

# Contra Costa Community College District

**TITLE IX/TITLE 5 SEXUAL HARASSMENT  
TRAINING ON THE LAW, POLICIES AND PROCEDURES**



**Law Office of Marleen L. Sacks ©**

# Agenda

- ▶ Requirements of New Title IX Regulations
- ▶ Requirements of revisions to Title 5
- ▶ Revisions to Student Code of Conduct 3027 provisions
- ▶ Revisions to HR Procedure 1040.07
- ▶ New Administrative Procedure 2002
- ▶ Investigation of sexual harassment complaints, determination of whether they fall under Title IX, and “supportive measures”
- ▶ Preparing investigation reports
- ▶ Hearings under Title IX and Student Code of Conduct
- ▶ Appeals of Findings
- ▶ Additional due process requirements for students and employees

# Law Requires Publication of Training Materials On-Line

Section 106.45(b) of the 2020 Final Title IX Rules require the sharing of “[a]ll materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.”

These materials will be published on line for your reference, and reference by students, staff, and other stakeholders.

# What Title IX Says

No person in the United States shall, on the basis of sex,

- ▶ -- be excluded from participation in,
- ▶ -- be denied the benefits of, or –
- ▶ be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681





# The New Title IX Regulations

- Published in the Federal Register on May 19, 2020 (34 CFR Part 106)
- Effective date: August 14, 2020
- (Does not apply retroactively)
- The new federal regulation require significant changes in how institutions investigate and resolve allegations of sex discrimination/sex harassment
- In response, California adopted changes to Title 5 regulations (which apply even when Title IX doesn't)
- Rules are in effect now. More changes may be coming, but that is likely years away.

# Title IX Training Requirements

- ▶ For Title IX coordinators and those serving on hearing panels involving Title IX sexual harassment complaints, individuals will receive training on:
- ▶ (1) the definition of sexual harassment under Title IX;
- ▶ (2) the scope of the District's education program or activity;
- ▶ (3) how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution process, as applicable;
- ▶ (4) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- ▶ (5) issues of relevance and how to apply the rape shield protections for complainants;
- ▶ (6) any technology used at a live hearing.

# When Does Title IX Apply?

- ▶ Sexual harassment is defined as “conduct on the basis of sex that satisfies one more of the following” categories:

**Quid pro quo sexual harassment**, meaning that “an employee of the recipient [school] conditions the provision of an aid, benefit, or service of the recipient [school] on an individual’s participation in unwelcome sexual conduct”;

Hostile educational environment, meaning “unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies a person equal access** to the recipient[] [school’s] education program or activity”;

**Clery Act violations, including sexual assault** as defined in 20 U.S.C. 1092(f)(6)(A)(v), dating violence 34 U.S.C. 12291 (a)(10), domestic violence 34 U.S.C. 12291(a)(8), and stalking as defined in 34 U.S.C. 12291(a)(30).

# What does “Severe AND Pervasive” Mean?

“ ‘**Severe**’ means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass.” (Kollaritsch v. Michigan State University Board of Trustees).

**Pervasiveness** “means ‘systemic’ or ‘widespread,’” meaning “multiple instances of harassment; one incident of harassment is not enough.” (Kollaritsch v. Michigan State University Board of Trustees).

It is “‘unlikely that Congress would have thought’” that a school could be liable for “‘a single instance of sufficiently severe one-on-one peer harassment.’” Davis, 526 U.S. at 652–53).

The harassment must also be “**objectively offensive**”: “[t]he victim’s perceptions are not determinative,” and instead offensiveness “‘is to be judged by reference to a reasonable [person] at whom the comments were made.’” (Kollaritsch).



# Sexual Harassment Under Title IX – Very Narrow Application

- ▶ New law makes definition of “sexual harassment” under Title IX apply very narrowly
- ▶ Title IX requirements will apply only to the most egregious and serious forms of sexual harassment
- ▶ If you believe, upon initial intake, that you are dealing with Title IX sexual harassment (e.g. quid pro quo, sexual assault), notify District HR/District Title IX officer ASAP to obtain further guidance, and legal guidance if deemed appropriate, on how to proceed.

# Jurisdiction for Title IX

- ▶ Limited to circumstances in the United States – does not apply to study abroad programs
- ▶ Education program or activity includes:
  - Locations, events, or circumstances
  - whether on campus or off campus
  - over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment

§ 106.44(a)

# Jurisdiction for Non-Title IX Sexual Harassment/Discrimination

Standards of Student Conduct apply to off-campus conduct when the effects of the off-campus conduct create a hostile environment or impact a substantial District/college interest. A substantial District/college interest may include:

- ▶ a. • Any action that constitutes a criminal offense as defined by law. This includes, but is not limited to, a single or repeated violation(s) of any local, state, or federal criminal statute or ordinance;
- ▶ b. • Any situation where it appears that a student may present a danger or threat to the health or safety (including emotional safety) of themselves or others;
- ▶ c. • Any situation that significantly impinges upon the rights, property, or achievements of self or others, or that significantly breaches the peace or causes significant disruption; and
- ▶ d. • Any situation that is detrimental to the educational interest of the District/college.

(Student Services Procedure 3027)

# When do you have a duty to act Under Title IX?

- ▶ Actual Knowledge
- ▶ “Actual Knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient...”

§ 106.30

# Response Obligations Under Title IX

Once the institution has actual knowledge the Title IX Coordinator must:

1. promptly contact the complainant to discuss the availability of supportive measures,
2. consider the complainant's wishes with respect to supportive measures
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.

§ 106.44(a)



# Additional Title IX Response Obligations

If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.



# Dismissal

## **Mandatory Dismissal**

If the conduct alleged in the Formal Complaint:

- ▶ would not constitute sexual harassment even if proved,
- ▶ did not occur within the recipient's program or activity,
- ▶ did not occur against a person in the United States, or
- ▶ complainant is not participating in the programs or activities (e.g. individual is no longer a student or an employee);

But, "the Rule permits Title IX Coordinators to sign a formal complaint regardless of whether a complainant is 'participating or attempting to participate' in the school's education program or activity." (9/4/2020 Q&A, Question 5)

Dismissal does not preclude action under another provision of the recipient's code of conduct.

§ 106.45(b)(3)

# Discretionary Dismissal

If one (or more) of the following conditions is not met, the Title IX Coordinator may dismiss the Formal Complaint for Title IX purposes:

- ▶ Complainant withdraws Formal Complaint or allegations in writing;
- ▶ Respondent is no longer enrolled or employed by the institution; or
- ▶ Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination regarding responsibility.

# Decision That Title IX Does Not Apply Must Be Documented

- ▶ When a decision is made that Title IX does not apply (either under mandatory or discretionary dismissal guidelines), this decision **MUST** be documented and notice must be sent to both complainant and respondent, and both must be given the option to appeal.
- ▶ This is true even if the District intends to investigate the complaint as a non-Title IX sexual harassment complaint.
- ▶ Seek guidance from Title IX Coordinator on wording of any “dismissal” notices.

