



SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

Mendocino-Lake Community College District
Board of Trustees

**SEXUAL HARASSMENT
PREVENTION TRAINING**

September 26, 2019

Presented by:

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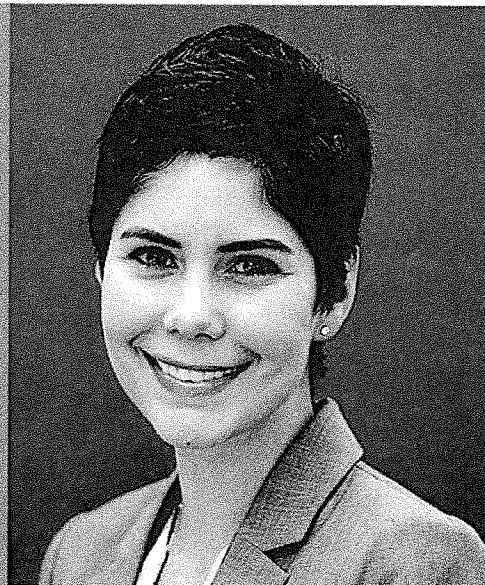
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Areas of Expertise

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Experience

Ms. Batanero has over 14 years of experience in administrative law; over 10 years of experience in education law. Ms. Batanero's practice touches upon myriad legal issues relating to students and school personnel. She advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law, student discipline and anti-discrimination laws. In addition to regularly participating in IEP meetings, Ms. Batanero has represented clients before the Office of Administrative Hearings, the California Department of Education and the Office for Civil Rights. Ms. Batanero also assists school districts in negotiating agreements and reaching settlements with parents regarding special education issues. Ms. Batanero also assists school districts and County Boards of Education at all levels of the student discipline process and conducts investigations on behalf of her clients of allegations of discrimination. Prior to joining SCLS, Ms. Batanero worked in education law in Southern California representing school districts in special education matters as well as addressing various legal matters as they arose. Ms. Batanero is a Member of the California State Bar and the California Council of School Attorneys.

Education

Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a *preventative law firm*, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.



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Mendocino-Lake Community College District – Board of Trustees Sexual Harassment Prevention Training September 26, 2019

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Sexual Harassment Prevention Training

September 26, 2019

Presented by:
Monica D. Batanero, Sr. Associate General Counsel
School & College Legal Services of California


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Training Objectives

1. Recognize sexual harassment in the work environment and educational environment;
2. Implement policies and practices to prevent sexual harassment from happening.
3. Conduct a thorough investigation if a complaint is filed, take appropriate action to stop it from recurring, and limit potential damages.


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Pre-Test

Please complete the Pre-Test in the Attachment to assess your knowledge of sexual harassment issues.

At the end of the training, we will revisit answers based on the information we will discuss today.



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Sexual Harassment Prevention Training is Required by Law

- Supervisors must receive at least 2 hours of sexual harassment prevention training every 2 years and within 6 months of employment
- District board trustees have the ultimate authority to hire and fire district employees and therefore meet the definition of "supervisor" under Government Code § 12929(s)
- By 1/1/21, nonsupervisory employees must receive at least 1 hour of sexual harassment training every 2 years and within 6 months of employment

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Sexual Harassment: An Overview

What is Sexual Harassment?

Unwelcome conduct of a sexual nature which interferes with an employee's performance of his/her job duties or a student's academic performance

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Applicable Laws

- Fair Employment and Housing Act (CA)
- Title VII of the Civil Rights Act of 1964 (Federal)
- Title IX of the Education Amendments of 1972 (Federal)
- Education Code (CA)

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California Fair Employment and Housing Act (FEHA)

True or False?

- Sex, sexual orientation, gender, gender identity and gender expression are all protected bases under the FEHA.
- California law identifies 17 specific protected bases for employment discrimination, harassment and retaliation.

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California Fair Employment and Housing Act (FEHA)

- Prohibits “discrimination” and “harassment” on the basis of sex, gender, gender identity, gender expression, or sexual orientation
- Also prohibits harassment on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic condition, marital status, age, or military and veteran status

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Important Terms to Know

- **Sex:** “male” or “female” sex categories (biological or physical characteristics, e.g., testicles for males; menstruation for females)
- **Gender:** socially constructed roles, behaviors, activities and attributes that society considers appropriate for men and women
- **Gender identity:** one’s internal sense of being a man or woman (or boy or girl). For transgender people, birth-assigned sex and their own internal sense of gender identity don’t match
- **Gender expression:** refers to all the external characteristics and behaviors that are socially defined as either masculine or feminine, such as clothing, grooming, mannerisms, speech patterns and social interactions
- **Sexual orientation:** the preferred term used when referring to an individual’s physical and/or emotional attraction to the same and/or opposite gender. “Gay,” “lesbian,” “bisexual” and “straight” are all examples of sexual orientations. A person’s sexual orientation is distinct from a person’s gender identity and expression

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California Fair Employment and Housing Act (FEHA)

Employers have a duty to take “all reasonable steps necessary to prevent harassment from occurring” (Government Code § 12940(j)(1))

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District Liability Under FEHA

- District is liable to employee, student or third party if the District...
 1. Knows or should have known of harassment, and
 2. Fails to take effective measures to stop it.
- Strict liability for harassment by a supervisor

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Personal Liability Under FEHA

True or False?

- An employee can be personally liable for sexual harassment.

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Personal Liability Under FEHA

An employee is personally liable for harassment regardless of whether the employer knows or should have known of the conduct and fails to take immediate and corrective action.

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New FEHA Regulations

Effective April 1, 2016, FEHA regulations were amended to require:

1. New written policy requirements
2. New training requirements
3. New dissemination requirements

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New FEHA Regulations

New written policy requirements:

1. Must include a list of all current protected categories under FEHA;
2. Must include a statement protecting employees from unlawful acts/conduct under FEHA of coworkers, managers, supervisors, and third parties;
3. Must make clear that contractors, unpaid interns and volunteers are protected under the policy;
4. Must inform complainants that complaints receive:
 - Designation of confidentiality, to the extent possible;
 - Timely responses;
 - Impartial and timely investigations by qualified personnel;
 - Documentation and tracking for reasonable progress;
 - Appropriate options for remedial actions and resolutions, and
 - Timely closure

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New FEHA Regulations

New Training Requirements Must Include:

- Instructing supervisors on their obligation to report sexual harassment, discrimination, and retaliation of which they become aware;
- Covering appropriate remedial measures to correct harassing behavior;
- Reviewing the definition of "abusive conduct"; and
- Maintaining, for two years, all written or recorded materials that comprise the training, including copies of all webinars, all written questions and responses from webinars and e-learning, all sign-in sheets, and all certificates of attendance or completion issued, in addition to the already-required names of supervisory employees trained, the date of the training, the type of training and the name of the training provider.

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New FEHA Regulations

New Dissemination Requirements:

- Employers must disseminate the new written policy to employees by using **one or more** of the following methods:
 - Printed copy with an acknowledgement form for the employee to sign and return;
 - Via email with an acknowledgement return form;
 - Posted on company intranet with a tracking system to ensure that employees have read and acknowledged receipt of the policy;
 - Discuss the policy upon hire and/or during a new orientation session (Title 2 CCR § 11023(c)); and/or
 - Employers must translate the written policy into every language that is used as the "spoken" language by at least 10% of the workforce.
- Also, in accordance with Education Code § 231.5, a copy of the district's policy on sexual harassment must be provided to every employee each school year – such as by one of the methods described above.

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New FEHA Requirements as of January 1, 2018

- Sexual harassment prevention training must include training inclusive of harassment based on gender identity, gender expression, and sexual orientation.
- Employers must post a poster on discrimination in employment and the illegality of sexual harassment in a prominent and accessible location.
- Employers must post a poster developed by DFEH regarding transgender rights in a prominent and accessible location.

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FEHA Changes as of January 1, 2019

- It is unlawful for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to require an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including sexual harassment.

(Cal. Govt. Code § 12964.5)

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Legislative Changes as of January 1, 2019

- A current or former employer is allowed to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

(Cal. Civil Code § 47)

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Legislative Changes as of January 1, 2019

- Settlement agreements are prohibited from including a provision that prevents the disclosure of factual information pertaining to:
 - Acts of sexual assault and sexual harassment;
 - Acts of workplace sexual harassment and sex discrimination;
 - The failure to prevent acts of workplace sexual harassment or sex discrimination; and
 - Retaliation against a person for reporting sexual harassment or sex discrimination.

(Cal. Code of Civil Procedure § 1001)

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Legislative Changes as of January 1, 2020

- By 1/1/21, all nonsupervisory staff must receive at least *one hour* of effective interactive training regarding sexual harassment prevention within first six months of employment and every two years thereafter.
- Beginning 1/1/20, for seasonal and temporary employees, or any employee hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever comes first.
- An employer who has provided this training and education to an employee after January 1, 2019, is not required to provide this training and education again until two years thereafter.

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Legislative Changes as of January 1, 2020

- Effective interactive training shall include:
 - Information and practical guidance regarding the federal and state statutory provisions concerning the *prohibition* against and the *prevention* and *correction* of sexual harassment and the *remedies* available to victims of sexual harassment in employment.
 - Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation.
 - Prevention of abusive conduct.
 - Practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation.

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FEHA

Hypothetical

Carl has been a district administrator for 5 years. Carl approaches another administrator, Terry, and tells him that she identifies as a transgender woman and is beginning the process of transitioning at work. From now on, Carl would like to be called Kay, will be wearing clothing consistent with an identity as a woman, and prefers the use of feminine pronouns.

As the weeks pass, Kay's coworkers become accustomed to her new name and appearance, but some of them inadvertently refer to Kay as "Carl" and use the masculine pronoun "he," especially when telling stories about things that happened before Kay's transition. Usually, the coworkers quickly correct themselves when this happens. Terry, however, pointedly says "good morning, Carl," when Kay passes by, and makes comments like "nice dress, dude."

Kay, embarrassed, says nothing to Terry or anyone else about these comments for months.

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FEHA

What advice would you give Kay?

- A. Kay should keep her head down and try to focus on work. Not everyone is going to be comfortable with her gender transition and she should expect some negative comments and remarks.
- B. Kay has a claim for discrimination and harassment because of gender identity and gender expression against the Board because of Terry's treatment of her, as well as because of her coworkers' occasional use of the wrong name and pronoun. Those coworkers should be reprimanded and notes placed in their files.
- C. Kay has a claim against Terry and the Board because of Terry's negative comments and purposeful, repeated use of the wrong name and pronouns. Her coworkers' occasional and accidental mistakes do not create a situation of discrimination or harassment.

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FEHA

The best answer is:

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Title VII of the Federal Civil Rights Act of 1964

A federal law that prohibits employment discrimination based on gender, including sexual harassment



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Title VII – Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature
- constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment, (2) submission to or rejection of such conduct ... is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (29 CFR §1604.11)

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Comparing FEHA and Title VII

True or False?

- Unpaid interns and volunteers are protected under federal laws against sexual harassment.
- California law is broader than federal law in providing protection against sexual harassment.

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Comparing FEHA and Title VII

Federal Title VII

- Negligence theory only [Employer not automatically liable].
- Employer not liable if:
 - Employer exercised reasonable care; and
 - Employee unreasonably failed to take advantage of opportunities to avoid harm.
- 15 employees or more.
- No application to independent contractors, volunteers and unpaid interns.

California FEHA

- Strict liability [Employer automatically liable for harassment by managers and supervisors].
- Employer has no defense if manager or supervisor is harasser.
- All employers, even those employing one person or sole proprietors.
- Includes independent contractors, volunteers and unpaid interns.

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Title IX of the Education Amendments of 1972

- A federal law that prohibits sex discrimination (including sexual harassment) in education programs or activities that receive federal funds
- Enforced by the U.S. Department of Education, Office for Civil Rights (OCR)



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Title IX of the Education Amendments of 1972

September 2017 Dear Colleague Letter

- Rescinded 2011 Dear Colleague Letter on Sexual Violence and 2014 Q&A on Title IX and Sexual Violence
- Refers schools to 2001 Revised Sexual Harassment Guidance and 2006 Dear Colleague Letter on Sexual Harassment to understand continuing Title IX obligations
- Significant changes:
 - Removed 60-day investigatory time frame
 - Allowed schools to choose between preponderance of the evidence and clear and convincing evidence standards
 - Provided responding party explicit rights during investigation and before decision-making
 - Allowed schools to provide interim remedies to both parties

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Title IX of the Education Amendments of 1972

- Title IX Coordinator Responsibilities:
 1. Oversees the school's response to Title IX reports and complaints and identifies and addresses any patterns or systemic problems revealed by such reports and complaints;
 2. Must have knowledge of the requirements of Title IX and of the school's own policies and procedures on sex discrimination;
 3. Must be informed of all complaints raising Title IX issues throughout the school.

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Title IX of the Education Amendments of 1972

- A school may decide to give its Title IX coordinator the following responsibilities:
 1. Provide training to student, faculty, and staff;
 2. Conduct Title IX investigations;
 3. Evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students;
 4. Determine appropriate sanctions against the perpetrator and remedies for the complainant;
 5. Determine appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and
 6. Ensure that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers.

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California Education Code

- "It is the policy of the State of California ... that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state" (Education Code § 231.5)
- Sexual harassment is prohibited as a form of sexual discrimination
- Enforcement of Ed Code complaints is through Board Policy

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Cal. Education Code § 220

"No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid"

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Cal. Education Code § 66270

"No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed or defined in Section 11135 of the Government Code or any other characteristic that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, including immigration status, in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid."

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Cal. Education Code § 66252

- (a) "All students have the right to participate fully in the educational process, free from discrimination and harassment."
- (b) "California's postsecondary educational institutions have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity."

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Nondiscrimination in Sex-Segregated School Programs (K-12 only)

Effective 1/1/14, a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records

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Nondiscrimination in Access to Sex-Segregated Facilities (Community Colleges only)

- The California Community Colleges Chancellor's Office has determined that colleges must allow transgender students to access facilities, such as restrooms and locker rooms, consistent with their gender identity
- Colleges must not treat transgender students any differently than non-transgender students

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Types of Sexual Harassment

- Quid Pro Quo
- Hostile Work/Educational Environment

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Quid Pro Quo

- "This for that"
- Occurs when one employee (in a position of power or authority over the other) explicitly or implicitly conditions a job, job benefits, or absence of job detriments on the other employee's acceptance of sexual conduct or conditions
- Can also occur when academic benefits are conditioned on the acceptance of sexual conduct or conditions

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Quid Pro Quo

True or False?

- The promise of a reward or threat of punishment in exchange for sexual favors must be explicit in order to constitute quid pro quo sexual harassment.
- An employee who gives in to the demand for sex in order to avoid negative consequences forfeits his or her claim for quid pro quo sexual harassment.

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Quid Pro Quo

Hypothetical

Sara is the Executive Director of We Love Children Charter School. She approaches Nancy, a teacher at the school, and says, "Hi Nancy. I've seen you at the gym. You seem to have a great time in Zumba! And so sexy! Nancy, I'd love to take you to Tahoe this weekend. Just the two of us." Nancy is stunned and intimidated by the attention. She says, "Well Sara, I'm flattered, but I'm not interested." Sara smiles and says, "Well, I had to ask. But I get it. I'll leave you alone." Sara does not proposition or engage in any unwelcome conduct toward Nancy again. Three months later Nancy is late to work for three days and Sara warns her that she will be reprimanded if she is late again.

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Quid Pro Quo

Choose the best answer:

- Nancy can establish a claim for quid pro quo sexual harassment because Sara should never have asked a subordinate on a date.
- Nancy cannot establish a claim for quid pro quo sexual harassment because there is no evidence that she is a lesbian.
- Nancy's claim for quid pro quo sexual harassment is weak because there is no evidence that Sara was offering job benefits if Nancy said yes, or threatening punishment if Nancy said no.

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Quid Pro Quo

The best answer:

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Hostile Work/Education Environment

Occurs when a supervisor/teacher or coworker engages in unwelcome sexual conduct that is sufficiently severe or pervasive to unreasonably interfere with the employee's/student's job/academic performance or create an intimidating, hostile or offensive working/academic environment

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Hostile Work/Education Environment

True or False?

- To prove hostile work environment sexual harassment, the complaining party does not need to show that they suffered an adverse employment action.
- To prove hostile work environment sexual harassment, the complaining party must show that they were subjected to unwanted sexual attention that was both severe and pervasive.

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Cal. Education Code § 201 and § 66252(c)

“Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution.”

