



Community College League of California
2017 Annual Convention

**CURRENT TITLE IX
CHALLENGES FOR CALIFORNIA
COMMUNITY COLLEGES**

November 17, 2017

Presented by:

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Mia N. Robertshaw, Associate General Counsel, SCLS
Ellie R. Austin, Schools Legal Counsel, SCLS

Stephanie Jarrett

Manager, Human Resources/Training and Compliance

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Experience

Ms. Jarrett serves as Manager, Human Resources/Training & Compliance at Santa Rosa Junior College (SRJC). She assists the College with Title IX and Clery compliance, including investigations of alleged sexual misconduct and prevention trainings for students and employees.

Prior to her role at SRJC, Ms. Jarrett served as the Assistant Dean of Students for Title IX Outreach, Support and Investigations at California Polytechnic University, San Luis Obispo where she assisted with campus and CSU system-wide Title IX compliance efforts. In addition, her previous positions at Hawai'i Pacific University and Stony Brook University focused on a variety of areas including, student conduct, peer mentor programs, retention services, and institutional accreditation.

Education

M.S.W. specialization in Student-Community Development, Stony Brook University (2011)
B.A. Hunter College, Psychology (2009)

Santa Rosa Junior College (SRJC) is known for academic excellence, superb faculty and staff, comprehensive student services and beautiful facilities. Nearly 100 years old, this beloved community institution enrolls approximately 28,000 students each semester. SRJC is dedicated to making higher education accessible to all and removing barriers to our students' success. Student life is vibrant, with over 40 clubs, conference-winning athletic teams, nationally ranked speech and debate teams, and outstanding theatre arts, music and dance programs.



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Associate General Counsel

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Areas of Expertise

Collective Bargaining
Personnel Issues
(Certificated and Classified,
K-12 and Community College Districts)
General Community College Issues

Experience

Ms. Robertshaw's practice focuses on collective bargaining and personnel matters. She assists school districts, county offices of education, and community college districts in negotiating collective bargaining agreements, resolving grievances and unfair practice charges, and addressing other labor relations issues such as unit modification petitions. Ms. Robertshaw provides legal advice on personnel matters such as discipline, transfers, and leaves. Ms. Robertshaw also assists clients with Title IX and Clery Act compliance, as well as other investigations of alleged discrimination or harassment. To further the goal of minimizing clients' legal risks and costs, Ms. Robertshaw provides general workshops and client-specific on-site training to prevent sexual harassment and unlawful discrimination.

Prior to joining SCLS, Ms. Robertshaw worked in the Orange County and San Francisco offices of the international law firm Latham & Watkins LLP, where she worked on litigation, arbitration, and environmental regulatory matters. Ms. Robertshaw drafted briefs and other legal documents, assisted clients to ensure compliance with state and federal regulatory requirements, and engaged state and federal agencies to obtain regulatory guidance.

Before law school, Ms. Robertshaw worked at the Santa Cruz County Office of Education's Human Resources department and directly with SCLS.

Education

Columbia Law School, Harlan Fiske Stone Scholar and Hamilton Fellow (2010); Bachelor of Arts in Sociology, University of California, Santa Cruz (2004)

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Ellie R. Austin

Schools Legal Counsel

Areas of Expertise

Collective Bargaining
Personnel
Legal Research
Litigation
Website Accessibility



Experience

Ms. Austin's practice focuses on collective bargaining negotiations and personnel matters. She assists school districts, county offices of education, and community college districts in negotiating collective bargaining agreements, resolving grievances and unfair practice charges, and handling personnel matters. Ms. Austin also assists clients with Title IX and Clery Act compliance, as well as investigations of alleged discrimination or harassment.

Prior to joining SCLS, Ms. Austin practiced special education law representing public school districts at a law firm in Southern California for over 3 ½ years, where she worked extensively on matters pending before the California Office of Administrative Hearings. She developed expertise in analyzing special education documents, including IEPs, multidisciplinary assessments, and transition plans, for legal compliance. While in law school, she interned at a human rights NGO in Thailand teaching English to refugee women and Thai schoolchildren. Her capstone project for her M.P.A. degree involved a qualitative research study which identified common barriers facing community college students in Oregon as they transferred to four-year institutions.

