

# Responding to Sexual Misconduct Effective Institutional Compliance with Title IX, SB 493, and Related Laws

Southern CA CCD ERC | May 2, 2023

Presented By: Pilar Morin

**LCW** LIEBERT CASSIDY WHITMORE

## Responding to Sexual Misconduct Effective Institutional Compliance with Title IX, SB 493, and Related Laws

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### Agenda

- Title IX Overview
- Title IX Regulations
- Cal. Fair Employment and Housing Act
- Title 5 of the California Code of Regulations
- Cal. Education Code (SB 493) Overview
- Clery Act
- Overlapping Legal Obligations
- Best Practices to Ensure Compliance

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## What is Title IX?



## Title IX

### **Title IX prohibits discrimination:**

- In the United States
  - On the basis of sex
  - In education programs or activities
  - Receiving federal financial assistance
- Discrimination on the basis of sex can include sexual harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion.

*20 U.S.C. § 1681 et seq.*

*34 C.F.R. § 106 et seq.*



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## Title IX Regulations



## Title IX Developments

- July 2021: OCR issued Q&As on regulations
- August 24, 2021: OCR guidance re statements not subject to cross-examination are admissible
- July 2022: DE published Title IX Notice of Proposed Rulemaking (NPRM)
  - Public comment period ended September 12, 2022
  - Final rules expected May 2023



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## 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

34 CFR § 106.6 (a)

## Title IX Regulations' Sexual Harassment Definitions

- 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 (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

34 CFR § 106.30

## Title IX Sexual Harassment

- Determining severity, pervasiveness, and offensiveness
  - Not applicable to reports of quid pro quo sexual harassment
  - Not applicable to reports of sexual assault, dating violence, domestic violence, or stalking
  - Consider surrounding circumstances, expectations, relationships
  - Reasonable person standard

## Case Study – Application of Title IX

Lucy is a student at Sunshine Community College. The College organizes a study abroad program to Barcelona, Spain. Lucy travels with 10 other students and Professor Kelly to Barcelona. Professor Kelly teaches a math course as part of the program. Lucy meets with Professor Kelly during his office hours to discuss her grade. She expresses concern she won't be getting an A. Professor Kelly leans, places his hand on her thigh and kisses her on the cheek. He tells her not to worry about the class, she will be getting an A. Lucy avoids interacting with Professor Kelly for the remainder of the trip.

## Case Study—Application of Title IX

When they return to California, Lucy tells her boyfriend about the incident who encourages her to file a complaint. She meets with the Title IX coordinator.

***Does Lucy's complaint against Professor Kelly fall under Title IX? Why or why not?***

## Title IX - 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)

## Title IX - Discretionary Dismissal

### **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)

## Title IX - 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)

## Assessing Reports of Sexual Harassment & Determining Title IX Obligations



### Actual Notice – Title IX

Notice 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; *District decides who is an OWA.*



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## Actual Knowledge – Title IX

If District (OWA or T9 coordinator) 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)



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## Compare with SB 493: Cal. Ed. Code Duty to Respond

- Primary concern must be student safety
- Must take reasonable steps to respond to incident of sexual harassment,
  - whether occurring in connection with or outside of its educational activities or programs
  - whether occurring on or off campus
- if there is any reason to believe the incident could contribute to a *hostile educational environment or otherwise interfere with a student's access to education.*

Ed. Code § 66281.8(b)(3)



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## Compare Cal FEHA – Employment Protections Against Sexual Harassment

- Must respond to sexual harassment as defined by California Fair Employment and Housing Act (FEHA)
- Supervisors must report under FEHA

## Case Study – Actual Knowledge

Professor Kelly is a member of the math program at Sandy Beach CCD and is responsible for teaching one of the mandatory courses. Lucy is in her final semester and is required to take Professor Kelly's class. Professor Kelly asks to meet with Lucy after the lecture. Lucy stays after class per his request. While they are alone in the classroom, Professor Kelly pushes Lucy against the wall and aggressively kisses her. He tells her, she's his best student and he cannot stop thinking about them in Barcelona. Lucy pushes him away and runs out of the classroom.

## Case Study – Actual Knowledge

She finds a campus police officer and files a police report. By the time the campus police officer walks over to Professor Kelly's classroom, he is gone. Lucy tells her mom and her boyfriend and refuses to attend Professor Kelly's class. She's encouraged to file another complaint against Professor Kelly. Lucy refuses, stating she was ignored before and doesn't trust the College. Lucy's mom receives a copy of the police report and emails it to the Title IX coordinator expressing her anger.