# Applicable District Policies and Procedures

- ▶ Human Resources Procedures 1040.07
- ▶ Student Services Procedure 3027
- ▶ Administrative Regulation 2002





# Human Resources Procedure 1040.07

HR Procedure 1040.07 has a DIFFERENT standard for defining sexual harassment:

“Sexual Harassment” in addition to the above, 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 workplace or in the educational setting, and includes but is not limited to:

\* Making unsolicited written, verbal, physical, and/or visual contacts with sexual overtones. (Examples of sexual harassment which appear in a written form include, but are not limited to: suggestive or obscene letters, notes, and invitations. Examples of verbal and visual sexual harassment include, but are not limited to: leering, gestures, display of sexually aggressive objects or pictures, cartoons, or posters.)

# HR Procedure definition of sexual harassment (cont.)

- \* Continuing to express sexual interest after being informed that the interest is unwelcome;
- \* Making reprisals, threats of reprisal, or implied threats of reprisal following a rebuff of harassing behavior. The following are examples of this type of sexual harassment within the work place or educational setting: implying or actually withholding grades earned or deserved; suggesting a poor performance evaluation will be prepared; or suggesting a scholarship recommendation or college application will be denied;
- \* Engaging in explicit or implicit coercive sexual behavior within the work environment which is used to control, influence, or affect the employee's career, salary, and/or work environment.

# HR Definition of Sexual Harassment (cont.)

- \* Engaging in explicit or implicit coercive sexual behavior within the educational environment that is used to control, influence, or affect the educational opportunities, grades, and/or learning environment of a student.
- \* Offering favors or educational or employment benefits, such as grades or promotions, favorable performance evaluations, favorable assignments, favorable duties or shifts, recommendations, reclassifications, etc., in exchange for sexual favors.

Sexually harassing conduct can occur between people of the same or different genders. The standard for determining whether conduct constitutes sexual harassment is whether a reasonable person of the same gender as the victim would perceive the conduct as sufficiently offensive to negatively impact the academic or work environment.

# For Students Only – Affirmative Consent

It is a violation of the Student Code of Conduct to engage in sexual activity without “affirmative consent.” The Code prohibits:

“Sexual misconduct, including sexual activity in the absence of affirmative consent. Sexual contact without affirmative consent is a form of sexual misconduct as is any intentional sexual touching with any object by a person upon another person, that is without affirmative consent and/or by force. Sexual contact includes intentional contact with the breast, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; or any other intentional bodily contact in a sexual manner, as well as non-consensual sexual intercourse, including vaginal or anal penetration by a penis, object, tongue, or finger, or oral copulation (mouth to genital contact), no matter how slight the penetration or contact.”

Student Services Procedure 3027

# Other sexual misconduct prohibited by Student Code of Conduct

- ▶ Sexual assault, defined as actual or attempted sexual contact with another person without that person's consent, regardless of the victim's affiliation with the community college, including, but not limited to, any of the following:
  - ▶ a. Intentional touching of another person's intimate parts without that person's consent or other intentional sexual contact with another person without that person's consent.
  - ▶ b. Coercing, forcing, or attempting to coerce or force a person to touch another person's intimate parts without that person's consent.
  - ▶ c. Rape, which includes penetration, no matter how slight, without the person's consent, of either of the following:
    - ▶ 1. The vagina or anus of a person by any body part of another person or by an object.
    - ▶ 2. The mouth of a person by a sex organ of another person.



# Other sexual misconduct prohibited by Student Code of Conduct

Sexual exploitation, defined as a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, regardless of the victim's affiliation with the community college, including, but not limited to, any of the following:

- ▶ a. Prostituting another person.
- ▶ b. Recording images, including video or photograph, or audio of another person's sexual activity, intimate body parts, or nakedness without that person's consent.
- ▶ c. Distributing images, including video or photograph, or audio of another person's sexual activity, intimate body parts, or nakedness, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure and objected to the disclosure.
- ▶ d. Viewing another person's sexual activity, intimate body parts, or nakedness in a place where that person would have a reasonable expectation of privacy, without that person's consent, and for the purpose of arousing or gratifying sexual desire.

# Stalking definition – SSP 3027

Stalking, which is defined as engaging in a repeated course of conduct directed at a specific person that would cause a reasonable person to fear for their or others' safety or to suffer substantial emotional distress. For the purpose of this definition, course of conduct means two or more acts, including, but not limited to acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveys, threatens, or communicates to or about a person, or interferes with a person's property; reasonable person means a reasonable person under similar circumstances and with the same protected status as the victim; substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

# New AP 2002

- ▶ Prohibits sexual assault and provides definitions of sexual assault, dating violence, domestic violence, stalking, affirmative consent, sexual violence, sexual exploitation, and sexual battery.
- ▶ Provides special procedures for victims of sexual abuse, including providing of “supportive services,” (e.g. transport to hospital, mental health services), options for investigation, notice to police, and other relevant information.
- ▶ Special protections against being disciplined for victims who report allegations of sexual abuse;
- ▶ Application of the “affirmative consent” standard
- ▶ Both the complainant and respondent must be notified of outcome of disciplinary proceedings involving sexual abuse, and when outcome becomes final

# Education/Orientation Requirements Under AP 2002

- The Title IX Coordinator/HR Office, or designee, shall:

Provide to employees and students, **as part of each campus' established on-campus orientation program**, education and prevention information about domestic violence, dating violence, sexual assault, or stalking.

The information shall be developed in collaboration with campus-based and community-based victim advocacy organizations, and shall include sexual assault prevention strategies including empowerment programming for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction.

# College Website Requirements per AP 2002

Title IX Coordinator or designee must:

Post sexual violence prevention and education information on the campus website regarding domestic violence, dating violence, sexual assault and stalking.





# Law Enforcement Requirements under AP 2002

The Title IX Officer or Designee must:

“Maintain compliance with the Clery Act and Kristin Smart Campus Safety Act through updated written agreements with local law enforcement agencies regarding the investigation and operational responsibilities over sexual assaults and other assaults on District property or on an off-campus site or facility maintained by the District or on grounds or facilities maintained by a student organization or at a District-sponsored activity on non-District property. Such agreements shall be revised and updated pursuant to law.”

# Required response to sexual harassment under HR Procedure 1040.07

- a. Undertake efforts to informally resolve the charges;
- b. Provide the complainant with a copy of HR Procedure 1040.07.
- c. Advise the complainant that he or she need not participate in informal resolution;
- d. Notify the person bringing the charges of his or her right to file a formal complaint and explain the procedure for filing a formal complaint; and
- e. Advise the complainant that he or she may file a complaint with the Office of Civil Rights of the U.S. Department of Education (OCR).
- f. If the complaint is employment-related, the complainant should also be advised that he or she may file a complaint with the Department of Fair Employment and Housing (DFEH).