Education

B.A. Humboldt State University, Geography *magna cum laude* (2007)

J.D. Drexel University School of Law (2011)

M.P.A. University of Oregon (2016)

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Current Title IX Challenges for California Community Colleges

November 17, 2017

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SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

Current Title IX Challenges for California Community Colleges

November 17, 2017

Presented by:

**Stephanie Jarrett, Manager, Human Resources/Training and Compliance,
Santa Rosa Junior College**

**Mia N. Robertshaw, Associate General Counsel, SCLS and
Ellie R. Austin, Schools Legal Counsel, SCLS**

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Agenda

- Brief overview of Title IX
- Brief overview of the Clery Act
- Respondents' due process rights
- Conflicts between Title IX and Title 5
- Coordination with campus and local law enforcement
- Questions

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SCHOOL & COLLEGE LEGAL SERVICES
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I. Brief Overview of Title IX

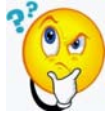


What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

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





You Decide: Does Title IX Apply?

1. Scholarships offered to student athletes.
2. Pregnant or parenting students.
3. Faculty-on-faculty sexual harassment.
4. Disproportionate enrollment in STEM courses by male students.
5. Student-on-student harassment on the basis of bisexuality.
6. Complainant receives a failing grade after filing a Title IX complaint against a professor.

Enforcement of Title IX

- Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR).
- A possible penalty for violating Title IX is the loss of all federal funding.
- In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.
- If OCR finds a recipient has violated Title IX, OCR will seek appropriate remedies.
- OCR may refer the case to the Department of Justice.

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 decisionmaking
 - Allowed schools to provide interim remedies to both parties

II. Brief Overview of the Clery Act



Image Source: UC Berkeley Police Department

Why the Clery Act?

- Jeanne Anne Clery was a 19 year old college student who was brutally raped and murdered in her dorm room at Lehigh University (Pennsylvania) in 1986.
- Ms. Clery’s parents believed that their daughter had died due to the campus’s lackadaisical security measures.
- They lobbied for the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”), which became law in 1990.
- The Clery Act aims to provide transparency around campus crime statistics and policies.

Clery Requirements

- The Clery Act requires institutions to:
 - Collect, classify, and count crime reports and crime statistics
 - Issue campus alerts: (1) timely warnings and (2) emergency notifications
 - Provide educational programs and campaigns
 - Have procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault, and stalking
- Publish an Annual Security Report
- Submit crime statistics to the U.S. Department of Education
- Maintain a daily crime log
- Publish an Annual Fire Safety Report
- Maintain a fire log
- Submit fire statistics to the U.S. Department of Education
- Have numerous safety and security-related policies in place

Clery Requirements

- The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs victims of certain Clery crimes of their options to:
 - Notify proper law enforcement authorities, including campus and local police, and
 - Be assisted by campus personnel in notifying such authorities.
- The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community.

Clery Training & Programming

- Programs to prevent dating violence, domestic violence, sexual assault, and stalking
 - Primary prevention programs offered to all new employees and incoming students
 - Ongoing prevention and awareness campaigns for students and employees
- For institutions with on-campus student housing, safety education programs and fire safety training
- Training for CSAs is recommended, but not required –
 - The role of the Clery Act, sample reporting materials, the importance of documentation, need for timely report submission

III. Respondents' Due Process Rights



Respondents Have Title IX Rights Too

- Parties must have an equal opportunity to present witnesses and other relevant evidence.
- Any school-imposed restrictions on parties' ability to use attorneys must be applied equally to complainant and respondent.
- If school provides for an appeal, it may provide that right only to the responding party, or may provide the right to both parties.*
- Both parties must have the opportunity to respond to the investigation report in writing in advance of any decision of responsibility or the hearing to decide responsibility.
- School may use either the preponderance of the evidence standard or the clear and convincing evidence standard.

