Title IX Sexual Harassment Complaint Procedures

Sexual Harassment under Title IX

The complaint procedures described in this regulation shall be used to address any complaint containing an allegation that a student was subject to conduct falling within the scope of conduct prohibited by Title IX of the Education Amendments of 1972. Specifically, conduct on the basis of sex that satisfies one or more of the following (34 C.F.R. §106.30):

1. A District employee conditioning the provision of a District aid, benefit, or service on the student's participation in unwelcome sexual conduct;

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a student equal access to an education program or activity provided by the District; or


Further, the District must have jurisdiction over the complaint, meaning that (34 C.F.R. §106.45):

1. The alleged conduct occurred in the United States;

2. The alleged conduct occurred in an education program or activity over which the District exercised substantial control over both (a) the respondent and (b) the context in which the sexual harassment allegedly occurred; and

3. The complainant was participating/attempting to participate in an educational program or activity at the time the complaint was filed.

All other complaints containing an allegation that a student was subject to sexual harassment not meeting the definition above, shall be investigated and resolved in accordance with AR 1312.3 – Uniform Complaint Procedures.

(cf. 1312.3 - Uniform Complaint Procedures)

The determination of whether the alleged conduct meets the above definition of sexual harassment shall be made by a District Title IX Coordinator.
Definitions (34 C.F.R. § 106.31)

“Title IX Regulations”: means Title IX of the Education Amendments of 1972 set forth at United States Code, title 34, sections 106.1 et seq.

“Complainant”: means an individual who is alleged to be the victim of conduct that could constitute sexual harassment, or that victim’s parent(s)/guardian(s).

“Respondent”: means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

“Formal Complaint”: means a document filed by a complainant or signed by a Title IX Coordinator, or designee, alleging Title IX sexual harassment against a respondent and requesting that the District investigate and remedy the allegation. At the time of filing a formal complaint, the complainant must be an individual participating in or attempting to participate in a District educational program or activity.

“Supportive Measures”: means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures are designed to restore or preserve equal access to a District program or activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties and/or to deter additional incidents of sexual harassment. Supportive measures may include counseling, extensions of deadlines or other related adjustments, modifications of schedules, campus escort services, mutual restrictions on contact between the parties, changes in locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

“Education Program or Activity”: means locations, events or circumstances over which the District exercises substantial control over both the respondent and the context in which the sexual harassment occurs.

“Sexual assault”: means actual or intentional physical sexual acts against an individual without consent that may include: rape, rape and seduction, sodomy, lewd and lascivious acts, oral copulation, sexual penetration, sexual battery, and sexual assault, as defined under Education Code section 48900(n) and Penal Code sections 261, 266e, 286, 288, 288a, 289 and 243.4.

“Dating violence”: means violence committed by an individual who is or has been in a social relationship of a romantic or intimate nature with the victim (34 U.S.C. § 12291(a)(10)).

“Domestic violence”: means felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by an individual with whom the victim shares
a child in common, by an individual who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by an individual similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other individual against an adult or youth victim who is protected from that individual's acts under the domestic or family violence laws (Ed. Code § 48900 (n)).

“Stalking”: means engaging in a course of conduct directed at a specific individual that would cause a reasonable individual to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress (34 U.S.C. § 12291(a)(30)).

"Without consent" or "against that individual’s will": may include force, duress, violence, fear of immediate harm, or an individual’s inability to consent.

Conflict of Interest/Bias

The Superintendent or designee shall ensure that the individuals (Title IX Coordinator, investigator, decision-maker, or a facilitator of an informal resolution process) tasked with implementing the procedures set forth in this regulation does not have a conflict of interest or bias for or against complainants or respondents generally, or an individual complainant or respondent, and that such individuals receive training in accordance with Code of Federal Regulations, title 34, section 106.45.

Reporting Incidents/Filing Complaints

All incidents of sexual harassment meeting the definition above and/or formal complaints alleging the same, shall be reported/submitted directly to or forwarded to the District’s Title IX Coordinator using the contact information listed in Board Policy 5145.7 – Sexual Harassment.