## Case Study - Actual Knowledge

***Does the District have knowledge of sexual harassment in its educational program or activity?***

***If yes, is the District required to take any action?***

## True/False/Maybe

James is the Director of the Study Abroad Program. Lucy is an administrative assistant (part time classified employee) in the department. She tells James about Professor Kelly's conduct. 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?***



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## Case Study & Discussion

Rudy reports to the Title IX Coordinator that he recently broke up with Carlos, another student at the District, who he dated for two years. Carlos raped Rudy in their apartment as Rudy was trying to move out. Rudy and Carlos do not have classes together, but Rudy is afraid of Carlos.

***Does the Title IX Coordinator have jurisdiction to file a complaint over the incident that took place in Carlos and Rudy's private apartment?***



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## Case Study

Rudy is a member of the College's business club. The business club hosts its annual gala at a private residence two blocks away from the College. The business club only pays for the advisement and provides student volunteers. Carlos attends the gala and sees Rudy enter the bathroom. Carlos follows Rudy into the bathroom. While in the bathroom, Carlos sexually assaults Rudy. Carlos threatens to hurt Rudy if he tells anyone.



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## Case Study (continued)

Rudy meets with the Title IX Coordinator and asks for help. Rudy states he is afraid for his life and doesn't want to be on campus while Carlos is there. Rudy refuses to attend class.



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## Case Study

***Does the Title IX Coordinator have jurisdiction to file a complaint over the incident that took place at the private residence?***

***Can the District provide any supportive measures if Rudy does not file a complaint? What are examples of supportive measures?***



## Initiating the Title IX Grievance Process



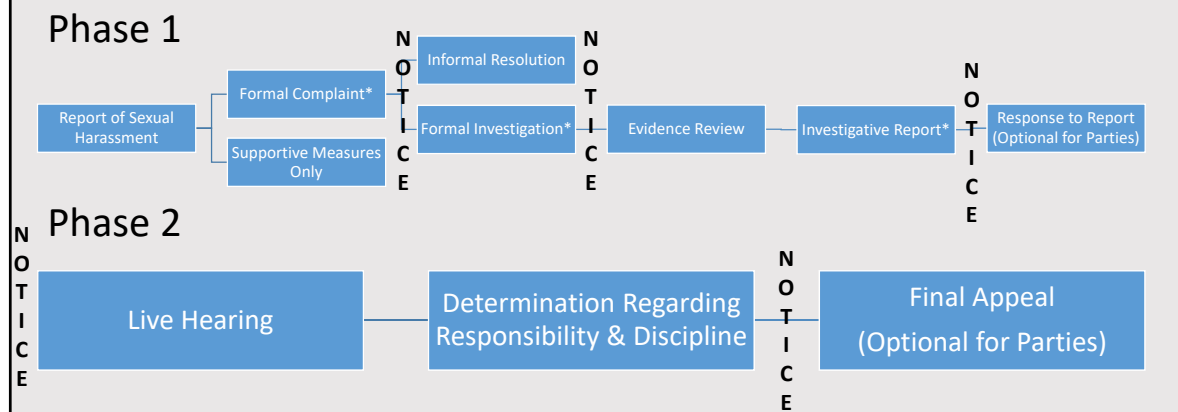
## Discipline: Student & Employees

Under title IX, the district can only discipline the respondent if the grievance process has been followed and completed:

- *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)

## Overview of Grievance Process



## Title IX - When Does the Grievance Process Apply?

- Formal written complaints
- Sexual harassment as defined in the Title IX Regulations
  - For conduct falling outside of Title IX definition follow California Law
- Not for discrimination: treating individual differently/unfavorably because of that person's sex

## Title IX - 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)



## Title IX: 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)

## Title IX: Complainant

- The alleged *victim* of sexual harassment
  - Must be participating in or attempting to participate in the district's education program or activity
  - 3<sup>rd</sup> parties can report, but no 3<sup>rd</sup> party complaints

34 CFR 106.30(a)

## **Title IX: No Formal Complaint Signed by Complainant**

- If the alleged conduct falls under Title IX but the Complainant refuses to submit a formal complaint, the Coordinator must:
  - Become the signatory (but will not become the complainant) OR
  - Close the report