# Informal resolution

“The purpose of the informal resolution process is to allow an individual who believes she/he has been unlawfully discriminated against or sexually harassed to resolve the issue through a mediation process rather than the formal complaint process. Typically, the informal process will be invoked when there is a simple misunderstanding or the complainant does not wish to file a formal complaint. Resolution of an informal complaint may require nothing more than a clarification of the misunderstanding or an apology from the respondent and an assurance that the offending behavior will cease. The district officer should advise the complainant of his or her rights and responsibilities under both the formal and informal processes. If the complainant declares his or her preference for the informal process, the responsible district officer should present the complainant with a document that describes the informal/formal process that contains the basics of complainant’s allegations of unlawful discrimination. This document should clearly indicate that the complainant opted for the informal resolution process and should be signed and dated by the complainant. The informal resolution process will not be made a predicate to the process and investigation of a formal complaint. If a complaint is filed, an investigation must be completed within the time required unless it is voluntarily rescinded by a complainant as a result of a successful informal resolution.”

# Need to document resolution of sexual misconduct complaints

Any disciplinary action imposed on a student, including oral warnings, must be documented in writing via written notice to the student, and in the student's records, as outlined below. Where the conduct of the student appears to have caused, will cause, or may cause an ongoing threat to others, including students or staff, the District shall consider any measures that may be appropriate to protect those individuals, including written directives to the student, seeking of a temporary restraining order, report to the police, etc.

Where the alleged misconduct involves violation of the District's anti-discrimination and/or sexual harassment/sexual assault policies, the alleged victim must be provided with a copy of the District's complaint policies and procedures.

In evaluating the type of discipline to be imposed, the President's designee must review the student's past disciplinary record to determine whether the student has been previously disciplined in the past, particularly for similar offenses. Where the student has been disciplined in the past for similar offenses, a more severe consequence must be imposed.

# Timelines for filing complaint

- ▶ The complaint must be filed within one year of the date of the alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts underlying the allegation of unlawful discrimination or harassment.
- ▶ In complaints involving employment, the complaint must be filed within 180 days of the date of the alleged unlawful discrimination or unlawful harassment, or 90 days after expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged violation after the 180 days expired.

BUT.....



# Timelines for filing complaint (cont.)

You SHOULD consult with HR regarding investigation of complaints beyond the timelines, particularly with respect to serious allegations, e.g.

1. Student alleges instructor molested him when he was 17 years old, and it has taken him years to muster the courage to report it;
2. Employee alleges she was sexually harassed by a supervisor three years ago, but he is being considered for a promotion, prompting her to decide she has waited long enough.

Note: For Title IX Allegations – There is no set time limit. • “[The Department] decline[s] to impose a requirement that formal complaints be filed ‘without undue delay’”

Doing so would be “unfair to complainants” because “for a variety of reasons complainants sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment” 85 FR 30127

# Use of formal complaint form

- ▶ Provide complainant with formal complaint form...

BUT

- ▶ Note that verbal complaints must be processed as well. Failure to complete a formal complaint is not a defense to failing to process/investigate an otherwise valid complaint.



# Requirements for Oral Complaints

- ▶ “The Title IX officer receiving such a complaint will document the fact that the complainant declined to file a formal written complaint, and shall reduce the oral complaint to writing, and ensure the accuracy of the written summary with the complainant.”



# Supportive Measures Required Under Title IX

- ▶ Non-disciplinary, non-punitive individualized services;
- ▶ offered as appropriate, as reasonably available, and without fee or charge;
- ▶ designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party;
- ▶ including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)



# Process for Supportive Measures

- ▶ • Flexibility to determine how to process requests for supportive measures
- ▶ • The burden of arranging & enforcing supportive measures remains on the institution not on a party
- ▶ • Title IX Coordinator must remain responsible for coordinating effective implementation . . .

Title IX Coordinator must:

- Serve as the point of contact for parties;
- Ensure that the burden of navigating administrative requirements does not fall on the parties;

Title IX Coordinator may: Rely on other campus offices/administrators to actually provide supportive measures



# What are Supportive Measures?

- ▶ Non-disciplinary, non-punitive individualized services;
- ▶ offered as appropriate, as reasonably available, and without fee or charge;
- ▶ to the complainant or the respondent;
- ▶ **designed to restore or preserve equal access** to the recipient's education program or activity without unreasonably burdening the other party;
- ▶ including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)

# To Whom and When?

## ► **The Complainant**

- Must be discussed with/offered to every complainant promptly upon receipt of actual notice (including a report) § 106.44(a); 85 FR 30180
- “Section 106.44 obligates a recipient to offer supportive measures to every complainant . . . .” 85 FR 30266

If you do not provide supportive measures to the Complainant, you must document why that response was not clearly unreasonable in light of the known circumstances (e.g. because complainant did not wish to receive supportive measures or refused to discuss measures with the Title IX Coordinator”)

85 FR 30266

# To Whom and When (Cont.)

- ▶ Discretion to continue providing measures after a finding

## **The Respondent**

- ▶ • “There is no corresponding obligation to offer supportive measures to respondents [at reporting], rather, recipients may provide supportive measures to respondents.”

85 FR 30266



# Examples of Supportive Measures

- ▶ No-contact directives, restraining orders
- ▶ Academic accommodations
- ▶ Medical and mental health services, including counseling
- ▶ Assistance in arranging for alternative College employment arrangements and/or changing work schedules
- ▶ Providing an escort to ensure that the student can move safely between school programs and activities
- ▶ Transportation accommodations, such as shuttle service, cab voucher, or parking arrangements to ensure safety and access to other services
- ▶ Assistance identifying an advocate to help secure additional resources or assistance including off-campus and community advocacy, support, and services
- ▶ Final discipline against respondent is NOT a “supportive measure”

§ 106.45(a)(3)

# What does “Non-Disciplinary” Mean?

- ▶ Institutions cannot “treat a Respondent as though accusations are true before the accusations have been proved” 85 FR 30267
- ▶ “The final regulations prohibit a recipient from taking disciplinary action, or other action that does not meet the definition of a supportive measure, against a respondent without following a [compliant] grievance process” 85 FR 30267, n.1097
- ▶ “Does not bar all measures that place any burden on a respondent” 85 FR 30267; 85 FR 30180 (or complainant).

Note: Immediate interim measures against student Respondent are permissible, provided Student Code of Conduct is followed.



