

Title IX Training Series Part 1: Title IX Obligations Before the Investigation

Liebert Cassidy Whitmore | May 14, 2021

Presented By: Jenny Denny

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Title IX Obligations Before the Investigation

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This slide features a background image of a sunset over water. The text is centered and includes the firm's logo at the top and the presenter's name at the bottom.

Agenda

- Changing Landscape: Biden Administration Order
- When Does the Institution Have Actual Knowledge
- Assessing Reports of Sexual Harassment and Determining Whether Title IX Applies (Jurisdiction)
 - Sexual Harassment Definition
 - Programs or Activities
 - In the United States
 - Options/Duties When Title IX Does Not Apply
- Supportive Measures
- Emergency Removals

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Agenda

- The Formal Complaint- Triggering the Grievance Process
- Advisors
- Dismissals
- Appeals
- Anti-Retaliation Protections
- Confidentiality

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Changes Are Coming

Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (Mar. 8, 2021)

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Required Training Components

- Definition of sexual harassment
- Scope of education program or activity
- How to conduct investigation and prepare investigative report
- How to implement grievance process
 - Hearings
 - Appeals
 - Informal resolution process
- How to serve impartially
- Decision-makers: Hearing technology and issues of relevance

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Participant Background Poll

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Participant Background Poll

- Which Title IX role do/will you hold?
 - A. Coordinator
 - B. Investigator
 - C. Decision-Maker/Panelist
 - D. Advisor
 - E. Official with Authority
 - F. Other or multiple roles

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Participant Background Poll

Have you received a Title IX complaint since August 14, 2020?

- A. Yes
- B. No

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Title IX

Title IX prohibits discrimination that is:

- On the basis of sex
- In education programs or activities
- Receiving federal financial assistance

20 U.S.C. § 1681 *et seq.*
34 C.F.R. § 106 *et seq.*

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Title IX Protections

- Title IX protection applies to **all** students and employees
- Protects students and employees from sexual harassment committed by:
 - Students
 - District employees
 - Third-parties

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Assessing Reports of Sexual Harassment & Determining Title IX Obligations

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Actual Knowledge

If District 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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Actual Notice

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.

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Case Study: Actual Knowledge

James is the Director of Information Technology. Celia, a student who works in IT, confides in him that she has been sexually assaulted by a coach. The District's policy says that all supervisors have a duty to report sexual harassment in the workplace. Does District now have actual notice of a potential Title IX matter?

Yes, No, or Maybe

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Sexual Harassment: Three Categories

- Quid pro quo: An *employee* conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct
- Unwelcome conduct so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking

34 CFR § 106.30

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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

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Case Study: Sexual Harassment

Celia who is a work study student reports to the Title IX Coordinator the following:

James, the Director of Information Technology, has told her she can get more hours if she goes out with him. He only asked her out once. He did not reduce her hours when she said no.

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Correct/Incorrect/Maybe

Celia's report does not meet the definition of sexual harassment under Title IX because a reasonable person would not find the conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity?

Correct, Incorrect, or Maybe

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Case Study: Sexual Harassment

Celia also reports the following to the Title IX Coordinator the following:

Last week, Tom, another student who works with her in the Information Technology Department, kissed her in the elevator. She pushed him away and he immediately apologized. He has not bothered her again.

Is this Title IX sexual harassment?

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Education Program or Activity

- Locations, events, or circumstances over which the District exercised substantial control over respondent and context
- Any building owned or controlled by a student organization

34 CFR § 106.44(a)

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Location of Incident

Sexual harassment must occur against the complainant **in the United States**

- Title IX not triggered by incidents outside the U.S.

34 CFR § 106.44(a)

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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 Rudy and Carlos's private apartment?

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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)

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Employee Issues

- Must respond to sexual harassment as defined by California Fair Employment and Housing Act (FEHA)
 - Sex harassment has a different definition under FEHA
 - Supervisors must report under FEHA
- Title IX obligations might conflict with collective bargaining agreements

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Student Issues

Student services – discipline/due process:

- Must be consistent with federally guaranteed due process rights
- Cannot remove, suspend, or expel a student unless discipline is related to college activity or attendance
 - Exception for sexual assault and sexual exploitation
 - Must still follow Title IX regulations

Ed. Code §§ 76033 and 76034

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Coordinate with State Law

State Law Requirements:

- "Yes" means "Yes" Policy → Ed Code § 67386
- District Nondiscrimination → Ed Code § 220
- Student Orientation Requirements → Ed Code § 67385.7
- District / School Safety Plans → Ed Code §§ 67380 (postsecondary)
- Coordination with Law Enforcement → Ed Code § 67381
- Confidentiality of Sexual Assault Victims → Ed Code § 67385
- Mandated Reporting → Pen Code § 11164 et seq. & Ed Code § 48906
- Data Collection, Analysis, Notice → Ed Code § 67380
- Cal/OSHA → Lab Code § 6300 et seq.

