

Title IX

Overview and Toolkit

Prepared By

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Title IX Impact Team



In Partnership With



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school administrators

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TITLE IX: AT A GLANCE



WHAT IS TITLE IX?

- > Title IX is a federal law that was signed by President Nixon as part of the Education Amendments of 1972.
- > Title IX prohibits **any educational program or activity** that receives federal funding from discriminating against any person on the basis of sex.
- > Title IX states:
 - “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.”
- > 34 CFR Section 106.2 specifies that Title IX covers:
 1. Education Programs or Activities
 2. Sports
 3. Sexual Misconduct (Harassment & Violence)
 4. Employment
 5. Equal Access to Facilities
 6. Admissions and Recruitment
- > The US Department of Education’s Office of Civil Rights (OCR) enforces Title IX.

DISCRIMINATION THAT VIOLATES TITLE IX

- > Some examples of discrimination that violate Title IX include:
 - Sexual harassment
 - Gender discrimination, including gender preference and gender identity
 - Pregnancy discrimination
 - Unequal distribution of athletic funds
 - Unequal admissions
 - Marital or family status discrimination

REMEDIES

- > Remedies under Title IX are broad and include attorney’s fees and an action for money damages
- > Loss of all federal funding
- > OCR may require districts enter into resolution agreements, including ongoing monitoring

TITLE IX COORDINATOR

- > All recipients of federal funds must designate at least one Title IX Coordinator.
- > The Title IX Coordinator is responsible for overseeing the educational institution’s response to Title IX complaints, and for identifying and addressing any patterns or systemic issues.
- > The Title IX Coordinator must be trained and visible according to guidance from OCR.

BEST PRACTICES

- > Designate a Title IX Coordinator.
- > Review and update all policies, including the Uniform Complaint Procedures and policies regarding gender and sex-based discrimination and harassment.
- > Train all employees on their reporting duties as “responsible employees” under Title IX, including how to identify and respond to Title IX issues.
- > Issue annual notifications regarding non-discrimination.
- > Verify all school sites are in compliance with Title IX posting requirements under the Education Code, including:
 - Education Code § 221.9 which requires schools to post statistics on the percentage of students that are involved in competitive sports, and the number of competitive sports teams, classified by gender; and
 - Education Code § 221.61 which requires all educational institutions to post specific information on students’ rights under Title IX, including: the Title IX Coordinator’s contact information; the rights of students under Title IX; the responsibilities of the educational institution under Title IX; and a description of how to file a complaint.
- > Act immediately when Title IX issues are brought forth by determining and implementing appropriate interim measures for the complainant and respondent.
- > Investigate all complaints in a timely manner and in accordance with the appropriate policy, and document the investigation.
- > Consider whether it is appropriate to file a CPS report or notify local law enforcement agencies, but remember that even if another agency initiates an investigation, the district is not relieved of its obligation to conduct its own investigation under Title IX.
- > At the conclusion of an investigation, issue investigation findings to the complainant and respondent that include, for the complainant only, any remedial measures that were put into place.
- > To ensure sports equity, consider periodic program audits by outside consultants or legal counsel to identify equity issues in athletic benefits (e.g., sports facilities, equipment, coaches, schedules, etc.).

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SIGNIFICANT NEW TITLE IX GUIDANCE ON HANDLING SEXUAL MISCONDUCT: WHAT SCHOOLS NEED TO KNOW



FIRM OVERVIEW

Practice Areas

Charter Schools
Community Colleges
Facilities & Business
Labor & Employment
Litigation
Local Government/
Special Districts
Public Finance
Special Education
Students
Technology & Innovation

Statewide

Bakersfield
Fresno
Los Angeles
Mission Viejo
Monterey
Sacramento
San Diego
Walnut Creek

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New guidance on schools' responsibilities for addressing claims of sexual misconduct under Title IX places greater emphasis on the rights of those accused of sexual misconduct. The new guidance marks a significant departure from prior guidance but lacks details, creating the potential for many issues requiring legal consultation.

On September 22, the United States Department of Education issued interim guidance on schools' responsibilities in addressing sexual misconduct and rescinded a 2011 Dear Colleague Letter (DCL) and a 2014 Q&A document, which were both intended to provide more support for those making sexual misconduct complaints. The Department plans to go through a notice and comment period before putting new, permanent guidance in place.

Separately, California lawmakers are seeking to return to the standards laid out in the 2011 DCL in Senate Bill (SB) 169, which was approved by the Legislature and is awaiting Governor Jerry Brown's signature or veto. If the bill is signed, educational institutions may wish to consult with legal counsel regarding potential conflicts between federal guidance and state law.