A formal complaint, with the complainant’s physical or digital signature, should be filed with the Title IX Coordinator or designee in person, by mail, by email, or by any other method authorized by the District.

Upon receiving notice of an incident, the Title IX Coordinator or designee shall promptly meet with the complainant. The Title IX Coordinator or designee shall listen to the complainant’s concerns, and inform the complainant of the process for filing a formal complaint, and their right to file or not file a formal complaint. The Title IX Coordinator or designee shall also discuss supportive measures with the complainant, and explain that supportive measures will be available to the complainant, regardless of whether a formal complaint is filed.

Even if the complainant chooses not to file a formal complaint, the Title IX Coordinator or designee shall file a formal complaint in situations in which a safety threat exists. In addition, the Title IX Coordinator or designee may file a formal complaint in other situations as permitted
under the Title IX regulations, including as part of the District’s obligation to not be deliberately indifferent to known allegations of sexual harassment. In such cases, the Title IX Coordinator or designee is not a party to the case, and the victim will be treated as a party and receive notices as required by the Title IX regulations at specific points in the complaint process.

Where a formal complaint is filed, the Title IX Coordinator or designee shall also contact the respondent to notify the respondent of the formal complaint, explain the applicable complaint procedure, and discuss the availability of supportive measures.

Supportive Measures

Upon receipt of an incident, even if a formal complaint is not filed, the Title IX Coordinator or designee shall promptly contact the complainant to discuss the availability of supportive measures which are non-disciplinary, non-punitive, and do not unreasonably burden the other party. Supportive measures shall be designed to restore or preserve equal access to a District program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties and/or to deter additional incidents of sexual harassment. Such measures may include, but are not limited to, counseling, workload-related adjustments, modifications of schedules, mutual restrictions on contact, increased security, and monitoring of certain areas of campus. The Title IX Coordinator or designee shall consider the complainant's wishes with respect to supportive measures. Supportive measures, including those detailed herein, shall also be offered to the respondent upon receipt of a formal complaint (34 C.F.R. §§106.30, 106.44).

Emergency Removal from School and Administrative Leave

The District is prohibited from disciplining a student for alleged sexual harassment under Title IX until a full Title IX investigation has been completed (34 C.F.R. §106.44). However, on an emergency basis, the District may remove a student from the District's education program or activity, provided that the District conducts an individualized safety and risk analysis, determines that removal is justified due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations, and provides the student with notice and an opportunity to challenge the decision immediately following the removal. This authority to remove a student does not modify a student's rights under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. §106.44).

If a District employee is the respondent, the employee may be placed on administrative leave during the pendency of the formal complaint process (34 C.F.R. §106.44).

Mandatory and Discretionary Dismissals

The Title IX Coordinator or designee shall dismiss a formal complaint if the alleged conduct
TITLE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

would not constitute sexual harassment as defined above, even if proven. The Title IX Coordinator or designee shall also dismiss any complaint wherein the alleged conduct did not occur in the District's education program or activity, did not occur against a person in the United States, or wherein the complainant was not participating or attempting to participate in the educational program at the time the complaint was filed. The Title IX Coordinator or designee may dismiss a formal complaint if the complainant notifies the District in writing that the complainant would like to withdraw the complaint or any allegations in the complaint, the respondent is no longer enrolled or employed by the District, or sufficient circumstances prevent the District from gathering evidence sufficient to reach a determination with regard to the complaint (34 C.F.R. § 106.45).

Upon dismissal, the Title IX Coordinator or designee shall promptly, and simultaneously to the parties, send written notice of the dismissal and the reasons for the dismissal (34 C.F.R. § 106.45). Both parties have the right to appeal a dismissal in accordance with the appeal procedures set forth below.

If a complaint is dismissed on the grounds that the alleged conduct does not constitute sexual harassment as above, or on another appropriate basis, the allegations may still be addressed pursuant to Administrative Regulation 1312.3 – Uniform Complaint Procedures, or other District policies and procedures, as is deemed appropriate under the circumstances.

