

Title IX Training Series: Part 2

Southern 30 | April 30, 2021

Presented By: Pilar Morin & Jenny Denny

LCW LIEBERT CASSIDY WHITMORE

Title IX Training Series: Part 2

Presented By:

Pilar Morin & Jenny Denny / April 30, 2021

Agenda

- Changing Landscape
- Pre-Investigation Matters
- Training Reminders
- Impartiality
- Informal Resolution Process
- Investigations
 - Notice
 - Evidence Review
 - Investigative reports

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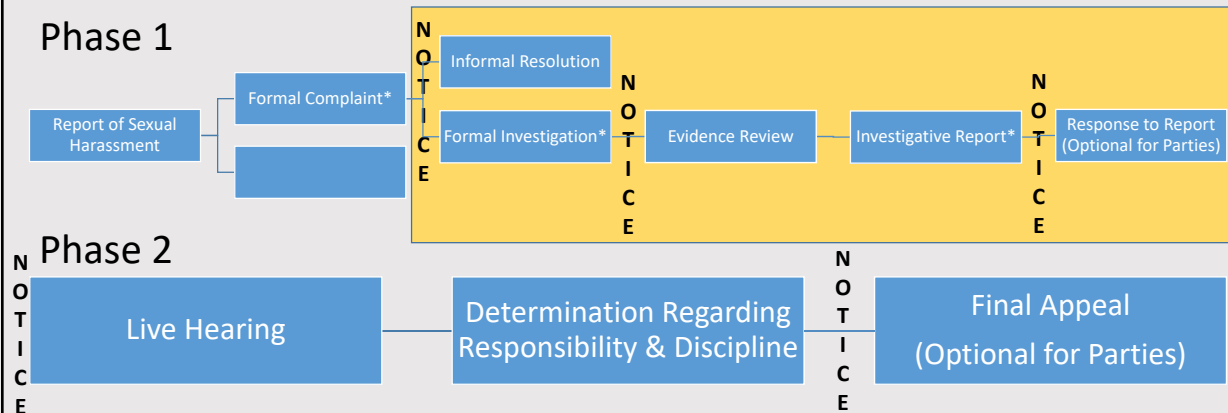
Changes Are Coming...

04/06/21 OCR Announces Launch of Comprehensive Review

- Q&A Guidance
- Public Hearing
- Notice of Proposed Rulemaking with formal notice and comment period to amend Regulations

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Overview of Grievance Process



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* Potential need for mandatory dismissal

The Grievance Process – Issues Before the Investigation



Notice of Allegations

Must provide written notice to the parties:

- Notice of the allegations with sufficient detail (identity of the parties, conduct allegedly constituting sexual harassment, date, location if known)
- Notice of the grievance process, [including the availability of an informal resolution process](#)
- Presumption that Respondent is not responsible
- Statement that determination occurs at end of grievance process

34 CFR § 106.45(b)(2)(i)



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Notice of Allegations

Must provide written notice to the parties:

- Sufficient time to prepare before interview
- Right to Advisor
- Right to evidence review
- Code of conduct provisions re: false statements and false information
- Reissue notice if new allegations are added

34 CFR § 106.45(b)(2)(i)

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Timeline

- Must be reasonably prompt
- Can delay for good cause
 - Must provide written notice to the Parties

34 CFR § 106.45(b)(1)(v)

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Required Training

- Coordinators
- **Individuals Facilitating Informal Resolution**
- **Investigators**
- Decisions Makers



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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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Required Training Components

Additionally, facilitators must also be trained on how to conduct informal resolution processes

"It is not the intent of the Department in referring to resolution processes ... as 'informal' to suggest that personnel who facilitate such processes need not have robust training and independence.."