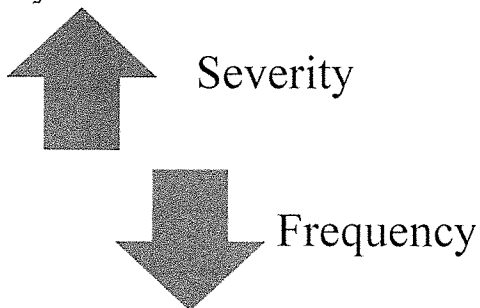
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Key Elements of Sexual Harassment

- Unwelcome – Illegal harassment is based on unwelcome conduct
- Sexual – Sexual in nature or gender-based (because of sex)
- Severe or Pervasive – Conduct must be sufficiently severe or pervasive to alter the working/academic conditions of the complainant

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Key Element: Severe or Pervasive



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Key Elements of Sexual Harassment

- Offensive, both objectively and subjectively
 - Objectively: A reasonable person, similarly situated, would find the conduct offensive
 - Subjectively: The victim actually finds the conduct offensive
- Totality of the Circumstances

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Totality of the Circumstances

1. Whether the conduct was verbal or physical, or both;
2. How frequently it occurred;
3. Whether the conduct was hostile and patently offensive;
4. Whether the alleged harasser was a co-worker or a supervisor;
5. Whether others joined in perpetuating the harassment; and
6. Whether the harassment was directed at more than one individual.

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Hostile Work Environment

Hypothetical

Tamika starts as a supervisor for the Commission in Yuba County. The other four supervisors and all the field crews at the Yuba County office are men. Eve, the District Administrator does not think women should be field supervisors and resents that headquarters is "forcing an affirmative action case" on her office.

Eve tells the other supervisors and crew members, "the field is no place for a woman." She tells Tamika's crew to "keep an eye on her" and "use your own judgment in the field." During office meetings, around the office, and in emails, Eve consistently refers to Tamika as "little one," "Wonder Girl," "Oprah Jr.," and similar names.

Tamika tells Eve she is undermining her, but Eve tells her to "grow a pair or you'll never make it out there."

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Hostile Work Environment

Choose the best answer:

- A. Eve's use of diminutive nicknames and undermining of Tamika's authority is OK because Tamika needs to demonstrate the ability to supervise men in what can be an inherently crude environment.
- B. Eve's nicknames and statements undermining Tamika's authority have created a hostile work environment.
- C. Because Eve has no interest in Tamika sexually, her hostile behavior is not actionable as sexual harassment.

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Hostile Work Environment

The best answer:

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Hostile Work Environment

Hypothetical

Warren, a member of Tamika's crew, frequently refuses to follow her orders, saying, "your boss told me to use my own judgment." Warren and Ben routinely interrupt team meetings by burping, talking and laughing. They insincerely offer "apologies to your ladyship."

Frank tells Warren and Ben, "leave my gal alone." Frank repeatedly comments on Tamika's appearance saying things like, "you are the hottest boss I've ever had," and, "dollyface, you can tell me what to do whenever and wherever you want." He repeatedly asks her out even though Tamika makes it clear she is happily married.

Tamika is afraid to call Eve on her behavior, but complains about the treatment by her crew. Eve takes her written complaint but takes no action.

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Hostile Work Environment

Choose the best answer:

- A. Frank cannot be found liable for hostile work environment sexual harassment because he is defending Tamika.
- B. Warren and Ben are not liable for sexual harassment because there is no evidence that their disruptive actions are substantially motivated by Tamika's sex. Besides, their actions are neither severe nor pervasive.
- C. The Commission is liable for the sexual harassment of Warren, Ben and Frank because management knew or should have known of their behavior.

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Hostile Work Environment

The best answer:

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Hostile Work Environment

True or False?

- An employee can file a claim for sexual harassment even if the supervisor took no adverse employment action (e.g., termination, failure to hire, demotion), against the employee.
- Sexual desire is a key element to any claim for sexual harassment.

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Special Issues in Sexual Harassment

- Motive does not excuse the conduct
- Confidentiality
- Third party concerns
- Both sexes protected
- Sexual favoritism
- Sexual harassment outside the workplace

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Special Issues in Sexual Harassment

Hypothetical

Cody and two office technicians, Parker and Rachel, are openly in a sexual relationship. Cody regularly calls them to the office for "special consultations." Their sexual congress is audible through the door.

Cody gives Parker and Rachel preferred shifts, bonuses, and training denied to others. Cody allows Parker and Rachel to use Drew, Logan, and Timothy, other office technicians, to do their work and run personal errands for them.

Drew, Logan, and Timothy are disgusted but work together to make sure they excel at all assignments.

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Special Issues in Sexual Harassment

Choose the best answer:

- A. Drew and Logan can successfully maintain a sexual harassment/hostile work environment – widespread sexual favoritism claim against Parker and Rachel but not Cody.
- B. Timothy, who has never been harassed by Cody, cannot maintain a successful action for sexual harassment/hostile work environment – widespread sexual favoritism.
- C. Drew, Logan and Timothy can successfully sue Cody, Parker, Rachel and the Board for sexual harassment/hostile work environment – widespread sexual favoritism.

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Special Issues in Sexual Harassment


The best answer:


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Types of Conduct that Constitute Sexual Harassment

Verbal 

Visual 

Physical 

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Examples of Verbal Conduct

- Unwelcome gender-specific epithets, comments or slurs
- Foul or obscene language
- Graphic comments
- Explicit discussions about sexual activities
- Jokes or stories
- Advances or propositions
- Spreading rumors of a sexual nature

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Examples of Physical Conduct

- Unwelcome touching, assault, kissing, hugging, or grabbing
- Coercing intercourse or other sexual behaviors
- Sexual gestures
- Any physical interference with work or school activities when directed at an individual on the basis of sex
- Assault

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Examples of Visual Conduct

- Leering, staring
- Obscene letters, text messages, emails or notes
- Display or distribution of sexually suggestive objects or pictures
- Sexually suggestive cartoons
- Derogatory gender-based cartoons, objects or pictures
- Making sexual gestures



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Not All Unwelcome Communication is Illegal Harassment

“We simply recognize that, like Title VII, the FEHA is not a civility code and is not designed to rid the workplace of vulgarity”

-California Supreme Court in *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264

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Retaliation is Illegal

- Retaliation – Denying employment benefits or other adverse treatment towards an individual because he/she opposed harassing or discriminatory conduct
- What is protected?
 - Filing a complaint
 - Seeking advice about filing a complaint
 - Assisting someone with filing a complaint
 - Participating in an investigation
- “Third party reprisals” are also actionable as retaliation under Title IX

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Abusive Conduct

- Employers should also prevent abusive conduct.
- Abusive conduct is an employer’s or employee’s conduct in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests. (Government Code § 12950.1(g)(2))

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Abusive Conduct

- **Abusive Conduct may include:**
 - Repeated infliction of verbal abuse, like the use of derogatory remarks, insults, epithets
 - Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating
 - Gratuitous sabotage or undermining of a person’s work performance
- A single act will not constitute abusive conduct unless it is especially severe or egregious

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Abusive Conduct

No independent cause of action

Abusive conduct (“bullying”) in and of itself is not a violation of FEHA unless it can be shown to have been substantially motivated by a protected characteristic.

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Abusive Conduct

True or False?

- The FEHA makes it unlawful to engage in behavior that a reasonable person in the employee’s place would find demeaning?

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Abusive Conduct

Hypothetical

Jason is a new employee and having difficulty learning the office protocols. He asks his supervisor Ming for assistance. In a loud, sarcastic voice, audible throughout the open work station area, Ming tells Jason: “I’ve showed you how to do this simple, simple, simply simple three simple step procedure over and over and over. You should have been paying attention. I won’t show you again!”

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Abusive Conduct

Choose the best answer:

- A. Jason can sue Ming for abusive conduct.
- B. Jason should have paid better attention earlier.
- C. Ming's actions constitute abusive workplace conduct, and can likely be disciplined for violation of workplace behavior policies.
- D. Ming's conduct exposes the District to liability for unlawful discrimination.

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Abusive Conduct

The best answer:

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Abusive Conduct

Hypothetical

Ming writes an email to Jason which reads:
 "Jason, are all Irish mutts as stupid as you? What is it about that thick potato head of yours that you can't understand the most simple, simple, simple instructions?"

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Abusive Conduct

Choose the best answer:

- A. Ming would likely be found personally liable for harassment based on race, ancestry, national origin.
- B. The Authority is strictly liable for the harassment by Ming, its supervisor.
- C. Jason can recover damages from Ming, personally.
- D. All of the above.

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Abusive Conduct

The best answer:

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Remedies Available for Sexual Harassment

- Consequences of Discrimination/Harassment to the Victim
- Victim Remedies
- Student Body/District Community Remedies
- Consequences to the Harasser

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The College's Responsibilities

The College has duties related to discrimination and harassment. It must:

- Prevent discrimination/harassment from occurring;
- Thoroughly investigate complaints of discrimination/harassment; and
- Take immediate and effective corrective action to stop discrimination/harassment when it occurs.

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Prevent Sexual Harassment

- Establish a written policy prohibiting sexual harassment
- Distribute and post policy
- Train supervisors
- Inform employees and students on how to file a complaint
- Take complaints seriously
- Notify of resources available
- Notify that retaliation is prohibited

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Investigate Complaints

- Credible and impartial trained investigator
- Effective, timely, thorough and fair investigation
- Give both parties a fair opportunity to present their versions of what occurred
- Interview any witnesses
- Assess credibility
- Ensure the investigation process is clear to all
- Maintain confidentiality of process
- Caution the accused against retaliation
- Document the investigation and maintain records of all claims

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Take Immediate and Effective Corrective Action

- Is immediate action necessary, e.g., interim remedies?
- Is there sufficient evidence to sustain the allegation?
- If unlawful harassment, then implement appropriate measures, including discipline
- Make the victim whole
- Be sure the inappropriate conduct or harassment has stopped
- Ensure no retaliation occurs
- Keep victim informed of actions to the extent appropriate

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Denials

The common response to charges of sexual harassment is a denial of the charges:

- "It never happened."
- "There are no witnesses."
- "Look at how she dresses!"
- "I am a hugger."
- "Ever hear of a woman scorned? If I don't say she's hot, she's not going to get the job done."

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Denials

Hypothetical

Sam, a senior supervisor for the SPED Department calls Maggie into his office. He tells her that if she'd like to avoid a bad review she must perform a sexual act with him. He grabs her and pushes her to the ground. Maggie manages to escape Sam's grasp and flees.

Jose sees Maggie running out of Sam's office in distress and thinks her blouse may have been partially off. Katie sees Maggie in the restroom crying and fixing a tear in her blouse. Maggie tells Katie about the attack. Sam abruptly promotes Maggie.

Katie and Jose tell the Equal Employment Opportunity (EEO) Officer what they saw and heard. Sam denies anything happened. Maggie files a complaint with the California Department of Fair Employment and Housing alleging quid pro quo sexual harassment.

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Denials

Choose the best answer:

- A. Sam is a senior executive and no one witnessed the alleged unwelcome conduct so no one will believe Maggie.
- B. Because Maggie was promoted she suffered no damages, so there can be no claim for quid pro quo harassment.
- C. A reasonable investigator would conclude, based on circumstantial evidence and credibility assessments, that quid pro quo sexual harassment did occur.

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Denials

The best answer:

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What to Do if You are Accused of Sexual Harassment?

- Objectively review your challenged behavior
- Review the policy on sexual harassment
- Conform your conduct to the expectations of your job
- Cooperate with investigation and resolution
- Do not retaliate against accuser or witnesses
- Recognize that employees/students have a right to a working/educational environment that is free from sexual harassment

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How Sexual Harassment is Reported

True or False?

In California, if the employee does not take advantage of the established internal complaint process, the employer has a complete defense to an action for sexual harassment.

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How Sexual Harassment is Reported

- A complainant can:
 - Follow the procedure in College policies
 - Report directly to the California Community Colleges Chancellor's office
 - Report directly to DFEH or EEOC (or OCR)
- Supervisors should take action if they:
 - Actually know about sexual harassment, or
 - Reasonably believe that sexual harassment is occurring

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Who May Receive a Report of Sexual Harassment?

- Immediate supervisor
- Coordinator for Nondiscrimination in Employment or similar position
- President/Superintendent or designee
- Human resources or personnel department
- Board members
- Department of Fair Employment and Housing
- Equal Employment Opportunity Commission
- U.S. Department of Education Office for Civil Rights

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Reporting

Hypothetical

Jan has been employed by the District for 20 years, and is one of the most senior employees in her unit. She is well respected by her coworkers and the students she assists.

One day, when walking back to work from her lunch break, Jan overhears two students gossiping about a student that Jan is assigned to assist (Tyler). From what she overhears, the two students believe that Tyler has been acting strangely because he was approached by a much older student in one of his extra-curricular clubs to engage in sexual activities. The students gossiped that Tyler "did it" with the other student so that he could get a leadership position in the club.

What should Jan do with this information?

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Reporting

Choose the best answer:

- A. Jan should ignore the gossip. She didn't notice Tyler acting strange, and she does not have a responsibility to report unless *she* believes there is reasonable likelihood of truth to the accusations.
- B. Jan should investigate the rumor by speaking with the gossiping students and Tyler, and then reporting the incident if she believes it may be sexual harassment.
- C. Jan should report the information she learned to the appropriate school official.

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Reporting

The best answer:

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Mendocino-Lake CCD Policies

- BP 3410 – Non-Discrimination
- AP 3410.1 – Non-Discrimination
- BP 3430 – Prohibition of Harassment
- AP 3430.1 – Prohibition of Harassment
- BP 3540 – Sexual and Other Assaults on Campus
- AP 3540.1 – Sexual and Other Assaults on Campus
- AP 3435.1 – Discrimination and Harassment Complaints and Investigations

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Mendocino CCD AP 3410

“Any person who desires to file a complaint based on discrimination, harassment or access should contact the District Compliance Officer, Director of Human Resources, by phone at (707) 468-3065 or in person at the District’s Human Resources Department, 1000 Hensley Creek Road, Ukiah, California, 95482. A complete copy of the District’s complaint procedure, Administrative Procedure 3435.1, can be found at the District’s Human Resources Department, Room 1160 in MacMillan Hall, and the Library, Room 4220 in the Library/Learning Center, both at the Ukiah Campus and on the District’s website at <http://www.mendocino.edu>.”

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Mendocino CCD AP 3435.1

Complaint Procedure:

- **Informal Complaints:** Any person may submit an informal complaint to the Director of Human Resources or any other District or college administrator. Administrators receiving an informal complaint shall immediately notify the Director of Human Resources in writing of all pertinent information and facts alleged in the informal complaint.
- **Formal Complaints:**
 - Formal Complaints must be filed with the Chancellor of the California Community Colleges or the Director of Human Resources.
 - Formal Complaints should be submitted on the form prescribed by the Chancellor of the California Community Colleges. A copy of the form will be available at the District’s web site, Human Resources Department, Superintendent/President’s Office, and the District “Centers.”

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Mendocino CCD AP 3435.1

Investigation Procedure:


- The District shall promptly investigate every complaint and claim of harassment or discrimination.
- The District shall promptly investigate complaints of harassment or discrimination that occur off campus if the alleged conduct creates a hostile environment on campus.
- The investigator shall prepare a written report within 90 days of the District receiving the complaint.
- Within 90 days of receiving a formal complaint and after completion of its investigation, the District shall issue its Administrative Determination as to whether there is probable cause to believe discrimination occurred, actions taken to prevent similar occurrences from happening, the proposed resolution of the complaint, and the complainant's right to appeal.

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Group Discussion of Hypotheticals

In groups, review the scenarios set forth in the Attachment scenarios. Be prepared to discuss your group's decisions.



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Review

True or False?

1. An employer is strictly liable for sexual harassment committed by a supervisor or agent.
2. Only employers with 5 or more employees are liable for sexual harassment under the FEHA.
3. Sexual desire is a required element of a sexual harassment claim.
4. The employer's duty to take immediate, effective action in response to a claim of sexual harassment only applies where there is a credible report or threat of unwanted physical contact.

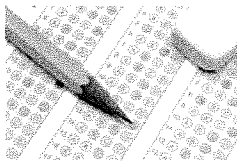
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Recap and Strategies to Prevent Sexual Harassment

- Disseminate the sexual harassment policy at least annually
- Conduct sexual harassment training
- Promptly investigate all sexual harassment complaints
- Discipline those who engage in inappropriate and/or illegal conduct
- Do not participate in sexual harassment

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Answers to Pre-Test



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Additional Resources

- California Department of Fair Employment and Housing, www.dfeh.ca.gov
- U.S. Equal Employment Opportunity Commission, www.eeoc.gov
- U.S. Department of Education Office of Civil Rights, www.ed.gov/ocr
- California Community Colleges Chancellor's office, www.cccco.edu

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Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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ATTACHMENTS

PRE-TEST

The following pretest allows you to assess your knowledge of sexual harassment issues. At the end of the training session, you will revisit your answers based on the information you received during training. (Answers appear in Answers to Pre-Test attachment.)

1. A person (student or employee) who is concerned about the behavior of another must tell that person of the concerns before reporting it to a school official as sexual harassment. T or F
2. A student who complains of sexual harassment by other students in her class should be required to withdraw and enroll in the class the next semester. T or F
3. A school employee can be held personally liable for unlawful sexual harassment. T or F
4. A school supervisor should take action if he/she actually knows about sexual harassment or if he/she reasonably believes that sexual harassment is at issue. T or F
5. If an employee grabs another employee's "private parts" just as a joke, the behavior isn't harassment. T or F
6. Sexual harassment based on gender identity is unlawful. T or F
7. A supervisor should tell an employee who complains of sexually harassing conduct not to file a police report until the school has completed its investigation. T or F
8. Name two steps the school can take to help prevent sexual harassment.

