



LCW LIEBERT CASSIDY WHITMORE

Key Changes in Title IX Regulations
North 14 Weekly Webinar | May 20, 2020

Presented By:
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Key Changes in Legal Obligations

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.
- If a conflict, the Title IX regulations preempt state law.
 - This preemption might affect collective bargaining agreements.

34 CFR § 106.6 (a)



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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
New	<ul style="list-style-type: none"> (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 determined by a reasonable person to be 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" (20 U.S.C. 1092(f)(6)(A)(v)), "dating violence" (34 U.S.C. 12291(a)(10)), "domestic violence" (34 U.S.C. 12291(a)(8)), or "stalking" (34 U.S.C. 12291(a)(30)). 	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

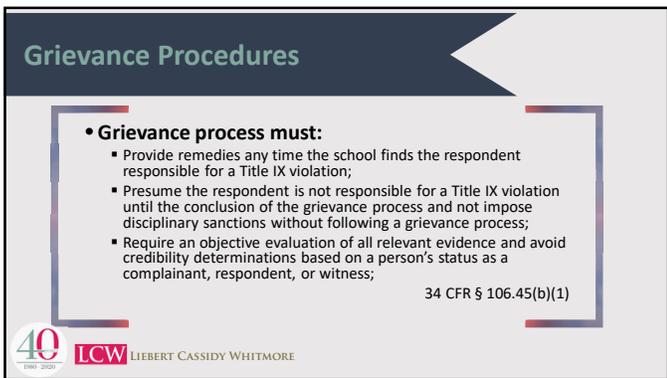
Current	All college operations, including academic, extra-curricular, athletic, college trips, sponsored events. Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity.	2001 Guidance, 20 USC § 1687, 34 CFR § 106.2(h)
New	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 org that is officially recognized by a postsecondary institution.	34 CFR § 106.44(a)
California	In the work or educational setting.	Education Code § 212.5

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Key Changes In Grievance Procedures

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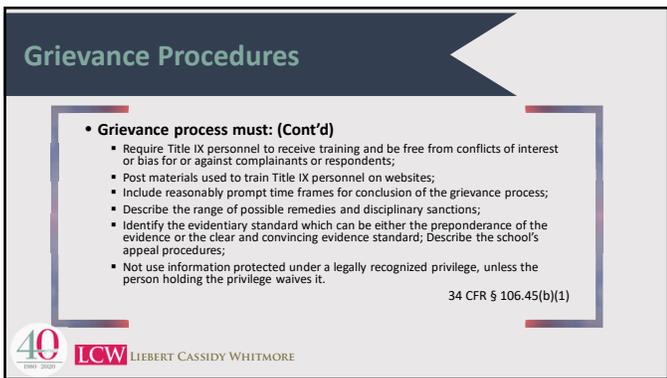


Grievance Procedures

- **Grievance process must:**
 - Provide remedies any time the school finds the respondent responsible for a Title IX violation;
 - Presume the respondent is not responsible for a Title IX violation until the conclusion of the grievance process and not impose disciplinary sanctions without following a grievance process;
 - Require an objective evaluation of all relevant evidence and avoid credibility determinations based on a person's status as a complainant, respondent, or witness;

34 CFR § 106.45(b)(1)

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Grievance Procedures

- **Grievance process must: (Cont'd)**
 - Require Title IX personnel to receive training and be free from conflicts of interest or bias for or against complainants or respondents;
 - Post materials used to train Title IX personnel on websites;
 - Include reasonably prompt time frames for conclusion of the grievance process;
 - Describe the range of possible remedies and disciplinary sanctions;
 - Identify the evidentiary standard which can be either the preponderance of the evidence or the clear and convincing evidence standard; Describe the school's appeal procedures;
 - Not use information protected under a legally recognized privilege, unless the person holding the privilege waives it.

34 CFR § 106.45(b)(1)

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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
New	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

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Grievance Procedures

Formal Complaint

- Document filed by the **complainant** or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment.

34 CFR §106.30(a)

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Grievance Procedures

Complainant

- An individual who is alleged to be the *victim* of conduct that could constitute sexual harassment.
 - Must be an individual participating in or attempting to participate in the institution's education program or activity.

34 CFR 106.30(a)

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Grievance Procedures: Notice of Allegations

- Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties:
 - Notice of the recipient's grievance process;
 - Notice of the allegations including sufficient details and with sufficient time to prepare a response before any initial interview;
 - Must include statement that respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process;
 - Must inform parties they may have an advisor of their choice and may inspect and review evidence;
 - Must inform parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

34 CFR § 106.45(b)(2)(i)



Investigations

- Cannot restricting the ability of parties to discuss the allegations or gather evidence (e.g., no "gag orders").
- Prior to conclusion of investigation, both parties must receive opportunity to review evidence directly related to the allegations obtained during investigation.
- Both parties have a right to respond to the evidence at least ten (10) days after receiving it.
- Investigative report must be provided to parties and their advisor for their review and response.

34 CFR 106.45(b)(5)



Grievance Procedures

Dismissal

- If the conduct alleged in the formal complaint would not constitute sexual harassment (as defined) even if proved, did not occur within the recipient's program or activity, or did not occur against a person in the United States, the recipient must dismiss the formal complaint for Title IX purposes.

34 CFR § 106.45(b)(3)(i)



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 of the recipient's choice;" for free; not necessarily an attorney.
- Decision-maker must explain why question excluded.
- Can cross examine using video technology.

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



Hearing Procedures

- If a party or witness does not submit to cross-examination, the decision-maker(s) cannot rely on any statement of that party or witness in reaching a determination regarding responsibility.
 - Decision-maker(s) cannot draw an inference about the determination regarding responsibility 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)



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
New	To both parties: (1) identification of the allegations, (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)(7)(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
New	Must offer both parties an appeal from a determination regarding responsibility, and from dismissal of a formal complaint/allegations, based on: (1) procedural irregularity that affected the outcome of the matter, (2) newly discovered evidence that could affect the outcome, or (3) a conflict of interest or bias by Title IX personnel that affected the outcome. May offer appeal to both parties on additional bases.	34 CFR §106.45 (b)(8)(i) and (ii)
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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Retaliation

- Regulations protect all who participate in the complaint, investigation, and hearing process from retaliation such as intimidation, threats, coercion, or discrimination.
 - Cannot take action against anyone for refusing to participate in a Title IX investigation, proceeding, or hearing.
- Thus, OCR's anti-retaliation regulations now prevent institutions from directing employees to participate in investigations, hearings and other Title IX proceedings, under the threat of discipline for insubordination for failing to do so.

34 CFR § 106.71(a)

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QUESTIONS?



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Thank You!

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