## **Formal Complaint by Title IX Coordinator**

### **Considerations**

- Complainant's wishes
- Ability to conduct investigation without Complainant's participation
- District's need to protect campus safety
  - Respondent in position of authority
- Nature of alleged harassment
  - Multiple reports against same respondent

## Case Study

Three days after Lucy takes her last final exam and before commencement, Lucy's mom emails the Title IX Coordinator a copy of the police report and asks that the District please protect her daughter. The Title IX Coordinator contacts Lucy and talks to her on the phone. Lucy refuses to file a complaint and states she will not participate in an investigation. Professor Kelly is scheduled to participate in commencement.



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## Case Study

***Did Lucy's mom make a formal complaint?***

***Is Lucy participating in or attempting to participate in the District's education program or activity?***

***Does the Title IX Coordinator have actual notice?***



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## Case Study

After numerous discussions between Lucy and the Title IX Coordinator, Lucy refuses to file a complaint. However, she agrees to participate in the District's investigation.

## Grievance Procedures: Triggers

***Should the Title IX Coordinator sign the complaint?***

## Grievance Procedures

- Grievance process (your District policies and procedures) must:
  - Presume respondent is not responsible
  - Require objective evaluation of all relevant evidence
  - Describe the range of possible remedies and disciplinary sanctions

34 CFR § 106.45(b)(1)

## Grievance Procedures

- Grievance process must (cont'd):
  - 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"
  - Require Title IX personnel to receive training
  - Be free from conflicts of interest or bias

34 CFR § 106.45(b)(1)

## Grievance Procedures

- Grievance process must: (cont'd)
  - Include reasonably prompt time frames
  - Identify the evidentiary standard (in California the preponderance of the evidence is required)
  - Not use privileged info (unless waived in writing)

34 CFR § 106.45(b)(1)



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## The Title IX Grievance Process – Notice, Emergency Removal and Administrative Leave, Advisors



## Title IX – Student Emergency Removal

- Available at any point in grievance process
- Possible after an individualized analysis
- Appropriate when **non-employee** Respondent poses immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Must provide notice to Respondent & appeal
- Can be used to remove from class or campus

34 CFR § 106.44(c)

## Title IX or Ed Code: Employee Paid Administrative Leave

- District has authority to place **employee** Respondents on administrative leave during Title IX grievance process or under SB 493 (Ed. Code)
  - Coordinate with HR to ensure compliance with CBAs and Ed Code
  - Example: faculty admin. leave per Ed. Code 87623 (Effective Nov. 4, 2022, title 5 regulations require to complete investigation in 90 days and can only extend with agreement of employee)

## Title IX - 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 Advisor – DOE Q&A (July 2021)

- District only required to provide advisor for cross exam, but party has a right to advisor of choice at all times
- District can limit role of advisor:
  - Can attend meetings but may not be proxy for party
  - No role outside of cross examination
  - Party must author questions
- District can allow advisor role to be active:
  - Can conduct opening statement/closing argument
  - Provide guidance through hearing
  - May author questions, may make objections



## Role of Advisors Before Hearing

- Purpose: provide assistance and support to Party
- Individual of the party's choosing: family member, friend, an attorney, a neighbor
- Parties have right to advisor at all times, but required for cross exam
  - May attend investigative interview, participate in evidence review, help party prepare response to investigative report
- May not obstruct interview or disrupt grievance process
- District may require confidentiality agreement

## The Title IX The Grievance Process – Informal Resolution and Formal Investigation

## Informal Resolution

### Must provide notice of:

- Allegations
- Rules/requirements of the informal resolution process
- Circumstances under which the IRP precludes Parties from resuming formal complaint arising from the same facts
- Consequences of participating
- Records that will be maintained or could be shared
- Right to withdraw from process

34 CFR § 106.45(b)(9)



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## Informal Resolution

- Only after Formal Complaint
- Cannot offer for student v. employee 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 cannot be facilitator
- Understand pros and cons



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## Yes, No or Maybe

Rudy reports to the Title IX Coordinator that he broke up with Carlos last semester. At the time of the breakup, Carlos was a student at the District, but he is no longer enrolled. Rudy recently realized Carlos was stalking him on campus and filed a formal complaint. Carlos, an experienced mechanic, is now an adjunct employee at the District. Rudy has filed a complaint.

