

Title IX Coordinator Training for Community College Districts

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Agenda

- Review Title IX Regulations: Scope and Definitions
- Roles of Title IX Team
- Intake Process for Reports of Sexual Harassment
- Title IX Grievance Process
- Retaliation



Federal Law - Title IX:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

(Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681 et seq.) and related regulations (34 C.F.R. Part 106).)

TITLE IX SCOPE AND DEFINITIONS

2020 Title IX Regulations

1. Regulations and Guidance

- Text of regulations contained in **34 CFR Part 106** have the full force and effect of law

2. Overall Intent of Changes

- Strengthen/Clarify Title IX protections for survivors of sexual misconduct & provide due process protections to those facing accusations of sexual misconduct

3. Scope Under Title IX Regulations

- Amended sexual harassment definitions, clarified jurisdiction, & confirmed that Title IX sex discrimination includes sexual harassment and other sexual misconduct

4. Live Hearing Required for Post-Secondary Institutions

- A live hearing required under the Title IX grievance process complies with the 2019 California court decision in ***John Doe v. Kegan Allee***, (30 Cal. App. 5th 1036), which requires a fair hearing and an opportunity for direct or indirect cross-examination before a neutral adjudicator who has independent power to find facts and make credibility assessments.

Response to Sexual Harassment

According to **34 CFR §106.44(a)**: 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 promptly in a manner that is not deliberately indifferent** (e.g.; clearly unreasonable in light of the known circumstances.)

Actual Knowledge

- In **Post-Secondary Institutions**, per §106.30, **actual knowledge** occurs when:
 - (1) the ***Title IX Coordinator*** or
 - (2) any ***official*** of the recipient who has ***authority to institute corrective measures*** on behalf of the recipient
 - (3) has notice of sexual harassment or notice of allegations of sexual harassment.
- The Institution must identify who those officials are in the organization and notify them of their status as an Official With Authority or “OWA”

Actual Knowledge, continued

The Institution should:

- Provide **written** notice and guidelines to OWAs
- **Train** all OWAs in their responsibilities, such as:
 - Promptly providing a verbal or written report to the Title IX Coordinator, likely within 1-2 business days
 - Prohibited from filing anonymous reports to the Title IX Coordinator
 - Provide the Title IX Coordinator all known information
 - Not required to evaluate the complaint or information received unless the OWA is the Title IX Coordinator

Education Program or Activity

- Per § 106.44(a): An education program or activity includes locations, events, or circumstances over which the recipient 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 organization that is officially recognized*** by a postsecondary institution.
- At time of filing the formal complaint, the Complainant must be ***participating or attempting to participate*** in recipient's education program or activity.

Sexual Harassment Defined

According to § 106.30, Sexual Harassment means conduct on the ***basis of sex*** under one or more of following:

1. Quid Pro Quo Harassment

- **Employee** conditions the provision of an aid, benefit, or service of the recipient on the Complainant's participation in unwelcome sexual conduct

2. Hostile Environment Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be **so severe, pervasive and objectively offensive** that it effectively denies Complainant equal access to the recipient's education program or activity

Sexual Harassment Defined, Cont.

Conduct on the ***basis of sex*** under one of following:

3. Other Sexual Acts

- **Sexual assault** per 20 U.S.C. 1092(f)(6)(A)(v): Includes Forcible and Nonforcible Sex Offenses
- **Dating violence** per 34 U.S.C. 12291(a)(10)
- **Domestic violence** per 34 U.S.C. 12291(a)(8)
- **Stalking** per 34 U.S.C. 12291(a)(30)

ROLES OF THE TITLE IX TEAM

Who's on the Title IX Team?

1. Title IX Coordinator, per §106.8(a)
 2. Investigator(s)
 3. Decision Maker(s)
 4. Appeal Officer(s)
 5. Informal Resolution Process Facilitator(s)
- *All team members must be impartial, unbiased, and free from conflicts.*
 - *All team members must be trained in the 2020 Title IX Regulations.*

Title IX Team: Title IX Coordinator

Title IX Coordinator Duties:



- Coordinates Title IX compliance and training
- Conducts intake meeting with Complainant
- Offers supportive measures to Complainant & Respondent
- Explains grievance process, accepts formal complaint & determines mandatory dismissal
- Evaluates emergency removal
- Evaluates use of informal resolution process
- Assigns unbiased investigator free from conflicts
- Sends notices (e.g., Notice of Allegations)
- Considers permissive dismissal of complaint