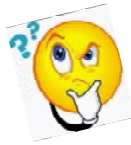
Respondents' Due Process Rights

- Under the 2017 OCR guidance, both complainant and respondent must have access to any information that will be used during disciplinary meetings and hearings.
- In cases involving dating violence, domestic violence, sexual assault, or stalking, districts must provide the parties the same opportunity to have advisors present during any disciplinary proceedings or meetings (Clery).
 - May not limit choice of advisor, but can limit their role
- The respondent may have a right under FERPA to inspect and review portions of the complaint that directly relate to him/her.
 - The school must redact complainant's name and other identifying information before allowing respondent to inspect/review sections of complaint that relate to him/her.



Blowback

- Respondents, often male students, are filing their own Title IX complaints against complainants and schools for subjecting them to investigation and/or disciplinary action.
- Male students allege that Title IX compliance efforts provide female students “preferential treatment,” and make it more difficult for the accused to defend themselves.
- Respondents are also filing federal lawsuits against their universities.
- Sometimes respondents sue to fight discipline imposed as a result of a Title IX investigation.



You Decide: Is There a Title IX Violation?

- a) College uses clear and convincing evidence standard for all disciplinary cases except those involving sexual misconduct, which are subject to the preponderance of the evidence standard.
- b) The respondent was given the wrong policies and procedures relating to the investigation process.
- c) College provides the following details of the allegation to the respondent: “A fellow student has alleged that you engaged in sexual harassment from September 2016 to June 2017.”
- d) The respondent was notified of the outcome of the disciplinary proceeding against him two weeks after the reporting party was notified.

Recommendations



- Despite withdrawal of two major guidance documents, the majority of schools' Title IX obligations remain intact.
- OCR has increased its focus on respondents' due process rights.
- Schools should examine policies and practices to ensure they provide due process to those under investigation for sexual misconduct.
- Institutions should be fair, impartial, and follow their policies and procedures.

IV. Conflicts Between Title 5 and Title IX



Appeals

- Under the 2017 Title IX guidance, districts can provide the right to appeal: (1) only to the responding party, or (2) to both the responding and reporting parties.
- Title 5 regulations provide for a right of appeal only to the complaining party. (5 C.C.R. § 59311(a)).
- At this time, many districts follow the Title 5 guidelines and only provide the complaining party the right to appeal in the context of a Title IX complaint.

Who Can File a Complaint

- Title IX must investigate alleged sex discrimination when any responsible employee “knows or has reason to know”.
- Title IX complainant may learn of alleged discrimination indirectly.
- Title 5 regulations provide that only the following individuals may file a complaint (5 C.C.R. § 59328(a)):
 - Victim;
 - Faculty member who learned of the unlawful discrimination in his/her official capacity; or
 - Administrator who learned of the unlawful discrimination in his/her official capacity.

Burden of Proof

- 2017 Title IX guidance provides that a district’s findings of fact and conclusions should be reached applying either the preponderance of the evidence standard or a clear and convincing evidence standard.
- Under Title 5, the results of the district’s fact-finding investigation must be set forth in a written report that must include “a specific finding as to whether there is probable cause to believe that discrimination occurred...” (5 C.C.R. § 59334(d)).

V. Coordination with Law Enforcement



Education Code 67381.1

(b) The governing board of each community college district shall adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of Part 1 violent crimes occurring on each campus.

(c) Local law enforcement agencies shall enter into written agreements with community college campus law enforcement agencies if there are community college campuses located in the jurisdictions of the local law enforcement agencies.

(d) Each written agreement entered into pursuant to this section shall designate which law enforcement agency shall have operational responsibility for the investigation of each Part 1 violent crime and delineate the specific geographical boundaries of each agency's operational responsibility, including maps as necessary.

