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Overview and Toolkit

Title IX

Prepared by:
Lozano Smith's Title IX Practice Area

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TITLE IX: AT A GLANCE



WHAT IS TITLE IX?

- > Title IX is a federal law that was signed by President Nixon as part of the Education Amendments of 1972.
- > Title IX prohibits **any educational program or activity** that receives federal funding from discriminating against any person on the basis of sex.
- > Title IX states:
 - “No person in the United States shall, on the basis of sex, be excluded from **participation** in, be denied the **benefits** of, or be subjected to **discrimination** under any education program or activity receiving Federal financial assistance.” (Emphasis added.)
- > Title IX covers issues of equity in areas that include:
 - Education Programs or Activities
 - Athletics
 - Sexual Misconduct (Harassment & Violence)
 - Employment
 - Equal Access to Facilities
 - Admissions and Recruitment
- > Title IX applies to both employees and students.
- > The U.S. Department of Education’s Office for Civil Rights (OCR) enforces Title IX.

TYPES OF DISCRIMINATION THAT FALL UNDER TITLE IX

- > Sexual harassment
- > Gender discrimination, including discrimination based on a person’s gender identity, sexual orientation, or transgender status
- > Pregnancy discrimination
- > Unequal opportunities for men and women to participate in sports
- > Unequal treatment of student-athletes in the provisions of equipment, games and practice times, travel, coaching, locker rooms and facilities
- > Marital or family status discrimination

EXPOSURE TO LIABILITY/REMEDIES

- > An action for monetary damages, including attorney’s fees
- > OCR may require local educational agencies (LEAs) to enter into resolution agreements, which may include ongoing monitoring
- > Loss of all federal funding

TITLE IX COORDINATOR

- > All recipients of federal funds must designate at least one employee as their Title IX Coordinator.
- > The Title IX Coordinator’s responsibilities include: providing or coordinating Title IX trainings and other preventative measures, receiving Title IX complaints coordinating the LEA’s response to Title IX complaints, and identifying and addressing any patterns or systemic issues of sex-based discrimination.
- > The Title IX Coordinator must be trained and visible according to the Title IX regulations.

INITIAL STEPS TOWARD COMPLIANCE

> **Train All Employees**

- Designate and train Title IX team members: Title IX Coordinator(s), investigators, decision-makers, informal resolution officers, and appeal officers.
- Train all employees on their reporting duties under Title IX, including how to identify and report potential Title IX issues.

> **Update Policies**

- Review and update all employee and student policies concerning gender and sex-based discrimination, including sexual harassment, to comply with the grievance process required under Title IX.

> **Adhere to All Notice and Posting Requirements**

- Title IX requires notice be given to all employees, students, parents/guardians, applicants, that includes: contact information for the Title IX Coordinator; a non-discrimination statement; and a description of the Title IX grievance procedures.
- All Title IX training materials must also be posted on the LEA's website.
- Education Code § 221.61 requires all LEAs to post specific information on students rights under Title IX, including: the Title IX Coordinator's contact information; the rights of students under Title IX; the responsibilities of the LEA under Title IX; and a description of how to file a complaint.
- Education Code § 221.9 requires schools to post statistics on the percentage of students that are involved in competitive sports, and the number of competitive sports teams, classified by gender.

> **Appropriately Respond to Title IX Reports and Complaints**

- Act immediately by determining and implementing appropriate supportive measures for the complainant and respondent.
- Investigate all complaints in a prompt and timely manner, in accordance with Title IX and the appropriate District policy, and document the investigation and decision-making process.
- Implement appropriate corrective measures at the conclusion of the investigation and decision-making process.
- To ensure sports equity, consider periodic program audits by outside consultants or legal counsel to identify equity issues in athletic benefits (e.g., sports facilities, equipment, coaches, schedules, etc.).

> **Maintain all Title IX Records for 7 Years**

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NEW TITLE IX REGULATIONS ISSUED BY THE DEPARTMENT OF EDUCATION TAKE EFFECT AUGUST 14, 2020



FIRM OVERVIEW

Practice Areas

Administrative Hearings
Charter School
Community College
Facilities & Business
Governance
Investigations
Labor & Employment
Litigation
Municipal
Public Finance
Public Safety
Special Education
Student
Technology & Innovation
Title IX

Statewide

Sacramento
Walnut Creek
Fresno
Monterey
Bakersfield
San Luis Obispo
Los Angeles
San Diego

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On May 6, 2020, the United States Department of Education (DOE) issued much-anticipated Regulations (Regulations) addressing how schools and colleges (referred to as Recipients) must respond to claims of sexual harassment covered by Title IX of the Education Amendments of 1972 (Title IX). Title IX is the federal law which prohibits discrimination on the basis of sex in educational settings. The Regulations make significant changes to current requirements and practices and require compliance by August 14, 2020. Some of the most notable changes imposed by the Regulations are detailed below.