9. If you have any questions about your responsibilities with regard to sexual harassment, you should call _____.



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LEGAL UPDATE

April 13, 2017

To: Superintendents/Presidents/Chancellors, Member Community
College Districts

From: Carl D. Corbin *CDC*
General Counsel

Subject: District Board Trustees Are Required to Receive Sexual
Harassment Prevention Training
Memo No. 11-2017(CC)

As a gentle reminder, our office would like to remind our clients that the two hours of sexual harassment prevention training every two years requirement for district supervisors applies to community college district board trustees.

Government Code section 12950.1 requires private employers with 50 or more employees or any California public sector employer (such as school districts), regardless of the number of employees, to ensure that all "supervisors" receive at least two hours of effective interactive training and education regarding sexual harassment prevention every two years.

"Supervisors" is defined under California Government Code section 12929(s) as:

"... any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

District board trustees have the ultimate authority to hire and fire district employees and therefore they meet the definition of "supervisor."

Based on the above, our office encourages our clients to ensure that their district board trustees receive at least two hours every two years of sexual harassment prevention training. This training may either be in a classroom setting and/or



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through an internet-based seminar.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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SEXUAL HARASSMENT INCLUDES MANY FORMS OF OFFENSIVE BEHAVIORS

BEHAVIORS THAT MAY BE SEXUAL HARASSMENT:

THE MISSION OF THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING IS TO PROTECT THE PEOPLE OF CALIFORNIA FROM UNLAWFUL DISCRIMINATION IN EMPLOYMENT, HOUSING AND PUBLIC ACCOMMODATIONS, AND FROM THE PERPETRATION OF ACTS OF HATE VIOLENCE AND HUMAN TRAFFICKING.



SEXUAL HARASSMENT

- 1 *Unwanted sexual advances*
- 2 *Offering employment benefits in exchange for sexual favors*
- 3 *Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters*
- 4 *Derogatory comments, epithets, slurs, or jokes*
- 5 *Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations*
- 6 *Physical touching or assault, as well as impeding or blocking movements*

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Actual or threatened retaliation for rejecting advances or complaining about harassment is also unlawful.

Employees or job applicants who believe that they have been sexually harassed or retaliated against may file a complaint of discrimination with DFEH within one year of the last act of harassment or retaliation. DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a civil complaint in state or federal court to address the causes of the discrimination and on behalf of the complaining party. DFEH may seek court orders changing the employer's policies and practices, punitive damages, and attorney's fees and costs if it prevails in litigation. Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

THE FACTS

Sexual harassment is a form of discrimination based on sex/gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Individuals of any gender can be the target of sexual harassment. Unlawful sexual harassment does not have to be motivated by sexual desire. Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person's sexual orientation or gender identity.

THERE ARE TWO TYPES OF SEXUAL HARASSMENT

- ① *"Quid pro quo"* (Latin for "this for that") sexual harassment is when someone conditions a job, promotion, or other work benefit on your submission to sexual advances or other conduct based on sex.
- ② *"Hostile work environment"* sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with your work performance or create an intimidating, hostile, or offensive work environment. You may experience sexual harassment even if the offensive conduct was not aimed directly at you.

The harassment must be severe or pervasive to be unlawful. That means that it alters the conditions of your employment and creates an abusive work environment. A single act of harassment may be sufficiently severe to be unlawful.

FOR MORE INFORMATION

Department of Fair Employment and Housing
Toll Free: (800) 884-1684
TTY: (800) 700-2320
Online: www.dfeh.ca.gov

Also find us on:



If you have a disability that prevents you from submitting a written intake form on-line, by mail, or email, the DFEH can assist you by scribing your intake by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or call us through your VRS at (800) 884-1684 (voice).

To schedule an appointment, contact the Communication Center at (800) 884-1684 (voice or via relay operator 711) or (800) 700-2320 (TTY) or by email at contact.center@dfeh.ca.gov.

The DFEH is committed to providing access to our materials in an alternative format as a reasonable accommodation for people with disabilities when requested.

Contact the DFEH at (800) 884-1684 (voice or via relay operator 711), TTY (800) 700-2320, or contact.center@dfeh.ca.gov to discuss your preferred format to access our materials or webpages.



CIVIL REMEDIES:

ALL EMPLOYERS MUST TAKE THE FOLLOWING ACTIONS TO PREVENT HARASSMENT AND CORRECT IT WHEN IT OCCURS:

- 1 *Damages for emotional distress from each employer or person in violation of the law*
- 2 *Hiring or reinstatement*
- 3 *Back pay or promotion*
- 4 *Changes in the policies or practices of the employer*

EMPLOYER RESPONSIBILITY & LIABILITY

All employers, regardless of the number of employees, are covered by the harassment provisions of California law. Employers are liable for harassment by their supervisors or agents. All harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassment or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take such steps, that employer can be held liable for the harassment. In addition, an employer may be liable for the harassment by a non-employee (for example, a client or customer) of an employee, applicant, or person providing services for the employer. An employer will only be liable for this form of harassment if it knew or should have known of the harassment, and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way for an employer to avoid or limit liability if harassment occurs.

- Indicate that when the employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
 - Make clear that employees shall not be retaliated against as a result of making a complaint or participating in an investigation.
- ④ Distribute its harassment, discrimination, and retaliation prevention policy by doing one or more of the following:
- Printing the policy and providing a copy to employees with an acknowledgement form for employees to sign and return.
 - Sending the policy via email with an acknowledgment return form.
 - Posting the current version of the policy on a company intranet with a tracking system to ensure all employees have read and acknowledged receipt of the policy.
 - Discussing policies upon hire and/or during a new hire orientation session.
 - Using any other method that ensures employees received and understand the policy.
- ⑤ If the employer's workforce at any facility or establishment contains ten percent or more of persons who speak a language other than English as their spoken language, that employer shall translate the harassment, discrimination, and retaliation policy into every language spoken by at least ten percent of the workforce.
- ⑥ In addition, employers who do business in California and employ 5 or more part-time or full-time employees must provide at least one hour of training regarding the prevention of sexual harassment, including harassment based on gender identity, gender expression, and sexual orientation, to each non-supervisory employee; and two hours of such training to each supervisory employee. Training must be provided within six months of assumption of employment. Employees must be trained during calendar year 2019, and, after January 1, 2020, training must be provided again every two years. Please see Gov. Code 12950.1 and 2 CCR 11024 for further information.

- ① Distribute copies of this brochure or an alternative writing that complies with Government Code 12950. This pamphlet may be duplicated in any quantity.
- ② Post a copy of the Department's employment poster entitled "California Law Prohibits Workplace Discrimination and Harassment."
- ③ Develop a harassment, discrimination, and retaliation prevention policy in accordance with 2 CCR 11023. The policy must:

- Be in writing.
- List all protected groups under the FEHA.
- Indicate that the law prohibits coworkers and third parties, as well as supervisors and managers with whom the employee comes into contact, from engaging in prohibited harassment.
- Create a complaint process that ensures confidentiality to the extent possible; a timely response; an impartial and timely investigation by qualified personnel; documentation and tracking for reasonable progress; appropriate options for remedial actions and resolutions; and timely closures.
- Provide a complaint mechanism that does not require an employee to complain directly to their immediate supervisor. That complaint mechanism must include, but is not limited to including: provisions for direct communication, either orally or in writing, with a designated company representative; and/or a complaint hotline; and/or access to an ombudsperson; and/or identification of DFEH and the United States Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
- Instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so that the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training (see 2 CCR 11024).



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LEGAL UPDATE

April 14, 2016

To: Superintendents/Presidents/Chancellors, Member Community
College Districts

From: Monica D. Batanero *MDB*
Associate General Counsel

Subject: New Anti-Discrimination and Anti-Harassment Regulations
Impose Additional Requirements for California Employers
Memo No. 06-2016(CC)

Effective April 1, 2016, California employers, including school districts, county offices of education and community college districts, are required to implement new anti-discrimination and anti-harassment regulations. The new California Fair Employment and Housing Act (FEHA) regulations are available on the Department of Fair Employment and Housing website.¹ The California FEHA requires employers to take all reasonable steps to prevent discrimination and harassment from occurring at a workplace.²

One of the key new revisions is the requirement that employers provide employees with anti-harassment and anti-discrimination policies that outline a formalized complaint process to address any employee concerns regarding discrimination or harassment.

New Written Policy Requirements

- **Protected Categories**—A list of all current protected categories under FEHA: race, religion, color, national origin, ancestry, physical and/or mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and/or veteran status (Government Code §§ 12940, 12945, and 12945.2).

¹ <http://www.dfeh.ca.gov/res/docs/FEHC/FinalText.pdf>.

² Cal. Govt. Code § 12940(j)(1).



- **Protected Statement**—A statement protecting employees from unlawful acts/conduct under FEHA of coworkers, managers, supervisors, and third parties. The written policy must also make clear that contractors, unpaid interns and volunteers are protected under the policy.
- **Complaint Mechanism**—Complaints receive: (a) a designation of confidentiality, to the extent possible; (b) timely responses; (c) impartial and timely investigations by qualified personnel; (d) documentation and tracking for reasonable progress; (e) appropriate options for remedial actions and resolutions; and (f) timely closure.

Additionally, the policy must ensure that employees are given the option to complain to someone other than his or her immediate supervisor, such as a designated company representative, a hotline, an ombudsperson, or to direct employees to the California Department of Fair Employment and Housing (DFEH) and the U.S. Equal Employment Opportunity Commission.

- **Non-retaliation**—Employees will not be subject to retaliation as a result of submitting a complaint or participating in any workplace investigation.

New Training Requirements

The new regulations also add the following to existing supervisor harassment training³ requirements for employers with 50 or more employees:

- Instructing supervisors on their obligation to report sexual harassment, discrimination, and retaliation of which they become aware (Title 2, California Code of Regulations Section (CCR) 11024(c)(2)(F)).
- Covering appropriate remedial measures to correct harassing behavior (Title 2 CCR 11024(c)(2)(J)).
- Reviewing the definition of “abusive conduct,” explaining the negative impact of abusive conduct, specifically discussing the elements of abusive conduct, providing examples of abusive conduct, and emphasizing that, unless the act is especially severe or egregious, a single act shall not constitute abusive conduct. Although the new regulations still do not identify the amount of time that must be dedicated specifically to the subject of “abusive conduct,” they make clear that the subject should be covered “in a meaningful manner.” (Title 2 CCR 11024(c)(2)(M)).
- Maintaining, for two years, all written or recorded materials that comprise the training, including copies of all webinars, all written questions and responses from webinars and e-learning, all sign-in sheets, and all certificates of attendance or completion issued, in addition to the already-required names of supervisory employees trained, the date of the training, the type of training and the name of the training provider. (Title 2 CCR 11024(a)(2)(C); (b)(2)).

³ (Govt. Code § 12950.1(a))



New Dissemination Requirements

Employers must disseminate the new written policy to employees by using **one or more** of the following methods:

- (1) Printed copy with an acknowledgement form for the employee to sign and return;
- (2) Via email with an acknowledgement return form;
- (3) Posted on company intranet with a tracking system to ensure that employees have read and acknowledge receipt of the policy;
- (4) Discuss the policy upon hire and/or during a new orientation session (Title 2 CCR 11023(c)); and/or
- (5) Employers must translate the written policy into every language that is used as the “spoken” language by at least 10% of the workforce. (Title 2 CCR 11023(d)).

Also, in accordance with Education Code § 231.5, a copy of the district’s policy on sexual harassment must be provided to every employee each school year – such as by one of the methods described above.

Update Your Policy

Employers should promptly review their employee handbooks, anti-harassment policies, and anti-harassment training to ensure compliance with the amended regulations.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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CALIFORNIA LAW PROHIBITS WORKPLACE DISCRIMINATION AND HARASSMENT

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING (DFEH) ENFORCES LAWS THAT PROTECT YOU FROM ILLEGAL DISCRIMINATION AND HARASSMENT IN EMPLOYMENT BASED ON YOUR ACTUAL OR PERCEIVED:

- ANCESTRY
- AGE (40 and above)
- COLOR
- DISABILITY (physical and mental, including HIV and AIDS)
- GENETIC INFORMATION
- GENDER IDENTITY, GENDER EXPRESSION
- MARITAL STATUS
- MEDICAL CONDITION (genetic characteristics, cancer or a record or history of cancer)
- MILITARY OR VETERAN STATUS
- NATIONAL ORIGIN (includes language use and possession of a driver's license issued to persons unable to prove their presence in the United States is authorized under federal law)
- RACE
- RELIGION (includes religious dress and grooming practices)
- SEX/GENDER (includes pregnancy, childbirth, breastfeeding and/or related medical conditions)
- SEXUAL ORIENTATION

THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (GOVERNMENT CODE SECTIONS 12900 THROUGH 12996) AND ITS IMPLEMENTING REGULATIONS (CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTIONS 11000 THROUGH 11141):

- ① Prohibit harassment of employees, applicants, unpaid interns, volunteers, and independent contractors by any persons and require employers to take all reasonable steps to prevent harassment. This includes a prohibition against sexual harassment, gender harassment, harassment based on pregnancy, childbirth, breastfeeding and/or related medical conditions, as well as harassment based on all other characteristics listed above.
- ② Require that all employers provide information to each of their employees on the nature, illegality, and legal remedies that apply to sexual harassment. Employers may either develop their own publications, which must meet standards set forth in California Government Code section 12950, or use a brochure from DFEH.
- ③ Require employers with 5 or more employees and all public entities to provide training for all employees regarding the prevention of sexual harassment, including harassment based on gender identity, gender expression, and sexual orientation.
- ④ Prohibit employers from limiting or prohibiting the use of any language in any workplace unless justified by business necessity. The employer must notify employees of the language restriction and consequences for violation. Also prohibits employers from discriminating against an applicant or employee because they possess a driver's license issued to a person who is unable to prove that their presence in the United States is authorized under federal law.
- ⑤ Require employers to reasonably accommodate an employee, unpaid intern, or job applicant's religious beliefs and practices, including the wearing or carrying of religious clothing, jewelry or artifacts, and hair styles, facial hair, or body hair, which are part of an individual's observance of their religious beliefs.

- ⑥ Require employers to reasonably accommodate employees or job applicants with disabilities to enable them to perform the essential functions of a job.
- ⑦ Permit job applicants, unpaid interns, volunteers, and employees to file complaints with DFEH against an employer, employment agency, or labor union that fails to grant equal employment as required by law.
- ⑧ Prohibit discrimination against any job applicant, unpaid intern, or employee in hiring, promotions, assignments, termination, or any term, condition, or privilege of employment.
- ⑨ Require employers, employment agencies, and unions to preserve applications, personnel records, and employment referral records for a minimum of two years.
- ⑩ Require employers to provide leaves of up to four months to employees disabled because of pregnancy, childbirth, or a related medical condition.
- ⑪ Require an employer to provide reasonable accommodations requested by an employee, on the advice of their health care provider, related to their pregnancy, childbirth, or a related medical condition.
- ⑫ Require employers of 20 or more persons to allow eligible employees to take up to 12 weeks leave in a 12-month period for the birth of a child or the placement of a child for adoption or foster care; also require employers of 50 or more persons to allow eligible employees to take up to 12 weeks leave in a 12-month period for an employee's own serious health condition or to care for a parent, spouse, or child with a serious health condition.

- ⑬ Require employment agencies to serve all applicants equally, refuse discriminatory job orders, and prohibit employers and employment agencies from making discriminatory pre-hiring inquiries or publishing help-wanted advertisements that express a discriminatory hiring preference.
- ⑭ Prohibit unions from discriminating in member admissions or dispatching members to jobs.
- ⑮ Prohibit retaliation against a person who opposes, reports, or assists another person to oppose unlawful discrimination.

FILING A COMPLAINT

The law provides for remedies for individuals who experience prohibited discrimination or harassment in the workplace. These remedies include hiring, front pay, back pay, promotion, reinstatement, cease-and-desist orders, expert witness fees, reasonable attorney's fees and costs, punitive damages, and emotional distress damages.

Job applicants, unpaid interns, and employees: If you believe you have experienced discrimination or harassment you may file a complaint with DFEH. Independent contractors and volunteers: If you believe you have been harassed, you may file a complaint with DFEH.

Complaints must be filed within one year of the last act of discrimination/harassment or, for victims who are under the age of 18, not later than one year after the victim's eighteenth birthday.

If you have a disability that prevents you from submitting a written intake form on-line, by mail, or email, DFEH can assist you by scribing your intake by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or call us through your VRS at (800) 884-1684 (voice).

To schedule an appointment, contact the Communication Center at (800) 884-1684 (voice or via relay operator 711) or (800) 700-2320 (TTY) or by email at contact.center@dfeh.ca.gov.

DFEH is committed to providing access to our materials in an alternative format as a reasonable accommodation for people with disabilities when requested.

