

Title IX: The U.S. Department of Education's Proposed Regulations

Chief Student Services Officers (CSSO) | March 26, 2019

Presented by: Pilar Morin and Jenny Denny

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Chief Student Services Officers (CSSO)
Annual Conference | March 25, 2019

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Agenda

- Background Leading Up to Proposed Regulations
- Overview of Key Changes
 - Definitions
 - Grievance Procedures
 - Hearing Procedures
- Comparison with California Law
- Next Steps

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Background Leading Up to Proposed Regulations

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.*

Legal Obligations Under Title IX

Title IX requires:

- Policies/procedures
- Reporting of sexual misconduct
- Investigation
- Effective action
- Training and education
- No retaliation

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History Leading Up to Regulations

- 20 U.S.C. sec. 1681 *et seq.*
- January 2001 Guidance Letter from OCR
- April 2011 Dear Colleague Letter from OCR*
- April 2014 Questions and Answers Letter from OCR*
- April 2014 White House Task Force Report
- 2017 Interim Guidance
 - Withdraws 2011 and 2014 documents

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Federal Rulemaking

- November 29, 2018 – U.S. Dept. of Edu. issues proposed regulations to amend Title IX
 - Clarify and modify requirements
 - Specify how recipients must respond
 - Ensure due process protections

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Key Changes in Proposed Regulations

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)
Proposed	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)
California	CCDs must insure its programs and activities are available to all persons without regard to sex or gender, sexual orientation, etc. CCDs must investigate complaints of unlawful discrimination in its programs or activities, and seek to resolve those complaints in accordance with the provisions of [sections 59300 et seq.].	Title 5, California Code of Regulations (CCR) § 59320

Key Definitions: Notice		
Current	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
Proposed	Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient	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

Key Definitions: Responsible Employees		
Current	A responsible employee: <ul style="list-style-type: none"> • has the authority to take action to redress sexual violence; • has been given the duty of reporting incidents of sexual violence or any other misconduct • Is someone a student could reasonably believe has this authority or duty to address complaint 	2001 Guidance and 2014 Q&A
Proposed	No “responsible employee,” but recipients must have trained Title IX Coordinator.	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
Proposed	(i) an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (ii) unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (iii) sexual assault as defined in 34 CFR 668.46(a)	34 CFR § 106.30
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Key Definitions: Sexual Harassment, Cont’d		
California	Unwelcome conduct of a sexual nature, made by someone from or in the work or educational setting. <ul style="list-style-type: none"> Includes unwelcome sexual advances, requests for sexual favors, and other nonverbal or physical conduct of a sexual nature Two types <ul style="list-style-type: none"> Quid pro quo Hostile environment – conduct has the purpose or effect of having a negative impact upon the individual’s work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment. 	Education Code § 212.5
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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)
Proposed	<ul style="list-style-type: none"> No definition in the regulation; refers to the statute (“all operations of a recipient”). Preamble states determination not dependent on geographic location. Preamble suggests factors to consider in determining whether conduct occurred as part of recipient’s education program or activity. But, excludes persons outside the US (study abroad programs) 	Preamble p. 61468
California	In the work or educational setting	Education Code § 212.5

Key Changes in Proposed Regulations: Grievance Procedures

Grievance Procedures: Triggers

Current	When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred	2001 Guidance and 2014 Q&A
Proposed	A recipient must follow procedures consistent with section 106.45 in response to a formal complaint .	34 CFR § 106.44(b)(1)
California	If a district receives a 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

Proposed Regulations' Grievance Procedures

Formal Complaint

- Document signed by the **complainant** or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity **and requesting initiation of the recipient's grievance procedures.** (34 CFR §106.30)

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Proposed Regulations' Grievance Procedures

- Duty to investigate under proposed Title IX regulations **ONLY** triggered when
 - Recipient receives formal complaint OR
 - Recipient has actual knowledge of reports by *multiple complainants* of conduct by the same respondent that could constitute sexual harassment → Title IX Coordinator must file a formal complaint. (34 CFR § 106.44(b)(2))

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Grievance Procedures: Interim 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
Proposed	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
California	No state guidance.	

