Top Ten Things to Know About the New Title IX Regulations

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Presented by:

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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
4. In the United States

20 U.S.C. § 1681 et seq.
34 C.F.R. § 106 et seq.
#1 New Definition of Sexual Harassment

**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
#2 Preemption of State Law/Regulations and District Policies/Procedures/Union Agreement

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.
- Conflicts: the Title IX regulations preempt state law
  - This preemption might affect collective bargaining agreements

34 CFR § 106.6 (a)
#3 Districts Must Follow One Grievance Procedure (Investigation and Hearing) for Both Students and Employees Before Imposing Any Discipline

Discipline: Student & Employees

If the allegations meet the definition of Title IX sexual harassment then district can only discipline if the grievance process if followed:

- The district must treat the respondent equitably... by following the grievance process before any imposition of disciplinary sanction or actions that are not supportive

34 CFR §§ 106.44(a), 106.45(b)(1)
Grievance Procedures

• **Grievance process must:**
  - Provide remedies on finding of Title IX violation
  - Presume the respondent is not responsible for a Title IX violation
    - Only on a finding that respondent violated Title IX;
  - Require an objective evaluation of all relevant evidence
  - Avoid credibility determinations based on a person’s status as a complainant, respondent, or witness
    - No “Complainants never lie” or “Respondents never tell the truth”

  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
  - Post Title IX training materials on district’s website
  - Include reasonably prompt time frames
  - Describe the range of possible remedies and disciplinary sanctions
  - Identify the evidentiary standard
    - Either “preponderance of the evidence” or “clear and convincing evidence”
  - Not use privileged info
    - Unless privilege waived

  34 CFR § 106.45(b)(1)
Investigations

- Gag Orders no longer permitted
- Both parties must receive opportunity to review evidence before investigation concluded
- Both parties have at least ten (10) days to respond to evidence after receiving it. Both parties receive investigative report.

34 CFR 106.45(b)(5)

#4 Districts Should Identify Employees Who Must Report Sexual Harassment
Key Definitions: Official with Authority

Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official with authority to institute corrective measures on behalf of the recipient. (Note if the OWA is a Respondent, then the district will not be deemed to have actual notice)

- District has discretion to determine which employees will be required to make reports
- We recommend “supervisors” under Cal. Fair Employment and Housing Act; administrators that enforce policy and procedures

34 CFR § 106.30

#5 Only A Formal Complaint Triggers an Investigation
Key Definition: Complainant

**Formal complainant**
- An individual alleged to be the *victim* of conduct
  - Must be an individual participating in or attempting to participate in the district’s education program or activity
  - No 3rd party complaints

34 CFR 106.30(a)

Key Definitions: Formal Complaint

**Formal complaint**
- Document filed by the *complainant* OR signed by the Title IX Coordinator
- Alleging sexual harassment AND requesting investigation
- Requires that the district follow the grievance procedures

34 CFR §106.30(a); 106.44(b)(1)
#6 Informal Resolution is Allowed

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)
#7 A Hearing is Required and Only Advisors Can Cross Examine Parties

Hearing Procedures

- Live cross examination by party’s advisor of choice
  - If party doesn’t have advisor, district must provide an advisor free of cost for cross-examination; not necessarily an attorney
- Decision-maker must explain why question excluded
- Can cross examine virtually

34 CFR 106.45(b)(6)(i)
Cross-Examination by Advisors

- If a party or witness does not submit to cross-examination, or refuses to answer a relevant cross-examination question, decision-maker cannot rely on his/her/their statement
  - Decision-maker(s) cannot draw an inference 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)

#8 A Written Determination of Responsibility Must Be Issued to the Parties
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Grievance Procedures: Determinations

To both parties:
• Identify allegations;
• Procedural steps;
• Findings of fact;
• Conclusions;
• Rationale, including sanctions and remedies provided to complainant; and
• Appeal procedures for complainants and respondents.

34 CFR § 106.45 (b)(7)(ii)

#9 Parties Have the Right to Appeal Dismissals and Determinations of Responsibility
Grievance Procedures

**Mandatory dismissal:**
- 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:**
- If the complainant withdraws the complaint
- If the respondent is no longer enrolled or employed
- Specific circumstances prevent the institution from gathering sufficient evidence to reach a determination regarding the allegations

34 CFR § 106.45(b)(3)(ii)
Grievance Procedures

**Dismissals:**
Must provide prompt:
- Simultaneous notice of dismissal to the parties
- Include reasons for dismissal
- Appeal Process for dismissal

34 CFR §§ 106.45(b)(3)(iii), 106.45(b)(8)(i).

Grievance Procedures: Appeals

**Appeals:**
Must offer both parties an appeal, and 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)
#10 Protections Against Retaliation

**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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Thank You!

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