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Complying with Anti-Sexual Harassment Laws in the Community College District Workplace

Association of Chief Human Resource Officers/ Equal Employment Officers (ACHRO/EEO) Fall Training Institute | October 25, 2022

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Sources of Law

Federal Law

- Title VII of the 1964 Civil Rights Act
- Title IX of the Education Amendments of 1972
- Violence Against Women Act (VAWA)

California Law

- Fair Employment and Housing Act (FEHA)
- Education Code (including SB 493)

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Administrative Agencies

Employees


- U.S. Equal Employment Opportunity Commission
- California's Civil Rights Agency (formerly known as the Department of Fair Employment and Housing)

Students

- U.S. Department of Education, Office for Civil Rights

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Exercises 1 and 2: Determining Whether the Allegations Fall Into Federal or State Law




Title IX: Jurisdiction

Title IX prohibits discrimination:

- In the United States
- 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 Sexual Harassment Definitions: 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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Senate Bill 493: Jurisdiction

- Must take reasonable steps to respond to ... sexual harassment ... that occur in connection with any educational activity or other program ... as well as incidents that ... could contribute to a hostile educational environment or otherwise interfere with a student's access to education.

Ed. Code § 66281.8 (b)(3)(B)

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Senate Bill 493: Sexual Harassment Protections

- Added 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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Senate Bill 493 Definition of "Sexual Harassment"

- "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

Cal. Ed. Code §§ 212.5

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Senate Bill 493 Definition of "Sexual Harassment"

Includes:

- Quid Pro Quo (employment or academic)
- Unwelcome conduct with 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
- Includes sexual battery, sexual violence, and sexual exploitation

Cal. Ed. Code §§ 212.5, 66262.5

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Exercise 3: Student/Employee Complainant

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Notice of Harassment Under California Education Code

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Notice of Sexual Harassment Under the Education Code

“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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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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Title 5 Requirements

- Identify person responsible for coordinating investigation
- Establish option for informal resolution process
- Set forth investigation process, including report content requirements
- Provide notice of investigation results
- Provide for appeal to governing board and State Chancellor
- Provide required information to State Chancellor
- Establish timelines for completion of investigation

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California Fair Employment and Housing Act

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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

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Gender Identity / Expression

Employers **Must:**

- Permit employees to use the restroom that corresponds to the employee’s gender identity/expression
- Refer to employees using the employee’s preferred name, gender, and pronouns
- Designate single occupancy facilities using gender-neutral signage

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Gender Identity / Expression

Employers **Must Not:**

- Enforce dress codes more harshly against an employee based on their gender identity/expression
- Discriminate against an applicant for failing to designate a gender or designating a gender that is inconsistent with the applicant’s sex assigned at birth
- Inquire about or require documentation or proof of an individual’s sex or gender

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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)

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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

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Hostile Work Environment ("Environmental" Harassment)

Changes After "Me Too" Movement:

- Decline in productivity not required to establish harassment – it is sufficient that the conduct "so altered working conditions as to make it more difficult to do the job"
- A single incident of harassing conduct may be sufficient to create a hostile work environment
- Totality of the circumstances matter, including "stray remarks" by non-decision-makers
- Standards do not vary by workplace
- Rarely determinable "on paper" alone

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Supervisor Responsibilities

- 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

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Consequences, Damages & Liability

- Employers are liable for the conduct of **supervisors** who harass
- Employees can be personally liable for harassment
- Liability can include:
 - Back pay
 - Damages
 - compensatory & punitive

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Exercise 4: SB 493 Student Request for Confidentiality

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Confidentiality

If a 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.

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Confidentiality

- If complainant’s identity will be disclosed, complainant must receive notice prior to disclosure or investigation and District must take immediate steps to provide for the safety of complainant when appropriate
- If the complainant requests that the District inform the respondent that the student asked the District not to investigate or seek discipline, the institution shall honor this request

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Exercise 5: Education Code Training Requirements

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SB 493 Training Employees

- A district must provide each employee engaged in the grievance procedures training 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)

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SB 493 Training Employees and Notice of Obligation to Report

- A district must provide all employees training 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)

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**Fair Employment and Housing Act
Training - Employees**

- One hour training anti-harassment training for non-supervisory employees
Gov. Code § 12950.1
- Two-hour supervisory employee harassment training
Gov. Code § 12950.1
- Two-hour elected official harassment training
Gov. Code § 53237

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**Exercise 6: Emergency Removal, Paid
Administrative Leave and No Contact Orders**

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**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)

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Title IX - 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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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)

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Education Code Grievance Procedures No Contact Orders

- When requested by a complainant or otherwise determined to be appropriate, District can issue an interim no-contact
- No mutual no contact order unless
 - necessary or justifiable to protect the noncomplaining party's safety or well-being
 - necessary to respond to interference with an investigation
- After a decision of responsibility, the no contact order can only apply to the respondent


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

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Exercise 7: SB 493, Student Sexual Harassment Complaints Against Employees or Students, Procedures Under California's Education Code




Exercise 7, Question 1



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)

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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)

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Exercise 7, Question 2

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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)

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**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)

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Exercise 7, Question 3




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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Exercise 7, Question 4



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)

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Exercise 7, Question 5

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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)

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Exercise 7, Question 6



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)

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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)

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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)

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Changes to Title 5 Regulations: Unlawful Discrimination (Effective November 4, 2020)

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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)

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Title 5 Regulations – Section 59327 Informal Resolution

Timelines are tolled pending good faith efforts at informal resolution

5 CCR § 59327(e)

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Title 5 Regulations – 59332 Defective Complaints

- Provide written notice within 14 days if complaint is defective
- Provide opportunity to offer additional facts to support claim through an intake interview
- If after intake it is still defective, provide written determination explaining the basis for dismissing the complaint within 14 days of the intake interview.
- Provide the complainant notice that they can appeal to the Chancellor's Office

5 CCR § 59332

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Title 5 Regulations – 59334 Investigation

Explain why an identified potential witness was not interviewed

5 CCR § 59334(b)(3)


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Title 5 Regulations – 59336
Administrative Determination


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 this only if the employee agrees, and the extension cannot exceed more than 30 additional calendar days

5 CCR § 59336(d)

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Questions?



Thank You!

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