TITLE IX AND SEXUAL MISCONDUCT

Title IX requires educational institutions, including school districts, county offices of education and community college districts, to do the following:

- > Designate a Title IX coordinator to accept reports of sexual misconduct and to oversee Title IX compliance;
- > Investigate and respond to allegations of sexual misconduct involving students;
- > Prior to investigating a complaint, offer assistance to complainants such as counseling, medical services and class schedule modifications;
- > Provide both parties with an equal opportunity to present evidence;
- > Notify parties of the outcome of the complaint; and
- > Take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects.

WHAT DOES THE INTERIM GUIDANCE DO?

The interim guidance, released as a Q&A document (2017 Q&A), changes how the Department will evaluate whether schools' procedures satisfy Title IX's procedural requirements. For example, it could loosen the time frame for investigating sexual misconduct claims and raise the standard of evidence required to prove them. It may also provide new rights for the accused, including the right to interim measures (described below) and written notice of the accusations against them.

INTERIM MEASURES

The 2017 Q&A makes it clear that interim measures must be extended, as appropriate, to both accused and complainants. Interim measures are temporary measures that are put into place to stop sexual misconduct, protect involved parties and preserve the integrity of the investigation. The 2014 Q&A had emphasized interim measures that avoided impact to the complainant's educational environment. The 2017 Q&A states that interim measures should "avoid depriving any student of his or her education" and that "a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party." The 2017 Q&A does not provide specific examples for evaluating the appropriateness of interim measures, but the revised wording and enhanced focus on the rights of the accused suggest that the Department may be more critical of procedures that do not give equal consideration to the interim needs of the accused and the complainant.



INVESTIGATION TIME FRAME

The 2017 Q&A provides that there is no fixed time frame in which schools are expected to complete an investigation. As a result, the suggested 60-day “safe harbor” period contained in the withdrawn guidance will apparently no longer be the bar against which the promptness of investigations is measured. Instead, while schools must still establish reasonable timelines, whether an investigation was in fact conducted timely will be measured on a case-by-case basis. Schools should be mindful of timelines that may apply to sexual misconduct complaints under their internal policies and state law, including the Uniform Complaint Procedures and Title 5 of the California Code of Regulations.

DISCLOSURE OF INFORMATION AND CONFIDENTIALITY

The 2017 Q&A provides that initial disclosures regarding allegations of sexual misconduct should be made to the accused if an educational institution initiates an investigation. The disclosure should be in writing and should include:

- > The identities of the parties involved;
- > The specific section of the code of conduct allegedly violated;
- > The precise conduct allegedly constituting the potential violation; and
- > The date and location of the alleged incident.

The 2017 Q&A does not include procedures that would allow a complainant to request confidentiality. However, the Department’s 2001 Revised Sexual Harassment Guidance, which remains in effect, provides that the institution should consider a student’s request for confidentiality and evaluate the request in conjunction with its duty to provide a safe environment for all students. Educational institutions should consult with legal counsel prior to issuing this type of written notice to a responding party in cases where a student has requested confidentiality.

INFORMAL RESOLUTION AND MEDIATION

The 2017 Q&A states that informal resolution of complaints, including through a mediation process, may be deemed appropriate by a school if the parties involved agree to such a voluntary resolution after receiving full disclosure of the allegations and options for formal resolution. The 2011 DCL had expressly stated that mediation was not appropriate in cases of alleged sexual assault, as did the 2001 DCL, which is still in effect. The new guidance appears to grant schools discretion, with the consent of both complainant and accused, to use mediation even in cases of alleged sexual assault. Due to the inconsistency between the 2001 and 2017 guidance, districts should proceed with caution and consult counsel if considering mediation in sexual assault cases.

STANDARD OF PROOF

The 2017 Q&A provides discretion to educational institutions regarding the standard of proof to use in making findings of fact.

Educational institutions may choose to apply either a preponderance of the evidence standard (i.e., more likely than not) or a more rigorous clear and convincing evidence standard (i.e., substantially more likely than not). While an educational institution has the discretion to apply either standard, the 2017 Q&A provides that the standard selected for Title IX investigations should be consistent with the standard the school applies in all other student misconduct cases.

WRITTEN REPORTS/NOTICE OF FINDINGS OF FACT

The 2017 Q&A provides that a written report summarizing the relevant evidence should be completed at the conclusion of each Title IX investigation. No specific guidance is provided in the 2017 Q&A regarding notice to the parties of the factual findings resulting from the investigation, other than to state that notice is required and that parties must have timely and equal access to any information that will be used during disciplinary proceedings that follow.