Title IX Team: Title IX Coordinator

Title IX Coordinator duties, continued:

- Reviews investigative reports, written decision, & appeal decision, but **does not make decision** about responsibility
- Drafts letter of outcome after written decision issued
- *Likely does not* determine sanctions
- If applicable, ensures effective implementation of remedies for Complainant, sanctions for Respondent, and overall corrective plan
- *May* investigate when needed
- *May* act as facilitator of an informal resolution process

Title IX Team: Investigator(s)

Investigator Role:



- Trained and Knowledgeable
- Impartial, unbiased, & free from general or specific conflicts of interest
- Investigates formal complaint
 - Reviews complaint and relevant policies
 - Interviews parties and witnesses
 - Gathers, reviews, weighs, and synthesizes evidence
 - Assesses relevance and credibility
- Coordinates two review processes for parties and assesses responses
- Prepares a written investigative report about the evidence
- Investigator does **not** make decision about whether the Respondent is “responsible” for violation of sexual harassment policy

Title IX Team: Decision Maker

Decision Maker Role:



- Reviews Final Investigative Report with “fresh eyes” to see if information is missing or incomplete
- May be a hearing officer or a hearing panel
- Facilitates “live cross-examination” for parties through the parties’ advisors
- Makes conclusions about whether alleged conduct occurred and the decision about responsibility for a policy violation
- Prepares written determination with findings of fact, conclusions, and rationale for the result as to each allegation
- If applicable, recommends sanctions for Respondent and remedies for Complainant

Title IX Team: Appeals Officer

Appeal Officer Role:



- Provides written notice to both parties about the right to appeal based on three grounds for appeal
- If an appeal is filed, the Appeal Officer evaluates the appeal request(s) to determine if within the scope of appeal
- Provides a written Notice of Appeal to both parties
- Reviews both written statements and arguments from the parties
- Renders written decision on appeal and explains rationale for the result
- Provides the written decision to parties at same time

Title IX Team: Informal Resolution Process Facilitator

Informal Resolution Process Facilitator Role:

- Cannot require the parties to participate in informal process or to waive the right to an investigation
- Obtains voluntary, written consent of the parties to resolve the matter anytime before a determination of responsibility is made
- Process does not involve full investigation or adjudication, but includes a written notice to the parties disclosing the allegations, the requirements of the process, and notice that the parties can withdraw and resume the grievance process
- May consider the use of a trained mediator or trained restorative justice facilitator, if requested and appropriate
- Process cannot be used where an employee is alleged to have sexually harassed a student

INTAKE PROCESS FOR REPORTS OF SEXUAL HARASSMENT

Meeting with Complainant

The Title IX Coordinator:

- Promptly schedules a meeting with Complainant and listens to allegations and concerns
- If Complainant describes sexual harassment allegations, the Title IX Coordinator explains the Title IX grievance process
- Informs Complainant of the right to file or **not** to file a formal complaint and the right to supportive measures even if a formal complaint is not filed
- If **no** formal complaint is filed, the Title IX Coordinator informs Complainant of right to file a formal complaint at a later time. The Title IX Coordinator also assesses, despite Complainant's decision, whether to independently initiate a complaint if the failure to initiate an investigation would be clearly unreasonable considering the circumstances (e.g. based on a safety threat)

Meeting with Complainant

The Title IX Coordinator:

- If a formal complaint is filed, Title IX Coordinator gathers the signature of Complainant, parent/guardian and/or Title IX Coordinator
- Informs Complainant of right to request an informal resolution process after submission of a formal complaint and the right to exit informal resolution process at any time
- If a formal complaint is filed, Title IX Coordinator determines if the complaint falls within the scope of mandatory dismissal and informs Complainant and Respondent
- Best practice to provide a written summary of the meeting

Supportive Measures

1. Requirement to Offer Supportive Measures per §106.30 & §106.44

- Must be offered to Complainant as soon as CCD has notice of possible Title IX issue and to Respondent after complaint filed

2. Avoid Burden on Parties

- Supportive Measures must be non-punitive, non-disciplinary, and not unreasonably burdensome to the other party

3. Individualized

- Supportive Measures must ensure equal educational access, protect safety, and/or deter sexual harassment