Contact DFEH at
(800) 884-1684
(voice or via relay operator 711),
TTY (800) 700-2320,
or contact.center@dfeh.ca.gov
to discuss your preferred format to access our materials or webpages.

DFEH-E07P-ENG / December 2018

FOR MORE INFORMATION

Department of Fair Employment and Housing

Toll Free: (800) 884-1684

TTY: (800) 700-2320

Online: www.dfeh.ca.gov

Also find us on:



Government Code section 12950 and California Code of Regulations, title 2, section 11013, require all employers to post this document. It must be conspicuously posted in hiring offices, on employee bulletin boards, in employment agency waiting rooms, union halls, and other places employees gather. Any employer whose workforce at any facility or establishment consists of more than 10% of non-English speaking persons must also post this notice in the appropriate language or languages.



TRANSGENDER RIGHTS IN THE WORKPLACE

WHAT DOES "TRANSGENDER" MEAN?

Transgender is a term used to describe people whose gender identity differs from the sex they were assigned at birth. Gender expression is defined by the law to mean a "person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." Gender identity and gender expression are protected characteristics under the Fair Employment and Housing Act. That means that employers, housing providers, and businesses may not discriminate against someone because they identify as transgender or gender non-conforming. This includes the perception that someone is transgender or gender non-conforming.

WHAT IS A GENDER TRANSITION?

- 1 "Social transition" involves a process of socially aligning one's gender with the internal sense of self (e.g., changes in name and pronoun, bathroom facility usage, participation in activities like sports teams).
- 2 "Physical transition" refers to medical treatments an individual may undergo to physically align their body with internal sense of self (e.g., hormone therapies or surgical procedures).

A person does not need to complete any particular step in a gender transition in order to be protected by the law. An employer may not condition its treatment of a transitioning employee upon completion of a particular step in a gender transition.

FAQ FOR EMPLOYERS

What is an employer allowed to ask? Employers may ask about an employee's employment history, and may ask for personal references, in addition to other non-discriminatory questions. An interviewer should not ask questions designed to detect a person's gender identity, including asking about their marital status, spouse's name, or relation of household members to one another. Employers should not ask questions about a person's body or whether they plan to have surgery.

How do employers implement dress codes and grooming standards? An employer who requires a dress code must enforce it in a non-discriminatory manner. This means that, unless an employer can demonstrate business necessity, each

employee must be allowed to dress in accordance with their gender identity and gender expression. Transgender or gender non-conforming employees may not be held to any different standard of dress or grooming than any other employee.

What are the obligations of employers when it comes to bathrooms, showers, and locker rooms? All employees have a right to comparable, safe, and adequate restroom and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth. In addition, to respect the privacy interests of all employees, employers should provide feasible alternatives, such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. An employer may not require an employee to use a particular facility. Unless exempted by other provisions of state law, all single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency must be identified as all-gender toilet facilities.

FILING A COMPLAINT

If you believe you are a victim of discrimination you may, within one year of the discrimination, file a complaint of discrimination by contacting DFEH.

If you have a disability that prevents you from submitting a written intake form online, by mail, or email, DFEH can assist you by scribing your intake by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or call us through your VRS at (800) 884-1684 (voice). DFEH is committed to providing access to our materials in an alternative format as a reasonable accommodation for people with disabilities when requested.

To schedule an appointment or to discuss your preferred format to access our materials or webpages, contact the Communication Center at (800) 884-1684 (voice or via relay operator 711) or (800) 700-2320 (TTY) or by email at contact.center@dfeh.ca.gov.

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January 29, 2019

**To: Superintendents/Presidents/Chancellors, Member Community
College Districts**

From: Carl D. Corbin, General Counsel *CDC*

**Subject: SB 1343 – Sexual Harassment and Abusive Conduct Prevention Training
ADDENDUM to Memo No. 16-2018(CC) - REVISED**

This Addendum to Legal Update No. 16-2018(CC) – Revised is provided as a gentle reminder that SB 1343 requires private employers (with five or more employees) and public employers such as, but not limited to, school districts, county offices of education, charter schools, and community college districts to provide training to all staff between January 1, 2019, and January 1, 2020, on sexual harassment and abusive conduct prevention. At least two hours of effective interactive training must be provided to supervisors and at least one hour of effective interactive training must be provided to non-supervisors during 2019. Employees who were trained prior to January 1, 2019 will need to be retrained.

After January 1, 2020, supervisors must receive at least two hours of effective interactive training every two years within six months of their assumption of a supervisory position.

After January 1, 2020, non-supervisors must receive at least one hour of effective interactive training every two years within six months of their assumption of a non-supervisory position.

For more information on the training requirements, please see the following link to the Department of Fair Employment and Housing (“DFEH”): https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/12/SB_1343_FAQs.pdf.

Please contact our office with questions regarding this Legal Update Addendum or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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LEGAL UPDATE

September 18, 2019

**To: Superintendents/Presidents/Chancellors, Member Community
College Districts**

From: Carl D. Corbin, General Counsel CDC

**Subject: SB 778 Extends Sexual Harassment Prevention Training
Deadline by One Year
Memo No. 12-2019(CC)**

As previously referenced in our Legal Update 16-2018, Senate Bill ("SB") 1343 required private employers (with five or more employees) and public employers such as, but not limited to, school districts, county offices of education, charter schools, and community college districts to provide training on sexual harassment and abusive conduct prevention to all staff. The training must include at least two hours of effective interactive training for supervisors and at least one hour of effective interactive training for non-supervisors. SB 1343 required the training to be provided by January 1, 2020, and every two years after.

On August 30, 2019, the Governor approved SB 778¹, which extends the sexual harassment and abusive conduct prevention training deadline for all staff to January 1, 2021, and every two years after.

For those agencies that have already provided the training during the year 2019, the training does not have to be completed again for two years.²

As a gentle reminder, new non-supervisory employees are to receive the training within six months of hire and new supervisors are to receive the training within six months of the assumption of a supervisory position.³

Please contact our office with questions regarding this Legal Update or any other matter.

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¹ As "urgency legislation" SB 778 took immediate effect.

² Government Code § 1290.1(a).

³ *Id.*



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LEGAL UPDATE

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November 15, 2018

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To: Superintendents/Presidents/Chancellors, Member Community College Districts

From: Carl D. Corbin, General Counsel CDC

Subject: SB 820 and SB 1343 – Sexual Harassment Prevention Legislation
Memo No. 16-2018(CC) - REVISED

The Governor signed two Senate Bills (“SB”) 820¹ and 1343² relating to sexual harassment issues.

SB 820

Effective January 1, 2019, settlement agreements may not include a provision that prevents the disclosure of factual information related to a claim filed in a civil action or a complaint filed in any administrative action regarding any of the following four issues:

1. An act of sexual assault that is not governed by subdivision (a) of Section 1002 of the Code of Civil Procedure.
2. An act of sexual harassment, as defined in Section 51.9 of the Civil Code.
3. An act of workplace harassment or discrimination based on sex, or failure to prevent an act of workplace harassment or discrimination based on sex or an act of retaliation against a person for reporting harassment or discrimination based on sex, as described in subdivisions (h), (i), (j), and (k) of Section 12940 of the Government Code.
4. An act of harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex, by the owner of a housing accommodation, as described in Section 12955 of the Government Code.³

SB 1343

Since 2005, California law has required that all supervisors of public employers (such as K-12 school districts, county offices of education, and community college districts) regardless of the number of employees and all supervisors of private employers with 50

¹ Available at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820.

² Available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1343.

³ Code of Civil Procedure § 1001.



or more employees receive at least two hours of interactive training regarding sexual harassment prevention within the first six months of the supervisor assuming the position.

Effective January 1, 2020, all supervisors of public employers and all supervisors of private employers with five or more employees must receive at least two hours of interactive training regarding sexual harassment prevention within the first six months of the supervisor assuming the position and every two years thereafter.⁴

Also effective January 1, 2020, all nonsupervisory staff of public employers and all nonsupervisory staff of private employers with five or more employees must receive at least one hour of interactive training regarding sexual harassment prevention within the first six months of their assumption of a position and every two years thereafter.

Effective January 1, 2020, for seasonal and temporary employees, or any employee that is hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first.⁵

While districts can continue to use other methods to complete the training (such as an “in-person” workshop or via online training), the Department of Fair Employment and Housing (“DFEH”) will be required to offer two online training courses on the prevention of sexual harassment in the workplace with the course for nonsupervisory employees being one hour in length and the course for supervisory employees being two hours in length.⁶

Please contact our office with questions regarding this Legal Update or any other legal matter.

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⁴ Government Code § 12950.1(a).

⁵ Government Code § 12950.1(h)(1).

⁶ Government Code § 12950.1(k).



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October 4, 2017

To: Superintendents/Presidents/Chancellors, Member Community
College Districts

From: Damara L. Moore, Senior Associate General Counsel *DM*
Ellie R. Austin, Schools Legal Counsel *ERA*

Subject: OCR Withdraws Significant Title IX Guidance; Issues New Dear
Colleague Letter and Q&A on Title IX
Memo No. 20-2017(CC)

On September 22, 2017, the Department of Education issued a Dear Colleague Letter which withdrew guidance on Title IX previously provided by the Office of Civil Rights (“OCR”) (“2017 Dear Colleague Letter”).¹ OCR utilizes “Dear Colleague” letters to help clarify how OCR will apply existing laws to schools, districts, and educational institutions of higher learning (hereinafter “schools”). The withdrawn guidance addressed investigations of Title IX complaints of student-on-student sexual violence. Simultaneously, OCR issued a Question and Answer on Campus Sexual Misconduct² (“2017 Q&A”) to provide information regarding how OCR will evaluate a school’s compliance with Title IX under the new guidance.³

Title IX applies to public and private elementary and secondary schools, school districts, colleges and universities receiving federal financial assistance. It prohibits discrimination on the basis of sex, including sexual harassment, in federally funded education programs.⁴

I. The Withdrawn Guidance

The 2017 Dear Colleague Letter withdraws two documents issued by OCR under the Obama Administration: the 2011 Dear Colleague Letter on Sexual Violence (“2011 Dear Colleague Letter”) and the 2014 Questions and Answers on Title IX and Sexual Violence (“2014 Q&A”). The former guidance was significant in that it specifically stated that sexual violence is a form of sexual harassment, and was thus prohibited under Title IX. OCR stated that the reason for the withdrawal of the 2011 and 2014 guidance documents was that they did not adequately ensure that the due process

¹ Available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>

² In the 2017 Q&A, OCR defines sexual misconduct to include “peer-on-peer sexual harassment and sexual violence.”

³ References to the new guidance within this Legal Update are to the 2017 Q&A unless otherwise noted.

⁴ 20 U.S.C. § 1681 and 34 C.F.R. § 106.



rights of the responding party were protected. Additionally, OCR took issue with the fact that the 2011 and 2014 guidance documents were adopted without notice and an opportunity for public comment.

II. New Guidance

The 2017 Dear Colleague Letter explicitly refers schools to OCR's 2001 Revised Sexual Harassment Guidance ("2001 Guidance") and 2006 Dear Colleague Letter on Sexual Harassment⁵ ("2006 Dear Colleague Letter") to understand their continuing obligations to address sexual misconduct in education programs and activities. The new guidance also discusses a number of other topics, including: interim measures, grievance procedures and investigations, informal resolutions of complaints, the decision-making process, notices of the outcome, the right to appeal, the Clery Act's reporting requirements,⁶ and the effect of the rescission of the former guidance on previously-entered voluntary resolution agreements.

a. **What Is the Same**

Much remains the same under the new guidance. Schools continue to have a responsibility to promptly and effectively address sexual misconduct, prevent its recurrence, and remedy its effects.⁷ Schools continue to have an obligation to designate a Title IX coordinator to ensure they are meeting their Title IX obligations. The new guidance affirms that schools are deemed to have notice of sexual misconduct when a "responsible employee" knows or should know of such conduct.⁸ Schools must still adopt grievance procedures to address sexual misconduct. When conducting an investigation, schools have the burden to gather evidence and conduct a fair, impartial investigation. The current guidance, like the previous guidance, acknowledges that during the period of time that adjudication is pending, interim steps may be taken to separate the reporting and responding parties. The new guidance continues to recognize that schools may need to address issues which arise due to off-campus misconduct if it creates a hostile educational environment in educational programs or activities. When addressing allegations of dating violence, domestic violence, sexual assault, or stalking, community colleges must continue to comply with Title IX and the Clery Act.

As under the previous guidance, each party is entitled to access the same processes and information as the other party during the school's investigation. In disciplinary proceedings relating to allegations of dating violence, domestic violence, sexual assault, or stalking, schools may not limit the presence of an advisor to either party during a hearing, although they may limit restrictions on advocates' participation.

⁵ Available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>

⁶ These reporting requirements are unaffected by the 2017 Dear Colleague Letter.

⁷ 2001 Guidance, V.B.; 2006 Dear Colleague Letter.

⁸ A "responsible employee" remains, as previously defined, "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees or an individual who a student could reasonably believe has this authority or responsibility." 2001 Guidance V.C.



b. What Is Different

This Legal Update highlights many of the changes that are made by the new guidance, but is not a comprehensive list of all changes.

Timeframe. Title IX investigations no longer must be concluded within 60 calendar days. Instead, the guidance provides that “[t]here is no fixed time frame under which a school must complete” its investigation. OCR will now evaluate on a case-by-case basis a “school’s good faith effort to conduct a fair, impartial investigation in a timely manner.”

Interim Remedies. The 2017 Q&A provides that interim measures might be appropriate for either the reporting or the responding parties prior to an investigation or while an investigation is pending. This is a departure from previous OCR guidance, where interim measures were offered only to the reporting party.

Standard of Evidence. Significantly, the 2017 Q&A provides that schools may apply *either* the preponderance of the evidence standard or the clear and convincing evidence standard. The clear and convincing evidence standard represents a higher standard of proof, somewhere in between preponderance of the evidence and beyond a reasonable doubt. Previous guidance provided that all Title IX investigations must proceed using the preponderance of the evidence standard. The new guidance also requires that the standard of proof utilized for evaluating a claim of sexual misconduct be consistent with the standard that applies in other student misconduct cases. In other words, a school cannot use the preponderance of the evidence standard in sexual misconduct cases but the clear and convincing evidence standard in plagiarism cases.

Informal Resolution for Allegations of Sexual Assault. Previous Title IX guidance provided that allegations of sexual assault could *not* be resolved using an informal mediation process, even if both the reporting and responding parties agreed. The new guidance allows schools to facilitate voluntary resolution processes, such as mediation, for any Title IX complaint, including those involving allegations of sexual assault.

Rights During Decision Making Process. The new guidance makes explicit the requirement that both the reporting and responding parties have access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report, and provides that the responding party must have the opportunity to respond to the report in writing in advance of any decision about responsibility and/or hearing.

Notice of Outcome of Disciplinary Proceedings. The new guidance provides that a “written notice of the outcome of disciplinary proceedings” must be provided to both the reporting and responding parties, and recommends that both parties be notified “concurrently.” For elementary and secondary schools and for allegations at the postsecondary level that do not involve Clery crimes,⁹ the notice must inform the reporting party whether the investigation found that the alleged conduct occurred, any individual remedies offered to the reporting party, any sanctions imposed on the responding party that relate directly to the reporting party, and other steps the school has taken to eliminate the hostile environment. In elementary and secondary schools, the notice should be provided to the parents of students under 18 and directly to students who are 18 or older.

⁹ The 2017 Q&A also incorporates the requirements under the Clery Act with respect to this written notification.



Obligation to Produce Written Report. The 2017 guidance mandates that any investigation under Title IX that may lead to disciplinary action against the responding party must result in a written investigation report “summarizing the relevant exculpatory and inculpatory evidence.”

Right to Cross-Examine. The 2017 guidance makes clear that if one party is permitted to cross-examine the other party, that right must extend to the other party.

Right to Appeal. Under the former guidance, if a school granted a right to appeal investigation findings, the school was required to allow both parties the right to appeal. Under the new guidance, if a school chooses to allow appeals from either its decision regarding responsibility or its disciplinary sanctions, it may choose to allow an appeal only for the responding party or for both parties.

III. **Impact**

Despite the withdrawal of two major guidance documents, the majority of schools’ Title IX obligations remain intact. Many other advisory letters and guides related to sex discrimination and harassment remain in place,¹⁰ and can assist schools in understanding their continuing obligations under Title IX.

However, with the increased focus by OCR on the responding party’s due process rights, schools should examine their policies and practices to ensure they provide due process to those under investigation for sexual misconduct. Schools may also reconsider and heighten the standard of proof they believe is appropriate in such investigations. Counsel should be consulted to ensure any new policies are in alignment with the changes in the law.

Additionally, the 2017 Q&A provides that voluntary resolution agreements previously entered into between a school and OCR remain binding on the school.

OCR has indicated that it will engage in rulemaking after a public comment process. This will allow schools the ability to provide input into the development of new regulations related to Title IX’s requirements for investigating student-on-student sexual misconduct. The Department of Education has not released any dates for the public comment period as of the time of publication of this Legal Update; however, we will keep our clients updated on this developing issue.