SEXUAL HARASSMENT IS NARROWLY DEFINED

Sexual harassment is now narrowly defined to mean conduct on the basis of sex that satisfies one or more of the following:

1. Any 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;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it denies a person equal access to the Recipient's educational program; or
3. Sexual assault (as defined in the Clery Act (20 U.S.C. § 1092(f)(6)(A)(v)), or dating violence, domestic violence, or stalking (as defined in the Violence Against Women Act (20 U.S.C. § 12291(a))).

A SINGLE INVESTIGATOR/DECISION-MAKER MODEL IS PROHIBITED

The Regulations clearly provide that the decision-maker, or the person(s) responsible for determining responsibility, cannot be the same person as the Title IX Coordinator or the investigator. Moreover, in the event of an appeal, the appellate decision-maker cannot be the same person who served as the Title IX Coordinator, investigator, or decision-maker making the original determination. Among other things, the decision-maker must also issue a written determination regarding responsibility in accordance with the Regulations at section 106.45(b)(7).

DISCLOSURE OF EVIDENCE

As part of the formal grievance process, detailed within section 106.45 of the Regulations, both parties and their advisors must be given the opportunity to inspect, review, and respond to all evidence that is directly related to the allegations in the formal complaint, before the investigator completes the investigation report. Additionally, the final investigative report must be provided to the parties and their advisors at least 10 days before any hearing, if there is one.

LIVE HEARINGS ARE REQUIRED FOR POSTSECONDARY RECIPIENTS

Post-secondary Recipients must have live hearings that permit the cross-examination of the involved parties and witnesses. Cross-examination must be conducted by the advisor,



and not by the parties themselves. If a party does not have their own advisor, one must be provided by the Recipient at no cost. The decision-maker overseeing the hearing must determine whether each question posed by the advisor is relevant and explain any decision to exclude a question. Live hearings may be conducted with all parties physically present in the same location, or may be conducted virtually. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.

Under the Regulations, K-12 Recipients have the option of conducting live hearings, though live hearings are still mandated under California Education Code section 48900 et seq. prior to the expulsion of any student. For K-12 Recipients, whether a hearing is conducted or not, once the investigative report has been sent to the parties and before reaching a determination regarding responsibility, the decision-maker must afford each party the opportunity to submit written questions they want asked of any party or witness. Answers to relevant questions must be provided along with additional, limited follow-up questions from each party.

RECIPIENTS MUST CHOOSE AND CONSISTENTLY APPLY THE STANDARD OF EVIDENCE

A Recipient can decide whether the standard of evidence to be used during the grievance process is the “preponderance of the evidence” or the “clear and convincing evidence” standard. The standard used must be consistent whether the respondent is a student or an employee, and with all other formal investigation processes.

THE OPTION TO APPEAL MUST BE AFFORDED TO BOTH PARTIES

Both complainant and respondent must be offered the opportunity to appeal a determination regarding responsibility, and from a dismissal of a formal complaint or any allegation therein. Appeals may be based on (i) procedural irregularity; (ii) new evidence that was not reasonably available at the time of the determination or dismissal; or (iii) conflict of interest or bias of the involved Title IX personnel.

RECORDS MUST BE MAINTAINED FOR 7 YEARS

A Recipient must maintain for a period of seven years, all records relating to sexual harassment investigations, any appeal and the results therefrom, any information resolution and the results therefrom, and all materials used to train Title IX Coordinators, investigators, decision-makers, or any person who facilitates an informal process.

TAKEAWAYS

The over 2,000 page document presents sweeping changes that are required for Recipients in their implementation and handling of Title IX complaints. The above highlights some of the key changes, though by no means is an extensive or complete outline of the Regulations. By August 14, 2020, all Recipients will need to update their policies and procedures, train personnel, and in some cases add personnel to their Title IX teams. It is important that the new requirements be included in student discipline procedures, as well as employee complaint and discipline procedures.

If you have any questions about the new Title IX Regulation, Investigations or Title IX in general, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also subscribe to our podcast, follow us on Facebook, Twitter and LinkedIn or download our mobile app.