85 CFR § 30405



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Impartiality



Lack Impartiality = Consequences

- Conflict of interest or bias may be grounds for appeal 34 CFR § 106.45(b)(8)(i)(C)
- Creates lack of confidence in integrity of the process

Impartiality

Title IX Coordinator, **Investigator**, Decision, **Individual Facilitating an Informal Resolution Process** must be free of:

- Conflict of interest or
- Bias

34 CFR § 106.45[b][1][iii]

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Impartiality

Separation of Roles

Title IX Coordinator or Investigator cannot serve as a Decision Maker:

- Prevents influence on decision
- Avoids consideration of non-relevant information obtained/gleaned as a Coordinator or Investigator

See Preamble 30370



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Impartiality

- Serve impartially
- Without
 - Pre-judgement of the allegations
 - Conflicts of Interest
 - Bias



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Impartiality

Free of Conflicts of Interests

- Actual or perceived conflict between personal interest and professional title IX duties
- Personal interests should not be allowed to enter the decision-making process



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Impartiality

- Treating all parties impartially without ... bias against an individual's sex, race, ethnicity, sexual orientation, gender, identity, disability or immigration status, financial ability, or other characteristic. Any person can be a complainant, and any person can be a respondent, and every individual is entitled to impartial, unbiased treatment regardless of personal characteristics.



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Impartiality

Biases

- Personal feelings or attitudes that impact our actions
- Ideas, beliefs, and assumptions
- Often based on stereotypes and without full awareness
- Past experiences and current perceptions drive our perspectives and our actions
- Under stress or pressure, we gravitate even more strongly toward our unconscious bias

Impartiality

Types of Biases

- Anchoring
 - The tendency to rely too heavily on one piece of information when making decisions
 - Fixation on initial information and fail to adjust to later information
- Bandwagon effect
 - The tendency to do (or believe) things because many other people do (or believe) the same thing

Impartiality

Types of Biases

- Bias Blind Spot
 - The tendency to see oneself as less biased than other people, or to identify more bias in another than in oneself
- Confirmation
 - The tendency to confirm what we already believe is true
 - Influences

Impartiality

Types of Biases

- Affinity/Similar to Me Effect
 - The tendency to have an affinity or get along better with people similar to you

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Impartiality

- Be self-aware and mindful
- Assess actual or perceived conflicts of interest
- Recognize possible biases
- Use Form/Self-Report/Recuse



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Case Study

At the hearing, the respondent claims that the investigator had a conflict of interest because the investigator's wife works for the complainant's father. The respondent also claims the investigator was biased because the investigator did not speak to witnesses the respondent identified. The investigator testifies that the surveillance video captured the entire incident and that is why he didn't see the need to speak to witnesses Respondent identified who were not at the scene.



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Discussion

Additionally, the investigator testifies that he could not possibly be biased. He regularly teaches and writes about equity and inclusion.

Are there issues of conflict of interest and/or bias in this investigation? How can these be avoided? What are the possible consequences of bias/conflicts of interest?

The Grievance Process – Informal Resolution

Informal Resolution

- Does not involve a full investigation and adjudication
- Possible at any time prior to determination regarding responsibility
- Cannot use for student complaint against employee

34 CFR § 106.45(b)(9)

Informal Resolution

Must provide notice of:

- the allegations
- the rules/requirements of the informal resolution process
- the circumstances under which the IRP precludes the parties from resuming a formal complaint arising from the same facts
- any consequences of participating in the IRP
- the records that will be maintained or could be shared
- right to withdraw from process

34 CFR § 106.45(b)(9)

Informal Resolution

- Not required, totally voluntary
 - May not be appropriate for all formal complaints
- Only after Formal Complaint
- Requires both Parties' voluntary, written consent
- The District's Title IX Coordinator should determine if Informal Resolution is appropriate
- Coordinator should not be the facilitator
- Understand pros and cons



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Determining Whether to Offer Informal Resolution

- Considerations
 - Outcome of an individualized safety and risk analysis
 - Nature of the alleged conduct
 - Whether allegations involve multiple victims
 - Whether allegations involve a pattern of conduct
 - Other evidence-informed factors indicative of increased risk to campus safety
 - Whether the circumstances warrant the Title IX Coordinator signing a formal complaint