4. Examples of Supportive Measures

- Counseling, course-related adjustments, modify schedule, extend deadlines, campus escort, increased security and monitoring, and/or mutual restrictions on contact between the parties

Discuss Advisor of Choice

- The Title IX regulations provide the Complainant and Respondent with the same opportunities to have “others present” during any grievance proceeding
 - An advisor may be a parent, family member, attorney, or other person
 - The advisor may be present for any meeting, interview, and/or hearing and may inspect and review any evidence obtained as part of the investigation
 - The advisor **shall** ask the cross-examination questions in the live hearing process
 - If a party does not have an advisor to conduct cross-examination at a live hearing, the institution must provide one to the party
 - The institution may establish restrictions on the extent of an advisor’s participation, if restrictions apply equally to both parties
 - Since advisors will have access to inspect and review student, employee and/or other confidential documents, consider having advisor(s) sign an agreement not to release copies of or information from those records to the public

Removal of Students and Employees

Emergency Removal Option for Students

- Institution may remove Respondent per §106.44(c)
- Institution must undertake individualized safety & risk analysis re Respondent
 - The analysis determines if there is an *immediate threat to the physical health or safety* of any student or other individual arising from the allegations to justify removal

Administrative Leave Option

- Institution may place a non-student employee Respondent on administrative leave, per §106.44(d) during the pendency of a grievance process that complies with §106.45

TITLE IX GRIEVANCE PROCESS

Grievance Process

1. Basic Requirements
2. Notice of Allegations
3. Dismissal of Formal Complaint
4. Consolidation
5. Investigation
6. Hearing/Cross-Examination
7. Determination of Responsibility
8. Appeals
9. Informal Resolution
10. Recordkeeping

Basic Requirements

1. Per §106.45(b)(1)(i), treat Complainant and Respondent equitably in the grievance process and related to remedies and sanctions, if any
2. Require objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence
3. Cannot make credibility decisions based on a person's status as Complainant, Respondent, or witness
4. Presume that Respondent is not responsible until a determination is made
5. Follow prompt time frames (estimate 60-90 days)
6. State a standard of evidence (preponderance or clear and convincing)
 - Most CCDs use preponderance of evidence, (e.g., Ed Code §67386(a)(3))
 - Caution: Some post-secondary recipients have a clear and convincing standard for employee discipline, which would affect which standard of evidence to use for Title IX matters

Notice of Allegations

- **Provide Notice of Allegations to Each Party per §106.45(b)(2)**
 - **Notice of the institution’s grievance process and informal resolution process**
 - Identification of relevant Board Policies & Administrative Regulations which contain the grievance process and informal resolution process
 - Identification of standard of evidence
 - Right to inspect and review evidence
 - **Notice of allegations with sufficient details, including:**
 - Identification of the parties
 - Description of alleged conduct allegedly constituting sexual harassment and the date and location of alleged incident

Dismissal of Formal Complaint

- **Required Dismissal per §106.45(b)(3)**
 - Recipient **must** dismiss the formal complaint *if* the conduct alleged:
 - Would not constitute sexual harassment as defined in §106.30 even if proved
 - Did not occur in the recipient's education program or activity
 - Did not occur against a person in the United States
 - Such dismissal does **not** preclude action under another provision of recipient's Code of Conduct, Board Policy/Administrative Procedure or California law

Dismissal of Formal Complaint

- **Permissive Dismissal per §106.45(b)(3)**
 - Recipient **may** dismiss the formal complaint or allegations any time during the investigation or hearing, *if* :
 - The Complainant notifies the Title IX Coordinator in writing to withdraw the complaint
 - The Respondent is no longer enrolled or employed
 - Special circumstances prevent the recipient from gathering evidence in order to reach a determination
- **All dismissals require written notice & reasons delivered to the parties at the same time**

Consolidation of Formal Complaints

- **A recipient may consolidate formal complaints as to allegations of sexual harassment where the allegations arise out of the *same facts or circumstances***
 - Against more than one Respondent;
 - By more than one complainant against one or more respondents; or
 - By one party against the other party (cross-claims)

Investigation

1. Trained Investigators

- Additional training may include how to conduct a thorough and impartial interview, what types of questions to avoid, how to weigh evidence, and how to prepare witness summaries

2. Presumption

- The institution must presume Respondent is *not responsible* for the alleged conduct

3. Evidence Gathering

- Investigator has the burden to gather sufficient evidence; the burden to gather evidence is not on the Complainant or Respondent
- Investigator cannot gather privileged information without voluntary, written consent (e.g., physician or psychiatrist records, confidential counseling records, etc.)