***Rudy wants to mediate via the informal resolution process with Carlos. Can the District offer mediation?***

## Title IX Investigator

- Title IX Coordinator can serve as the Title IX Investigator
- The Title IX Investigator cannot be the Decision-Maker or the Informal Resolution Facilitator

## 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



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## 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)



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## Yes, No or Maybe

After reviewing the evidence, Professor Kelly'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 Lucy affects her memory.

***The parties are allowed to produce expert witnesses to provide evidence.***



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## The Grievance Process – The Hearing and Determination Regarding Responsibility



## Yes, No or Maybe

After the District provided the parties notice of the hearing, Professor Kelly contacted the decision-maker and stated he accepted responsibility and wanted to bypass the hearing in order to expedite the disciplinary decision.

***Because Professor Kelly admitted responsibility, the decision-maker can issue the determination regarding responsibility without the hearing?***

## Hearing

- Opportunity for Parties to appear before a decision maker to respond to the evidence gathered during the investigation
- Neither Party may unilaterally 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

## Role of Decision-Maker

- Conduct hearing
  - May ask Parties and witnesses questions
- Must objectively evaluate all relevant evidence
  - Including inculpatory and exculpatory evidence
  - No credibility determinations based on status as Complainant, Respondent, or witness
- Must independently reach a determination regarding responsibility
  - Without giving deference to the investigative report

## Responsibilities of Decision-Maker

- Must ensure hearing process is impartial, objective, unbiased, neutral, and independent
  - Cannot have conflict of interest or bias
  - Must be independent from Title IX Coordinator and Investigator
- Can be one person or panel, internal or external

## Determination Regarding Responsibility

**To both parties simultaneously:**

- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;

34 CFR § 106.45 (b)(7)(ii)

## Determination Regarding Responsibility

**To both parties simultaneously:**

- 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)



## Title IX - 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

## Confidentiality

- The District must keep confidential the identity of
  - The complainant, respondent, or witness
    - Except as may be permitted by FERPA; or
    - As required by law

## 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

34 CFR §106.45(c)(10)

## Record Retention

### **Retain for at least 7 years:**

- 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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## California Fair Employment and Housing Act (FEHA) – Workplace Anti-Harassment Protections



## FEHA - Sexual Harassment

- “Sex” includes pregnancy, childbirth, gender, gender identity, transgender, gender expression, and breastfeeding or a medical condition related to breastfeeding
- “Sexual Orientation” includes gay, lesbian, and bisexual individuals

## FEHA - Key Definitions

### **SUPERVISOR**

- Anyone who has any responsibility or discretion to lead others
  - Those with purely clerical or record-keeping responsibilities are excluded

*Government Code Section 12926(r)*

## FEHA - Supervisor Responsibilities

- Must report observed/overheard conduct
- Forward reports to Human Resources
  - Third-party complaints
  - Verbal complaints
  - Rumors

**Remember:**

**The word “*harassment*” need not be used to trigger a supervisor’s duty to act**

## FEHA - Unlawful Employment Harassment

- Unwelcome physical, verbal, visual conduct related to or taken because of an employee’s protected classification
- Harassment is **NOT** within the course and scope of employment
- Two types:
  - Quid Pro Quo
  - Hostile Work/School Environment

## Quid Pro Quo Harassment

Job or education benefits promised:

- Explicitly or implicitly
- In exchange for sexual favors **or** denied if sexual favors are not given



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## Hostile Work/Education Environment

- Physical, Verbal or Visual Conduct
- Based on a Protected Classification
- Objectively **and** Subjectively Offensive (Unwelcome)
- Severe **or** Pervasive
  - Single Incident May Establish Liability Under FEHA
- Unreasonably interferes with work or learning opportunities



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## Title 5 Regulations



### Title 5 – District Responsibilities and Policies

- “Community college districts must ensure that their programs and activities are available to all persons without unlawful discrimination. Community college districts shall investigate complaints of unlawful discrimination in their programs and activities, in accordance with the provisions of this subchapter.” (5 CCR § 59320.)
- Each district must establish and adopt written policies consistent with the Title 5 Regulations. (5 CCR § 59322.)