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Examples of Informal Resolution Processes

- Mediation
 - Participant-focused, structured dialogue facilitated by a neutral and impartial mediator
 - Parties' needs and interests are explored without judgement to reach a mutually agreeable solution

Examples of Informal Resolution Processes

- Arbitration
 - Parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments
 - Different from mediation because the arbitrator has authority to make a decision about the dispute

Examples of Informal Resolution Processes

- Restorative Justice
 - Focuses on harm caused rather than the guilt or responsibility of the offender
 - In conference, Parties and a District representative discuss their perspectives, feelings, needs, and expectations of each
 - Intent is to acknowledge and understand the harm caused and work collaboratively to identify ways to repair that harm and restore community

Examples of Informal Resolution Processes

- Restorative Justice Resources:
- <https://www.sandiego.edu/soles/restorative-justice/campus-prism.php>
 - PRISM - Promoting Restorative Initiatives for Sexual Misconduct on College Campuses
 - Articles, webinars

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Examples of Informal Resolutions

Settlements Agreements can include:

- Academic accommodations
- Apology or agreement to repair harm
- Education/Training
- Mutual restrictions/stay away orders
- Counseling/Treatment
- Other sanctions or discipline
 - Restrictions on participation in district's programs
 - Voluntary resignation, withdrawal, accepting lesser discipline

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Case Study: Informal Resolution

Rudy reports to the Title IX Coordinator that he broke up with Carlos last semester. At the time of the breakup, Carlos was a student at the District, but he is no longer enrolled. Rudy recently realized Carlos was stalking him on campus and filed a formal complaint. Rudy is now an adjunct employee at the District. The District initiated its grievance process. Can the District offer the Parties informal resolution?

Yes, No, or Maybe?

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Case Study: Informal Resolution of Sexual Assault Complaints

Nikhil alleges he was sexually assaulted while he was asleep after he had a dental procedure by Valeria, his ex-girlfriend. Valeria and Nikhil are both in the nursing program. Valeria allegedly took photos of Nikhil during the incident and posted them on social media when Nikhil broke up with her. Nikhil reports that Valeria continued to stalk him on campus and at the hospital where they work. Nikhil claims she showed the photo to doctors at the hospital and claimed Nikhil sent her the photos to harass her. Would you recommend the District offer the Parties an opportunity for informal resolution?

Yes, No, or Maybe?

Pop Quiz

A district can use emergency removal to remove an employee Respondent from campus if it determines the employee presents an immediate threat to the physical health or safety of the Complainant arising from the allegations of sexual harassment.

True or False?

Case Study: Informal Resolution

*The District began an investigation into a student's formal complaint of sexual harassment against another student. The investigator completed her interviews of the Complainant and two other witnesses. The Complainant called the Title IX Coordinator and stated she wants to engage in the informal resolution process. **Did the Complainant waive her right to participate in the informal resolution process by completing the investigative interview?***

Yes, No, or Maybe?



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Case Study: Minors on Campus

The parties who seek informal resolution are minors. They attend a joint enrollment program on campus. They are both seniors at the local high school. They both agree that they want to enter into a mutual stay away agreement. One party expressly states she does not want her parents to find out because they were cutting class and drinking during the incident.

Discussion: Should the informal resolution process be offered to these students? What are things to consider?



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Possible Outcomes of Informal Resolution

- No Agreement Reached
 - District begins/resumes formal complaint investigation
- Formal Resolution Process Agreement Reached
 - Parties bound by terms
 - Allegations resolved
 - End of grievance process (depending on stage, no investigation, hearing or determination of fault)

Documenting Informal Resolution

- If complaint resolved:
 - Parties sign agreement (parents if minors are involved);
 - District closes complaint;
 - Parties cannot appeal resolution; and
 - District will not re-instate formal complaint process.
- If Party withdraws from the informal resolution process:
 - Document withdrawal in writing; and
 - Resume/Begin investigation.