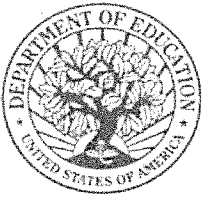
Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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¹⁰ Including the 2001 Revised Sexual Harassment guidance, the 2006 Dear Colleague Letter on Sexual Harassment Issues, the 2015 Dear Colleague Letter on Title IX Coordinators, and the 2015 Title IX Resource Guide.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

U.S. Department of Education
Office for Civil Rights

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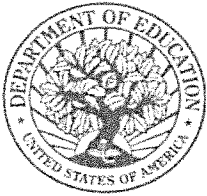
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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

September 22, 2017

Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

- Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.
- Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard. The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students. The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis. The Letter provided that any due-process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them.

Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing “improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”¹ As a result, many schools have established procedures for resolving allegations that “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”²

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have

¹ Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, WALL ST. J. ONLINE (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty).

² *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty); see also ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017); AMERICAN COLLEGE OF TRIAL LAWYERS, TASK FORCE ON THE RESPONSE OF UNIVERSITIES AND COLLEGES TO ALLEGATIONS OF SEXUAL VIOLENCE, WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS (2017).



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

September 2017

Q&A on Campus Sexual Misconduct

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the *Revised Sexual Harassment Guidance* previously issued by the Office for Civil Rights¹—provide information about how OCR will assess a school's compliance with Title IX.

SCHOOLS' RESPONSIBILITY TO ADDRESS SEXUAL MISCONDUCT

Question 1:

What is the nature of a school's responsibility to address sexual misconduct?

Answer:

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.² In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond.³

¹ Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 Guidance]; see also Office for Civil Rights, Dear Colleague Letter on Sexual Harassment (Jan. 25, 2006), available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

² 2001 Guidance at (VII).

³ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999); 34 C.F.R. § 106.31(a); 2001 Guidance at (V)(A)(1). Title IX prohibits discrimination on the basis of sex “under any education program or activity” receiving federal financial assistance, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.1, meaning within the “operations” of a postsecondary institution or school district, 20 U.S.C. § 1687; 34 C.F.R. § 106.2(h). The Supreme Court has explained that the statute “confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.” *Davis*, 526 U.S. at 644. Accordingly, OCR has informed institutions that “[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.” Oklahoma State University Determination Letter at 2, OCR Complaint No. 06-03-2054 (June 10, 2004); see also University of Wisconsin-Madison Determination Letter, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) (“OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University.”). Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities. Under the Clery Act, postsecondary institutions are obliged to collect and report statistics on crimes that occur on campus, on noncampus properties controlled by the institution or an affiliated student organization and used for educational purposes, on public property within or immediately adjacent to campus, and in areas within the patrol jurisdiction of the campus police or the campus security department. 34 C.F.R. § 668.46(a); 34 C.F.R. § 668.46(c).

Each recipient must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.⁴ Other employees may be considered “responsible employees” and will help the student to connect to the Title IX Coordinator.⁵

In regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.⁶

THE CLERY ACT AND TITLE IX

Question 2:

What is the Clery Act and how does it relate to a school's obligations under Title IX?

Answer:

Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX.⁷ Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs. The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports. In October 2014, following a negotiated rulemaking process, the Department issued amended regulations to implement these statutory changes.⁸ Accordingly, when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.

INTERIM MEASURES

Question 3:

What are interim measures and is a school required to provide such measures?

Answer:

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.⁹ Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

⁴ 34 C.F.R. § 106.8(a).

⁵ 2001 Guidance at (V)(C).

⁶ Office for Civil Rights, Dear Colleague Letter on the First Amendment (July 28, 2003), *available at* <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>; 2001 Guidance at (XI).

⁷ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, 20 U.S.C. § 1092(f).

⁸ See 34 C.F.R. § 668.46.

⁹ See 2001 Guidance at (VII)(A).

It may be appropriate for a school to take interim measures during the investigation of a complaint.¹⁰ In fairly assessing the need for a party to receive interim measures, 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. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs.

GRIEVANCE PROCEDURES AND INVESTIGATIONS

Question 4:

What are the school's obligations with regard to complaints of sexual misconduct?

Answer:

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.¹¹ OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.¹²

Question 5:

What time frame constitutes a "prompt" investigation?

Answer:

There is no fixed time frame under which a school must complete a Title IX investigation.¹³ OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

Question 6:

What constitutes an "equitable" investigation?

¹⁰ 2001 Guidance at (VII)(A). In cases covered by the Clery Act, a school must provide interim measures upon the request of a reporting party if such measures are reasonably available. 34 C.F.R. § 668.46(b)(1)(v).

¹¹ 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); *see also* 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must "[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result").

¹² 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking, 34 C.F.R. § 668.46 (k)(1)(i), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay, 34 C.F.R. § 668.46 (k)(3)(i)(A).

¹³ 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k)(3)(i)(A).

Answer:

In every investigation conducted under the school's grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.¹⁴

Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.¹⁵ Restricting the ability of either party to discuss the investigation (e.g., through “gag orders”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.¹⁶

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details 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.¹⁷ Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.¹⁸

INFORMAL RESOLUTIONS OF COMPLAINTS

Question 7:

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer:

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

¹⁴ 2001 Guidance at (V)(A)(1)-(2); *see also* 34 C.F.R. § 668.46(k)(2)(ii).

¹⁵ 2001 Guidance at (X).

¹⁶ 34 C.F.R. § 106.31(a).

¹⁷ 2001 Guidance at (VII)(B).

¹⁸ 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

DECISION-MAKING AS TO RESPONSIBILITY

Question 8:

What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?

Answer:

The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school's sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.¹⁹

The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.²⁰ The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).²¹ When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must "[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice."²² In such disciplinary proceedings and any related meetings, the institution may "[n]ot limit the choice of advisor or presence for either the accuser or the accused" but "may establish restrictions regarding the extent to which the advisor may participate in the proceedings."²³

Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

¹⁹ The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied "basic fairness" to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) ("[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused."). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution's annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).

²⁰ 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

²¹ A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns, as noted in Question 11.

²² 34 C.F.R. § 668.46(k)(2)(iii).

²³ 34 C.F.R. § 668.46(k)(2)(iv).

DECISION-MAKING AS TO DISCIPLINARY SANCTIONS

Question 9:

What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?

Answer:

The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.²⁴ In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.²⁵

NOTICE OF OUTCOME AND APPEALS

Question 10:

What information should be provided to the parties to notify them of the outcome?

Answer:

OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently. The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students. Under the Clery Act, postsecondary institutions must provide simultaneous written notification to both parties of the results of the disciplinary proceeding along with notification of the institution's procedures to appeal the result if such procedures are available, and any changes to the result when it becomes final.²⁶ This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.²⁷ For proceedings not covered by the Clery Act, such as those arising from allegations of harassment, and for all proceedings in elementary and secondary schools, the school should inform the reporting party whether it found that the alleged conduct occurred, any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and other steps the school has taken to eliminate the hostile environment, if the school found one to exist.²⁸ In an elementary or secondary school, the notice should be provided to the parents of students under the age of 18 and directly to students who are 18 years of age or older.²⁹

²⁴ 34 C.F.R. § 106.8(b); 2001 Guidance at (VII)(A).

²⁵ 34 C.F.R. § 668.46(k)(1)(iii).

²⁶ 34 C.F.R. § 668.46(k)(2)(v). The Clery Act applies to proceedings arising from allegations of dating violence, domestic violence, sexual assault, and stalking.

²⁷ 34 C.F.R. § 668.46(k)(3)(iv).

²⁸ A sanction that directly relates to the reporting party would include, for example, an order that the responding party stay away from the reporting party. See 2001 Guidance at vii n.3. This limitation allows the notice of outcome to comply with the requirements of the Family Educational Rights and Privacy Act. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 99.12(a). FERPA provides an exception to its requirements only for a postsecondary institution to communicate the results of a disciplinary proceeding to the reporting party in cases of alleged crimes of violence or specific nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13).

²⁹ 20 U.S.C. § 1232g(d).

Question 11:

How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?

Answer:

If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.³⁰

EXISTING RESOLUTION AGREEMENTS

Question 12:

In light of the rescission of OCR's 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

Answer:

Yes. Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact-specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

Note: The Department has determined that this Q&A is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This document does not add requirements to applicable law. If you have questions or are interested in commenting on this document, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

³⁰ 2001 Guidance at (IX). Under the Clery Act, a postsecondary institution must provide simultaneous notification of the appellate procedure, if one is available, to both parties. 34 C.F.R. § 668.46(k)(2)(v)(B). OCR has previously informed schools that it is permissible to allow an appeal only for the responding party because “he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation.” Skidmore College Determination Letter at 5, OCR Complaint No. 02-95-2136 (Feb. 12, 1996); *see also* Suffolk University Law School Determination Letter at 11, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“[A]ppeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University.”); University of Cincinnati Determination Letter at 6, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (“[T]here is no requirement under Title IX that a recipient provide a victim’s right of appeal.”).

STATE OF CALIFORNIA



ERIK SKINNER, INTERIM CHANCELLOR

CALIFORNIA COMMUNITY COLLEGES

CHANCELLOR'S OFFICE

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<http://www.cccco.edu>

OFFICE OF THE GENERAL COUNSEL

Jacob Knapp, *Acting General Counsel*
Peter V. Khang, *Deputy Counsel*

To: Office of the General Counsel Listserv

From: Jacob Knapp, *Acting General Counsel* JK

Date: July 27, 2016

Re: Facilities for transgender students

The Office of the General Counsel (OGC) has received various questions regarding a topic that has received national media attention: facilities for transgender students. In the wake of North Carolina's House Bill 2 which bans individuals from using a public restroom or locker-room that is inconsistent with the biological sex stated on the individual's birth certificate, the U.S. Department of Education (DOE) and Department of Justice (DOJ) issued a "Dear Colleague Letter"¹ as guidance on the rights of transgender students in May of 2016. The OGC recently consulted with the Office of Civil Rights (OCR) at the DOE on the key points of the letter, along with a discussion of how the directive affects our California community colleges.²

The OCR has made it clear that the authority for enforcement of the directive is linked to federal funding. If a public school is a recipient of federal funds, the school must follow Title IX, the federal law that prevents sex-based discrimination in educational institutions, or run the risk of losing funding. In the state of California, all but two exempt colleges (excluding private and parochial schools) receive federal funds. The list of federal fund recipients includes California community colleges.

The directive indicates that transgender students should be afforded broad civil rights protections under Title IX. The DOE and DOJ interpret Title IX to require schools to treat students consistent with the student's gender identity once the school receives notice that the student will begin asserting a gender identity different from their education record. Notice of a gender change can come from the student or the parent/guardian of a minor and a medical diagnosis or treatment is not required.

It is important to note that California law currently prevents gender discrimination. California Education Code section 220 states that "No person shall be subjected to discrimination on the basis of... gender,

¹ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

² The OCR directive discusses multiple issues concerning transgender students, including: educational records, Family Educational Rights and Privacy Act (FERPA), single-sex schools, etc. This memo is limited to the discussion of facilities.

gender identity, gender expression... in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.”

In light of the federal guidance and California law, if a California community college is notified that a student is asserting a gender different from the gender listed on their education record, the college must allow the transgender student to access facilities, such as restrooms and locker rooms, consistent with their gender identity.

When providing facilities, community colleges must not treat transgender students any differently than non-transgender students. Colleges must ensure that transgender students do not feel isolated or discriminated against by requiring the transgender students to use facilities inconsistent with his/her gender identity or requiring use of individual facilities when other students are not required to do so.

Colleges may still provide separate facilities based on sex – that is, having separate restrooms for male and female students, but the OCR has clearly indicated that colleges are not required to create new or separate “transgender restrooms” strictly for transgender students. Such a policy would treat transgender students differently and would segregate them from other students. Colleges may have unisex restrooms or family restrooms available if the transgender student voluntarily chooses to use such facilities with the requirement that the facility is open to everyone and not limited to transgender students.

It is also important to remember that providing a safe and nondiscriminatory environment under Title IX extends to all students, including students who do not identify as transgender. Accordingly, when providing accommodations to transgender students, colleges should also be aware of non-transgender students who may seek additional privacy or alternative facilities as a result of the accommodation.

To help colleges facilitate and provide support to all students, the DOE also issued a document titled “Examples of Policies and Emerging Policies.”³ This document was intended to help schools provide a safe, supportive, and nondiscriminatory environment for all students. Some of the policies include making individual-user restrooms available to all students who voluntarily seek additional privacy or providing access to an alternative restroom or changing area to any student who wants increased privacy. Again, these practices should be afforded to all students to create a nondiscriminatory environment.

With the recent changes, the OCR has seen an influx of cases involving transgender students and facilities within the past year. Although numerous states across the country have joined in a lawsuit against the DOJ for issuance of the guidance, California law and the recent directive by the DOE and DOJ make it clear that discrimination based on sex or gender is strictly prohibited. The Office of the General Counsel suggests that colleges consult with their local counsel if they have any questions about the federal directive, Title IX, California law and/or implementing best practices to support community college students of all genders.

JHK/pvk

³ <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>

**SEXUAL HARASSMENT
IS PROHIBITED
IN THE SCHOOL AND WORK ENVIRONMENT**

1. The District will take action to ensure that this campus is free of sexual harassment.
2. The District has a policy and complaint procedure. Copies are available at _____.
3. Employees and students may report allegations of sexual harassment to _____ at _____.
4. If you have any questions or concerns, please see _____ at _____.



Unlawful Discrimination Complaint Form

Name: _____
Last First

Address: _____
Street or P.O. Box City State Zip

Phone: Day () Evening ()

I Am A: ☐ Student ☐ Employee ☐ Other: _____

I Wish To Complain Against: _____

District: _____ College: _____

Date of Most Recent Incident of Alleged Discrimination: _____

(Nonemployment complaints must be filed within one year of the date of the alleged unlawful discrimination. Employment complaints must be filed within 180 days of the date of the alleged unlawful discrimination.)

I Allege Discrimination Based on the Following Category Protected under Title 5 (you must select at least one):

- | | | | |
|-----------------------------------|--|--|---|
| <input type="checkbox"/> Age | <input type="checkbox"/> Ethnic Group Identification | <input type="checkbox"/> National Origin | <input type="checkbox"/> Religion |
| <input type="checkbox"/> Ancestry | <input type="checkbox"/> Genetic Information | <input type="checkbox"/> Physical Disability | <input type="checkbox"/> Retaliation** |
| <input type="checkbox"/> Color | <input type="checkbox"/> Mental Disability | <input type="checkbox"/> Race | <input type="checkbox"/> Sex/Gender (includes Harassment) |
| | | | <input type="checkbox"/> Sexual Orientation |

☐ Perceived to be in protected category or associated with those in protected category

Clearly state your complaint. Describe each incident of alleged discrimination separately. For each incident provide the following information: 1) date(s) the discriminatory action occurred; 2) name of individual(s) who discriminated; 3) what happened; 4) witnesses (if any); and 5) why you believe the discrimination was because of your religion, age, race, sex or whatever basis you indicated above. **If applicable, explain why you believe you were retaliated against for filing a complaint or asserting your right to be free from discrimination on any of the above grounds. (Attach additional pages as necessary.)

What would you like the District to do as a result of your complaint -- what remedy are you seeking? _____

I certify that this information is correct to the best of my knowledge.

Signature of Complainant

Date

Send **Original** to the District, or:

Chancellor's Office, California Community Colleges
1102 Q Street, Sacramento, California 95811
Attention: Legal Affairs Division

(Revised 02/14)

U.S. Equal Employment Opportunity Commission
Guidance on Investigations of Complaints

FROM: EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

**NON-DISCRIMINATION**

The District is committed to equal opportunity in educational programs, employment, and all access to institutional programs and activities.

The District, and each individual who represents the District, shall provide access to its services, classes, and programs without regard to national origin, religion, age, gender, gender identity, gender expression, race or ethnicity, color, medical condition, genetic information, ancestry, sexual orientation, marital status, physical or mental disability, pregnancy, or military and veteran status, or because he/she is perceived to have one or more of the foregoing characteristics, or based on association with a person or group with one or more of these actual or perceived characteristics.

The Superintendent/President shall establish administrative procedures that ensure all members of the college community can present complaints regarding alleged violations of this policy and have their complaints heard in accordance with the Title 5 regulations and those of other agencies that administer state and federal laws regarding nondiscrimination.

No District funds shall ever be used for membership, or for any participation involving financial payment or contribution on behalf of the District or any individual employed by or associated with it, to any private organization whose membership practices are discriminatory on the basis of national origin, religion, age, gender, gender identity, gender expression, race, color, medical condition, genetic information, ancestry, sexual orientation, marital status, physical or mental disability, pregnancy, or military and veteran status, or because he/she is perceived to have one or more of the foregoing characteristics, or because of his/her association with a person or group with one or more of these actual or perceived characteristics.