Sexual Assault Investigations: Coordinating with Law Enforcement

- A district should coordinate with any other ongoing district or criminal investigations.
 - Establish fact-finding roles for each investigator.
 - Consider whether information can be shared among investigators to limit re-traumatizing victim.
 - If applicable, consult with forensic expert to ensure evidence is correctly interpreted by school officials.
- Consider a memorandum of understanding with local law enforcement and local prosecutor's office.

Sexual Assault Investigations: Parallel Criminal Investigations

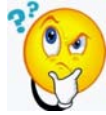
- A criminal investigation does not alleviate schools of their duty to conduct an independent Title IX investigation.
- There may be circumstances in which a school's fact-finding process may be delayed when police are gathering evidence.
 - During delay, consider interim remedies for complainant (and respondent, according to the 2017 OCR guidance).
- In that case, school must promptly resume its investigation once police have finished gathering evidence.
- Under no circumstances should the school delay its investigation until the ultimate outcome of a criminal investigation or the filing of charges.

Recommended Provisions in MOU with Law Enforcement

- Law enforcement will advise individuals reporting incidents of sexual or gender-based harassment, assault, or violence of their right to pursue a criminal action with law enforcement and a Title IX complaint through the college simultaneously.
- Law enforcement will assist the college in obtaining relevant evidence.
- Clearly identify when the college will refer a matter to local law enforcement.
- Parties will promptly notify one another when either receives a complaint of sexual or gender-based harassment, assault, or violence.

Recommended Provisions in MOU with Law Enforcement, Cont'd.

- Protocols and procedures for:
 - How parties will conduct contemporaneous investigations
 - How investigation(s) will be documented
 - How information will be shared
- Law enforcement will:
 - Appoint a specialized, trained investigator in matters of sexual or gender-based assault or violence; and
 - Help the complainant obtain a protection order against respondent if he/she wants one.
- Training for law enforcement staff who will respond to sexual or gender-based violence complaints



Pop Quiz

Your college's MOU with local law enforcement does not contain any provision on required training for personnel who will investigate complaints of sexual assault.

Are there any issues here?

Resources

- Clery Center, <https://clerycenter.org/>
- Department of Education: Handbook on Campus Safety and Security Reporting (2016), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>
- Department of Education: Campus Security, <https://www2.ed.gov/admins/lead/safety/campus.html>
- Know Your IX: Clery Act, <https://www.knowyourix.org/college-resources/clery-act/>
- Rape, Abuse & Incest National Network, Campus SaVE Act, <https://www.rainn.org/articles/campus-save-act>

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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**OCR DEAR COLLEAGUE LETTER ON
CAMPUS SEXUAL MISCONDUCT,
SEPTEMBER 2017**

ATTACHMENT 1



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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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).

**OCR Q&A ON CAMPUS
SEXUAL MISCONDUCT,
SEPTEMBER 2017**

ATTACHMENT 2



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)(11)(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.").

**WHITE HOUSE TASK FORCE
INTERSECTION OF TITLE IX AND
THE CLERY ACT,
APRIL 2014**

ATTACHMENT 3

Intersection of Title IX and the Clery Act

The purpose of this chart is to clarify the reporting requirements of Title IX and the Clery Act in cases of sexual violence and to resolve any concerns about apparent conflicts between the two laws. To date, the Department of Education has not identified any specific conflicts between Title IX and the Clery Act.