4. Written Notice with Time to Prepare

- Provide written *notice for interviews* with sufficient time for the person to prepare to participate

Investigation, continued

5. Equal Opportunity for Parties

- To present witnesses, including fact & expert witnesses and other inculpatory and exculpatory evidence
- To have an advisor present for any meeting, interview or hearing
 - The advisor should not answer questions or interrupt the party's answers
 - The advisor can ask for a break in between questions

6. No “Gag” Orders or Directives

- Cannot restrict the ability of the Complainant or Respondent to discuss the allegations under investigation or to gather and present relevant evidence
- Likely can direct parties and witnesses not to tamper with evidence

Investigation, continued

7. Equal Opportunity to Inspect and Review Evidence

- Provide parties with opportunity to meaningfully respond to the evidence *before* the conclusion of the investigation
- Parties may review evidence that is directly related to the allegations, including evidence which the investigator does *not* intend to rely upon as well as inculpatory and exculpatory evidence regardless of where it was obtained
 - Practice tip: The investigator can receive, review, and place any irrelevant or unrelated evidence into a separate exhibit of the file or report in order to demonstrate the information was reviewed and set aside as having no weight

Investigation, continued

8. Prepare and Share Draft Report of Evidence

- Before completing the Investigative Report, provide a ***Draft Report of Evidence and Attachments*** to both parties and their advisor, if any, via electronic format or a hard copy.
- Provide the parties and advisors, if any, with at least ***10 days to review the Draft Report of Evidence and Attachments*** & submit written responses
- Share any new evidence with the parties and continue the investigation related to new information, if needed
- Consider and incorporate new information and responses in the ***Final Investigative Report***
- Again, consider written agreement with advisors who inspect and review other pupil, employee, health, and/or other private records

Investigation, continued

9. Investigator Prepares Final Investigative Report

- The report must fairly summarize relevant evidence
- Relevant evidence may include credibility assessments in order to indicate the weight of the evidence

10. Provide Final Investigative Report to Parties

- ***At least 10 days prior to a hearing*** or other time of determination regarding responsibility, send the Final Investigative Report to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response
- Review written responses, revise investigative report if needed, and attach all written responses to the Final Investigative Report

Pre-Hearing and Hearing Procedures

The Post-Secondary Institution must provide a “live hearing” with cross-examination of the parties and witnesses by the parties’ advisors in compliance with **§106.45(b)(6)**. In general, the Institution must create Pre-Hearing, Live Hearing, and Post-Hearing Procedures that provide adequate notice, equitable participation, and a fair process. Procedures must address:

- 1. Dates, location, recording, and other logistics by Hearing Coordinator**
- 2. Appointing Decision-Maker (Hearing officer or panel) & Conflict process**
- 3. Notice of Hearing with rights, responsibilities, timeline, & process**
- 4. In-Person or Virtual Hearing Options**
 - At the request of either party, the entire live hearing may be conducted with parties located in separate rooms with technology enabling the decision maker(s) and parties to simultaneously see and hear the party or witness answering questions.

Live Hearing with Cross-Examination

Cross-Examination and Other Questions

- Each party’s advisor may ask the other party and any witnesses all relevant, follow-up, and questions challenging credibility
- Cross-Examination must be conducted directly, orally, and in real time by the party’s advisor of choice and “never” by a party personally
- Before a party or witness answers the cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant
 - *Rape Shield Protections:* Evidence about Complainant’s sexual predisposition or prior sexual behavior are **not relevant** unless offered to prove someone else committed the alleged conduct or if prior sexual behavior with respondent offered to prove consent
- Decision-Maker(s) must explain any decision to exclude a question as not relevant

Live Hearing with Cross-Examination (Title IX)

Cross-Examination and Other Questions, continued:

- Title IX Regulations state that if a party or witness does not submit to cross-examination at the live hearing, the Decision-Maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility, however, OCR has stated that it will not enforce this, based on court ruling in *Victim Rights Law Center v. Cardona (2021)*
- Decision-Maker(s) cannot draw an inference about the responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions
- Decision-Maker(s) must be trained to rule on relevance of questions and repetitive questions
- Institution must create an audio or audiovisual recording or transcript and make it available to parties for inspection and review

Determination of Responsibility - After Hearing

Decision-Maker Determines Responsibility per §106.45(b)(7):

- Decision-maker(s) must be trained to apply the standard of evidence (“preponderance” or “clear & convincing”) and to understand what evidence may not be relied upon after a failure to submit to cross-examination.
- Decision-maker(s) must issue a written determination of responsibility
- Reminder: The Title IX Coordinator or investigator cannot determine responsibility

Determination of Responsibility - After Hearing

Written Decision per §106.45(b)(7) must include:

- The allegations potentially constituting sexual harassment
- A description of procedural steps from receipt through determination, including notifications, interviews, evidence gathering & hearings
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct to the facts
- Statement of, and rationale for, the result as to each allegation, including determination regarding responsibility, any disciplinary sanctions, and whether remedies will be provided to complainant to restore equal access to education
- Procedures and permissible bases for parties to appeal
- The written decision must be provided to the parties simultaneously

Appeals

1. Equal Opportunity for Appeal under §106.45(b)(8)

- Both parties must have opportunity to appeal
 - the determination of responsibility, or
 - the dismissal of a formal complaint or allegations

2. Bases for Appeal

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available & could have affected outcome; or
- Conflict of interest or bias generally or specifically by Title IX Coordinator, investigator, and/or decision-maker which affected the outcome

Institution may include other bases for appeal if both parties have equal right to use

Informal Resolution Process

1. Optional Process per §106.45(b)(9)

- May use informal resolution process on a case-by-case basis after formal complaint is filed

2. Informed, Mutual Consent

- Both parties must give voluntary, informed, and written consent but cannot be required as a condition of enrollment/employment

3. Right to Withdraw from Informal Process

- Either party can withdraw from informal process at any time and resume formal process

4. Not Suitable for Student vs. Employee Matters

- No informal process for allegations that an *employee* harassed a student

Informal Resolution Process

- If the parties agree, a recipient ***may decide*** to offer Informal Resolution depending on if personnel are trained and the Title IX Coordinator thinks the process can be successful for the situation
- Time frames designated by the recipient must account for conclusion of the entire grievance process, including Informal Resolution processes
- Informal Resolution is left undefined for recipients to use discretion in adopting a process

Informal Resolution Process – The Agreement

- Written Agreement
 - Must be documented and approved by the Title IX Coordinator
 - Must be voluntarily entered into
 - Is treated like a binding contract
 - Must be provided to both parties simultaneously

Informal Resolution Process – After the Agreement

- There is no possibility for appeal once the parties come to an agreement
- Neither party can request a formal investigation of the same matter
- The Title IX grievance process concludes and records are stored
- Sanctions: Expulsion (or other forms of discipline) is not precluded if Informal Resolution is used instead of the formal grievance process

Recordkeeping

- **Maintain all records for 7 years, including:**
 - **For allegations reported without a formal complaint (i.e. §106.44 response), keep:**
 - Supportive Measures/actions taken in response; If no action was taken, document why that decision was not deliberately indifferent
 - **In matters with a formal complaint (i.e. §106.45 response), keep records of:**
 - Investigation documents and notices; Informal resolution (if any) and the result of the informal process; Audio or audiovisual recording(s) or transcript(s) of interviews and/or hearing; Determination regarding responsibility/Decision/Document showing the outcome(s); If applicable, any disciplinary sanctions imposed on Respondent and any remedies provided to Complainant and Appeal (if any) and Appeal Decisions
 - **All materials used to train Title IX Coordinators, investigators, decision-makers, appeal officers, and informal process facilitators**
 - These training materials must be publicly available on the institution's website; If no website, training materials must be available upon request for inspection by the public

RETALIATION

Retaliation

- 1. Section 106.71(a) – Retaliation Prohibited**
- 2. Avoiding the Title IX Process May Be Retaliation**
- 3. Retaliation Complaints Filed Under Same Process**
- 4. Confidentiality Required by Recipient**
- 5. First Amendment Rights**
- 6. False Statement Charge**

Question & Answer
Session

Thank You

For questions or comments, please contact:

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