Case Study: Withdrawal

Before the Parties signed the resolution agreement, the Complainant called the Title IX Coordinator and requested to proceed with a formal investigation. Can the District enforce the resolution agreement?

Yes, No, or Maybe?



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Case Study: Documentation

After the Parties resolved a complaint of sexual harassment through informal resolution and fully executed the resolution agreement, the Title IX Coordinator closed the file. Should the Title IX Coordinator shred the original formal complaint and the informal resolution facilitator's notes since the matter was resolved?

Yes, No, Maybe?



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The Grievance Process – The Investigation



Title IX Investigations

- Fact-finding investigation to find out:
 - Did the misconduct occur?
- Investigations may vary, but must be:
 - Prompt
 - Adequate
 - Reliable
 - Impartial



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Title IX Investigator

- Title IX Coordinator can serve as the Title IX Investigator
- The Title IX Investigator cannot be the Decision Maker or the Informal Resolution Facilitator

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The Investigator

- The investigator must
- Be free of biases and conflicts of interest
 - Conduct the investigation– gather inculpatory and exculpatory evidence
 - Be trained on issues of relevance to create an investigative report that fairly summarizes relevant evidence
 - Write the report

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The Investigation

- Inculpatory evidence tends to support a determination that the respondent's *is* responsible for alleged conduct; evidence that tends to establish guilt
- Exculpatory evidence tends to support a determination that the respondent *is not* responsible for the alleged conduct; evidence that tends to exonerate

The investigation

- Parties have right to discuss allegations (no gag orders), gather evidence, identify witnesses, and other inculpatory and exculpatory evidence
- The District can also present evidence: “[T]he Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence...”

Standard of Evidence

- Title IX regulations require “preponderance of the evidence” or “clear and convincing evidence standard” 34 CFR § 106.45(b)(7)(i)
- California law requires “preponderance of the evidence” Ed. Code, § 67386
 - It is more likely than not that the fact occurred

Credibility Determinations

- Investigator may include credibility assessment but not determination of responsibility
- If an investigator’s credibility determination is actually a determination of responsibility, it violates § 106.45(b)(7)(i)

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Assess Witness Credibility – DFEH Guide's Factors

1. Inherent plausibility
2. Motive to lie
3. Corroboration
4. Extent an individual was able to perceive, recollect or communicate about the matter
5. Evidence of dishonesty

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Assess Witness Credibility – DFEH Guide's Factors

6. Habit/consistency
7. Inconsistent statements
8. Manner of testimony
9. Demeanor

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Evaluating the Evidence

- Report must fairly summarize relevant evidence
- The report may include recommended findings or conclusions
- Decision-maker cannot give deference to recommended findings
- Decision-maker has obligation to objectively evaluate relevant evidence

Preamble at p. 30308

Relevance

- Not defined in regulations
- Evidence having any tendency in reason to prove or disprove any allegation at issue (Cal. Evid. Code CFR § 210)
- Can rely on logic, common sense, experience or science

Relevance Considerations

Does the evidence:

- Indicate bias on the part of a witness
- Corroborate an allegation
- Provide motive/justification for an allegation
- Provide witness leads
- Provide evidence that might exonerate accused



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Relevance of Privileged Information

The District cannot use, seek disclose, or consider legally privileged information unless the party has waived the privilege voluntarily and in writing

- Attorney/Client, Marital, other privileges
34 CFR § 106.45(b)(1)(x)
- Doctor/Patient/Therapist (Medical Records)
34 CFR § 106.45(b)(5)(i)