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Grievance Procedures: Informal Resolution		
Withdrawn	In cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.	2001 Guidance, 2011 DCL
Proposed	At any time prior to reaching a determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.	34 CFR § 106.45(b)(6)
California	Informal resolution is allowed for informal complaints, but complainants may file formal complaint.	5 CCR § 59327

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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
Proposed	“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

Proposed Regulations’ Grievance Procedures

Termination

- If the conduct alleged by the complainant would not constitute sexual harassment even if proved or did not occur within the recipient’s program or activity, the recipient must terminate its grievance process with regard to that conduct.
 - 34 CFR § 106.45(b)(3)

Grievance Procedures: Reviewing Evidence		
Current	Must provide notice to the parties of the outcome of the complaint	2001 Guidance
Proposed	Complainant and respondent: <ul style="list-style-type: none"> • Right to inspect and review evidence, including evidence on which recipient does not intend to rely • Right to submit written response to evidence prior to the finalization of report • Must provide final investigative report at least 10 days prior to hearing 	34 CFR §106.45 (b)(3)(ix)
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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Key Changes in Proposed Regulations: Hearing Procedures

Proposed Regulations’ Hearing Procedures

- Live cross examination must be conducted by party’s advisor of choice
 - If party doesn’t have advisor, recipient must provide the party an advisor “aligned with that party” to conduct cross examination.
- Decision-maker must explain decisions to exclude evidence.
- Can conduct cross examination in separate rooms using video technology.

Grievance Procedures: Determinations

Withdrawn	Must inform complainant as to whether it found alleged conduct occurred, individual remedies offered or provided complainant or sanctions imposed on respondent that directly relate to the complainant, and other steps the school took.	2014 Q&A
Proposed	To both parties: (1) identification of conduct code sections, (2) description of procedural steps, (3) findings of fact, (4) conclusions, (5) rationale for result as to each allegation, including sanctions and remedies provided to complainant, and (6) recipient’s appeal procedures for complainants and respondents.	34 CFR § 106.45 (b)(4)(ii)
California	To complainant administrative determination: (1) CEO/designee’s determination re probable cause to believe discrimination occurred for each allegation, (2) actions taken to prevent recurrence, (3) proposed resolution, and (4) the complainant’s right to appeal to the district governing board and Chancellor or DFEH.	5 CCR § 59336

Grievance Procedures: Appeals		
Withdrawn	Not required, but recommend where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If provided, must allow for both parties.	2014 Q&A
Proposed	Not required, but if provided, must allow both parties to appeal. Complainant may appeal to challenge remedies not sufficient	34 CFR §106.45 (b)(5)
California	Complainant may appeal to district governing board and State Chancellor (non-employment complaints) or DFEH (employment complaints)	5 CCR § 59336

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Grievance Procedures: Requirements		
Withdrawn	<ol style="list-style-type: none"> 1. Similar and timely access to any information (whether used for investigator model or hearing model) 2. Equal opportunity to present relevant witnesses and evidence 3. Cross examination of victim discouraged 4. Preponderance of evidence standard required 	2011 DCL
Proposed	<ol style="list-style-type: none"> 1. Right to inspect evidence directly related to allegations 2. Live hearing with cross examination 3. Right to present witnesses and evidence at hearing 4. Preponderance of evidence or clear and convincing 	34 CFR § 106.45 (b)(3)(vii)

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CA Hearing Procedures (Discipline): Reviewing Evidence		
California	Suspension/Expulsions <ol style="list-style-type: none"> 1. Written Notice <ul style="list-style-type: none"> • Conduct • Violations • Discipline Being Considered • All Evidence Relied Upon 2. Right to meet with President or Designee (Dean) or to respond in writing 3. Written decision by President or Designee (Dean) <ul style="list-style-type: none"> • If sustained, right to hearing 	Education Code §§ 66017 and 76030
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CA Hearing Procedures (Discipline): Reviewing Evidence		
California	Due Process Requirements <ul style="list-style-type: none"> • Provide notice that hearing will be closed to public <ul style="list-style-type: none"> • In writing <ul style="list-style-type: none"> • Registered or certified mail or personal service • To parent if student is minor • Student may request open hearing <ul style="list-style-type: none"> • Within 48 hours of receipt of notice • Closed session for privacy of other students • The final action of board taken in open session 	Education Code § 72122
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Next Steps

Next Steps

- Public comment period closed on January 28, 2019.
- ED must review 103,000+ comments
 - Expect 3-12 months for review and response
- ED will publish final rule
 - May delay effective date
 - OCR begins enforcing regulations through investigations
- For now: wait and see

Thank You!

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