Chief Student Services Officers (CSSO) Annual Student Services Conference

Addressing Student Sexual Misconduct Under Title IX

9/16/2021

Presented by:

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Addressing Student Sexual Misconduct under Title IX
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Agenda
• Status of Regulations
• Assessing Initial Obligations
• Triggering the Grievance Process
• Supportive Measures
• Informal Resolution and Investigation
• Hearing and Determination
• Dismissals and Appeals
• Questions?
Future Changes to Title IX

- April 2021: OCR announced comprehensive review
- June 2021: OCR
  - Conducted virtual public hearings and collected written comments
  - Issued Notice of Interpretation
  - Proposed Title IX regulations in May 2022
- July 2021: OCR issued Q&A on regulations

Institutions Can Rely on Statements Not Subject to Cross-Examination

- August 24, 2021, OCR issued new guidance: will no longer enforce part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits decision-makers from considering statements not subject to cross-examination
- Follows July 28, 2021 U.S. District Court for the District of Massachusetts’ decision holding provision to be arbitrary and capricious
  - Court issued a second order clarifying that it had vacated and remanded the provision and that its ruling applied nationwide
Institutions Can Rely on Statements Not Subject to Cross-Examination

CCD decision makers can now consider statements even if the parties or witnesses do not submit to cross-examination at the live hearing, including:

- Statements made by the parties and witnesses during the investigation
- Emails or text messages between the parties
- Statements in Sexual Assault Nurse Examiner (SANE) reports, police reports, medical reports and other documents

What is 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.
Title IX Protections

- Title IX protects all students and employees from sexual harassment committed by:
  - Students
  - District employees
  - Third-parties
Overall Requirement

If the 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)

Polling Question: Case Study: Actual Knowledge

James is the Vice President of Business Services. Connie, a student who works in his office confides in him that she has been sexually assaulted by her boyfriend, Robert, who is an athlete at the college. The district’s policy says that all supervisors have a duty to report sexual harassment in the workplace.

*Does the district now have actual notice of a potential Title IX matter?*

Yes, No, or Maybe
**Actual Notice**

Notice of sexual harassment or allegations of sexual harassment 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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**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
Polling Question

Connie reports to the Title IX Officer that Robert sexually assaulted her during a trip they took to Mexico during spring break.

Is this complaint covered by Title IX?

Yes, No, Maybe

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, 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

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
    - Such as, “complainants should react like this...” or “respondents tend to be dishonest”

34 CFR § 106.45(b)(1)
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)

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)
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)

Complainant

- The alleged *victim* of sexual harassment
  - Must be participating in or attempting to participate in the district’s education program or activity
  - 3rd parties can report, but no 3rd party complaints
    - Except if complainant is a minor or under conservatorship

34 CFR 106.30(a)
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)
Role of Advisors Before Hearing

- Respondent has right to advisor
  - Attend investigative interview(s), participate in evidence review, help party prepare response to investigative report
- District not required to provide one before hearing
- May not obstruct interview or disrupt grievance process
- District may require confidentiality agreement

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)

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
Polling Question - 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, an experienced mechanic, is now an adjunct employee at the district. Carlos has filed a complaint.

*Can the district offer the parties informal resolution?*

Yes, No, or Maybe

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
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)
Polling Question - Case Study: Witnesses

After reviewing the evidence, a respondent’s advisor, who is a lawyer, requests that the investigator interview a medical doctor as an expert 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

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)
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
Hearing Procedures

• Live cross examination by party’s advisor
  ▪ If party doesn’t have advisor, district must provide one
  ▪ Decision-maker must explain why question excluded
• Can cross examine virtually

34 CFR 106.45(b)(6)(i)

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)
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 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)
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

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?

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