DISCIPLINARY HEARINGS

The 2017 Q&A makes it clear for the first time that the investigation report must be offered to both parties if it will be used during any informal or formal disciplinary meeting or hearing, and that the parties should be given the opportunity to respond to the report in writing in advance of the decision of responsibility or a hearing to decide responsibility. The Department had not previously issued any guidance related to the disclosure of an investigation report in Title IX matters.

Educational institutions still have the option to offer the right to appeal the decision on responsibility and/or any disciplinary decision to both the complainant and the accused, though the 2017 Q&A permits schools to limit the right to appeal only to the accused. Similar to prior guidance, the 2017 Q&A recommends that written notice of the outcome of disciplinary proceedings be issued to both parties concurrently.

Going forward, the Department has said that in addition to the 2017 Q&A, schools may continue to rely its 2001 Revised Sexual Harassment Guidance as well as its 2006 DCL on Sexual Harassment as it solicits input on new, permanent guidance. Additionally, any existing resolution agreements that educational institutions entered into with the Department’s Office for Civil Rights will not be impacted by the change in guidance and will continue to be binding.

For questions about the significant changes made by the new guidance or Title IX obligations to address sexual misconduct in general, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also visit our website, follow us on Facebook or Twitter or download our Client News Brief App.



ASSESS THE COMPLAINT: PRE-INVESTIGATION

A. Complaints Against Students and Employees

If the Allegation is ...	Action to Take...
Gender or sex-based discrimination	<ol style="list-style-type: none"> Contact the Title IX Coordinator Contact Student Services (for complaints against other students) or Human Resources (for complaints against employees)
Sexual Harassment, including sexual coercion, assault and battery	<ol style="list-style-type: none"> Call Child Protective Services or law enforcement immediately if there is a reasonable suspicion of abuse or neglect; file a written report within 36 hours Contact the Title IX Coordinator Contact Student Services (for complaints against other students) or Human Resources (for complaints against employees)

B. Complaints Against Persons Who are Not Students or Employees of the LEA

If the Allegation is ...	Action to Take...
Sexual Harassment, including sexual coercion, assault and battery	<ol style="list-style-type: none"> Call Child Protective Services or law enforcement immediately if there is a reasonable suspicion of abuse or neglect; file a written report within 36 hours Contact the Title IX Coordinator

* These guidelines provide a quick desk reference for local educational agencies (“LEAs”) to use in addressing Title IX complaints at the site level. LEAs should review their own Title IX policies and adopt practices in accordance with those terms. This is not an exhaustive summary of applicable law and should not be construed as legal advice.

Reminder: All Title IX Complaints Must Be Resolved in a Prompt Manner.*

The following procedure is recommended for processing complaints filed by or on behalf of a student:

Step 1. Assess the Situation - Immediately

1. Review the written complaint and ask the complainant any clarifying questions you feel are necessary. If the complaint is verbal, ask the complainant to put it in writing. If the complainant refuses to put his/her complaint in writing, prepare a written statement of what you were told.
2. Notify the Title IX Coordinator of the complaint or incident that was brought to your attention if you have not already. Consult with the Title IX Coordinator and determine:
 - > Whether an informal resolution of the complaint may be appropriate.
 - > Who should conduct the investigation.
 - > Initial investigation strategy.
3. Determine mandatory and discretionary reporting obligations.
 - > If there is a reasonable suspicion of child abuse or neglect, call Child Protective Services immediately and file a written report within 36 hours, if not already done.
 - > Consider contacting law enforcement, if there is potential criminal activity.
 - > Notify the complainant of their right to contact law enforcement.
4. Consider whether the accused is a danger to others and should be removed from school grounds.
 - > For complaints involving employees, if the employee is a danger to others, or should otherwise not be on school grounds, contact Human Resources regarding placement on administrative leave while the investigation is pending.
 - > For complaints involving other students, if there is sufficient information to merit a suspension, and suspension is deemed appropriate, begin that process.
5. Determine whether the parents of involved or potentially affected students should be notified.

Step 2. Evaluate Appropriate Interim Measures - Immediately and on an Ongoing Basis

1. In consultation with the Title IX Coordinator, determine whether interim measures should be put into place, before the investigation is completed, to protect or support the complainant and/or accused. Interim measures should be considered on a case-by-cases basis. Interim measures should not unfairly penalize the complainant or the accused. Interim measures should consider both the complainant's and the accused's rights to access educational programs and activities.
2. Appropriate measures to consider include, but are not limited to, the following:
 - > Physically separate the complainant and the accused.
 - > Offer medical, counseling or other support services to the complainant.
 - > No contact orders.
 - > Any other measures requested by the complainant or accused.
 - > Support services for bringing forth and defending allegations of sexual misconduct.