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Supportive Measures

- Individualized services offered as appropriate and reasonably available without charge
- Non-disciplinary and non-punitive
- Before or after or without formal complaint
- Available to Complainant and Respondent

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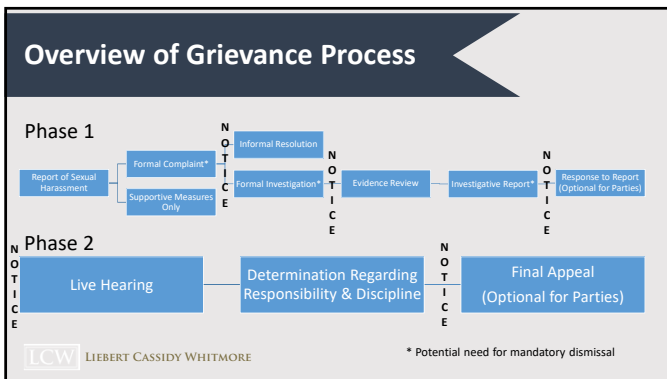
Examples of Supportive Measures

- Medical/mental health services (or referral)
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual no-contact orders
- Transportation accommodations
- Changes in work/housing locations
- Leaves of absence
- Increased security

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Triggering the Grievance Process

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When Does the Grievance Process Apply?

- For formal complaints of sexual harassment under Title IX
 - Not for informal complaints
- Not for sexual harassment that falls outside of the definition in the regulations
- Not for discrimination: treating individual differently/unfavorably because of that person's sex

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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)

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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)

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Complainant

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

34 CFR 106.30(a)

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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

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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

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Case Study & Discussion

The Title IX Coordinator receives a report from Julie who reports that Rudy is her friend and confided in her about the rape. She also reports that Carlos is stalking and harassing Rudy on and off campus, in person and via the cell phone, since they broke up two months ago. Julie has seen Carlos hit Rudy in the past and believes that Rudy is suffering from PTSD as the victim of domestic violence. The Title IX Coordinator contacts Rudy who refuses to file a complaint. Carlos is a popular student athlete and a member of the Model United Nations.

Should the Title IX Coordinator file a title IX complaint? Why?

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Consolidating Complaints

Discretion to consolidate complaints:

- Arise out of the same facts or circumstances (so intertwined that their allegations directly relate to all parties) and
- Involve more than one complainant, more than one respondent, or counter-complaints

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The Grievance Process – Issues Before the Investigation

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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)

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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)

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Emergency Removal

Considerations

- The particular Respondent and the specific circumstances;
- Whether there is an immediate threat
- Whether the threat is to the physical health or safety of one or more individuals
- Whether the emergency situation specifically arises from the allegations of Title IX sexual harassment.
- Applicability of any disability laws
- Appropriateness of other supportive measures in lieu of removal

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Case Study & Discussion

Carlos was arrested but released after a few days and has returned to school; the criminal proceedings are pending. The Title IX Coordinator considers an emergency removal against Carlos after meeting with Rudy to provide him with supportive measures. Rudy was nervous and appeared to have bruises on his arms and face.

Should the Title IX Coordinator seek an emergency removal against Carlos? Why?

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Administrative Leave

- District has authority to place **employee** Respondents on administrative leave during Title IX grievance process

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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)

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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)

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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)

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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)

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Role of Advisors

- Purpose: provide assistance and support to Party
- Individual of the party's choosing: family member, friend, an attorney, a neighbor

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Role of Advisors Before Hearing

- Not required before hearing
 - May attend investigative interview(s), participate in evidence review, help Party prepare response to investigative report
- May not obstruct interview or disrupt grievance process
- May require confidentiality agreement

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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

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Confidentiality

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

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Case Study: Employee Discipline

Carlos refuses to cooperate with the investigator. The Title IX Coordinator learns that Carlos, who is a talented mechanic, is now working as an adjunct at the college.

Can the District terminate Carlos as an adjunct immediately because of the pending complaint?

Yes, No, or Maybe

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Case Study: Employee Discipline

Carlos refuses to cooperate with the investigator. The Title IX Coordinator learns that Carlos, who is a talented mechanic, is now working as an adjunct at the college.

Can the District discipline Carlos for insubordination?

Yes, No, or Maybe

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Case Study: Title IX Obligations

In March, campus security cameras captured an attack in a college parking structure. The Title IX Coordinator recognizes Carlos as the attacker. It appears from the footage that Carlos pulled Maria, a student from his auto mechanics class, into his car and sexually assaulted her. Maria refuses to speak to the Title IX Coordinator.

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Discussion

Does this trigger the District's Title IX obligations?

Because Maria refuses to file a complaint, what should the Title IX Coordinator do?

If a report is filed, should the Title IX Coordinator consolidate the complaints involving Maria and Rudy?

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Case Study: Dismissals

Carlos drops out of school and quits his adjunct job. The Title IX Coordinator learns Carlos has applied to teach at another community college district. The District must end the investigation since Carlos has left the District.

True, False, or Maybe

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Questions?

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Next Title IX Training Series

- Part 2
 - Informal Resolution Process
 - Investigations
- Part 3
 - Hearing
 - Determination of Responsibility
 - Discipline

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Thank you!

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