

POLICY UPDATE

*DISCUSSING TITLE IX AND OTHER RECENT
REVISIONS TO CSBA SAMPLE POLICIES*

AUGUST 12, 2020



TOPICS FOR DISCUSSION

- Federal Title IX Regulations
- Special Education
- Infectious Diseases
- Q & A

TODAY'S PRESENTERS

- Bode Owoyele - Associate General Counsel, CSBA
- Bob Tuerck – Asst. Exec. Director: Policy & Governance Technology, CSBA
- Barbara Laifman – Policy Manual Consultant, CSBA/School Board President, Oak Park USD

FEDERAL TITLE IX REGULATIONS

Policy Implications for California's Elementary
and Secondary Schools



TITLE IX REGULATIONS

- When do the regulations take effect
- Unless...

WHAT ARE TITLE IX REGULATIONS

- Definition of “sexual harassment” for Title IX purposes
- Response to allegations of sexual harassment
- Grievance procedure for resolving sexual harassment allegations
- Obligations for schools

SEXUAL HARASSMENT UNDER TITLE IX

According to **34 CFR 106.30**, sexual harassment is defined as conduct on the basis of sex that satisfies any of the following:

1. A school employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to a school's education program or activity

CONTINUED...

SEXUAL HARASSMENT UNDER TITLE IX

CONTINUED...

According to **34 CFR 106.30**, sexual harassment is defined as conduct on the basis of sex that satisfies any of the following:

3. “Sexual assault” as defined in 20 USC 1092(f)(6)(A)(v), “dating violence” as defined in 34 USC 12291(a)(10), “domestic violence” as defined in 34 USC 12291(a)(8), or “stalking” as defined in 34 USC 12291(a)(30)

RESPONSE TO SEXUAL HARASSMENT ALLEGATIONS (34 CFR 106.44)

- When a school has actual knowledge of an allegation of sexual harassment, it must respond promptly in a manner that is not deliberately indifferent
- Duty to respond exists whether a formal complaint is filed or not
- Duty to respond involves treating complainant and respondent equitably

NOTES ABOUT EQUITABLE TREATMENT

- **For Complainants** – Includes offering of supportive measures, considering complainant's wishes, informing complainant of availability of supportive measures whether or not formal complaint is filed, and process for filing formal complaint

NOTES ABOUT EQUITABLE TREATMENT

- **For Respondent** – Following the grievance process before disciplinary sanction or other action that is not a supportive measure can be imposed against respondent.
 - This does not preclude removal of respondent on an emergency basis.
 - However, before such removal, an individualized safety and risk analysis must be undertaken which resulted in a determination of an immediate threat to the physical health or safety of any student or other individual that justifies the removal. In such circumstances, the respondent must be provided an opportunity to challenge the decision immediately following the removal.

GRIEVANCE PROCESS - BASIC ELEMENTS (34 CFR 106.45(B)(1))

Requires the following:

- a. Equitable treatment of parties
- b. Objective evaluation of all available evidence
- c. Title IX coordinator, investigator, decision-maker, etc., not have conflict of interest against complainants or respondents generally or against the particular complainant or respondent
- d. Presumption that respondent is not responsible for alleged conduct until determination is made at the conclusion of the grievance process

CONTINUED...

GRIEVANCE PROCESS - BASIC ELEMENTS (34 CFR 106.45(B)(1)) CONTINUED...

- e. Reasonably prompt time frames for conclusion of grievance process
- f. Description or list of possible disciplinary sanctions or remedies following determination of responsibility
- g. Standard of evidence for determining responsibility – preponderance of evidence or clear and convincing evidence
- h. Procedures and permissible reasons for appeal by either party
- i. Description of supportive measures available to either party
- j. Not allow or use evidence or questions that constitute or seek disclosure of legally privileged information, unless waived

GRIEVANCE PROCESS – NOTICE REQUIREMENTS (34 CFR 106.45(B)(2))

When formal complaint is received, written notice must be provided to all known parties:

- a. Notice of the grievance process, including any informal resolution process.
- b. Notice of the allegations which must include the following:
 - i. Sufficient details known at the time
 - ii. Sufficient time to allow the respondent to prepare a response before any initial interview
 - iii. Statement that respondent is presumed not responsible for alleged conduct and that responsibility will be determined at the conclusion of the grievance process

CONTINUED...