TITLE IX DISCRIMINATION PREVENTION CHECKLIST FOR K-12 SCHOOL DISTRICTS



□ ADOPT AND DISSEMINATE A TITLE IX POLICY/GRIEVANCE PROCEDURE

Districts must adopt a grievance procedure that provides for a prompt and equitable resolution of employee and student Title IX complaints. The grievance process must:

- > Include the definition of sexual harassment under Title IX.
- > **Treat complainants and respondents equitably.**
- > Require an **objective evaluation** of all relevant evidence.
- > Require that the Title IX team members assigned to the matter **not have a conflict of interest or bias for or against complainants or respondents** generally or an individual complainant or respondent.
- > Include a **presumption** that the respondent is **not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- > Include **reasonably prompt time frames** for conclusion of the grievance process.
- > Describe the **range of possible disciplinary sanctions and remedies** or list the possible disciplinary sanctions and remedies that the District may implement following any determination of responsibility.
- > State whether the standard of evidence to be used to determine responsibility is the **preponderance of the evidence** standard or the **clear and convincing evidence** standard.
- > Include the procedures and permissible bases for the complainant and respondent to **appeal**.
- > **Describe the range of supportive measures** available to complainants and respondents.

□ PUBLISH REQUIRED TITLE IX NOTICES REQUIRED BY FEDERAL AND STATE LAWS

The District must publish Title IX notices on the District and each school site's website, in a "prominent and conspicuous" location, and in all handbooks or catalogs given to students, employees, job applicants, parents/guardians. The notices must include the following information:

- > The name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator, who must be referred to as the "Title IX Coordinator."
- > A statement that the District does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and specifically Section 106.8(b) not to discriminate in such a manner."
- > A statement that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of Title IX and Section 106(b) may be referred to the Title IX Coordinator, to the Assistant Secretary of Education, or both.
- > The District's policy/grievance procedures, including:
 - > how to report or file a complaint of sex discrimination,
 - > how to report or file a complaint of sexual harassment,
 - > how the District will respond to a complaint of sex discrimination or sexual harassment, including the investigation/grievance procedures,
 - > the statute of limitations, and
 - > where investigation forms from the U.S. Department of Education may be located.

- > Post the Title IX information required under Education Code section 221.61 on the District and all school sites' Internet Websites. This information should include the following:
- > A statement of an individual' s rights and the school' s responsibilities under Title IX, including links to the U.S. Department of Education Office for Civil Rights, Office for Equal Opportunity, and those rights listed in Education Code section 221.8.

DESIGNATE A TITLE IX COORDINATOR AND OTHER MEMBERS OF THE TITLE IX TEAM

Title IX Coordinator: Districts must designate at least one employee as the Title IX Coordinator, who must hold the title "Title IX Coordinator."

- > Other team members will include: investigator, decision-maker, informal resolutions officer, and appeals officer.
- > With few exceptions, the roles of the team members may not overlap.

TRAIN STAFF AND STUDENTS

Training all employees and students is the key to prevention and compliance.

The District's Title IX team must be trained in areas that include:

- > the definition of sexual harassment in § 106.30;
- > the scope of the District's education program or activity;
- > working with and interviewing sexual violence victims;
- > conducting investigations, including appeals and the informal resolution process;
- > consent and the role drugs or alcohol can play in the ability to consent;
- > how to serve impartially;
- > determining credibility;
- > evaluating and weighing evidence; and
- > deciding issues of relevance.

It is recommended that **all other employees**, as well as others likely to witness or receive reports of sexual misconduct (e.g., volunteer coaches) should be trained in areas that include:

- > their reporting obligation;
- > consequences for failure to report;
- > appropriate methods for interacting with sexual violence victims;
- > handling requests for confidentiality;
- > overlap and coordination with local law enforcement.

Students should also be trained on appropriate conduct and how to report sexual misconduct with age and grade appropriate content and methods.

APPROPRIATELY MAINTAIN RECORDS

Districts should determine a mechanism for tracking Title IX complaints and documents, and must maintain the following documents for a period of seven (7) years:

- > Any Title IX investigation of sexual harassment, including determinations regarding responsibility, recordings or transcripts of involved hearings, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant.
- > Any appeal and the result therefrom.
- > Any informal resolution and the result therefrom.
- > All training materials for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

- > For every instance when a District has actual knowledge of sexual harassment, regardless of whether it is processed as a formal complaint, the District must document all actions, including any supportive measures implemented to demonstrate the response was not deliberately indifferent. Particular detail should be included if supportive measures are not offered to a complainant.