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## Title 5 – Protected Characteristics 5 CCR § 59311(d)

“Unlawful discrimination” means unfair or unequal treatment of an individual (or group) based upon an actual or perceived characteristic related to:

- Ethnic group identification,
- National origin
- Immigration status
- Religion
- Age
- Sex, gender, gender identification, gender expression
- Military and veteran status
- Marital status
- Medical condition
- Race
- Color
- Ancestry
- Sexual orientation
- Physical or mental disability,
- Any other characteristic protected under applicable federal or state law

## Title 5 Regulations – Section 59311 Definitions

"Neutral investigator"

Outside investigator or an internal investigator

- Not in the chain of command of the respondent,
- Not substantially implicated by the allegations in the complaint, and who is otherwise impartial.
- Properly trained

5 CCR § 59311(d)



## Title 5 Regulations

- Definition of “complaint” includes verbal complaints
- Districts must comply with Title IX regulations
- 90 day timeline and process for obtaining extensions
- Parties get copy of report or administrative determination of findings, action to prevent sustained allegations, proposed resolution, and complainant right to appeal

## Title 5 Regulations – 59336 Paid Administrative Leave (effective Nov. 4, 2022)

If an academic employee is placed on involuntary paid administrative leave, the District’s deadline to complete its investigation is 90 working days from the date the administrative leave started

The District can extend the administrative leave only if the employee agrees, and the extension cannot exceed more than 30 additional calendar days

5 CCR § 59336(d)

# Responding to Sexual Misconduct Effective Institutional Compliance with Title IX, SB 493, and Related Laws

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## California Education Code Senate Bill 493



### Senate Bill 493: Effective Jan. 1, 2022

- Adds additional protections re sexual harassment
- Applies to institutions receiving state financial assistance including California community colleges
- Amended the definition of “sexual harassment” (Cal. Ed. Code § 66262.5.)
- Added procedural requirements for responding to notice of sexual harassment (Cal. Ed. Code § 66281.8.)



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## Definition of “Sexual Harassment” Under the Education Code

- “Sexual harassment” means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under certain conditions
- Includes sexual battery, sexual violence, and sexual exploitation

Cal. Ed. Code §§ 212.5



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## Knowledge of Sexual Harassment

“A postsecondary institution shall be presumed to know of sexual harassment if a **responsible employee** knew, or, in the exercise of reasonable care, should have known, about the sexual harassment.”

An institution may rebut this presumption of knowledge if certain elements are met.

Cal. Ed. Code § 66281.8(b)(3)(C)



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## Definition of “Responsible Employee” Under the Education Code

A “responsible employee” includes an employee:

- With authority to take action to redress sexual harassment or provide supportive measures; or
- With a duty to report sexual harassment to an employee with such authority.



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## Who is a Responsible Employee?

• “Responsible employee” includes the following positions or positions with similar job duties (regardless of title):

- Title IX Coordinator
- Residential advisors
- Housing directors, coordinators, or deans
- Athletic directors, coordinators, or deans
- Athletic and academic coaches
- Faculty, associated faculty, teachers, instructors, or lecturers
- Graduate student instructors
- Laboratory directors, coordinators, or principal investigators
- Internship/externship directors or coordinators
- Study abroad program directors or coordinators

Cal. Ed. Code § 66281.8(a)(2)(B)



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## Case Study

Darius Biers is an probationary faculty member who teaches a biology lab class. Tony is a part time employee in the lab and a biology student at the College. Darius assigns Tony work such as which labs to set up and what materials are needed. Tony tells Professor Biers that for the past week, Professor Angela Smith commented on his looks right after class and texted him several sexually explicit jokes while he is working in the lab.



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## Case Study (continued)

Professor Biers does not want to get involved because Professor Smith is on his tenure faculty review committee.

***Does Darius have any reporting obligations under the Education Code?***

***Does it matter that he is worried Professor Randall may retaliate against him?***



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## Overview of Education Code Procedural Requirements (SB 493)



### Notice of Nondiscrimination

- **Ed. Code** (Cal. Ed. Code §§ 66281.5; 66281.8(b)(1).):
  - Must include the following information:
    - Complaint process information and timeline
    - Where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies and resources, both on and off campus
  - Must be disseminated to each:
    - Employee of the district
    - Volunteer who will regularly interact with students
    - Individual or entity under contract for services involving regular interaction with students
- **Title 5** (5 CCR § 59326.)
  - Each district must notify students and employees of the provisions of the subchapter on nondiscrimination



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## Duty to Respond

- Primary concern must be student safety
- Must take reasonable steps to respond to incident of sexual harassment
  - Whether occurring in connection with or outside of its educational activities or programs
  - Whether occurring on or off campus
- If there is any reason to believe the incident could contribute to a hostile educational environment or otherwise interfere with a student's access to education

Ed. Code § 66281.8(b)(3)

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## Confidentiality

If a student complainant reporting sexual harassment requests:

- Confidentiality or
- No investigation or
- Disciplinary action

A district must generally grant the request, but must consider safety responsibilities and certain factors.