GRIEVANCE PROCESS – NOTICE REQUIREMENTS (34 CFR 106.45(B)(2))

CONTINUED...

- b. Notice of the allegations (continued) – must also include:
 - iv. Information that parties have a right to an advisor of their choice (may be an attorney) who may inspect and review evidence
 - v. Information regarding any provision in the school’s code of conduct that prohibits knowingly making false statements or providing false information in the grievance process

- c. If during investigation, the school decides to investigate allegations about a complainant or respondent that were not included in the original written notice, written notice of the additional allegations must be provided to the known parties.

DISMISSAL OF FORMAL COMPLAINT (34 CFR 106.45(B)(3))

Mandatory Dismissal – Formal complaint must be dismissed:

- a. When, even if the conduct alleged is proved, it would not constitute sexual harassment as defined in 34 CFR 106.30
- b. When the conduct alleged did not occur in the school's education program or activity
- c. When the conduct alleged did not occur against a person in the United States

NOTE: Dismissal does not preclude action under another law or policy

DISMISSAL OF FORMAL COMPLAINT (34 CFR 106.45(B)(3))

Discretionary Dismissal – A formal complaint may be dismissed at any time during investigation or hearing:

- a. If complainant notifies the Title IX Coordinator in writing of their wish to withdraw the formal complaint or an allegation
- b. If the respondent's enrollment or employment ends
- c. If specific circumstances prevent the gathering of evidence sufficient to reach a determination as to the formal complaint or an allegation in it

NOTE: Whenever dismissal occurs, whether due to a mandatory or permitted reason, written notice of the dismissal and the reason(s) must be sent simultaneously to the parties

INVESTIGATIONS (34 CFR 106.45(B)(5))

In investigating a formal complaint, a school must:

- a. Ensure that the burden of proof and of gathering evidence to reach a determination rests on the school, not complainant or respondent
- b. Provide both parties an equal opportunity to present witnesses and evidence
- c. Not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence

CONTINUED...

INVESTIGATIONS (34 CFR 106.45(B)(5))

CONTINUED...

In investigating a formal complaint, a school must:

- d. Provide the parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice, who may or may not be an attorney, and not limit the choice or presence of **an** advisor for either complainant or respondent. However, restrictions as to the extent of participation of advisors are permitted, as long as the restrictions apply equally to both parties.

CONTINUED...

INVESTIGATIONS (34 CFR 106.45(B)(5))

CONTINUED...

In investigating a formal complaint, a school must also:

- e. Provide to a party whose participation is invited or expected written notice of date, time, location, participants, and purpose of any investigative interview, hearing, or other meeting with sufficient time for them to prepare to participate
- f. Provide both parties and their advisors, if any, equal opportunity to review evidence directly related to the allegations in the formal complaint prior to the completion of the final investigation report and in time to give the parties at least 10 days to prepare a written response which the investigator must consider in completing the investigation report.

CONTINUED...

INVESTIGATIONS (34 CFR 106.45(B)(5))

CONTINUED...

In investigating a formal complaint, a school must also:

- g. Prepare an investigative report that fairly summarizes the relevant evidence and send the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility.

HEARINGS (34 CFR 106.45(B)(6)(II))

- a. Hearing not required for elementary and secondary schools
- b. After the investigative report has been sent to the parties and before reaching a determination regarding responsibility, the school, with or without a hearing, must provide each party an 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.

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HEARINGS (34 CFR 106.45(B)(6)(II))

CONTINUED...

- c. With or without a hearing, questions or evidence of complainant's sexual predisposition or prior sexual behavior are generally not relevant.

DETERMINATION REGARDING RESPONSIBILITY (34 CFR 106.45(B)(7))

A decision-maker, who cannot be the investigator or Title IX Coordinator, must apply the school's adopted standard of evidence and issue a written determination of responsibility, that:

- a. Identifies the allegations that potentially constitute sexual harassment as defined in 34 CFR 106.30
- b. Describes the procedural steps taken from the receipt of the complaint to the determination
- c. Includes findings of fact supporting the determination
- d. Includes conclusions regarding the application of the school's code of conduct to the facts

CONTINUED...