Title IX	The Clery Act
<h3 style="margin: 0;">What types of incidents must be reported to school officials under Title IX and the Clery Act?</h3>	
<p>Overview: Title IX promotes equal opportunity by providing that no person may be subjected to discrimination on the basis of sex under any educational program or activity receiving federal financial assistance. A school must respond promptly and effectively to sexual harassment, including sexual violence, that creates a hostile environment. When responsible employees know or should know about possible sexual harassment or sexual violence they must report it to the Title IX coordinator or other school designee.</p> <ul style="list-style-type: none"> ➤ Sexual Harassment: Sexual harassment is unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. ➤ Sexual Violence: Sexual violence is a form of sexual harassment. Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (e.g., due to the student's age or use of drugs or alcohol or an intellectual or other disability that prevents the student from having the capacity to give consent). Sexual violence includes rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. 	<p>Overview: The Clery Act promotes campus safety by ensuring that students, employees, parents, and the broader community are well-informed about important public safety and crime prevention matters. Institutions that receive Title IV funds must disclose accurate and complete crime statistics for incidents that are reported to Campus Security Authorities (CSAs) and local law enforcement as having occurred on or near the campus. Schools must also disclose campus safety policies and procedures that specifically address topic such as sexual assault prevention, drug and alcohol abuse prevention, and emergency response and evacuation. The Clery Act also promotes transparency and ongoing communication about campus crimes and other threats to health and safety and empowers members to take a more active role in their own safety and security.</p> <p>Criminal Offenses: Criminal homicide; rape and other sexual assaults; robbery; aggravated assault; burglary; motor vehicle theft; and, arson as well as arrests and disciplinary referrals for violations of drug, liquor, and weapons laws.</p> <ul style="list-style-type: none"> ➤ Hate Crimes: Any of the above-mentioned offenses against persons and property and incidents of larceny-theft, simple assault, intimidation or destruction/damage/vandalism of property, in which an individual or group is intentionally targeted because of their actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, ethnicity, or disability. 20 U.S.C. §1092(f)(1)(F)(ii). Use FBI definitions, and the

<p>modifications from the Hate Crime Statistics Act. 20 U.S.C. §1092(f)(7).</p> <p>➤ VAWA: The reauthorization of the Violence Against Women Act of 1994 amended the Clery Act to include disclosure of statistics regarding incidents of dating violence, domestic violence, and stalking as defined in 20 U.S.C. §1092(f)(1)(F)(iii) and 20 U.S.C. §1092(f)(7).</p>	<p>modifications from the Hate Crime Statistics Act. 20 U.S.C. §1092(f)(7).</p> <p>➤ VAWA: The reauthorization of the Violence Against Women Act of 1994 amended the Clery Act to include disclosure of statistics regarding incidents of dating violence, domestic violence, and stalking as defined in 20 U.S.C. §1092(f)(1)(F)(iii) and 20 U.S.C. §1092(f)(7).</p>
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Occurring where? (geography/jurisdiction)

Recipients must respond to sexual violence that occurs:

➤ **In the context of a school's education programs and activities:** This includes academic, educational, extracurricular, athletic, and any other school programs, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. Additional examples include school-sponsored field trips, school-recognized fraternity or sorority houses, and athletic team travel; and events for school clubs that occur off campus.

➤ **Off-campus:** Even if the sexual violence did not occur in the context of an educational program or activity, a school must process such complaints and consider the effects of the sexual violence when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.

Institutions must disclose crime statistics for Clery-reportable offenses that occur on its so-called "Clery Geography." Clery Geography includes three general categories:

➤ **Campus:** Any building or property that an institution owns or controls within a reasonably contiguous area that directly supports or relates to the institution's educational purposes. On campus also includes residence halls and properties the institution owns and students use for educational purposes that are controlled by another person (such as a food or retail vendor). The definition of "controlled" includes all such properties that are leased or borrowed and used for educational purposes. 20 U.S.C. §1092(f)(6)(ii)

➤ **Non-campus building or property:** Any building or property that is owned or controlled by a recognized student organization. And, any building or property that is owned or controlled by the institution that is used in support of its educational purposes but is not located within a reasonably contiguous area to the campus. 20 U.S.C. §1092(f)(6)(iii).

➤ **Public property:** All public property within the reasonably contiguous geographic area of the institution that is adjacent to or accessible from a facility the institution owns or controls and that is used for educational purposes. Examples include sidewalks, streets, and parking facilities. 20 U.S.C. §1092(f)(6)(iv).

Who must report details of an incident of sexual violence, including personally identifiable information?