Ed. Code § 66281.8(b)(3)

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## Confidentiality – Factors to Consider

- Whether there are multiple or prior reports against the respondent;
- Whether a weapon, physical restraints or battery was involved;
- Whether the respondent was a faculty or staff member with student oversight;
- The imbalance of power, if any, between the parties;
- The safety of complainant; and
- Whether a thorough investigation can be completed while maintaining the request for confidentiality.

If student complainant's identity will be disclosed, student complainant must receive notice prior to disclosure or investigation and District must take immediate steps to provide for the safety of complainant when appropriate.

## Training Employees – Grievance Process Team

- A district must provide training to each employee engaged in the grievance procedures related to sexual discrimination, including sexual violence. It must include training on:
  - Trauma – informed investigatory and hearing practices that help ensure an impartial and equitable process;
  - Best practices for assessment of a sexual harassment or sexual violence complaint;
  - Best practices for questioning of the complainant, respondent, and witnesses; and
  - Implicit bias and racial inequities, both broadly and in school disciplinary processes.

Cal. Ed. Code §§ 66281.8(b)(6); 67386(b)(12)



## Training Employees and Notice of Obligation to Report

- A district must provide training to all employees on the identification of sexual harassment, including the person to whom it should be reported.
  - A district is not required to provide separate training for identification of sexual harassment. It may include this requirement in existing employee training on sexual harassment.
- A district must notify employees of the obligation to report harassment to appropriate school officials.

Cal. Ed. Code §§ 66281.8(b)(8)-(9)

## Education Code Grievance Procedures: Student Harassment Complaints

- A district must adopt and publish grievance procedures on its website that provide for prompt and equitable resolution of sexual harassment complaints filed by a student against an employee or another student
  - **These grievance procedures do not need to be separate for student sexual harassment complaints;** a district may use student disciplinary procedures or other separate procedures to resolve sexual harassment complaints
- The grievance procedures must
  - Provide a process for a student to report sexual harassment by a third party
  - Must state that this is not an adversarial process (no burden to prove or disprove the underlying allegation(s) of misconduct)
  - Prohibit questions that are repetitive, irrelevant, or harassing.

Cal. Ed. Code §§ 66281.8(b)(4), (c)

## Education Code Grievance Procedures: Student Harassment Complaints

- Must provide notice to all students of the grievance procedures, including where and how complaints may be filed
- Must apply the preponderance of the evidence standard, and provide an explanation of the meaning of that standard
- Must provide a reasonably prompt timeframe and a process for extending timelines for good cause
- Must not unreasonably deny a student party's request for an extension of a deadline during periods of examinations or school closures

*Cal. Ed. Code § 66281.8(b)(4)*

## Case Study

Professor Darius Biers decides to report what Student Tony told him about Professor Smith's harassment and sexually explicit texts messages to the Human Resources Department.

**Should this be covered by Title IX or California law? Explain why?**

## Education Code Grievance Procedures: Student Harassment Complaints

### Notice to Student Parties

- Both student parties must have the opportunity to have a support or advisory person accompany them during any stage of the process
- Student parties must be advised of their right to consult with an attorney, at their own expense. An attorney may serve as the student's support person or advisor
- Student parties must receive notice of the appropriate counseling resources developed and maintained by the district



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## Grievance Procedures – Notice to Student Parties

- A district must provide student parties notice that it is conducting a formal investigation. The notice must include the allegations and the alleged district policy violations under review
  - Any new allegations that arise during the course of the investigation that could subject either party to new or additional sanctions shall be subject to the same notice requirements

*Cal. Ed. Code § 66281.8(b)(4)(A)(xvi)*



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## Education Code Grievance Procedures – Investigation of Complaint

- Provide periodic status updates on the investigation to the complainant and respondent
- Provide written notice to parties of any granted extension in the investigation and fact-finding process and the reason for that extension

*Cal. Ed. Code § 66281.8(b)(4)*

## Education Code Grievance Procedures

- Grievance procedures must outline:
  - Possible interim measures pending an investigation;
  - Supportive measures that may be provided in the absence of an investigation; and
  - The disciplinary outcomes, remedial measures, and systemic remedies that may follow the final finding of responsibility.