DETERMINATION REGARDING RESPONSIBILITY (34 CFR 106.45(B)(7))

CONTINUED...

The written determination must also:

- e. Include a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions to be imposed on the respondent, and whether remedies designed to restore or preserve complainant's equal access to the education program or activity will be provided to complainant
- f. Include procedures and permissible bases for appeals

APPEALS (34 CFR 106.45(B)(8))

CONTINUED...

Both parties must be offered the right to appeal a determination of responsibility and dismissal of a complaint based on any of the following:

- a. Procedural irregularity that affects the outcome of the matter
- b. New evidence that could affect the outcome of the matter, but which was not reasonably available at the time the determination regarding responsibility or dismissal was made
- c. Conflict of interest or bias involving the Title IX Coordinator, investigator, or decision maker that affected the outcome of the matter

APPEALS (34 CFR 106.45(B)(8))

CONTINUED...

Other Requirements

The school must:

- a. Notify the other party in writing when an appeal is filed, and must implement the appeal procedures equally for both parties
- b. Ensure that the appeal is decided by a person who is not the decision-maker for the determination regarding responsibility or dismissal, the investigator, or the Title IX Coordinator
- c. Ensure that the appeal decision-maker is trained as required in 34 CFR 106.45(b)(1)(iii) and complies with the specified standards

APPEALS (34 CFR 106.45(B)(8))

CONTINUED...

Other Requirements

The school also must:

- d. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome of the matter
- e. Issue a written decision describing the result of the appeal and the rationale for the result
- f. Provide a written decision simultaneously to both parties

WHAT THESE MEAN FOR SCHOOLS

- Review and revision of policies
 - AR 4030 – Nondiscrimination in Employment
 - BP/AR 4119.11/4219.11/4319.11 - Sexual Harassment
 - AR 4119.12/4219.12/4319.12 - Title IX Sexual Harassment Complaint Procedures (New)
 - AR 5145.3 – Nondiscrimination/Harassment
 - BP/E 5145.6 – Parental Notifications
 - BP/AR 5145.7 – Sexual Harassment
 - AR 5145.71 – Title IX Sexual Harassment Complaint Procedures (New)

WHAT THESE MEAN FOR SCHOOLS

- Review and revision of implementation practices
 - Staffing – Title IX Coordinator
 - Professional Development and Training
- Consultation with legal counsel

SPECIAL EDUCATION



6159 – INDIVIDUALIZED EDUCATION PROGRAM

- NEW LAW (SB 98, 2020)
 - Requires the IEP to describe the means by which the IEP will be provided under emergency conditions in which instruction and/or services cannot be provided to the student at school or in person for more than 10 school days.

6159 – INDIVIDUALIZED EDUCATION PROGRAM

- NEW LAW (AB 947, 2019)
 - Authorizes districts to consider elements of the "expanded core curriculum," as defined, when developing an IEP for a student who is blind, has low vision, or is visually impaired,
 - Establishes requirements for orientation and mobility evaluations conducted for such students.

6159 – INDIVIDUALIZED EDUCATION PROGRAM

- NEW LAW (AB 605, 2019)
 - Requires districts to provide assistive technology devices for use in a student's home or other setting when required by the student's IEP
 - Requires such students be given continued access to assistive technology devices for up to two months after transferring out of the district.

6159.1 – PROCEDURAL SAFEGUARDS FOR SPECIAL EDUCATION

- NEW STATE REGULATIONS (Register 2020, No. 21)
 - Establishes a complaint process, separate from UCP, for complaints alleging noncompliance with federal or state laws related to the provision of FAPE
 - Regulation also updated to clarify that due process complaints should be filed with the state Office of Administrative Hearings - generally within 2 years of the alleged violation

6159.1 – PROCEDURAL SAFEGUARDS FOR SPECIAL EDUCATION

➤ NEW LAW (AB 1172, 2019)

- Requires districts to verify the NPS/A provides staff training in the use of practices and interventions specific to the unique behavioral needs of student
- Policy also reflects the requirement for the district to pay the full amount of the school's tuition or fees