* LEAs should refer to their individual complaint procedures for applicable timelines. Under the Uniform Complaint Procedures, complaints must be investigated and a decision must be issued within 60 calendar days from receipt of the complaint, unless the complainant agrees in writing to an extension of the timeline. (See 5 CCR § 4631.)

Step 3. Establish Timelines and Initiate an Investigation*

1. Notify the complainant of the policy the LEA will be following to process his/her complaint, as well as the timeline for completing the investigation.
2. Notify the accused that a complaint has been filed against him/her along with additional information, as appropriate.**
3. Update the timeline, as needed, and keep the complainant apprised of any delays or extensions.
4. Document any delays in the investigation.
5. Keep the Title IX Coordinator updated on the timelines and any delays.

Step 4. Interview the Complainant

1. Interview the complainant first.
 - > Carefully determine who should interview the complainant. You may wish to consider the complainants' age, gender and existing comfort level with potential interviewees.
 - > Obtain all facts regarding the incident.
 - > Allow the complainant to narrate without interruption; follow up with clarifying open-ended questions. This strategy may need to be modified depending upon the complainant's age and willingness to cooperate.
 - > Preserve evidence and documentation provided by witnesses. This may include emails, screen shots, pictures, or physical evidence.
 - > Ask for the names of other potential witnesses.
 - > Consider allowing the complainant to have an advisor or support person present.
 - > Maintain neutrality.
 - > Be compassionate and sensitive.
2. Depending on the circumstances you may want to request a written statement. If so, make sure it is signed and dated.
3. Remind the complainant that the LEA prohibits retaliation and what to do if he/she feels retaliated against.
4. Do not promise confidentiality.

Step 5. Interview Other Witnesses

1. Witnesses should not be interviewed together.
2. Obtain all facts regarding the incident.
 - > Ask broad, open-ended questions to narrow questions.
 - > Ask for the names of other potential witnesses.
3. Preserve evidence and documentation provided by witnesses. This may include emails, screen shots, pictures, or physical evidence.
4. Depending on the circumstances you may want to request a written statement. If so, make sure it is signed and dated.

* An LEA may use its disciplinary procedures in lieu of its sex-based discrimination or sexual harassment complaint procedures, so long as the disciplinary procedures meet the requirements of Title IX. Should the LEA choose to follow its disciplinary procedures, the complainant should still receive the interim measures and notices detailed herein.

** The Questions and Answers, dated September 22, 2017 outline detailed information that should be provided to the accused. However, providing this information may conflict with an LEAs obligation to respect a complainant's request for confidentiality. Legal counsel should be consulted in cases where confidentiality is a concern.

Step 6. Interview the Accused

1. If the accused is a bargaining unit member, he or she has a right to have a union representative present for their interview.
2. If the complainant was allowed an advisor or support-person, provide the accused the same opportunity.
3. Obtain all facts regarding the incident.
 - > Ask broad, open-ended questions to narrow questions.
 - > Ask for the names of other potential witnesses.
4. Preserve evidence and documentation provided by the accused. This may include emails, screen shots, pictures, or physical evidence.
5. Depending on the circumstances you may want to request a written statement. If so, make sure it is signed and dated.
6. Caution the accused against retaliation.

Step 7. Prepare a Summary or Report

1. Detail the steps taken during your investigation and the evidence considered, including:
 - > How the issue was brought to your attention and what actions you took.
 - > Describe who you interviewed and what they told you.
 - > Describe the documents you reviewed.
 - > Assess the credibility of each witness.
2. State your factual findings using the preponderance of the evidence or clear and convincing standard, depending on your LEA's policy.
3. Make a determination as to whether your factual findings establish a policy violation.
4. Discuss your conclusions and next steps with the Title IX Coordinator.

Step 8. Issue Investigation Findings

1. Prepare an investigation findings letter for the complainant and accused.
2. If your LEA is following the Uniform Complaint Procedures, the letters should include the following*:
 - > The findings of fact based on the evidence gathered;
 - > Conclusions of law;
 - > Disposition of the complaint;
 - > Rational for the disposition;
 - > Corrective actions taken, including disciplinary actions taken against the accused that directly impact the complainant; and
 - > Notice to both parties of their right to appeal the LEA's decision to the California Department of Education within 15 days.
3. Seek approval from the Title IX Coordinator before mailing your finding letters to the complainant and accused.
4. Forward a copy of your findings to the Title IX Coordinator and Human Resources and/or Student Services, if necessary.

* 5 CCR § 4631

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