Informal Resolution Process

When a formal complaint is filed, the District may offer an informal resolution process, such as mediation, at any time prior to reaching a determination regarding responsibility. The District shall not require a party to participate in the informal resolution process or to waive the right to an investigation and adjudication of a formal complaint (34 C.F.R. §106.45).

The District may facilitate an informal resolution process provided that the District (34 C.F.R. §106.45):

1. Provides the parties with written notice disclosing the allegations, the requirements of the informal resolution process, the right to withdraw from the informal process and resume the formal complaint process, and any consequences resulting from participating in the informal resolution process, including that records will be maintained or could be shared.

2. Obtains the parties' voluntary, written consent to the informal resolution process.

3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
TITILE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

As part of an Informal Resolution, the Parties may agree upon discipline, including suspension or expulsion, without the need for an investigation (Unofficial Regulations, pg. 1390).

Notice of Formal Complaint

If a formal complaint is filed, the Title IX Coordinator or designee shall provide the known parties (complainant and respondent) with written notice of the following (34 C.F.R. §106.45):

1. The District's complaint process, including any informal resolution process;

2. The allegations potentially constituting sexual harassment with sufficient details known at the time, including the identity of parties involved in the incident if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident if known;

Such notice shall be provided with sufficient time for the parties to prepare a response before any initial interview.

If, during the course of the investigation, the District investigates allegations about the complainant or respondent that were not included in the initial notice, the Title IX Coordinator or designee shall provide notice of the additional allegations to the parties.

3. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the complaint process;

4. The opportunity for the parties to have an advisor of their choice who may be, but is not required to be, an attorney, and the ability to inspect and review evidence;

5. The prohibition against knowingly making false statements or knowingly submitting false information during the complaint process; and

6. A statement that if at any time, the complainant or respondent has concerns regarding conflict of interest or bias regarding any of these individuals, the party shall immediately notify the Title IX Coordinator or designee.

Investigation Procedures

During the investigation process, the District’s designated investigator shall (34 C.F.R. § 106.45):

1. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
2. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

3. Provide the parties with the same opportunities to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney;

4. Not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or proceeding, although the District may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties;

5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all investigative interviews or other meetings, with sufficient time for the party to prepare to participate;

6. Send in an electronic format or hard copy to both parties and their advisors, if any, the evidence obtained as part of the investigation that is directly related to the allegations raised in the complaint, and provide the parties at least 10 calendar days to submit a written response for the investigator to consider prior to the completion of the investigative report;

7. Objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and determine credibility in a manner that is not based on an individual’s status as a complainant, respondent, or witness; and

8. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to the determination of responsibility, send to the parties and their advisors, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent (34 C.F.R. § 106.45).

Privacy rights of all parties to the complaint shall be maintained in accordance with applicable state and federal laws.

If the respondent is an employee of the District, rights conferred under an applicable collective bargaining agreement shall be applied to the extent they do not conflict with the Title IX regulations.
Written Decision

The Superintendent shall designate an individual as the decision-maker to decide responsibility for the alleged conduct. The decision-maker shall not be the Title IX Coordinator or any individual involved in the investigation of the matter (34 C.F.R. § 106.45).

After the investigative report has been sent to the parties but before reaching a determination regarding responsibility, the decision-maker shall afford each party the opportunity to submit written, relevant questions that the party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

The decision-maker shall issue, and simultaneously provide to both parties, a written decision as to whether the respondent is responsible for the alleged conduct (34 C.F.R. § 106.45).

The written decision shall be issued within sixty (60) calendar days of the receipt of the complaint.

The timeline may be temporarily extended for good cause with written notice to the complainant and respondent of the extension and the reasons for the extension (34 C.F.R. § 106.45).

In making this decision, the District shall use the "preponderance of the evidence" standard for all formal complaints of sexual harassment.