6159.2- NONPUBLIC, NONSECTARIAN SCHOOL AND AGENCY SERVICES FOR SPECIAL EDUCATION

- NEW LAW (AB 1172, 2019)
 - Regulation updated to include maximum term of the master contract between the district and NPS/A, and include the ability to terminate the contract for cause with 20 days' notice
 - Regulation includes new section for "On-Site Visits"
 - Requires on-site visit of the first time district places a student at the NPS/A
 - Requires annual on-site visit to review the services, facilities, and student's progress

INFECTIOUS DISEASES



5141.22 – INFECTIOUS DISEASES

- Why Update Board Policy and Administrative Regulation 5141.22 – Infectious Diseases?
 - Current Circumstances
 - Long Term Preparation
 - New Law

5141.22 – INFECTIOUS DISEASES

- New Law: AB 262 (Ch. 798, Statutes of 2019)
 - Adds Health and Safety Code 120175.5
 - Requirements for Local Health Officers
 - Requirements for Districts

5141.22 – INFECTIOUS DISEASES

- Infectious Diseases: Development and Updates to Emergency and Disaster Preparedness Plans
 - Nondiscriminatory and Promotion of Equity
 - Components to include
 - Health Experts

5141.22 – INFECTIOUS DISEASES

- Policy Also Includes:
 - Universal Precautions
 - Protocol to Follow for Students with Infectious Diseases
 - Clarification Regarding Allowable Exclusions
 - Requirement to Inform Local Health Officials

5141.22 – INFECTIOUS DISEASES

- Administrative Regulation
 - Components of a Prevention and Mitigation Plan
 - Universal Precautions in the Classroom
 - Laboratory Safety and Universal Precautions

5141.22 – INFECTIOUS DISEASES

- Valuable Resources
 - U.S. Department of Health and Human Services' School District (K-12) Pandemic Influenza Planning Checklist.
 - California Department of Education's Science Safety Handbook, 2014.

QUESTIONS



RESOURCES

Relentless Advocacy. Consistent Leadership. Indispensable Research.

California School Boards Association

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LEGAL WEBINAR Reopening/reclosing public schools during the COVID-19 pandemic - Part 1
California School Boards Association | 146 views | 1 day ago
Part 1 of the webinar series will feature top education law attorneys from CSBA's premier affiliate law firms discussing the legal effect on local educational agencies of the orders and guidelines...

Making sense of the 2020 budget ▶ PLAY ALL
CSBA releases series comprising of five webinars detailing the stages of this year's budget and the effects it will have on California schools.

COVID-19 Webinar Series ▶ PLAY ALL
CSBA is committed to providing updates and tools that help navigate the COVID-19 crisis. Please join us for a series of recorded webinars on vital topics during school closures due to COVID-19.

youtube.com/csbavideo

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Updates Resources Media Ask Questions FAQ Advocacy Kit Surveys

COVID-19 News and Resources

Updates Resources Ask Questions FAQ Advocacy Kit

CSBA would like to commend California's education leaders for confronting the challenges presented by the novel coronavirus (COVID-19). We understand these are demanding times with innumerable questions and few easy answers. As the organization representing nearly 1,500 school districts and county offices of education, we hope to provide -- to the extent possible -- clarity, resources and relief. Thank you for sharing your knowledge, passion and concern; these are some of the greatest assets we have as we care for and educate California's 6.2 million public school students during a time of profound crisis.

Recent Updates

June

- 6/9/20: New CSBA guidance for reopening schools addresses challenges faced by governance teams. (Click here to view summary)
- 6/8/20: On the CSBA Blog: State releases health and safety guidance for schools; funding needed for implementation
- 6/8/20: CDC releases guidebook as schools plan how to reopen campuses
- 6/5/20: State releases health and safety guidance for schools; funding needed for implementation
- 6/4/20: Update to California Department of Education FAQ on Education Substitution fund under the CARES Act
- 6/4/20: On the CSBA Blog: Legislature agrees on budget that rejects K-12 education cuts, counts on federal aid
- 6/3/20: On the CSBA Blog: CCEE webinar offers distance learning needs, strategies for small districts

NEW CSBA Schools Reopening Guidance

CSBA's new report, *The Uncertain Road Ahead: Reopening Schools in the Time of COVID-19* provides a robust examination of what it will take to reopen schools safely and effectively.

csba.org/coronavirus

Register for our upcoming webinars at: www.csba.org/webinars



**THANK YOU FOR JOINING US
TODAY.**