*Cal. Ed. Code § 66281.8(b)(4)(A)(xxi)*

## Case Study

***Assuming that we are going to follow California law, should the District treat Tony like an employee or student? (Remember, he works part time in the biology lab, but he is also a student)***

***Can Tony argue that the faculty members are his supervisors?***



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## Education Code Grievance Procedures: Student Harassment

- Any hearing shall be subject to the following rules:
  - Cross-examination of either party or any witness *shall not* be conducted directly by a party or a party's advisor
  - Either party or any witness may request testimony via video from a remote location
  - Student parties shall have the opportunity to submit written questions to the hearing officer in advance. At the hearing, the other party can object
  - Parties may not introduce evidence available, but not identified during the investigation. Hearing officer has discretion

*Cal. Ed. Code § 66281.8(b)(4)(A)(viii)*



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## Education Code – Consideration of Prior or Subsequent Sexual History

- Grievance procedures must include that the investigator or hearing officer shall not:
  - Consider the past sexual history of a complainant or respondent except in certain limited circumstances
  - Consider prior or subsequent sexual history between the complainant and anyone other than the respondent for any reason unless directly relevant to prove that physical injuries were inflicted by another individual
- Before allowing the consideration of any evidence re prior or subsequent sexual history, the investigator or hearing officer shall provide a written explanation to the parties as to why consideration of the evidence is consistent with Cal. Ed. Code § 66281.8(b)(4)(A)(vi)

## Education Code – Investigation of Complaint

- Must be trauma-informed and provide impartial investigation of complaints
- Person or entity responsible for conducting investigations, finding facts, and making disciplinary decisions must be neutral
- Student parties must be given opportunity to identify witnesses and other evidence
- Must inform parties that any evidence available but not disclosed during the investigation might not be considered at a subsequent hearing
- Grievance procedures must include reasonable and equitable evidentiary guidelines

Cal. Ed. Code § 66281.8(b)(4)

## Education Code Grievance Procedures: Student Harassment

- Cannot mandate mediation to resolve allegations of sexual harassment
- Cannot allow mediation to resolve allegations of sexual violence

*Ed Code § 66281.8(b)(4)(A)(xxi)(I)*

## Grievance Procedures – Outcome of Complaint and Next Steps

- District must provide written notice to parties of the outcome of the complaint, including:
  - Whether a policy violation was found to have occurred;
  - The basis for that determination, including factual findings; and
  - Any discipline imposed.
- Grievance procedures must provide assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate

*Cal. Ed. Code § 66281.8(b)(4)(A)(xiv)-(xv)*

## Grievance Procedures – Appeals

- Grievance procedures must allow either party to appeal the outcome of the grievance proceeding if the district has such an appeals process
  - **Unlike the Title IX Regulations, the Ed. Code does not require an appeals process**
  - **But, Title 5 permits a complainant to submit a written appeal within 30 days (5 CCR §§ 59338, 59339.)**
- A district's grievance procedure may limit the grounds for an appeal, provided that any limitation shall apply equally to all parties and that the non-appealing party shall have an opportunity to respond to the appeal

*Cal. Ed. Code § 66281.8(b)(4)(A)(xx)*

## Legal Obligations Under the Clery Act



## Clery Act

- Applies to districts that receive federal financial aid
- Ensures access to accurate information about crimes on campus and campus security procedures
- Fines may be up to \$62,689 per incident by the U.S. Department of Education, the agency with jurisdiction to enforce the Act



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## Campus Security Authority

### Campus Security Authority

- Duty to notify responsible individuals (Clery Act coordinator or District police) of alleged Clery Act crimes for reporting.
- CSA include campus police and officials who:
  - Are listed in college's annual security report as an individual to whom reportable criminal offenses should be reported;
  - Are responsible for campus security in addition to policy/security personnel
  - Have significant responsibility for student/campus activities, including student discipline



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## Clery Reports

The Clery Act requires Districts to report statistics of certain types of crimes in an annual security report to the U.S. Department of Education and posted on its web page by October 1 of every year.