See Administrative Procedure No. 3410.1

References: Education Code, Sections 66250 et seq., 72010 et seq., and 87100 et seq.;
Title 5, Sections 59300 et seq., and 59300 et. seq.;
Penal Code Section 422.55;
Government Code, Section 12926.1 and 12940 et. seq.;
Title 2 Sections 10500 et seq.;
Labor Code Section 1197.5;
ACCJC Accreditation Eligibility Requirement 20 and ACCJC
Accreditation Standard Catalog Requirements (formerly Accreditation
Standard II.B.2.c)

Adopted: December 19, 1978

Revised: March 3, 1982

December 6, 1989

June 2, 1993

October 16, 1995

July 7, 1999

June 5, 2013

May 15, 2019



ADMINISTRATIVE PROCEDURES

No. 3410.1

MENDOCINO - LAKE COMMUNITY COLLEGE DISTRICT

NONDISCRIMINATION

The District shall provide and maintain administrative complaint procedures that assure equal access to employment, services, classes, athletics, and programs without regard to actual, perceived or association with others' ethnic group identification, national origin, religion, age, gender, gender identity, gender expression, race or ethnicity, color, genetic information, ancestry, sexual orientation, or physical or mental disability, pregnancy, or any characteristic listed or defined in Section 11135 of the Government Code or any characteristic that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code. In addition to these protected bases, the District additionally provides equal employment opportunities to all applicants and employees regardless of gender, medical condition, marital status or military and veteran status.

Education Programs

All courses, including noncredit classes, shall be conducted without regard to the gender of the student enrolled in the classes. As defined in the Penal Code, "gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

The District shall not prohibit any student from enrolling in any class or course on the basis of gender.

Academic staff, including but not limited to counselors, instructors and administrators shall not offer program guidance to students which differs on the basis of gender.

Insofar as practicable, the District shall offer opportunities for participation in athletics equally to male and female students.

Employment

All employment decisions, including but not limited to hiring, retention, assignment, transfer, evaluation, dismissal, compensation, layoff and advancement for all position classifications shall be based on job-related criteria and the District's staffing needs.

It is also unlawful to discriminate against a person who serves in an unpaid internship or any other limited-duration program to provide unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any the basis of their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

The District shall from time to time as necessary provide professional and staff development activities and training to promote understanding of diversity.

Any person who desires to file a complaint based on discrimination, harassment or access should contact the District Compliance Officer, Director of Human Resources, by phone at (707) 468-3065 or in person at the District's Human Resources Department, 1000 Hensley Creek Road, Ukiah, California, 95482. A complete copy of the District's complaint procedure, Administrative Procedure 3435.1, can be found at the District's Human Resources Department, Room 1160 in MacMillan Hall, and the Library, Room 4220 in the Library/Learning Center, both at the Ukiah Campus and on the District's website at <http://www.mendocino.edu>.

- References: **Nondiscrimination References for Education Programs:**
Education Code Sections 66250 et seq., 200 et seq., and 72010 et seq.;
Penal Code Sections 422.55 et seq.;
Title 5 Sections 59300 et seq.;
ACCJC Accreditation Eligibility Requirement 20 and ACCJC Accreditation
Standard Catalog Requirements (*formerly II.B.2.c*)
- Nondiscrimination References for Employment:**
Education Code Sections 87100 et seq.;
Title 5 Sections 53000 et seq.;
Government Code Sections 11135 et seq. and 12940 et seq.;
Title 2 Sections 10500 et seq.;
Labor Code Section 1197.5

**PROHIBITION OF HARASSMENT**

All forms of harassment are contrary to basic standards of conduct between individuals and are prohibited by state and federal law, as well as this policy, and will not be tolerated. The District is committed to providing an academic and work environment that respects the dignity of individuals and groups. The District shall be free of sexual harassment and all forms of sexual intimidation and exploitation including acts of sexual violence. It shall also be free of other unlawful harassment, including that which is based on any of the following statuses: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation of any person, or military and veteran status, or because he/she is perceived to have one or more of the foregoing characteristics.

The District seeks to foster an environment in which all employees, students, unpaid interns, and volunteers feel free to report incidents of harassment without fear of retaliation or reprisal. Therefore, the District also strictly prohibits retaliation against any individual for filing a complaint of harassment or for participating in a harassment investigation. Such conduct is illegal and constitutes a violation of this policy. All allegations of retaliation will be swiftly and thoroughly investigated. If the District determines that retaliation has occurred, it will take all reasonable steps within its power to stop such conduct. Individuals who engage in retaliatory conduct are subject to disciplinary action, up to and including termination or expulsion.

Any student, employee, unpaid intern, or volunteer who believes that he/she has been harassed or retaliated against in violation of this policy should immediately report such incidents by following the procedures described in AP 3435.1. Supervisors are mandated to report all incidents of harassment and retaliation that come to their attention.

This policy applies to all aspects of the academic environment, including but not limited to classroom conditions, grades, academic standing, employment opportunities, scholarships, recommendations, disciplinary actions, and participation in any community college activity. In addition, this policy applies to all terms and conditions of employment, including but not limited to hiring, placement, promotion, disciplinary action, layoff, recall, transfer, leave of absence, training opportunities and compensation.

To this end the Superintendent/President shall ensure that the institution undertakes education and training activities to counter discrimination and to prevent, minimize and/or eliminate any hostile environment that impairs access to equal education opportunity or impacts the terms and conditions of employment.

The Superintendent/President shall establish procedures that define harassment on campus. The Superintendent/President shall further establish procedures for employees, students, unpaid interns, volunteers, and other members of the campus community that provide for the investigation

and resolution of complaints regarding harassment and discrimination, and procedures for students to resolve complaints of harassment and discrimination. All participants are protected from retaliatory acts by the District, its employees, students, and agents.

This policy and related written procedures (including the procedure for making complaints) shall be widely published and publicized to administrators, faculty, staff, students, unpaid interns, and volunteers particularly when they are new to the institution. They shall be available for students, employees, unpaid interns, and volunteers in all administrative offices, and shall be posted on the District's website.

Employees who violate the policy and procedures may be subject to disciplinary action up to and including termination. Students who violate this policy and related procedures may be subject to disciplinary measures up to and including expulsion. Unpaid interns who violate this policy and related procedures may be subject to disciplinary measure up to and including termination from the internship or other unpaid work experience program.

See Administrative Procedure 3430.1

References: Education Code Sections 212.5, 44100, 66252, and 66281.5;
Government Code Sections 12940 and 12950.1;
Title 2 Sections 10500 et seq.;
Title VII of the Civil Rights Act of 1964, 42 U.S. Code Annotated Section 2000e



ADMINISTRATIVE PROCEDURES

No. 3430.1

MENDOCINO-LAKE COMMUNITY COLLEGE DISTRICT

PROHIBITION OF HARASSMENT

The District is committed to providing an academic and work environment free of unlawful harassment. This procedure defines sexual harassment and other forms of harassment on campus, and sets forth a procedure for the investigation and resolution of complaints of harassment by or against any administrator, staff or faculty member or student within the District.

This procedure and the related policy protects students, employees, unpaid interns, and volunteers in connection with all the academic, educational, extracurricular, athletic, and other programs of the District, whether those programs take place in the District's facilities, a District bus, or at a class or training program sponsored by the District at another location.

Academic Freedom

No provision of this Administrative Procedure shall be interpreted to prohibit conduct that is legitimately related to the course content, teaching methods, scholarship, or public commentary of an individual faculty member or the educational, political, artistic, or literary expression of students in classrooms and public forums. (See BP 4030 Academic Freedom). This procedure will not protect speech or expressive conduct that violates federal or California anti-discrimination laws.

Definitions

General Harassment: Harassment based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation of any person, military and veteran status, or the perception that a person has one or more of these characteristics is illegal and violates District policy. Harassment shall be found where, in aggregate, the incidents are sufficiently pervasive, persistent, or severe that a reasonable person with the same characteristics as the victim of the harassing conduct would be adversely affected to a degree that interferes with his or her ability to participate in or to realize the intended benefits of an institutional activity, employment, or resource.

Gender-based harassment does not necessarily involve conduct that is sexual. Any hostile or offensive conduct based on gender can constitute prohibited harassment if it meets the definition above. For example, repeated derisive comments about a person's competency to do the job, when based on that person's gender, could constitute gender-based harassment. Harassment comes in many forms, including but not limited to the following conduct that could, depending on the circumstances, meet the definition above, or could contribute to a set of circumstances that meets the definition:

Verbal: Inappropriate or offensive remarks, slurs, jokes or innuendoes based on a person's race gender, sexual orientation, or other protected status. This may include, but is not limited to, inappropriate comments regarding an individual's body, physical appearance,

*Adopted: July 7, 1999
Revised: December 9, 2013
April 26, 2019*

*Admin Procedure 3430.1
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attire, sexual prowess, marital status or sexual orientation; unwelcome flirting or propositions; demands for sexual favors; verbal abuse, threats or intimidation; or sexist, patronizing or ridiculing statements that convey derogatory attitudes based on gender, race nationality, sexual orientation or other protected status.

Physical: Inappropriate or offensive touching, assault, or physical interference with free movement. This may include, but is not limited to, kissing, patting, lingering or intimate touches, grabbing, pinching, leering, staring, unnecessarily brushing against or blocking another person, whistling or sexual gestures. It also includes any physical assault or intimidation directed at an individual due to that person's gender, race, national origin, sexual orientation or other protected status. Physical sexual harassment includes acts of sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion. Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability.

Visual or Written: The display or circulation of visual or written material that degrades an individual or group based on gender, race, nationality, sexual orientation, or other protected status. This may include, but is not limited to, posters, cartoons, drawings, graffiti, reading materials, computer graphics, or electronic media transmissions.

Environmental: A hostile academic or work environment may exist where it is permeated by sexual innuendo; insults or abusive comments directed at an individual or group based on gender, race, nationality, sexual orientation or other protected status; or gratuitous comments regarding gender, race, sexual orientation, or other protected status that are not relevant to the subject matter of the class or activities on the job. A hostile environment can arise from an unwarranted focus on sexual topics or sexually suggestive statements in the classroom or work environment. It can also be created by an unwarranted focus on, or stereotyping of, particular racial or ethnic groups, sexual orientations, genders or other protected statuses. An environment may also be hostile toward anyone who merely witnesses unlawful harassment in his/her immediate surroundings, although the conduct is directed at others. The determination of whether an environment is hostile is based on the totality of the circumstances, including such factors as the frequency of the conduct, the severity of the conduct, whether the conduct is humiliating or physically threatening, and whether the conduct unreasonably interferes with an individual's learning or work.

Sexual Harassment: In addition to the above, sexual harassment consists of unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature made by someone from, or in, the work or educational setting when:

- submission to the conduct is explicitly or implicitly made a term or condition of an individual's employment, academic status, progress, internship, or volunteer activity;
- submission to, or rejection of, the conduct by the individual is used as a basis of employment or academic decisions affecting the individual;
- the conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment (as more fully described below); or

- submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the community college.

This definition encompasses two kinds of sexual harassment:

"Quid pro quo" sexual harassment occurs when a person in a position of authority makes educational or employment benefits conditional upon an individual's willingness to engage in or tolerate unwanted sexual conduct.

"Hostile environment" sexual harassment occurs when unwelcome conduct based on a person's gender is sufficiently severe or pervasive so as to alter the conditions of an individual's learning or work environment, unreasonably interfere with an individual's academic or work performance, or create an intimidating, hostile, or abusive learning or work environment. The victim must subjectively perceive the environment as hostile, and the harassment must be such that a reasonable person of the same gender would perceive the environment as hostile. A single or isolated incident of sexual harassment may be sufficient to create a hostile environment if it is severe, i.e. a sexual assault.

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 harassment based on sex.

Consensual Relationships

Romantic or sexual relationships between supervisors and employees they directly supervise, and between faculty and students when a student is enrolled in a faculty's class are prohibited. There is an inherent imbalance of power and potential for exploitation in such relationships. Also, in general, romantic or sexual relationships between or among administrators, faculty, or staff members and students are discouraged. A conflict of interest may arise if the administrator, faculty or staff member must evaluate the student's or employee's work or make decisions affecting the employee or student. The relationship may create an appearance of impropriety and lead to charges of favoritism by other students or employees. A consensual sexual relationship may change, with the result that sexual conduct that was once welcome becomes unwelcome and harassing. In the event that allowed relationships do occur, the District has the authority to transfer any involved employee to eliminate or attenuate the authority of one over the other, or of a teacher over a student in allowable settings (non-classroom). Such action by the District is a proactive and preventive measure to avoid possible charges of harassment and does not constitute discipline against any affected employee.

References: Education Code Sections 212.5, 44100, and 66281.5;
Government Code Section 12940;
Title 2 Sections 10500 et seq.;
Title IX, Education Amendments of 1972; Title 5 Sections 59320 et seq.;
Title VII of the Civil Rights Act of 1964, 42 U.S. Code Annotated Section 2000e

Adopted: July 7, 1999
Revised: December 9, 2013
April 26, 2019

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**SEXUAL AND OTHER ASSAULTS ON CAMPUS**

Any sexual assault or physical abuse, including, but not limited to rape as defined by California law, whether committed by an employee, student or member of the public, that occurs on District property, is a violation of District policies and procedures, and is subject to all applicable punishment, including criminal procedures and employee or student discipline procedures. Students, faculty, and staff who may be victims of sexual and other assaults shall be treated with dignity and provided comprehensive assistance.

The Superintendent/President shall establish administrative procedures that ensure that students, faculty, and staff who are victims of sexual and other assaults receive appropriate information and treatment, and that educational information about preventing sexual violence is provided and publicized as required by law.

The procedures shall meet the criteria contained in Education Code Sections 67385 and 67385.7 and 34 Code of Federal Regulations Section 668.46.

See Administrative Procedure 3540.1

References: Education Code 67382, 67385, and 67386
20 U.S. Code Section 1092(f);
34 Code of Federal Regulations Section 668.46(b)(11)



ADMINISTRATIVE PROCEDURES

NO 3540.1

MENDOCINO-LAKE COMMUNITY COLLEGE DISTRICT

SEXUAL AND OTHER ASSAULTS ON CAMPUS

Any sexual assault or physical abuse, including, but not limited to, rape, domestic violence, dating violence, sexual assault, or stalking, as defined by California law, whether committed by an employee, student, or member of the public, occurring on District property, in connection with all the academic, educational, extracurricular, athletic, and other programs of the District, whether those programs take place in the District's facilities or at another location, or on an off-campus site or facility maintained by the District, or on grounds or facilities maintained by a student organization, is a violation of District policies and regulations, and is subject to all applicable punishment, including criminal procedures and employee or student discipline procedures. (See also AP 5500.1 titled Standards of Student Conduct.)

"Sexual assault" includes but is not limited to, rape, forced sodomy, forced oral copulation, rape by a foreign object, sexual battery, or threat of sexual assault.

"Dating violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of a romantic or intimate relationship will be determined based on the length of the relationship, the type of relationship and the frequency of interaction between the persons involved in the relationship.

"Domestic violence" includes felony or misdemeanor crimes of violence committed by:

- a current or former spouse of the victim;
- a person with whom the victim shares a child in common;
- a person who is cohabitating with or has cohabitated with the victim as a spouse;
- a person similarly situated to a spouse of the victim under California law; or
- any other person against an adult or youth victim who is protected from that person's acts under California law.

"Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others, or to suffer substantial emotional distress.

It is the responsibility of each person involved in sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

"Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity.

These written procedures and protocols are designed to ensure victims of domestic violence, dating violence, sexual assault, or stalking receive treatment and information. (For physical assaults/violence, see also AP 3500, 3510, and 3515.)

All students, faculty members or staff members who allege they are the victims of domestic violence, dating violence, sexual assault or stalking on District property shall be provided with information regarding options and assistance available to them. Information shall be available from the Office of the Dean of Student Services, which shall maintain the identity and other information about alleged sexual assault victims as confidential unless and until the Dean of Student Services is authorized to release such information.

The Dean of Student Services shall provide all alleged victims of domestic violence, dating violence, sexual assault, or stalking with the following:

- A copy of the District's policy and procedure regarding domestic violence, dating violence, sexual assault or stalking;
- A list of personnel on campus who should be notified and procedures for such notification, if the alleged victim consents;
- Information about the importance of preserving evidence and the identification and location of witnesses;
- A description of available services, and the persons on campus available to provide those services if requested. Services and those responsible for provided or arranging them include:
 - transportation to a hospital, if necessary;
 - counseling by the Counseling Center;
 - notice to the police, if desired;
 - a list of other available campus resources or appropriate off-campus resources.
- A description of each of the following procedures:
 - criminal prosecution;
 - civil prosecution (i.e., lawsuit);
 - District disciplinary procedures, both student and employee;
 - modification of class schedules;
 - tutoring, if necessary.

The Dean of Student Services should be available to provide assistance to District law enforcement unit employees regarding how to respond appropriately to reports of sexual violence.

The District will investigate all complaints alleging sexual assault under the procedures for sexual harassment investigations described in AP 3435.1, regardless of whether a complaint is filed with local law enforcement.

All alleged victims of domestic violence, dating violence, sexual assault, or stalking on District property shall be kept informed, through the Office of the Vice President of Education and Student Services of any ongoing investigation. Information shall include the status of any student or employee disciplinary proceedings or appeal; alleged victims of domestic violence, dating violence, sexual assault, or stalking are required to maintain any such information in confidence, unless the alleged assailant has waived rights to confidentiality.