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Conduct the Investigation

Reminder: All Title IX Complaints Must Be Resolved in a Prompt and Equitable Manner.**

The following procedure is recommended for processing complaints filed by or on behalf of a student:

Step 1. Assess the Situation - Immediately

1. Assess whether the situation could rise to the level of sexual harassment under Title IX.
 - > If true, would the alleged conduct meet the definition of sexual harassment under Title IX?
 - > Is there Title IX jurisdiction?
2. Notify the Title IX Coordinator of the complaint or incident that was brought to your attention. The Title IX Coordinator should then:
 - > Promptly schedule a meeting with the victim.
 - > Meet with the complainant/victim to better understand the complaint and if it rises to the level of sexual harassment under Title IX.
 - > Explain options for filing a formal complaint.
 - > Discuss supportive measures.
 - > Discuss District policy that prohibits retaliation.
3. On an ongoing basis, the Title IX Coordinator should determine whether a complaint constitutes a “formal complaint” under Title IX, if it meets the definition of “sexual harassment” under Title IX, if there is Title IX jurisdiction, and/or if there are other reason that it must or should be formally dismissed.
4. Title IX Coordinator should assess whether to independently initiate a formal complaint if one is not filed by the complainant/victim.
5. Assess mandatory reporting obligations.
 - > If there is a reasonable suspicion of child abuse or neglect, call Child Protective Services immediately and file a written report within 36 hours, if not already done.
 - > Consider contacting law enforcement, if there is potential criminal activity.
 - > Notify the complainant of their right to contact law enforcement.
6. Consider whether the accused should be removed from school grounds.
 - > For complaints involving employees, if the employee is a danger to others, or should otherwise not be on school grounds, contact Human Resources regarding placement on administrative leave while the investigation is pending.
 - > For complaints involving other students, if the student is an immediate threat to the physical health or safety of others, assess if an emergency removal is permissible under Title IX.
7. Determine whether the parents of the involved or potentially affected students should be notified.

Step 2. Evaluate Appropriate Supportive Measures – Immediately and on an Ongoing Basis

1. The Title IX Coordinator should determine whether supportive measures should be put into place, before the investigation is completed, to protect or support the complainant and/or respondent. Supportive measures should be considered on a case-by-case basis. Supportive measures should not unfairly

* These guidelines provide a quick desk reference for local educational agencies (“LEAs”) to use in addressing Title IX complaints at the site level. LEAs should review their own Title IX policies and adopt practices in accordance with those terms. This is not an exhaustive summary of applicable law and should not be construed as legal advice.

** LEAs should refer to their individual complaint procedures for applicable timelines. Under the Uniform Complaint Procedures, complaints must be investigated and a decision must be issued within 60 calendar days from receipt of the complaint, unless the complainant agrees in writing to an extension of the timeline. (See 5 CCR § 4631.)

penalize the complainant or the respondent. Supportive measures should consider both the complainant's and the respondent's rights to access educational programs and activities.

2. Appropriate measures to consider include, but are not limited to, the following for the complainant and respondent:
 - > Medical, counseling, academic or other support services.
 - > No contact orders and physical separation.
 - > Changed schedules.
 - > Emergency removals in compliance with Title IX.
 - > Disciplinary sanctions are **not** permitted prior to the completion of the grievance process.

Step 3. Establish Timelines and Initiate an Investigation

1. Notify the complainant and respondent of the investigation process, including the policy the LEA will be following to process the complaint, as well as the timeline for completing the investigation.
2. Notify the complainant and respondent that informal resolution may be available to them.
3. Keep the complainant and respondent apprised of any delays or extensions.
4. Document any delays in the investigation.
5. Keep the Title IX Coordinator updated on the timelines and any delays.
6. If either party seeks informal resolution, ensure voluntary, written consent is obtained. Inform each party that withdrawal from the informal resolution process is possible at any time prior to a resolution being reached.