## Warnings and Notifications

### **District Must Provide**

- Timely warnings
  - A serious or continuing threat to safety
- Emergency notifications
  - Threat to the health or safety of students or employees

## Relevant Clery Crimes (includes others)

- Sexual Assault: rape, fondling, incest, statutory rape
- Hate crime reporting categories
  - National Origin
  - Gender Identity
- VAWA Offenses
  - Domestic Violence
  - Dating Violence
  - Stalking

## Crime Reporting Geography

- On-campus (anywhere)
- On-campus student housing
- Public property within or immediately adjacent to the campus, including sidewalks and parking facilities
- Non-District facilities and property owned or controlled by the District that are used for educational purposes and frequently used by students and controlled by a student organization officially recognized by the District

34 CFR § 668.48(a)

## Clery Act

Clery Act requires institutions to respond, provide resources and information, and include notice of procedures:

- How to file complaint
- Timelines
- Description of the standard of evidence
- List of all possible sanctions
- Range of protective measures
- Equal opportunity for parties to participate in disciplinary proceedings
- Advisor of choice

## Compliance Issue: FERPA and Clery Act

### **FERPA: Exception to Privacy in Pupil Records**

- Notification to complainant & respondent
- Results of disciplinary proceeding
- Arising from violent crime or non-forcible sex offense allegation

20 U.S.C. § 1232g(b)(6)(A)-(B)

# Responding to Sexual Misconduct Effective Institutional Compliance with Title IX, SB 493, and Related Laws

Southern CA CCD ERC | May 2, 2023

Presented By: Pilar Morin

## Other Overlapping Legal Obligations



### Compliance Issues: Overlapping Legal Requirements

#### State Law Mandates

• "Yes" means "Yes" Policy	<i>Ed Code § 67386</i>
• District Nondiscrimination	<i>Ed Code § 220</i>
• Student Orientation	<i>Ed Code § 67385.7</i>
• District Safety Plans	<i>Ed Code §§ 67380</i>
• Coordination with Law Enforcement	<i>Ed Code § 67381</i>
• Confidentiality of Sexual Assault Victims	<i>Ed Code § 67385</i>
• Mandated Reporting	<i>Pen Code § 11164 et seq.</i>
• Data Collection, analysis, notice	<i>Ed Code § 67380</i>
• Student Discipline Procedures	
• Collective Bargaining Agreements	



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## Adopt a Policy Concerning

### **Sexual Assault, Domestic Violence, Dating Violence, and Stalking**

- Involving a student, both on and off campus
- Affirmative consent standard
- Preponderance of evidence standard (more likely than not) for complaint
- Victim-centered
- Collaborative partnerships with community organizations for victim support
- Comprehensive prevention and outreach programs

Education Code § 67386



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## Affirmative Consent Standard

### **Affirmative, Conscious, and Voluntary Agreement to Engage in Sexual Activity**

- Responsibility of each party
- Lack of protest/resistance does not mean consent
- Silence does not mean consent
- Must be ongoing throughout
- Can be revoked at any time

Education Code § 67386(a)(1)



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## Student Expelled for Sexual Assault

### When a District Receives an Application for Admission From a Student:

- Expelled for sexual assault within five years
- Undergoing expulsion procedures for sexual assault
- District can request information from another District
- District can respond to requests
  - to determine if student poses a danger
- District may require student to disclose prior expulsions
- Before District denies admission, must hold a hearing

Education Code § 76038

## Best Practices

## Best Practices

### **Ensure Good Policies and Procedures are in Place**

- To address legal requirements
- To harmonize overlapping requirements
- To integrate efforts

## Best Practices for Compliance

### **Focus on Training, Education, Prevention**

- Employees, not just responsible employees and supervisors
- Coordinators – title IX, Clery and Education Code (SB 493)
- Students



## Best Practices for Compliance

### **Improve Reporting**

- Ensure required reporting is met
- Encourage reporting
- Build trust with the student body and include them in training
- Ensure complaint procedures are published, accessible understood

## Best Practices for Compliance

### **Implement Appropriate Remedies**

- Impose discipline when needed
- Provide support and care for the complainant/target of misconduct
- Get students involved!

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## Thank You!

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