# What does “Designed to Restore Access” Mean?

- ▶ It doesn't mean you actually HAVE to restore access. The measures need to be INTENDED to help restore access.
- ▶ The College still has discretion to offer supportive measures, but is protected against “unfair imposition of liability” (e.g. where “underlying trauma from a sexual harassment incident still results in a party's inability to participate in an education program or activity”)

85 FR 30182

# What is “reasonable” in terms of “burden?”

- ▶ Does not mean “proportional to the harm alleged”
- ▶ Does not mean “least burdensome measures” possible
- ▶ Fact-specific determination



# Investigation of Sexual Harassment Allegations

- ▶ Determine whether investigation is needed, or whether clear facts (e.g. your own observations or objective evidence) justifies discipline w/o investigation.
- ▶ Determine who should conduct investigation.
- ▶ Legal requirements for workplace investigations are (a) prompt; (b) neutral; (c) thorough

For low level misconduct, a direct supervisor/manager should be able to conduct the investigation. Check w/HR for additional guidance. In situations involving allegations of serious misconduct (e.g. serious sexual harassment, other harassment/discrimination based on protected classifications, retaliation, fraud/theft/dishonesty, discipline that could result in suspension/termination, consult with HR regarding who should conduct investigation.

# Investigation of Allegations

- ▶ Order of investigation/interviews: (1) complainant(s) first; (2) witnesses second; (3) accused last.
- ▶ Make sure for each question you include the "Five W's": Who, What, Where, When, and Why.
- ▶ As soon as possible, set up a time to interview the interviewee to ask all necessary follow-up questions, which you have written out in advance.



# Investigation of allegations (cont.)

- ▶ Order of investigation/interviews: (1) complainant(s) first; (2) witnesses second; (3) accused last.
- ▶ Make sure for each question you include the "Five W's": Who, What, Where, When, and Why.
- ▶ As soon as possible, set up a time to interview the interviewee to ask all necessary follow-up questions, which you have written out in advance.





# Investigation of Allegations (cont.)

- ▶ As soon as possible, set up a time to interview the interviewee to ask all necessary follow-up questions, which you have written out in advance.
- ▶ If the interviewee is an employee in a union, who requests union representation, you should accommodate this request, particularly if the employee is pursuing the matter using the grievance procedure



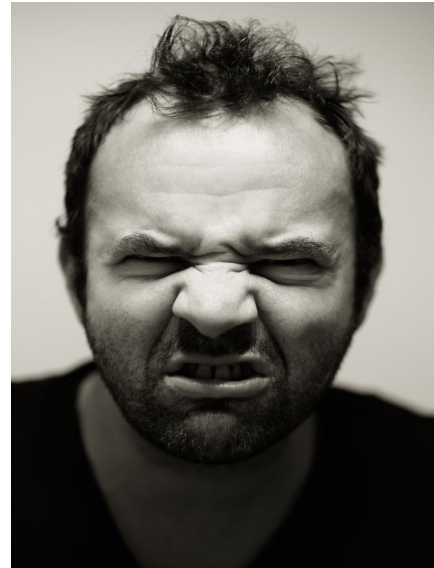
# Investigation of Allegations

- ▶ Ask all logical follow-up questions, including names of witnesses.
- ▶ Take copious notes during the interview. Interview should take place in quiet, confidential location, and witnesses must be interviewed separately.



# Investigation of allegations (cont.)

- ▶ Always come across as neutral. Never express disbelief at the interviewee's story, and never express sympathy for the complainant's alleged plight. Always express sincerity and concern for the Complainant's story. Never express emotion. Always be courteous.



# Investigation of Allegations (cont.)

- ▶ Consider having someone else present, depending on the seriousness of the complaint, just to help think of follow-up questions or to help with note-taking. But be aware of need for confidentiality.
- ▶ Advise the interviewee of the degree to which you can keep the information in confidence.
- ▶ Never make promises or representations that you can, will, or will not do something that cannot be delivered.
- ▶ Follow board policies/Student Code of Conduct/HR Procedure/CBAs regarding investigation of complaints.
- ▶ At conclusion of investigation, make determination regarding facts.

# Additional Requirements for Investigating Title IX Allegations

- ▶ “In all cases, the investigator will provide written notice to the accused individual, providing them with (1) a description of the alleged violation(s); (2) the date and location of the alleged incident(s); (3) the identity of the parties; and (4) a required date and time for the individual to contact the investigator to respond to the allegations. Both the complainant and the respondent must be informed in writing of their right to have an advisor or their choice present for the investigatory interview, and to review evidence obtained during the investigation. In addition, with respect to investigations involving allegations of Title IX sexual harassment, the written notice must include 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 investigation process/appeal process. Lastly, the notice must include a statement informing the parties of any provision of the institution’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the investigation/appeal/hearing process.” (HR Procedure 1040.07)



# Investigation of Title IX Allegations (cont.)

- ▶ The investigator will conduct interviews to determine whether Title IX sexual harassment has occurred. Interviews shall be conducted with the complainant, any witnesses, and the respondent(s). The investigator shall also review relevant documentation and other evidence. Both the complainant and the respondent are permitted to have an advisor present during the interview. However, the advisor may not disrupt the investigation process and may not coach or answer on behalf of the party being interviewed. Investigations should generally result in resolution within 90 calendar days after a complaint has been made, barring unexpected delays.
- ▶ For allegations determined to be minor in nature, a voluntary alternative to the formal Investigation and hearing process, as mutually agreed upon by the District and the respondent, and any other involved individual as appropriate. The District, will select a trained mediator to assist the parties in attempting resolving the allegation. The District may also utilize the services of an external mediator. (HR Procedure 1040.07)

# Title IX Allegations – Review of Evidence

- ▶ “Before concluding the investigation, the investigator must provide the parties and their advisors, if any, equal opportunity to inspect and review any evidence obtained during the investigation that is directly related to the allegations raised in a formal complaint, even if the investigator has not relied on that evidence in reaching a determination.
- ▶ All inculpatory and exculpatory evidence must be included, except as provided for by law, and except for a party’s medical, psychological, or similar treatment records, unless the party has provided a voluntary and consensual release for such records.
- ▶ The evidence must be provided to the parties in an electronic format or a hard copy, and the parties must be given 10 calendar days to submit a written response, which the investigator must consider before the completion of the investigative report.
- ▶ To the extent possible, the District shall use an electronic platform that prevents the downloading of the materials. Prior to permitting the review of such evidence, the investigator must obtain a signed nondisclosure agreement from the reviewing party to prevent the circulation of the evidence subject to inspection and review.”
- ▶ 34C.F.R.106.45(b) (HR Procedure 1040.07)

# Title IX Investigation Report Requirements

- ▶ a. A description of the circumstances giving rise to the complaint;
- ▶ b. A summary of the testimony provided by each witness, including the complainant and any available witnesses identified by the complainant in the complaint;
- ▶ c. An analysis of any relevant data or other evidence collected during the course of the investigation;
- ▶ d. A specific finding as to whether each factual allegation in the complaint occurred based on the preponderance of the evidence standard; and
- ▶ e. Any other information deemed appropriate by the District. (HR Procedure 1040.07)

# Title IX Obligations to Provide Final Report to Parties

- ▶ “At the conclusion of the Title IX Sexual Harassment investigation, the investigator must create an investigative report that fairly summarizes relevant evidence. The investigator must 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. The final investigative report must be provided at least 10 days before any hearing so the parties have time to review and provide written responses.”
- ▶ 34 C.F.R. 106.45(b)(5)(vii) (HR Procedure 1040.07)