Info deemed not relevant per September 4, 2020, Q&A Guidance



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Relevance of Sexual History

- Questions and evidence about Complainant's sexual predisposition or prior sexual behavior are not relevant
- Unless
 - Questions/evidence offered to prove someone other than Respondent committed the alleged conduct; or
 - Questions/evidence concern specific incidents of the Complainant's prior sexual behavior with respect to Respondent and offered to prove consent.
34 CFR § 106.45(b)(6)(i)-(ii)
 - But, Ed Code section 67386, consent can be revoked at any time, past relationship by itself does not indicate consent

Consent

- Affirmative consent standard (Ed. Code § 67386)
 - Affirmative, conscious, and voluntary agreement to engage in sexual activity

Relevancy Determinations

Initial steps for determining relevancy of evidence in Title IX Sex Harassment Complaint Process

- Step 1: Review the evidence being offered
- Step 2: Consider the allegations
- Step 3: Ask yourself whether the evidence being offered has the potential to prove/exonerate/explain or disprove an incident under investigation

Case Study

The mother of the minor student complainant provides the investigator with medical records and a written waiver and release to use the records, to show the student told the campus medical center staff about the sex assault and later about depression and anxiety from the alleged incident. The student complainant objects.

Yes, No, or Maybe

Can the investigator consider this information?

Evidence Review

Complainant and Respondent:

- At least 10 days time
- Right Inspect and review evidence *directly related to the allegations (note this is different from relevance)*
- Right to submit written response to evidence
- Investigator must consider response before completing report

34 CFR §106.45 (b)(5)(vi)

Case Study

After reviewing the evidence, which includes the medical reports produced by the minor complainant's mother, the respondent's advisor, who is a lawyer, requests that an expert be interviewed, a medical doctor, who will provide his opinion that medication taken by the student complainant affects memory.

Yes, No, Maybe

Are parties allowed to produce expert witnesses to provide evidence?

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Investigative Report

- Introduction / statement of scope of investigation
- Methodology and persons interviewed (taped?)
- Chronology: factual and procedural steps (complaint, notices, interviews)
- Summarize allegations
- Factual findings (depends on policy)
- Relevant evidence
- Credibility assessments (depends on policy) but never determinations of fault
- Summarize policies allegedly violated
- List attachments

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Investigative Report

- Must provide final investigative report to Parties at least 10 days prior to hearing
- Parties must have opportunity to review and provide written response

34 CFR §106.45 (b)(5)(vi) and (vii)

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How parties may raise bias or other challenges to report:

Report on its face reveals that investigation was not thorough, neutral, or fair :

- Key witness identified not interviewed
- Key document provided not reviewed
- Key questions not asked
- Findings don't seem supported by evidence

Case Study: Supportive Measures

After the Parties resolved a complaint of sexual harassment through informal resolution and fully executed the resolution agreement, the Complainant asked the Title IX Coordinator whether they were still able to have a campus escort, which was a supportive measure the District provided after it received the Complainant's formal complaint. Because the complaint process is closed, the District can no longer offer supportive measures.

Yes, No, Maybe?

Breakout Room Discussion



Case Study for Discussion

Gregory, a student volunteer in the Performing Arts Division, reports that he has been in a relationship with the Division Chair, Gina. According to Gregory, Gina threatened him by stating that if he ends the relationship or tells HR, she would post several compromising pictures she took of him on the Internet.



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Case Study for Discussion

Gregory says Gina made this threat when he was volunteering as an usher at the college's production of Goldilocks and that she was yelling at the time. He reported that two other student volunteers, Tracy and Morgan, were nearby when Gina made this threat. Gregory files a formal complaint.

Case Study for Discussion

1. Does this trigger the District's Title IX obligations? Why?
2. Should the District offer informal resolution? Why?
3. Should the District investigate? Why?
4. If the District initiates an investigation, what do you investigate?
 - a. Who should be interviewed?
 - b. List three examples of relevant evidence and irrelevant evidence
5. Must the District share the evidence collected? Why?

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Questions?



Next Title IX Training Series

- Part 3
 - Hearing
 - Determination of Responsibility
 - Discipline



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Thank you!

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