A complainant or witness who participates in an investigation of sexual assault, domestic violence, dating violence, or stalking will not be subject to disciplinary sanctions for a violation of the District's student conduct policy at or near the time of the incident, unless the District determines that the violation was egregious, including but not limited to, an action that places the health or safety of any other person at risk or involves plagiarism, cheating, or academic honesty.

In the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:

- The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused.
- The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.

In the evaluation of complaints in the disciplinary process, it shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or reasonably should have known that the complainant was unable to consent to the sexual activity under any of the following circumstances:

- The complainant was asleep or unconscious.
- The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.
- The complainant was unable to communicate due to a mental or physical condition.

The District shall maintain the identity of any alleged victim, witness, or third-party reporter of domestic violence, dating violence, sexual assault, or stalking on District property, as defined above, in confidence unless the alleged victim, witness, or third-party reporter specifically waives that right to confidentiality. All inquiries from reporters or other media representatives about alleged domestic violence, dating violence, sexual assaults, or stalking on District property shall be referred to the District's Office of Community Relations and Communication, which shall work with the Office of the Dean of Student Services to assure that all confidentiality rights are maintained.

Additionally, the Annual Security Report will include a statement regarding the District's programs to prevent sex offenses and procedures that should be followed after a sex offense occurs. The statement must include the following:

- A description of educational programs to promote the awareness of rape, acquaintance rape, other forcible and non-forcible sex offenses, domestic violence, dating violence, or stalking;
- Procedures to follow if a domestic violence, dating violence, sex offense, or stalking occurs, including who should be contacted, the importance of preserving evidence to prove a criminal offense, and to whom the alleged offense should be reported;

- Information on a student's right to notify appropriate law enforcement authorities, including on-campus and local police, and a statement that campus personnel will assist the student in notifying these authorities, if the student so requests;
- Information for students about existing on- and off-campus counseling, mental health, or other student services for victims of sex offenses;
- Notice to students that the campus will change a victim's academic situation after an alleged domestic violence, dating violence, sex offense, or stalking and of the options for those changes, if those changes are requested by the victim and are reasonably available;
- Procedures for campus disciplinary action in cases of an alleged domestic violence, dating violence, sex offense, or stalking including a clear statement that:
 - The accuser and the accused are entitled to the same opportunities to have others present during a disciplinary proceeding; and
 - Both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding resulting from an alleged sex offense. Compliance with this paragraph does not violate the Family Educational Rights and Privacy Act. For the purposes of this paragraph, the outcome of a disciplinary proceeding means the final determination with respect to the alleged domestic violence, dating violence, sex offense, or stalking and any sanction that is imposed against the accused.
- A description of the sanctions the campus may impose following a final determination by a campus disciplinary proceeding regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses, domestic violence, dating violence, or stalking.

Education and Prevention Information

The Office of the Dean of Student Services shall:

- Provide, as part of each campus' established on-campus orientation program, education and prevention information about domestic violence, dating violence, sexual assault, and stalking. The information shall be developed in collaboration with campus-based and community-based victim advocacy organizations, and shall include the District's sexual assault policy and prevention strategies including empowerment programming for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction.
- Post sexual violence prevention and education information on the campus internet website regarding domestic violence, dating violence, sexual assault and stalking.

References: Education Code Sections 67385 and 67386;
 20 U.S. Code Section 1092(f);
 34 Code of Federal Regulations Section 668.46(b)(11)



ADMINISTRATIVE PROCEDURES

No. 3435.1

MENDOCINO - LAKE COMMUNITY COLLEGE DISTRICT

DISCRIMINATION AND HARASSMENT COMPLAINTS AND INVESTIGATIONS

Complaints

The law prohibits coworkers, supervisors, managers, and third parties with whom an employee comes into contact from engaging in harassment, discrimination, or retaliation. Any person who has suffered harassment, discrimination, or retaliation may file a formal or informal complaint of harassment, discrimination, or retaliation, or who has learned of harassment, discrimination, or retaliation.

A formal complaint is a written and signed statement filed with the District or the California Community Colleges Chancellor's Office that alleges harassment, discrimination, or retaliation in violation of the District's Board Policies, Administrative Procedures or in violation of state or federal law. An informal complaint is any of the following: (1) An unwritten allegation of harassment, discrimination, or retaliation; (2) a written allegation of harassment, discrimination, or retaliation that falls outside the timelines for a formal complaint; or (3) a written complaint alleging harassment, discrimination, or retaliation filed by an individual who expressly indicates that he/she does not want to file a formal complaint.

Informal Complaints

Any person may submit an informal complaint to the Director of Human Resources or any other District or college administrator. Administrators receiving an informal complaint shall immediately notify the Director of Human Resources in writing of all pertinent information and facts alleged in the informal complaint.

Upon receipt of an informal complaint, the Director of Human Resources will notify the person bringing the informal complaint of his/her right to file a formal complaint, if the incident falls within the timeline for a formal complaint, and explain the procedure for doing so. The complainant may later decide to file a formal complaint, if within the timelines to do so. If the individual chooses not to file a formal complaint, or if the alleged conduct falls outside the timeline to file a formal complaint, the Director of Human Resources shall consider the allegations contained in the informal complaint and determine the appropriate course of action. This may include efforts to informally resolve the matter, or a fact-finding investigation.

Investigation of an informal complaint will be appropriate if the Director of Human Resources determines that the allegation(s), if proven true, would constitute a violation of the District policy prohibiting harassment, discrimination, or retaliation. The Director of Human Resources will explain to any individual bringing an informal complaint that the Director of Human Resources

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may decide to initiate an investigation, even if the individual does not wish the Director of Human Resources to do so. The Director of Human Resources shall not disregard any allegations of harassment, discrimination, or retaliation solely on the basis that the alleged conduct falls outside the deadline to file a formal complaint.

Formal Complaints

Formal Complaints must be filed with the Chancellor of the California Community Colleges or the Director of Human Resources unless the party submitting the Formal Complaint alleges discrimination, harassment, or retaliation against the responsible district officer, in which case it should be submitted directly to the Superintendent/President or the Chancellor of the California Community Colleges.

Formal Complaints should be submitted on the form prescribed by the Chancellor of the California Community Colleges. A copy of the form will be available at the District's web site, Human Resources Department, Superintendent/President's Office, and the District "Centers."

If any party submits a written allegation of harassment, discrimination, or retaliation not on the form described above, the District will seek to have the individual complete and submit the form. However, if the individual chooses not to do so, the District will attach the written allegation(s) to the form and treat it as a Formal Complaint. In no instance will the District reject a written allegation of harassment, discrimination, or retaliation on the basis that it was not submitted on the proper form.

A Formal Complaint must meet each of the following criteria:

- It must allege facts with enough specificity to show that the allegations, if true, would constitute a violation of District policies or procedures prohibiting discrimination, harassment, or retaliation;
- The complainant must sign and date the Formal Complaint;
- The complainant must file any Formal Complaint not involving employment within one year of the date of the alleged discriminatory, harassing, or retaliatory conduct or within one year of the date on which the complainant knew or should have known of the facts underlying the allegation(s) of discrimination, harassment, or retaliation.
- The complainant must file any Formal Complaint alleging discrimination, harassment, or retaliation in employment within 180 days of the date of the alleged discriminatory, harassing, or retaliatory conduct, except that this period shall be extended by no more than 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged violation after the expiration of the 180 days.

If the Formal Complaint does not meet the requirements set forth above, the Director of Human Resources will promptly return it to the complainant and specify the defect. If the sole defect is

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that the Formal Complaint was filed outside the applicable proscribed timeline, the Director of Human Resources will handle the matter as an informal complaint.

Oversight of Complaint Procedure

The Director of Human Resources is the "responsible District officer" charged with receiving complaints of discrimination or harassment, and coordinating their investigation.

The actual investigation of complaints may be assigned by the Director of Human Resources to other staff or to outside persons or organizations under contract with the District. This shall occur whenever the Human Resources is named in the complaint or implicated by the allegations in the complaint.

Who May File a Complaint

Any student, employee, or third party who believes he/she has been discriminated against or harassed by a student, employee, or third party in violation of this procedure and the related policy.

Where to File a Complaint

A student, employee, or third party who believes he/she has been discriminated against or harassed in violation of these policy and procedures may make a complaint orally or in writing.

If a complainant decides to file a formal written unlawful discrimination or harassment complaint against the District, he/she must file the complaint on a form prescribed by the California Community Colleges Chancellor's Office. These approved forms are available from the Director of Human Resources and at the California Community Colleges Chancellor's Office website.

The completed form must be filed with any of the following:

- the Director of Human Resources;
- Vice President of Student Services; or
- Superintendent/President; or
- the California Community Colleges Chancellor's Office.

Employment-Related Complaints

Complainants filing employment-related complaints shall be notified that they may file employment discrimination complaints with the U.S. Equal Employment Opportunity Commission (EEOC) or the Department of Fair Employment and Housing (DFEH).

Complaints filed with the EEOC or the DFEH should be forwarded to the California Community Colleges Chancellor's Office.

Any District employee who receives a harassment or discrimination complaint shall notify the Director of Human Resources immediately.

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Filing a Timely Complaint

Since failure to report harassment and discrimination impedes the District's ability to stop the behavior, the District strongly encourages anyone who believes they are being harassed or discriminated against, to file a complaint. The District also strongly encourages the filing of such complaints within 30 days of the alleged incident. While all complaints are taken seriously and will be investigated promptly, delay in filing impedes the District's ability to investigate and remediate.

All supervisors and managers have a mandatory duty to report incidents of harassment and discrimination; the existence of a hostile, offensive or intimidating work environment, and acts of retaliation.

The District will investigate complaints involving acts that occur off campus if they are related to an academic or work activity or if the harassing conduct interferes with or limits a student's or employee's ability to participate in or benefit from the school's programs or activities.

Communicating that the Conduct is Unwelcome

The District further encourages students and staff to let the offending person know immediately and firmly that the conduct or behavior is unwelcome, offensive, in poor taste or inappropriate.

Intake and Processing of the Complaint

Upon receiving notification of a harassment or discrimination complaint, the Director of Human Resources shall:

- Undertake efforts to informally resolve the charges, including but not limited to mediation, rearrangement of work/academic schedules; obtaining apologies; providing informal counseling, training, etc.
- Advise all parties that he/she need not participate in an informal resolution of the complaint, as described above, and they have the right to end the informal resolution process at any time.
- Advise a student complainant that he/she may file a complaint with the Office for Civil Rights of the U.S. Department of Education and employee complainants may file a complaint with the Department of Fair Employment and Housing. All complainants should be advised that they have a right to file a complaint with local law enforcement, if the act complained of is also a criminal act. The District must investigate even if the complainant files a complaint with local law enforcement. In addition, the District should ensure that complainants are aware of any available resources, such as counseling, health, and mental health services. The Director of Human Resources shall also notify the California Community Colleges Chancellor's Office of the complaint.
- Take interim steps to protect a complainant from coming into contact with an accused individual, especially if the complainant is a victim of sexual violence. The Director of Human Resources should notify the complainant of his/her options to avoid contact with the accused individual and allow students to change academic situations as

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appropriate. For instance, the District may prohibit the accused individual from having any contact with the complainant pending the results of the investigation. When taking steps to separate the complainant and accused individual, the District shall minimize the burden on the complainant. For example, it is not appropriate to remove complainants from classes or housing while allowing accused individuals to remain.

Investigation

The Director of Human Resources shall:

- Authorize the investigation of the complaint, and supervise or conduct a thorough, prompt and impartial investigation of the complaint, as set forth below. Where the parties opt for informal resolution, the designated officer will determine whether further investigation is necessary to ensure resolution of the matter and utilize the investigation process outlined below as appropriate. In the case of a formal complaint, the investigation will include interviews with the complainant, the accused, and any other persons who may have relevant knowledge concerning the complaint. This may include victims of similar conduct.
- Review the factual information gathered through the investigation to determine whether the alleged conduct constitutes harassment, or other unlawful discriminatory conduct, giving consideration to all factual information and the totality of the circumstances, including the nature of the verbal, physical, visual or sexual conduct, and the context in which the alleged incidents occurred.

Investigation of the Complaint

The District shall promptly investigate every complaint and claim of harassment or discrimination. No claim of workplace or academic harassment or discrimination shall remain unexamined. This includes complaints involving activities that occur off campus and in connection with all the academic, educational, extracurricular, athletic, and other programs of the District, whether those programs take place in the District's facilities, on a District bus, or at a class or training program sponsored by the District at another location. The District shall promptly investigate complaints of harassment or discrimination that occur off campus if the alleged conduct creates a hostile environment on campus.

As set forth above, where the parties opt for an informal resolution, the Director of Human Resources may limit the scope of the investigation, as appropriate. The District will keep the investigation confidential to the extent possible, but cannot guarantee absolute confidentiality because release of some information on a "need-to-know-basis" is essential to a thorough investigation. When determining whether to maintain confidentiality, the District may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the accused individual's rights to receive information about the allegations if the information is maintained by the District as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S. Code Section 1232g; 34 Code Federal Regulations Part 99.15. The District will inform the complainant if it cannot maintain confidentiality.

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Investigation Steps

The District will fairly and objectively investigate harassment and discrimination complaints. Employees designated to serve as investigators under this policy shall have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the District's grievance procedures operate. The investigator may not have any real or perceived conflicts of interest and must be able to investigate the allegations impartially.

Investigators will use the following steps: interviewing the complainant(s); interviewing the accused individual(s); identifying and interviewing witnesses and evidence identified by each party; identifying and interviewing any other witnesses, if needed; reminding all individuals interviewed of the District's no-retaliation policy; considering whether any involved person should be removed from the campus pending completion of the investigation; reviewing personnel/academic files of all involved parties; reach a conclusion as to the allegations and any appropriate disciplinary and remedial action; and see that all recommended action is carried out in a timely fashion. When the District evaluates the complaint, it shall do so using a preponderance of the evidence standard. Thus, after considering all the evidence it has gathered, the District will decide whether it is more likely than not that discrimination or harassment has occurred.

Timeline for Completion

The District will undertake its investigation promptly and swiftly as possible. To that end, the investigator shall complete the above steps, and prepare a written report within 90 days of the District receiving the complaint.

Cooperation Encouraged

All employees are expected to cooperate with a District investigation into allegations of harassment or discrimination. Lack of cooperation impedes the ability of the District to investigate thoroughly and respond effectively. However, lack of cooperation by a complainant or witnesses does not relieve the District of its obligation to investigate. The District will conduct an investigation if it is discovered that harassment is, or may be occurring, with or without the cooperation of the alleged victim(s) and regardless of whether a complaint is filed. No employee will be retaliated against as a result of lodging a complaint or participating in any workplace investigation.

Written Report

The results of the investigation of a complaint shall be set forth in a written report that will include at least all of the following information:

- A description of the circumstances giving rise to the Formal Complaint;
- A summary of the testimony provided by each witness interviewed by the investigator;
- An analysis of relevant evidence collected during the course of the investigation;
- A specific finding as to whether there is probable cause to believe that discrimination, harassment, or retaliation occurred with respect to each allegation in the complaint; and
- Any other information deemed appropriate by the District.

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Confidentiality of the Process

Investigations are best conducted within a confidential climate. Therefore, the District does not reveal information about ongoing investigations except as necessary to fulfill its legal obligations. The District will keep the investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality because release of some information on a “need-to-know-basis” is essential to a thorough investigation and to protect the rights of Accused students and employees during the investigation process and any ensuing discipline.

Administrative Determination

- In any case not involving employment discrimination, within 90 days of receiving a formal complaint, the district shall complete its investigation and forward a copy of the investigative report to the Chancellor of the California Community Colleges, a copy or summary of the report to both parties, and written notice setting forth all of the following to both the complainant and the Chancellor:
 - The determination of the Superintendent/President or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint;
 - A description of actions taken, if any, to prevent similar problems from occurring in the future;
 - The proposed resolution of the complaint; and
 - The complainant's right to appeal to the District governing board and the Chancellor California Community Colleges.
- In any case involving employment discrimination, within 90 days of receiving a formal complaint, the district shall complete its investigation and forward a copy or summary of the report to the complainant, and written notice setting forth all the following to the complainant:
 - The determination of the Superintendent/President or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint;
 - A description of actions taken, if any, to prevent similar problems from occurring in the future;
 - The proposed resolution of the complaint; and
 - The complainant's right to appeal to the district governing board and to file a complaint with Department of Fair Employment and Housing or the U.S Equal Employment Opportunity Commission.

Discipline and Corrective Action

If harassment, discrimination or retaliation occurred in violation of the policy or procedure, the District shall take disciplinary action against the accused and any other remedial action it determines to be appropriate. The action will be prompt, effective, and commensurate with the severity of the offense. Remedies for the complainant might include, but are not limited to:

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- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes or work in the same work area;
- preventing offending third parties from entering campus;
- providing counseling services or a referral to counseling services;
- providing medical services or a referral to medical services;
- providing academic support services, such as tutoring;
- arranging for a student-complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.