# Non-Title IX Sexual Harassment Administrative Determination

## **Non-employment related matters**

In any case not involving employment discrimination, within ninety (90) days of receiving an unlawful discrimination or unlawful harassment complaint filed under Title 5, sections 59300 et seq., the District will complete its investigation and forward , a copy or summary of the report and written notice to the complainant setting forth all of the following:

### **Notice to Complainant**

- ▶ 1) The determination of the chief executive officer or his/her designee as to whether discrimination or harassment did or did not occur with respect to each allegation in the complaint, based on a preponderance of the evidence standard;



# Notice to Complainant (Cont.)

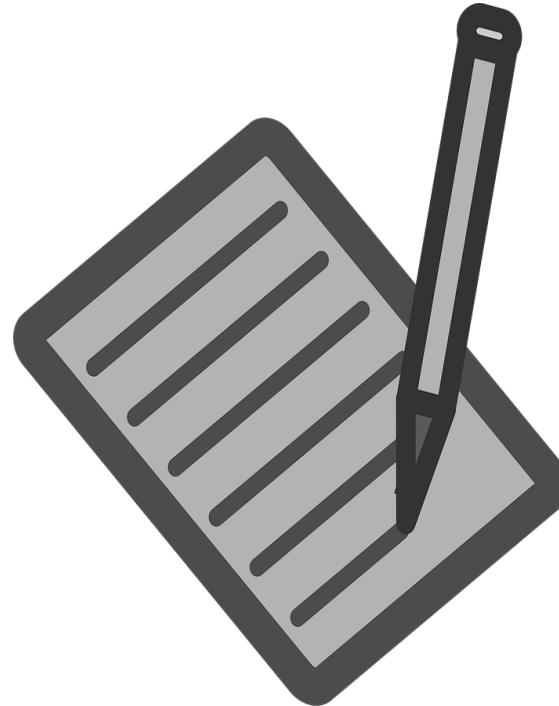
- ▶ 2) In the event a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar problems from occurring in the future;
- ▶ 3) The proposed resolution of the complaint; and
- ▶ 4) The complainant's right to appeal to the District Governing Board and the State Chancellor.
- ▶ 5) In matters involving student sexual misconduct, the respondent's right to appeal to the District's Governing Board any disciplinary sanction imposed upon the respondent.

# Notice to Complainant – Employment Related Matters

- ▶ In any case involving employment discrimination, within 90 days of receiving a complaint, the District shall complete its investigation and forward a copy or summary of the report and written notice to the complainant setting forth all the following:
- ▶ Notice to Complainant
- ▶ 1) The chief executive officer's or their designee's determination as to whether discrimination occurred with respect to each allegation in the complaint, based on the preponderance of the evidence standards.
- ▶ 2) If a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar acts of unlawful discrimination from occurring in the future;

# Notice to complainant (cont.)

- ▶ 3) The proposed resolution of the complaint; and 4) The complainant's right to appeal to the District's governing board and to file a complaint with the Department of Fair Employment and Housing.



# Retaliation Prohibited

- ▶ Retaliation is prohibited against any individual for exercising rights under Title IX or this process, including the participating in or refusing to participate in the filing of a complaint, the investigation, or any proceeding or hearing.
- ▶ Examples of prohibited retaliation include intimidation, threats, coercion, or discrimination, and specifically include bringing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same fact or circumstances as a report or complaint of sex discrimination or sexual harassment.

# Due Process for Student Discipline

## PROCEDURES FOR SHORT-TERM SUSPENSION, LONG-TERM SUSPENSION, OR EXPULSION

The following procedures shall be taken before suspension or expulsion except in the event that an as noted in Section XIV emergency/interim suspension is made as set forth in Section XIV.

- ▶ A. Administration. The President's designee shall administer these procedures and take appropriate action, subject to the approval of the College President and the Governing Board if required herein or otherwise by law.
- ▶ B. Reporting Of Conduct. Alleged student misconduct shall be reported to the President's designee. The President's designee shall be an individual designated by the College President as being responsible for administration of matters relating to Student Conduct. Other Any official may be designated as the President's designee, whenever necessary for the efficient operation of the District.



# Due process for Student Discipline (cont.)

C. Investigation. Upon receiving a report of alleged student misconduct, the President's designee shall initiate an investigation.

D. Notice. Before imposing discipline, the President's designee will provide the student with written notice of the conduct warranting discipline. The written notice will include the following:

- (1) The specific section of the Standards of Student Conduct that the student is accused of violating
- (2) A short statement of the facts supporting the accusation
- (3) The right of the student to meet with the President's designee to discuss the accusation, or to respond in writing
- (4) The nature of the discipline that is being considered

If the student is a minor, the President's designee shall also notify the parent or guardian in writing of the investigation and charges.

# Due Process for Student Discipline (Cont.)

- ▶ E. Meeting. If the student chooses to meet with the President's designee, the meeting will be scheduled within a reasonable period of time (normally within five (5) days following the delivery to the student of the notice referred to above). At the meeting, the student must again be told the facts leading to the accusation, and must be given the opportunity to respond verbally or in writing to the accusation. If a student chooses not to meet with the President's designee, or does not attend the scheduled meeting, the President's designee may proceed with proposed discipline without meeting with the student.
- ▶ F. Determination and Notice to Student. Based on the evidence presented, the President's designee shall decide whether or not to proceed with the proposed suspension and/or to recommend expulsion after hearing the student's explanation and considering all of the information.

# Due Process for Student Discipline (Cont.)

Short-Term Suspension – Within five (5) day after the meeting, the President's designee shall provide written notice of the decision to the student. The notice will include the length of time of the suspension, or the nature of the lesser disciplinary action. The President's designee's decision on a short-term suspension shall be final and cannot be appealed, except in situations in which the suspension is the result of a formal complaint of Title IX sexual harassment. In instances involving a formal complaint of Title IX sexual harassment, the student shall be entitled to appeal as outlined below.

Long-Term Suspension – Within five (5) after the meeting described above, the President or President's designee shall provide written notice of the decision to shall be provided to the student pursuant to (H) Notification of a Long-Term Suspension or Recommended Expulsion.

Expulsion – Within five (5) days after the meeting described above, the President or President's designee shall decide whether to recommend expulsion to the Board of Trustees. Written notice of the decision shall be provided to the student, pursuant to (H) Notification of a Long-Term Suspension or Recommended Expulsion.

# Due Process for Student Discipline (Cont.)

Notice To The College President. The President's designee shall report any disciplinary action imposed to the College President.

Notification of a Long-Term Suspension or Recommended Expulsion Of More Than Five (5) Days. The President's designee shall promptly send the student a letter of notification that is hand delivered or sent via certified mail to the student's last known address. The notification shall include:

1. A statement of the charges, the decision regarding disciplinary action, and a description of facts related to the misconduct, including the evidence against the student, the date(s) of the incident(s), time(s) and location(s) of the offense(s).
2. A copy of the Student Services Procedure 3027 – Standards of Student Conduct and Board Policy 3012.