The written decision shall include the following (34 C.F.R. § 106.45):

1. Identification of the allegations potentially constituting sexual harassment as defined above;

2. A description of the procedural steps taken from the receipt of the formal complaint through the written decision, including any notifications to the parties, interviews with parties and witnesses, site visits, and any other methods used to gather other evidence;

3. Findings of fact supporting the decision;

4. Conclusions regarding the application of the District’s policies and/or regulations to the facts;

5. A statement of, and rationale for, the result as to each allegation, including a decision regarding responsibility, any disciplinary sanctions the District imposes on the respondent, and whether remedies designed to restore or preserve equal access to the District’s workplace, educational program, or activity, will be provided by the District to the complainant; and
TITLE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

6. The District’s procedures and permissible basis for the complainant and respondent to appeal.

The written decision shall comply with the requirements outlined in Administrative Regulation 1312.3 – Uniform Complaint Procedures, as is necessary and required under the law.

Appeals

Either party may appeal the District's decision or dismissal of a formal complaint or any allegation in the complaint, if the party believes that a procedural irregularity affected the outcome, new evidence is available that could affect the outcome, or a conflict of interest or bias by the Title IX Coordinator, investigator(s), or decision-maker(s) affected the outcome. If an appeal is filed, the District shall (34 C.F.R. §106.45):

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

2. Ensure that the decision-maker(s) for the appeal is trained in accordance with 34 C.F.R. §106.45 and is not the same decision-maker(s) who reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator or designee;

3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

4. Issue a written decision describing the result of the appeal and the rationale for the result; and

5. Provide the written decision simultaneously to both parties.

An appeal must be filed in writing within 10 calendar days of receiving the notice of dismissal of a Title IX complaint or a written determination, stating the grounds for the appeal and including any relevant documentation in support of the appeal. Appeals submitted after this deadline are not timely and shall not be considered. A written decision on the appeal shall be provided to the parties within 20 calendar days from the receipt of the appeal.

If a student-respondent does not file an appeal, the District may suspend the student-respondent for sexual harassment, or sexual assault or battery, and move forward with expulsion proceedings, as are deemed appropriate and/or mandatory under the circumstances. If a student-respondent files a timely and valid appeal, the District may only suspend the student-respondent for sexual harassment, or sexual assault or battery, and move forward with expulsion proceedings, as are deemed appropriate and/or mandatory, after a written appeal determination has been issued to the parties.
TITHE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

In accordance with Administrative Regulation 1312.3 – Uniform Complaint Procedures, a complainant may also file an appeal of the District’s Investigation Findings Letter (referred to by the California Department of Education (“CDE”) as the “Investigation Report”) to CDE within 30 calendar days from the date of the Investigation Findings Letter.

The appeal must be signed by the complainant and specify and explain the basis for the appeal that includes at least one of the following: (1) the District failed to follow its complaint procedures; (2) the written decision (or Investigation Report) lack of material findings of fact necessary to reach a conclusion of law; (3) the material findings of fact are not supported by substantial evidence; (4) the District’s legal conclusions are inconsistent with the law; and/or (5) the corrective actions, listed herein, fail to provide a proper remedy. The appeal shall be accompanied by a copy of the locally filed complaint and a copy of this correspondence.

The appeal should be sent to:

California Department of Education
ATTN: Office of Equal Opportunity
1430 N Street
Sacramento, CA 95814-5901

Either party has the right to file a complaint with the U.S. Department of Education's Office for Civil Rights within 180 calendar days from the date of most recently alleged misconduct.

Remedies

When a determination of responsibility for sexual harassment has been made against the respondent, the District shall provide remedies to the complainant. Such remedies may include supportive measures but need not be non-disciplinary or non-punitive and need not avoid burdening the respondent (34 C.F.R. §106.45).

Corrective/Disciplinary Actions

The District shall not impose any disciplinary sanctions or other actions against a respondent, other than supportive measures, until the complaint procedure has been completed and a determination of responsibility has been made (34 C.F.R. §106.44).

