions: Notice

- Notice of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school

34 CFR § 106.30



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Key Definitions: 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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Key Definitions: 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. Conduct must occur within the United States.

34 CFR § 106.44(a)



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Key Definitions: Interim/Supportive Measures

- 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)



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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



Legal Obligations Under Title IX

Title IX requires

- **Policies/procedures**
- Reporting of possible sexual misconduct
- **Investigation**
- Training and education
- No retaliation



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Title IX Procedural Requirements

- Notice of nondiscrimination
 - Notify applicants, students, parents, employees, and all unions
 - Post on website and in handbooks
- Designation of Title IX Coordinator
 - Notify applicants, students, parents, employees, and all unions
 - Post on website and in handbooks



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Title IX Procedural Requirements

- Adopt compliant complaint procedures
 - Use the updated policy and procedures from LCW
 - Publish to applicants, students, parents, employees, and all unions
 - Post on website and in handbooks



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Title IX Procedural Requirements

- Can only impose discipline after completing grievance procedure
- Parties may have an advisor
- Require Title IX personnel to receive training
- Post Title IX training materials on school's website

34 CFR § 106.45(b)(1)



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Grievance Procedures: Notice of Allegations – Form

- Upon receipt of a formal complaint, the school 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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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

- “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)



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Grievance Procedures: Informal Resolution

- May facilitate an informal resolution process that does not involve a full investigation and adjudication any time prior to determination regarding responsibility (cannot use for student against employee or condition on a waiver)

34 CFR § 106.45(b)(9)



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Grievance Procedures: Reviewing Evidence

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)



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