Responsible employees

- A responsible employee is any employee who has the authority to take action to redress sexual violence, who has been given the duty to report to appropriate school officials about incidents of sexual violence or any other misconduct by students, or who a student could reasonably believe has this authority or responsibility.
- Schools must make clear to all of its employees and students which staff members are responsible employees.

Campus law enforcement officers, non-law enforcement campus safety officers, and local law enforcement officers

- These individuals are normally required to fully document all operative facts of an incident that are reported or that are developed throughout the course of a criminal investigation. The information collected during such an investigation will normally include personally-identifiable information (PII).

CSAs other than law enforcement/campus safety officers

- Most of these CSAs are not typically required to disclose PII as part of their normal reporting obligations. (see CSA definition below)

Who can provide completely confidential support services to victims of sexual violence?

Professional and pastoral counselors

- A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.
- A pastoral counselor is a person who is associated with a religious order or

Professional and pastoral counselors

- A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.
- A pastoral counselor is a person who is associated with a religious order or

denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.

- Professional and pastoral counselors are not required to report any information regarding an incident of alleged sexual violence. The exemption from reporting obligations for professional and pastoral counselors under Title IX is consistent with the Clery Act.

denomination, is recognized by that religious order or denominations as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.

- Crimes reported to a pastoral or professional counselor are not required to be reported by an institution under the Clery Act; however, institutions are strongly encouraged to establish voluntary, confidential reporting processes so that incidents of crime that are reported exclusively to professional and pastoral counselors will be included in the annual crime statistics. 34 C.F.R. §668.46(b)(2)(iii).

Who can provide services and keep personally identifiable information about incidents of sexual violence confidential?

Non-professional counselors or advocates

➤ Individuals who are not professional or pastoral counselors, but work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers, including front desk staff and students, and provide assistance to students who experience sexual violence, should report aggregate data, but are not required to report, without the student’s consent, incidents of sexual violence to the school in a way that identifies the student.

Most non-law enforcement/campus safety officers who are CSAs because of they have significant responsibilities for student and campus activities.

➤ The definition of campus security authority includes campus police and/or security personnel; any individual who has responsibility for campus security but is not part of a campus police or security department; an individual or organization specified in an institution’s statement of campus security policy as one to which students and employees should report criminal offenses; and an official of an institution who has a significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. Most of these mandatory reporters are specifically not required by the Clery Act to disclose PII. 34 C.F.R. §668.46(a).

➤ Because specific occupational titles, descriptions and statements of duties vary so significantly, each institution must conduct a substantive review of all of its officials, including students with official duties for example, resident assistants, and evaluate whether the Clery Act designates the individual a CSA and thereby confers reporting obligations. CSAs must be identified, notified of their reporting obligations, be properly trained, and provided with a mechanism for communicating reported incidents to the appropriate officials. (Handbook, 75).

What should non-professional counselors, advocates, and CSAs report about incidents of sexual violence?

<p><u>Aggregate Data</u></p> <ul style="list-style-type: none"> ➤ In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers. ➤ Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting information that would personally identify a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity. 	<p><u>Aggregate Data</u></p> <ul style="list-style-type: none"> ➤ Typically, most non-law enforcement/campus safety officer CSAs must only report the nature, date, time, general location, and the current disposition of the incident, if known. ➤ Most non-law enforcement/campus safety officer CSAs typically are not required to disclose PII or other information that would have the effect of identifying the victim.
<p>What must a school tell the complainant about the outcome of a sexual violence complaint and how does FERPA apply?¹</p>	
<p><u>Notice of the Outcome</u></p> <ul style="list-style-type: none"> ➤ Title IX requires a school to tell the complainant whether or not it found that the sexual violence occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, and prevent recurrence. ➤ Sanctions that directly relate to the complainant include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending 	<p><u>Results of Institutional Disciplinary Proceedings</u></p> <ul style="list-style-type: none"> ➤ The Clery Act specifically mandates that “each institution shall develop and distribute procedures for simultaneously notifying the accuser and accused of the outcome of institutional disciplinary proceedings.” 20 U.S.C. §485f(1)(J)(8)(B)(iv)(III)(aa). ➤ FERPA includes a provision that specifically allows schools to disclose to alleged victims of any crime of violence or rape and other sexual assaults, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator of the offense. 20 U.S.C.