# Due Process for Student Discipline (Cont.)

3. An explanation of the right of a student to appeal the decision and request a formal has a right to a further hearing ("Appeal Hearing") before the discipline is imposed. The notification shall also state that a request for an Appeal Hearing shall be filed within five (5) business days of the service or mailing of the notification, whichever is earlier. The written request for an appeal hearing must be submitted to the President's designee, and must cite the specific ground(s) for the appeal (from those listed below), and provide information which substantiates the ground(s) on which the appeal is being made.
4. An explanation that, if the student does not request a hearing within five (5) business days, the decision will be final and no longer subject to appeal.



# Due Process for Student Discipline (Cont.)

5. Grounds for appeal - A student may appeal the decision of the President's designee on grounds that:

(a.) Fair consideration was not provided to the student, (i.e., there is evidence that some aspect of the disciplinary process was prejudicial, arbitrary, or capricious). ;

(b.) New and significant information, not reasonably available at the time of the initial decision, has become available, and/or;

(c.) The sanction or remedy imposed is not in due proportion to the nature and seriousness of the offense. Any evidence supporting these grounds must be included in the request for an appeal hearing.

# Due Process for Student Discipline (Cont.)

6. A statement that the student has the right to be accompanied at the “Appeal Hearing” by an on-campus advisor of his or her choice. If the student decides to be accompanied by an advisor, the name and address of that advisor must be submitted to the President’s designee at the time the appeal is filed.

The Notification shall include the proposed date, time, and location of an Appeal Hearing if requested by the student.

Scheduling of Hearing. The President’s designee shall schedule an Appeal Hearing no later than 30 days from the date of the statement of charges is sent/delivered to the student.

# General Appeal Hearing Procedures for Student Suspension/Expulsion

The President's designee shall submit to the Hearing Authority: a description of the charges, notices, request for hearing submitted by the student, evidence, and a copy of the proposed decision.

The Chair will call the Appeal Hearing to order, explain the procedures of the Appeal Hearing, and have all Parties introduce themselves.

The Chair/Hearing Authority will present the rules governing the hearing. The Chair shall guarantee control of the hearing, making certain that all participants respect the right of others to make statements, and to ensure confidentiality of such statements.

The President's designee shall present relevant evidence regarding the alleged misconduct. The evidence presented may include live witness testimony, declarations submitted under penalty of perjury, and documentary evidence. Following the testimony of each witness, the accused student and Hearing Authority will have the opportunity to cross-examine witnesses. The accused student may then present any relevant evidence, including live witness testimony, declarations submitted under penalty of perjury, and documentary evidence. The President's designee and Hearing Authority will then have the opportunity to cross-examine witnesses. . Opening and closing statements shall be limited to five (5) minutes. The President's designee shall speak first, followed by the student.

# Appeal Hearing Procedures (cont.)

The Hearing Authority shall rule on all questions of procedure and admission of evidence. Only relevant and material evidence shall be presented to and considered by the Hearing Authority. Irrelevant, immaterial, and/or unduly repetitious evidence shall be excluded.

Hearings need not be conducted in accordance with strict rules of evidence or formality of a court hearing.

The Hearing Authority shall consider no evidence other than that evidence received at the hearing. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself, to support a finding.

The student may represent himself/herself/themself or be represented by an advisor of her/his/their choice, except that the student shall not be represented by an attorney unless, in the judgment of the hearing panel, complex legal issues are involved. If the student wishes to be represented by an attorney, a request must be submitted, in writing, not less than five (5) days prior to the hearing. If the student is represented by an attorney, the President's designee may request legal assistance. The hearing panel may also request legal assistance. Any legal advisor provided to the panel may act in an advisory capacity but shall not serve as a member of the panel nor participate in any vote.

# Appeal Hearing Procedures (cont.)

The Appeal Hearing shall be closed to protect the privacy and confidentiality of everyone involved unless the student and District agree in writing to have a public hearing at least five (5) days in advance of the hearing. A closed hearing will be closed to everyone except the following:

1. The student charged ;
2. The Hearing Authority ;
3. An advisor for the student charged, if so desired;
4. The President's designee;
5. A witness, while presenting evidence;
6. An on-campus advisor for a witness while presenting evidence.

An official audiotape or video recording of the hearing shall be kept. The record shall be the property of the District. The student charged may listen to the tape at a mutually agreeable location at the college. An accused student may, upon request, be provided a copy at his or her own expense.



# Appeal Hearing Procedures (Cont.)

An accused student who fails to appear for the hearing after having been notified of an Appeal Hearing is deemed to have waived their rights to participate in the appeal. The Appeal Hearing shall be terminated and the Appeal Committee shall be dismissed. The initial recommendation for disciplinary action shall stand.



# Title IX – Discipline Hearing Requirements

If the investigation findings result in any proposed discipline for either students or employees of the District, the employee/student will be entitled to a hearing, which must include the following elements.

1. The Hearing Authority must be free from conflict of interest or bias and must have received training on (a) how to serve impartially (b) issues of relevance and how to rule on relevance objections; (c) how to apply the rape shield protections provided for complainants; and (d) any technology to be used at the hearing.
2. Every witness at the hearing must be subject to cross-examination by the parties' advisors.
3. The Hearing Authority must allow a party's advisor to directly and in real time present all relevant questions and follow up questions to another party or witness. Cross-examination must come from a party's advisor and may not come directly from a party.
4. If a party does not have an advisor for the hearing, the District/College must provide that party with an advisor at no cost, for the purpose of conducting cross-examination on behalf of the party, or, in the discretion of the District/College, for the duration of the hearing in general.

# Hearing Requirements (cont.)

5. If a party or witness does not submit to live cross-examination, the panel or hearing officer cannot rely on any statement made by that party or witness when making the decision about the respondent's responsibility. This includes statements made during the investigation process.
6. Police reports, sexual assault nurse examiner (SANE) reports, medical reports, and other documents and records may not be relied on to the extent they contain the statements of a party or witness who has not submitted for cross-examination. In addition, where the evidence is a text exchange or an email thread and one party has refused to submit to cross-examination, but the other has not, the panel or hearing officer may rely only upon the statements made by the party who was cross-examined. However, the panel or hearing officer is not prevented from relying on a description of the words allegedly used by a respondent if they constitute part of the alleged sexual harassment at issue because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment.

# Hearing Requirements (cont.)

7. The panel/hearing officer cannot draw any inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
8. Questions posed to parties and witnesses at the hearing must be relevant. Before a complainant, respondent, or witness answers a cross-examination or other question, the panel/hearing officer must determine whether the question being asked is relevant and, upon objection on relevance grounds, provide an explanation as to any decision to exclude a question as not relevant.
9. Questions relating to a complainant's prior sexual behavior are deemed not relevant, unless the questions are offered to prove someone else was responsible for the alleged conduct or offered to prove consent.
10. At the request of either party, the District/College must provide for the entire hearing to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.