For students in grades 4-12, discipline for sexual harassment may include suspension and/or expulsion. After the completion of the complaint procedure, if it is determined that a student at any grade level has committed sexual assault or sexual battery at school or at a school activity off school grounds, the principal or Superintendent shall immediately suspend the student and shall recommend expulsion (Education Code 48900(n), 48915 (c)).
TITLE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

(continued)

Other actions that may be taken with a student who is determined to be responsible for sexual harassment include, but are not limited to:

1. Transfer from a class or school as permitted by law
2. Parent/guardian conference
3. Education of the student regarding the impact of the conduct on others
4. Positive behavior support
5. Referral of the student to a student success team

(cf. 6164.5 - Student Success Teams)

6. Denial of participation in extracurricular or cocurricular activities or other privileges as permitted by law

(cf. 6145 - Extracurricular and Co-curricular Activities)

When an employee is found to have committed sexual harassment or retaliation, the District shall take appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement.

(cf. 4117.7 - Employment Status Report)

(cf. 4118/4218 - Dismissal/Suspension/Disciplinary Action)

(cf. 4119.11 - Sexual Harassment)

Record-Keeping

The Superintendent or designee shall maintain, for a period of seven years, a record of (34 C.F.R. § 106.45):

1. Each sexual harassment investigation, including but not limited to, any decision regarding responsibility; any audio or audiovisual recording and transcript if applicable; any disciplinary sanctions imposed; and/or any remedies provided to the complainant;
2. Any appeal and the result therefrom;
TITLE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

3. Any informal resolution and the result therefrom;

4. All materials used to train Title IX coordinators, investigators, decision-makers, and any individual who facilitated an informal resolution process. These training materials must be made publicly available on its website; and

5. Any steps taken to respond to an allegation of sexual harassment, including but not limited to, supportive measures offered to the parties and a statement as to why the District’s response was not deliberately indifferent.

(cf. 3580 - District Records)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex
48900 Grounds for suspension or expulsion
48900.2 Additional grounds for suspension or expulsion; sexual harassment
48904 Liability of parent/guardian for willful student misconduct
48980 Notice at beginning of term

CIVIL CODE

51.9 Liability for sexual harassment; business, service and professional relationships
1714.1 Liability of parents/guardians for willful misconduct of minor

GOVERNMENT CODE

12950.1 Sexual harassment training

CODE OF REGULATIONS, TITLE 5

4600-4671 Uniform complaint procedures
4900-4965 Nondiscrimination in elementary and secondary education programs

UNITED STATES CODE, TITLE 20

1092 Definition of sexual assault
1221 Application of laws
1232g Family Educational Rights and Privacy Act
1681-1688 Title IX of the Education Amendments of 1972
TITLE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

UNITED STATES CODE, TITLE 34

12291  Definition of dating violence, domestic violence, and stalking

UNITED STATES CODE, TITLE 42

1983  Civil action for deprivation of rights
2000d-2000d-6  Title VI, Civil Rights Act of 1964

CODE OF FEDERAL REGULATIONS, TITLE 34

99.1-99.67 Family Educational Rights and Privacy
106.1-106.82 Nondiscrimination on the basis of sex in education programs

COURT DECISIONS

Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130
Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473
Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:

U.S. DEPARTMENT OF EDUCATION PUBLICATIONS

Title IX: Fact Sheet: Final Title IX Regulations
Title IX: U.S. Department of Education Title IX Final Rule Overview
Title IX: Summary of Major Provisions of the Department of Education’s Title IX Final Rule

CSBA PUBLICATIONS

Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014

Safe Schools:  Strategies for Boards of Education to Ensure Student Success, 2011

WEB SITES

CSBA:  http://www.csba.org
TITLE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES (continued)

California Department of Education:  http://www.cde.ca.gov
U.S. Department of Education, Office for Civil Rights:  http://www.ed.gov/about/offices/list/ocr

Regulation  ELK GROVE UNIFIED SCHOOL DISTRICT
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