Step 4. Interview the Complainant

1. Carefully determine who should interview the complainant. Consider the complainants' age, gender and existing comfort level with potential interviewers.
 - > Applying a trauma-informed approach, obtain all facts regarding the incident.
 - > Allow the complainant to narrate without interruption; follow up with clarifying open-ended questions. This strategy may need to be modified depending upon the complainant's age and other factors.
 - > Explain why you are asking difficult questions.
 - > Preserve evidence and documentation provided by the complainant. This may include emails, screenshots, text messages, pictures, or other physical evidence.
 - > Ask for the names of other potential witnesses.
 - > Maintain neutrality.
 - > Be compassionate and sensitive.
 - > Consider whether having a second administrator in the room would be beneficial.
2. Depending on the circumstances you may want to request a written statement. If so, make sure it is signed and dated.
3. Remind the complainant that the LEA prohibits retaliation and what to do if the complainant feels retaliated against.
4. Do **not** promise confidentiality.
5. Allow the complainant to have an advisor of their choice present during their interview and involved throughout the process.

Step 5. Interview Other Witnesses

1. Witnesses should not be interviewed together.
2. Obtain all facts regarding the incident.
 - > Ask broad, open-ended questions before more narrow questions.

- > Ask for the names of other potential witnesses.
- 3. Preserve evidence and documentation provided by witnesses. This may include emails, screenshots, text messages, pictures, or physical evidence.
- 4. Depending on the circumstances you may want to request a written statement. If so, make sure it is signed and dated.
- 5. Do **not** promise confidentiality.

Step 6. Interview the Respondent

1. Obtain all facts regarding the incident.
 - > Ask broad, open-ended questions before more narrow questions.
 - > Ask for the names of other potential witnesses.
2. Preserve evidence and documentation provided by the respondent. This may include emails, screenshots, text messages, pictures, or physical evidence.
3. Depending on the circumstances you may want to request a written statement. If so, make sure it is signed and dated.
4. Caution the respondent against retaliation.
5. Allow the respondent to have an advisor of their choice present during their interview and involved throughout the process.

Step 7. Review of Evidence by the Parties and Finalizing the Investigation Report

1. Prior to the completion of the investigation report, the investigator must send the complainant and respondent all evidence directly related to the allegations raised in the formal complaint.
2. Allow the complainant and respondent 10 days to respond to the evidence, in writing.
3. The investigator should consider any written response to the evidence and prepare an investigation report that summarizes the relevant evidence.
4. The investigator sends the final investigation report to the complainant and respondent, at least 10 days prior to any determination regarding responsibility.

Step 8. Decision-Maker Issues Determination Regarding Responsibility

1. The decision-maker must allow complainant and respondent the opportunity, upon their review of the final investigation report, to submit written, relevant questions to any other party. The decision-maker determines which questions are relevant, and if any question is not permitted, they must explain why.
2. The decision-maker prepares a written determination, which should include the following:
 - > Identification of the allegations potentially constituting sexual harassment;
 - > Description of the procedural steps taken from the complaint through the determination of responsibility;
 - > Findings of facts supporting the determination;
 - > Conclusions regarding the application of the District's code of conduct to the facts;
 - > Rationale for each finding and conclusion, including a determination of responsibility for each allegation;
 - > Statement of potential disciplinary sanctions; and
 - > Appeal rights
3. Determine appropriate remedies, including disciplinary action.

Step 9. Process Any Appeals

1. Either complainant or respondent may appeal a Dismissal or a Written Determination.
2. Appeals may be made on the following bases:
 - > Procedural irregularity that impacted the outcome of the matter;

- > New evidence not reasonably available at the time of the Dismissal or Written Determination that could impact the outcome of the matter; or
 - > Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest or bias that impacted the outcome of the matter.
3. If an appeal is filed the Appeal Officer must:
- > Notify the complainant and respondent in writing;
 - > Give the complainant and respondent reasonable, equal opportunity to submit a written statement in support of or challenge to the outcome; and
 - > Issue a written decision to the complainant and respondent simultaneously, describing the result of the appeal, and the rationale for the result.

Step 10. Retain Records for 7 Years

1. For a *formal Title IX complaint* retain: each sexual harassment investigation, including any determination regarding responsibility, any audio or audiovisual required or transcript, any remedies or disciplinary sanctions imposed; any appeal and the result therefrom; and any informal resolution and the results therefrom.
2. Whenever an obligation under Title IX is triggered but there was no formal complaint: any actions taken to address the report or complaint and to resort or preserve equal access to the LEA's program or activity, including supportive measures; and why the LEA's response was not deliberately indifferent.
3. Maintain all materials used to train Title IX Coordinators, Investigators, Decision- Makers and any person who facilitates an Informal Resolution. The LEA must make these training materials publicly available on its website.

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