HR Procedure 1040.07; SSP 3027

# Hearing Authority Impartiality Requirements

- ▶ Any individual designated as a Title IX Coordinator, investigator, decision-maker, or to facilitate an informal resolution process, must “not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.” §106.45(b)(1)(iii)
- ▶ Presence of bias or conflict of interest can serve as grounds for appeal of the Hearing Authority’s decision.
- ▶ Examples of bias: making a decision based on the characteristics of the parties, rather than the facts; treating a party differently based on sex or sex stereotypes, or any protected class and stereotypes about that protected class. 85 FR 30238-40d; 85 FR 30084
- ▶ “The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment must not be prejudged and must be based on objective evaluation of the relevant evidence.” 85 FR 30254.
- ▶ Title IX Signature on Formal Complaint is not indicative of bias. 85 FR 30372



# Conflict of Interest

It is not a conflict of interest for:

- ▶ A recipient to fill Title IX personnel positions with its own employees
- ▶ Recipients are not required to use outside, unaffiliated Title IX personnel. 85 FR 30252.
- ▶ A recipient to have a co-worker from the same office as the hearing officer serve as an investigator
- ▶ But the Title IX Coordinator and/or the investigator cannot be the decisionmaker or appeal decisionmaker;



# Title IX - Rape Shield Protections

- Prohibits questions or evidence about a complainant's prior sexual behavior, with two exceptions. See 34 CFR § 106.45(b)(6).
- Deems all questions and evidence of a complainant's sexual predisposition (e.g. mode of dress, speech, lifestyle) irrelevant, with no exceptions. See 85 FR 30352.
- Exception 1: Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.
- Exception 2: Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent and is offered to prove consent. 34 CFR § 106.45(b)(6).
- Does not permit evidence of a complainant's sexual behavior with anyone other than the respondent.

# Title IX - Relevance Determinations

The following evidence is always considered “irrelevant” (or otherwise not admissible):

- ▶ Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent;
- ▶ Any information protected by a legally recognized privilege without waiver;
- ▶ Complainant’s sexual predisposition or prior sexual behavior (subject to two exceptions); and
- ▶ Party or witness statements that have not been subjected to cross-examination at a live hearing.

85 FR 30293 n. 1147

# Title IX - Relevance Determinations (Cont.)

- ▶ • Decision-maker determines whether question is relevant ...

And must explain its reasoning if a question is deemed not relevant. 85 FR 30343.

- ▶ • At the hearing, the decision-maker may apply “logic and common sense” to reach any conclusions but must explain their rationale
- ▶ • Parties must be afforded the opportunity to challenge relevance determinations.

85 FR 30249.

- ▶ Parties have an “equal opportunity” to present evidence
- ▶ Witnesses cannot, however, be compelled to participate in the grievance process (No subpoenas for witnesses).

9/4/2020 Q&A, Question 14

# Title IX - Cross-examination of witnesses

- ▶ • Cross-examination may not be conducted by the parties themselves (only advisors)
- ▶ • If a party does not have an advisor present at the hearing to conduct cross-examination, the institution must provide an advisor without fee or charge
- ▶ • If a party or witness does not submit to cross-examination at the live hearing, then the decision-maker cannot rely on ANY statement of that party or witness in reaching a determination regarding responsibility.

If a party's advisor asks a relevant question of another party or a witness, and the party/witness declines to respond to the question, then the decisionmaker is precluded from relying on any statement made by that party or witness.



# Title IX - Cross-examination (cont.)

Confusing new rule: Hearsay prohibition does not apply to a party or witness' refusal to answer questions posed by the decisionmaker. 85 FR 30349.

- ▶ Decision-makers cannot draw an inference as to responsibility based on a party or witness's refusal to answer questions
- ▶ Applies when a party or witness refuses to answer cross-examination questions posed by a party advisor or refuses to answer questions posed by a decision-maker.
- ▶ Whether a party views an advisor of choice as 'representing' the party during a live hearing or not, [§ 106.45(b)(6)(i)] only requires recipients to permit advisor participation on the party's behalf to conduct cross-examination; not to 'represent' the party at the live hearing." 85 CFR 30342

# Title IX - Cross Examination (cont.)

- ▶ If a party refuses to work with an assigned advisor who is willing to conduct cross on the party's behalf, then that party has waived right to conduct cross examination. 85 FR 30342.
- ▶ If advisor of choice refuses to comply with a recipient's rules of decorum institution may provide that party with an assigned advisor to conduct cross. 85 FR 30342.



# Title IX - Outcome Determination

- ▶ The Respondent must be presumed not responsible for the alleged conduct until the determination regarding responsibility is made. §106.45(b)(1)(iv).
- ▶ Outcome must be based on an objective evaluation of all relevant evidence—including both inculpatory and exculpatory—and not taking into account the relative “skill” of the parties’ advisors. §106.45(b)(1)(ii); 85 FR 30332
- ▶ Credibility determinations may not be based on a person’s status as a Complainant, Respondent, or witness. §106.45(b)(1)(ii).
- ▶ Hearing Officer must issue a written determination regarding responsibility and provide the written determination to the parties simultaneously. §106.45(b)(7)(ii)-(iii)

# Hearing Requirements – Student Discipline – Where Title IX Does Not Apply

In cases of student sexual misconduct that are not subject to Title IX, when an accused student is subject to severe disciplinary sanctions (e.g. suspension or expulsion), and the credibility of witnesses was central to the investigative findings, District student discipline procedures must provide the following:

1. An opportunity for the accused student to cross-examine witnesses indirectly at a live hearing, either in person or by videoconference; and
2. A live hearing conducted by a neutral decision-maker other than the investigator.

For purposes of this section, “indirect” cross-examination shall be conducted as follows:

\* Any question to the witness shall be asked by a neutral party appointed by the District for the sole purpose of asking questions. The neutral party shall not be the accused student, the accused student’s representative, or a member of the hearing panel; and

\* The accused student may submit written questions before and during the cross-examination, including any follow-up questions. The neutral party asking questions shall not exclude any questions unless there is an objection to the question by the hearing panel.

