



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

Community College League of California (CCLC)
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Presented By:

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Agenda

- Background Leading Up to Proposed Title IX Regulations
- Overview of Key Changes
 - Definitions
 - Grievance Procedures
 - Hearing Procedures
- Comparison with California Law (Title 5)
- Next Steps

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.*

History Leading Up to Regulations

- 20 U.S.C. sec. 1681 *et seq.*
- Jan. 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
 - Withdrew 2011 and 2014 documents
- Nov. 2018 – Dept. of Edu. issued proposed regulations

Court Decisions Affecting Implementation in California

- ***Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44.**
 - Student discipline hearing must allow students access to critical evidence, opportunity to adequately cross-examine witnesses, and opportunity to present evidence in defense.
- ***Doe v. Baum* (2018) 903 F.3d 575.**
 - Must allow direct questioning of complainant in live hearing.
- ***Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055.**
 - If student discipline involves potentially severe consequences and the disciplinary committee's decision against the student depends on believing the complainant, the committee's procedures should include an opportunity for the committee to assess the complainant's credibility.

Court Decisions Affecting Implementation in California

- ***Doe v. University of Southern California (2018)* 29 Cal.App.5th 1212.**
 - Where a college or university's disciplinary determination turns on witness credibility, the adjudicator must have an opportunity to assess personally the credibility of critical witnesses.
- ***Doe v. Allee (2019)* 30 Cal.App.5th 1036.**
 - Single investigator model that requires individual to investigate and adjudicate complaint without providing a hearing or the right to confront adverse witnesses does not provide fair hearings to students.

Court Decisions Affecting Implementation in California

- ***Doe v. Westmont College* (2019) 34 Cal.App.5th 622**
 - College’s investigation and adjudication of a student’s claim of sexual assault was flawed where the college did not comply with its own policies, relied on statements from non-testifying critical witnesses, withheld evidence from the accused student.

Key Changes in Proposed Regulations

Overall Requirement

Current	<p>Upon notice of sexual harassment or sexual violence:</p> <ul style="list-style-type: none"> • Take prompt and effective action • To end the misconduct • To prevent its recurrence • To remedy its effects 	<p>2001 Guidance</p> <p>34 CFR § 106.8(b)</p>
Proposed	<p>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.</p>	<p>34 CFR § 106.44(a)</p>
California	<p>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.].</p>	<p>Title 5, California Code of Regulations (CCR) § 59320</p>

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: 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	<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 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

Key Definitions: Sexual Harassment (Cont'd)

California

Unwelcome conduct of a sexual nature, made by someone from or in the work or educational setting.

- Includes unwelcome sexual advances, requests for sexual favors, and other nonverbal or physical conduct of a sexual nature.
- Two types
 - 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

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)

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))

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 but complainants may file formal complaint.	5 CCR § 59327

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	<p>Complainant and respondent:</p> <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

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

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)

CA Hearing Procedures (Discipline): Reviewing Evidence

California

Suspension/Expulsions

1. Written Notice
 - 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)
 - If sustained, right to hearing

Education
Code §§
66017 and
76030

CA Hearing Procedures (Discipline): Reviewing Evidence

California

Due Process requirements

- Provide notice that hearing will be closed to public
 - In writing
 - Registered or certified mail or personal service
 - To parent if student is minor
- Student may request open hearing
 - 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

Next Steps

Next Steps

- Public comment period closed on January 28, 2019
- US Dept. of Ed reviewing 103,000+ comments
- US Dept. of Ed will publish final regulations
- Cal. Proposed changes to BOG Title 5 regulations re Unlawful Discrimination comments due prior to 4:00 p.m. on December 16, 2019

Thank You!

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