If the District imposes discipline, the nature of the discipline will not be communicated to the complainant. However, the District may disclose information about the sanction imposed on an individual who was found to have engaged in harassment when the sanction directly relates to the complainant; for example, the District may inform the complainant that the harasser must stay away from the complainant.

Disciplinary actions against faculty, staff, and students will conform to all relevant statutes, regulations, personnel policies and procedures, including the provisions of any applicable collective bargaining agreement.

The District shall also take reasonable steps to protect the complainant from further harassment, or discrimination, and to protect the complainant and witnesses from retaliation as a result of communicating the complaint or assisting in the investigation.

The District will ensure that complainants and witnesses know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred. The District shall take reasonable steps to ensure the confidentiality of the investigation and to protect the privacy of all parties to the extent possible without impeding the District's ability to investigate and respond effectively to the complaint.

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If the District cannot take disciplinary action against the accused individual because the complainant refuses to participate in the investigation, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence.

Appeals

If the District imposes discipline against a student or employee as a result of the findings in its investigation, the student or employee may appeal the decision using the procedure for appealing a disciplinary decision.

If the complainant is not satisfied with the results of the administrative determination, he/she may, within fifteen days, submit a written appeal to the Board of Trustees. The Board shall review the original complaint, the investigative report, the administrative decision, and the appeal. The Board shall issue a final District decision in the matter within 45 days after receiving the appeal. A copy of the decision rendered by the Board shall be forwarded to the complainant and to the California Community Colleges Chancellor's Office. The complainant shall also be notified of his/her right to appeal this decision.

If the Board does not act within 45 days the administrative determination shall be deemed approved and shall become the final decision of the District in the matter.

In any case not involving workplace discrimination, harassment, or retaliation, the complainant shall have the right to file a written appeal with the California Community Colleges Chancellor's Office within thirty days after the Board issued the final District decision or permitted the administrative decision to become final. Such appeals shall be processed pursuant to the provision of Title 5 Section 59350.

In any case involving employment discrimination, including workplace harassment, the complainant may, at any time before or after the issuance of the final decision of the District, file a complaint with the Department of Fair Employment and Housing.

Extension of Time

Within 150 days of receiving a formal complaint that does not involve employment discrimination, the District shall forward to the California Community Colleges Chancellor's Office the original complaint, the investigative report, a copy of the written notice to the complainant setting forth the results of the investigation, a copy of the final administrative decision rendered by the Board or indicating the date upon which the decision became final, and a copy of the notification to the complainant of his/her appeal rights. If, due to circumstances beyond its control, the District is unable to comply with the 150-day deadline for submission of materials, it may file a written request for an extension of time no later than ten days prior to the expiration of the deadline.

File Retention

The District will retain on file for a period of at least three years after closing the case copies of:

- the original complaint;
- the investigatory report;
- the summary of the report if one is prepared;

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- the notice provided to the parties, of the District's administrative determination and the right to appeal;
- any appeal; and
- the District's final decision.

The District will make such documents available to the Chancellor of the California Community Colleges upon request.

Where the complaint allegation consists of Sexual Misconduct, as defined by Title IX, the following applies:

Sexual Misconduct

Sexual misconduct includes sexual harassment and sexual violence:

- Sexual harassment may include unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or education setting.
- Sexual violence refers to physical sexual acts perpetrated against a person's will or when a person is incapable of giving consent due to the victim's use of drugs or alcohol or due to an intellectual or other disability. Sexual violence includes rape, sexual assault, sexual battery, and sexual coercion.
- Affirmative consent means an affirmative, conscious, and voluntary agreement to engage in sexual activity.

Sexual misconduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the District's program. A single or isolated incident may create a hostile environment if the incident is sufficiently severe.

Complaint Procedure

Where the complaint involves a minor, the District will comply with California mandated reporting requirements.

All responsible employees are required to report all actual or suspected sexual misconduct to the Title IX Coordinator immediately. A responsible employee is any employee who has the authority to take action to redress sexual misconduct, who has been given the duty of reporting incidents of sexual misconduct to the Title IX Coordinator or the Vice President of Student Services or whom a student or employee could reasonable believe has this authority or duty. The District is on notice if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual misconduct.

Any person may make a complaint by contacting the Title IX Coordinator directly. The District's Title IX Coordinator is:

Director of Human Resources
Mendocino-Lake Community College District

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1000 Hensley Creek Road, Room 1160
Ukiah, CA, 95482
Phone: (707) 468-3065 Fax: (707) 467-1023

The Title IX Coordinator will receive all relevant details about the alleged sexual misconduct reported to the District responsible employee in order to determine what occurred and how to resolve the situation. This includes the names of alleged victim and alleged perpetrator (if known), and the date, time, and location of the alleged sexual misconduct.

Privileged or Confidential Reporting

A District manager/administrator should, whenever possible, before a student or employee reveals information that he/she may wish to keep confidential, ensure that the person making the report understands the employee's obligations to report to the Title IX Coordinator, the victims option to request confidentiality, which the District will take into consideration, and the victims ability to share the information confidentially with designated District employees.

Professional, licensed, mental health counselors, who provide mental-health counseling to members of the District community, or interns, graduate students, and others supervised by professional licensed counselors, are not required to report any information to the Title IX Coordinator.

Authority over Parties

The District has authority over students, employees, and third parties for alleged violations of this policy that occur on District property. The District has authority over District employees and students for alleged violations of this policy that occur at District activities or events. The District may exercise authority over events that occur off-campus to determine if the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

Standard of Proof

The District will use a "preponderance of the evidence" standard of proof in determining whether there has been a violation of this policy. This standard of proof is also known as "more likely than not" standard.

Upon Receiving the Complaint – Health and Safety

The Title IX Coordinator, together with the Vice President of Student Services, will make an immediate assessment concerning the health and safety of the victim and campus community as a whole. The District will provide the reporting party and responding party with immediate, interim measures necessary to protect his/her health and safety. These immediate, interim measures may include providing an escort to ensure that the victim can move safely between classes, ensuring that the victim and perpetrator do not attend the same classes or work in the same area, preventing offending third parties from entering campus, providing counseling services or a referral to counseling services, providing academic support services, such as tutoring, arranging for a victim to retake a course or withdraw from a course without penalty, including ensuring that any changes do not adversely affect the victims' academic record, and reviewing any disciplinary actions taken

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against the victim to see if there is a causal connection between the harassment, discrimination, or retaliation and the misconduct that may have resulted in the victim being disciplined.

Where the District determines that there is a substantial threat to the campus community, it will issue a timely warning. The District will issue the warning according to District Administrative Procedures. The District will not to disclose the victim's name or other identifying information when issuing the warning.

Communicating that the Conduct is Unwelcome

The employee or student may, but is not required to let the offending person know immediately and firmly that the conduct or behavior is unwelcome, offensive, in poor taste, or inappropriate. This is not required.

Intake and Processing of the Complaint

If the District determines that a sexual misconduct complaint is appropriate for informal resolution, it may permit an informal resolution, including mediation. All parties, including the complainant and respondent, must receive full disclosure of the allegations and information about options for formal resolution before voluntarily agreeing to participate in an informal resolution. If all parties agree to an informal resolution, the District does not have to complete a full investigation and adjudication of a report of sexual misconduct.

Confidentiality

Where the victim requests confidentiality regarding a reportable incident, the District will take all reasonable steps to comply with the victim's request or inform the victim when it cannot ensure confidentiality. The District will not disclose the name of the victim unless the victim provides written consent after being informed of his/her right to have the information withheld. Where the victim insists that the District not disclose his/her name or other identifiable information to the alleged perpetrator, the District will inform the victim that its ability to respond will be limited. The District will evaluate this request in the context of its responsibility to provide a safe and nondiscriminatory environment for all employees and students. When weighing a request for confidentiality against the seriousness of the alleged harassment, the Title IX Coordinator will take the factors listed above into consideration.

Fact-Finding Investigation

Where the victim has filed a criminal complaint with local law enforcement, the District will consider what information the District is able to share, pursuant to state and federal law, to ensure that victims are not unnecessarily required to give multiple statements about a traumatic event. The District will continue to conduct its own thorough, reliable, prompt, and impartial investigation. The District will normally complete its sexual misconduct investigation within 90 days of receiving the complaint, unless extended by the Title IX Coordinator for good cause. The Title IX Coordinator will notify the victim and accused in writing of the reason for the extension and the projected new timeline.

The victim and accused will have equal opportunity to present relevant witnesses and other evidence to the District investigator. The District will provide the same opportunities to the victim and accused.

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The results of the fact-finding investigation will be set out in a formal investigative report which will include the requirements listed above and a credibility determination of the victim, accused, and witnesses.

Reporting to California Community Colleges Chancellor's Office

The District considers all sexual misconduct complaints to be formal complaints. The Title IX Coordinator or other designated person must notify the State Chancellor's Office of any sexual misconduct complaints. Upon completing the investigation, the District shall forward to the California Community Colleges Chancellor's Office a copy of the investigative report and administrative determination and to the parties a copy or summary of the investigative report and administrative determination.

Dissemination of Policy and Procedures

District Policy and Procedures related to harassment will include information that specifically addresses sexual violence. District policy and procedures will be provided to all students, faculty members, members of the administrative staff and members of the support staff, and will be posted on campus and on the District's website.

When hired, employees are required to sign that they have received the policy and procedures, and the signed acknowledgment of receipt is placed in each employee's personnel file. In addition, these policies and procedures are incorporated into the District's course catalogs and orientation materials for new students.

Training

The District shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005. All new supervisory employees must be provided with the training and education within six months of their assumption of a supervisory position. After January 1, 2006, the District shall provide sexual harassment training and education to each supervisory employee once every two years.

The training and education required by this procedure shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. Supervisor's harassment training must also address potential exposure and liability for employers and individuals, supervisor's obligation to report sexual harassment, discrimination, and retaliation when they become aware of it, appropriate remedial measures to correct harassing behavior, and a review of "abusive conduct."

The District will maintain appropriate records of the training provided, including the names of the supervisory employees trained, the date of training, sign in sheets, copies of all certificates of attendance or completion issued, the type of training provided, a copy of all written or recorded

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training materials, and the name of the training provider. If the training is provided by webinar, the District will maintain a copy of the webinar, all written materials used by the training and all written questions submitted during the webinar, and document all written response or guidance the trainer provided during the webinar. The District will retain these records for at least two years.

Training of all staff will be conducted. This includes counselors, faculty, health personnel, law enforcement officers, coaches, and all staff who regularly interact with students. Training for academic staff should emphasize environmental harassment in the classroom. The District will also provide training to students who lead student organizations. The District should provide copies of the sexual harassment policies and training to all District law enforcement unit employees regarding the grievance procedures and any other procedures used for investigating reports of sexual violence.

In years in which a substantive policy or procedural change has occurred, all District employees will attend a training update or receive a copy of the revised policies and procedures.

Participants in training programs will be required to sign a statement that they have either understood the policies and procedures, their responsibilities, and their own and the District's potential liability, or that they did not understand the policy and desire further training.

Education and Prevention for Students

In order to take proactive measures to prevent sexual harassment and violence toward students, the District will provide preventive education programs and make victim resources, including comprehensive victim services, available. The District will include such programs in their orientation programs for new students, and in training for student athletes and coaches. These programs will include discussion of what constitutes sexual harassment and sexual violence, the District's policies and disciplinary procedures, and the consequences of violating these policies. A training program or informational services will be made available to all students at least once annually.

The education programs will also include information aimed at encouraging students to report incidents of sexual violence to the appropriate District and law enforcement authorities. Since victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of District or campus rules were involved, the District will inform students that the primary concern is for student safety and that use of alcohol or drugs never makes the victim at fault for sexual violence. If other rules are violated, the District will address such violations separately from an allegation of sexual violence.

References: 20 U.S. Code Section 1681 et seq.;
Education Code Sections 212.5, 231.5, 66281.5, and 67386;
Government Code Section 12950.1;
Title 5 Sections 59320, 59324, 59326, 59328, and 59300 et seq.;
Title 2 Sections 11023 and 11024;
34 Code of Federal Regulations Section 106.8(b)

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HYPOTHETICAL SCENARIOS

1. You oversee a department with ten employees. At times, one group of the employees whose desks are in a corner away from other employees laugh and joke as they work. One day, you notice that this group of employees is making some obscene gestures with office supplies. The employees are not saying anything inappropriate and they are completing their work efficiently. What do you do? What if other employees are becoming distracted by the gestures? What would you do if no employees complained? What would you do if an employee did complain?
2. You are teaching a hands-on culinary class. Some areas are cramped and students often brush past each other or touch each other when reaching in the same area, etc. Student John tells you that Student Amanda is intentionally touching him and “being creepy.” What do you do?
3. Jamie and Chris are tenured faculty. One day, Jamie dropped a pen and bent over to pick it up. Chris happened to be walking by and whistled. Chris sometimes sits in on Jamie’s classes and makes joking comments that are sexual in nature. No students have complained about Chris’ behavior, and Chris seems to be popular among students, particularly students in Jamie’s classes.
 - a. If you were Jamie, what would you do?
 - b. If you were another employee who learned of this, what would you do?
 - c. Is this sexual harassment?
 - d. Does your analysis change if Chris and Jamie are in a relationship and Chris’ behavior is welcome to Jamie?
 - e. Did you imagine Chris and Jamie as men, women, or one of each? Does your analysis change if Chris and Jamie are the same sex or opposite sex?
4. A male instructor of a technology class at a community college would often lean over students’ shoulders to view their computer screens. The rows of computers in the classroom were narrow and he would occasionally brush up against students in the process. A couple female students were uncomfortable with this and claimed the instructor was using it as an excuse to touch them and also to look down their shirts. These two students started spreading claims that he was a “pervert” to other students.
 - a. The two students request to be removed from the class. What, if anything, do you do?
 - b. Same scenario as above, however, the students were unable to be transferred out of the class since there was not an equivalent class and it was a required part of the program. Since the investigation revealed there was no sexual harassment, no corrective actions were needed. However, the two female students were distracted by the investigation procedure and missed the deadline to turn in the last assigned project. The instructor refused to accept it and gave them both failing grades, even though he previously accepted late work by only taking 5% off the grade. What, if anything, do you do?

FOLLOW-UP

After workshop – what must you do?

1. Find and review your District's policy/complaint procedure.
2. Determine who is responsible for student complaints. For staff complaints.
3. Make sure both policies are posted.
4. Do mini-training for the staff you supervise.
Hand out policies and AP's.
5. Clarify duty to respond.

Key Issues for Your District Policy & Regulations

1. Must identify person/position responsible for answering questions, filing complaint, and investigating complaint.
2. Must set forth clear, workable complaint procedure. If reference is to another policy/procedure, that policy/procedure must be readily accessible.
3. Do not mandate that complaint be put in writing.
 - a. You are on notice if you know or "should have known."
 - b. Do you have a sample complaint form?
4. How is alleged wrongdoer notified of complaint?
 - a. Does person receive copy?
 - b. Is complaining party identified?
5. Do not mandate that complaining party meet or "confront" alleged wrongdoer.
6. Mediation/facilitation process may be included but is optional for both parties.
 - a. Documentation post-mediation is important.
7. Includes reasonable timeline for investigation process.

8. Includes clear information about what happens after investigation is concluded.
 - a. Is there a report? A summary report?
 - b. Who gets what?
 - c. Is there an appeal process? If so, is it reasonable?
 - e. Clear closure system.
9. Complaining party must be notified of right to seek assistance/file complaint with applicable federal/state agency.

ANSWERS TO PRE-TEST

1. **False.** Nothing in the law requires an alleged victim to confront the alleged perpetrator of sexual harassment.
2. **False.** While there may be several appropriate ways to address reported sexual harassment, corrective actions should not penalize the victim.
3. **True.** California Government Code section 12940, which outlines unlawful employment practices, including sexual harassment, provides in part: "An employee of an entity subject to this subdivision is **personally liable** for any harassment prohibited by this section that is perpetrated by the employee. . . ."
4. **True.** Supervisors are responsible for ensuring that the working/academic environment is free from discrimination, including sexual harassment, even if a supervisor doesn't know to a certainty that sexual harassment has occurred.
5. **False.** The effect of the conduct on the victim, not the intent of the harasser, determines whether behavior is sexual harassment. An expectation that employees will conduct themselves as professionals within the workplace will help ensure that harassment does not occur. Employees might consider what legitimate business or academic purpose is served by their conduct.
6. **True.** Harassment of an individual based on sexual orientation or identity is prohibited.
7. **False.** A supervisor should not discourage an employee or a student from filing a police report. Sexual harassment can also be criminal assault.
8. The School can take various steps to prevent sexual harassment, including adopting and distributing a policy that prohibits such conduct, training employees regarding preventing such harassment, providing effective processes for filing and investigating complaints, taking all complaints seriously, and assuring employees that retaliation for filing valid complaint will not be tolerated.
9. Any questions about the process or responsibilities for school staff should be directed to human resources, the Superintendent or _____.