- HR Procedure 1040.07; SSP 3027

# Hearing Panel's Decision

Following presentation of the evidence, the Hearing Authority shall privately consider the evidence with all persons excluded. The Hearing Authority shall send a written report to the College President, and a copy to the complainant and the respondent, within five (5) working days of the termination of the hearing. The report shall contain the following information:

- A. A summary of factual findings and a determination that the accused student did or did not commit the act(s) charged.
- B. A finding that the student's act(s) did or did not constitute a violation of the Student Code of Conduct Standards of Student Conduct.
- C. A recommendation for upholding or modifying the proposed discipline. The Hearing Authority may also recommend further investigation.
- D. The sanctions imposed on the respondent and the remedies provided to the parties, including the rights of the parties to appeal the decision. ***For hearings involving allegations of Title IX sexual harassment, both the complainant and the respondent shall have the right to appeal the decision to the Governing Board .***



# College President's Decision

- A. The College President shall reach a decision after reviewing the report submitted by the Hearing Authority. The College President may refer the matter back to the Committee or hearing officer for further clarification on details of the case, such as evidence and findings of fact. The College President may uphold the long-term suspension or expulsion, uphold the recommendation by the Hearing Authority, or adopt a lesser sanction, if appropriate. **[Note: For Title IX Decisions by the hearing authority, the decision is final, unless the complainant/respondent appeals].** A written statement of the decision shall be sent via certified or registered mail to the student's last known address within ten days of the College President's receiving the Hearing Authority's recommendation.
- B. The decision of the College President to suspend, expel, or impose a lesser sanction shall be final and not subject to further appeal. However, as noted below, an expulsion is not final until it is approved by the Governing Board.
- C. The College President shall report a disciplinary suspension or expulsion, of any student to the Governing Board at its next regular meeting. A copy of the suspension or expulsion determination, including the reasons for the suspension or expulsion, shall be placed in the student's permanent disciplinary record (not the transcript).

# College President's Decision (cont.)

- ▶ If the College President determines that a student should be expelled, he or she will forward that recommendation through the Chancellor, to the Governing Board for final approval.
- ▶ In the event that a College President is or will be unavailable for the making of a prompt decision, the College President or Chancellor may appoint an unbiased designee to act on the appeal.
- ▶ ***For any hearing involving allegations of Title IX sexual harassment, both the complainant and the respondent shall have the right to appeal the decision of the Hearing Authority to the Governing Board.***

# Requirements for Title IX Appeals

- ▶ Institutions must offer **both parties** an appeal from a determination regarding responsibility **and** from an institution's dismissal of a formal complaint or any allegations therein (whether or not it is a mandatory or discretionary dismissal). § 106.45(b)(8)(i)-(ii)
- ▶ Appeal rights **are not** conditioned on enrollment, employment, or participation. Meaning, for example, a respondent who has graduated or withdrawn from the institution since the hearing **retains** the right to an appeal. 1/15/2021 Q&A, Question 22



# Requirements for Appeal (Cont.)

- ▶ Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- ▶ Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome [of the initial determination]



# Grounds for Appeal

Mandatory bases for appeal:

- ▶ Procedural irregularity that affected the outcome of the matter;
- ▶ New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- ▶ The Title IX Coordinator, investigator(s), or decision- maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.



# Analyzing the Appeal

- ▶ First, do sufficient grounds exist for at least one basis of appeal (i.e., procedural irregularity, new evidence, bias/conflict, disproportionate sanction)?
- ▶ Second, is there merit to the appeal (e.g. there was a procedural irregularity)?
- ▶ Third, if yes, was the outcome affected (or, if new evidence, could it have been)?



# Written Determination on Appeal

- ▶ Appeal Officer must issue a written decision describing the result of the appeal and the rationale for the result
- ▶ The regulations require “reasoned written decisions describing the appeal results.” 85 FR 30397.
- ▶ Written decision must be issued simultaneously to both parties.

§106.45(b)(8)(iii)



# Title IX Applies To Employee Complaints Too!

If an employee alleges sexual harassment (or a student alleges sexual harassment against an employee), report immediately to District Title IX Officer to determine (a) who should investigate; (b) whether complaint could be governed by Title IX.

If complaint is governed by Title IX, then investigation, reporting, due process, hearing, and appeal rights apply.

Additional requirements under District policy, and applicable CBAs will apply as well.



# Additional Remedies Under Title IX

- ▶ Designed to “restore or preserve equal access to the recipient’s education program or activity.” §106.45(b)(1)(i)
- ▶ May include the same services described as “supportive measures.” 34 CFR § 106.30.
- ▶ Unlike supportive measures, though, remedies may in fact burden the respondent, or be punitive or disciplinary in nature. §106.45(b)(1)(i); 85 FR 30244.
- ▶ The Title IX Coordinator is responsible for the “effective implementation of remedies.” 85 FR 30276.

# Emergency/Interim Suspension/Restrictions

Interim Measures are in effect immediately and shall not be delayed. These Interim Actions may include:

- a. Interim Suspension – A Student who is suspended on an interim basis is subject to all of the same restrictions as if they had been suspended as a final sanction.
- b. Interim Restriction – These restrictions may include, but are not limited to:
  - ▶ • Restricted access to District facilities and District events;
  - ▶ • No-contact orders with specific individuals; or
  - ▶ • Any other restrictions deemed by the College Disciplinary Officer or Designee to be necessary to achieve the goals stated above.
- c. For Employees – consider placement on paid administrative leave



# Emergency/Interim Suspension/Restrictions (cont.)

An emergency/summary suspension is an immediate suspension imposed upon a student for good cause. (California Education. Code § 66017.)

The College President or the President's designee may impose an emergency/interim suspension. It is an extraordinary measure and shall be utilized when necessary to protect lives or property and to ensure the maintenance of order pending a hearing. Prior to imposing these measures, the District/college shall do the following:

- ▶ 1. Undertake an individualized safety and risk analysis to determine whether there is an immediate threat to the physical health or safety of any person;
- ▶ 2. Make an affirmative determination that such an immediate threat exists based on its individualized safety and risk analysis;
- ▶ 3. Provide the Respondent with notice and an opportunity to challenge the emergency decision immediately following the respondent's removal.

# Due Process for Student Facing Emergency/Interim Suspension

A preliminary hearing shall be provided within ten (10) calendar days of an emergency/interim suspension. (California Education. Code § 66017.) The procedures set forth in Sections IX (E) and X shall apply to the preliminary hearing.

An emergency/interim suspension shall be reported to the Governing Board at its next regular meeting after such suspension has been imposed. A copy of the suspension may be placed in the student's permanent record at the discretion of the College President.

# Due Process for Students Facing Emergency/Interim Suspension

The President's designee will provide the student with written notice of the conduct warranting discipline. The written notice will include the following:

- ▶ (1) The specific section of the Standards of Student Conduct that the student is accused of violating
- ▶ (2) A short statement of the facts supporting the accusation
- ▶ (3) The right of the student to meet with the President's designee to discuss the accusation, or to respond in writing
- ▶ (4) The nature of the discipline that is being considered
- ▶ If the student is a minor, the President's designee shall also notify the parent or guardian in writing of the investigation and charges.

# Due Process for Students Facing Emergency/Interim Suspension

- ▶ Meeting: If the student chooses to meet with the President's designee, the meeting will be scheduled within a reasonable period of time (normally within five (5) days following the delivery to the student of the notice referred to above). At the meeting, the student must again be told the facts leading to the accusation, and must be given the opportunity to respond verbally or in writing to the accusation. If a student chooses not to meet with the President's designee, or does not attend the scheduled meeting, the President's designee may proceed with proposed discipline without meeting with the student.