¹ This chart also addresses how the Family Educational Rights and Privacy Act (FERPA) applies to Title IX and the Clery Act. Once again, the Department of Education has not identified any specific situations where compliance with Title IX or the Clery Act will cause an institution to violate FERPA.

<p>school for a period of time or transferring the perpetrator to another residence hall, other classes, or another school.</p> <p>➤ The Department of Education interprets FERPA as not conflicting with the Title IX requirement that the school notify the complainant of the outcome of its investigation, <i>i.e.</i>, whether or not the sexual violence was found to have occurred, because this information directly relates to the victim. FERPA also permits the school to notify a complainant of sanctions imposed upon a student who was found to have engaged in sexual violence when the sanction directly relates to the complainant.</p> <p>➤ The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act. 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information in any Title IX complaint that involves a Clery Act offense, such as sexual violence.</p>	<p>§1232g(b)(6).</p> <p>➤ The “final results” of any proceeding are defined as: the name of the student, the findings of the proceeding board/official, any sanctions imposed by the institution, and the rationale for the findings and sanctions (if any). The presence of names of any other student, such as a victim or witnesses, may be included only with the consent of that student. 20 U.S.C. §1232g(c).</p> <p>➤ The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act. 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information.</p>
<h2 style="color: white;">How does FERPA apply to other obligations under Title IX and the Clery Act?</h2>	
<p>All Other Title IX Obligations</p> <p>➤ FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.</p>	<p>Timely Warnings</p> <p>➤ The Clery Act requires institutions to issue timely warnings to the campus community about crimes that have already occurred but may continue to pose a serious or ongoing threat to students and employees. Timely warnings are only required for Clery-reportable crimes that occur on Clery Geography although institutions are encouraged to issue appropriate warnings regarding other criminal activity that may pose a serious threat as well. 20 U.S.C. §485f(1)(J)(3); Handbook, 118.</p> <p>➤ FERPA does not preclude an institution’s compliance with the timely warning provision of the Clery Act. FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a). Further, if</p>

institutions utilize information from the records of campus law enforcement to issue a timely warning, those records are not protected by FERPA. 20 U.S.C. §1232g(a)(4)(B)(ii).

➤ However, timely warning reports must withhold the names and other identifying information about victims as confidential. 34 C.F.R. §668.46(e).
Emergency Response Procedures

➤ The Clery Act requires institutions to have and disclose emergency response and procedures. As part of these procedures, institutions must immediately notify the campus community about *any* significant emergency or dangerous condition that may pose an immediate threat to the health or safety of students or employees occurring on the campus. 20 U.S.C. §485f(1)(J)(1)(i).

➤ An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed. 34 C.F.R. §668.46(e)(3).

➤ FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a).

**CHANCELLOR'S OFFICE LEGAL
OPINION 16-03,
MAY 2016**

ATTACHMENT 4

**CALIFORNIA COMMUNITY COLLEGES
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Date: May 18, 2016

To: District Officers for Unlawful Discrimination Complaints
Chief Human Resources Officers
Equal Employment Opportunity Officers
Community College Attorneys

From: Thuy Thi Nguyen 
Interim General Counsel/Vice Chancellor

Re: Student and Employment Discrimination Complaint Procedures
Legal Opinion 16-03

The Chancellor's Office handles appeals of unlawful discrimination complaints under California Code of Regulations, title 5 sections 59300 et seq.¹ The purpose of this legal opinion is to explain the discrimination process and describe how the Chancellor's Office handles appeals. This legal opinion will serve as a guide on the steps that local districts need to follow to ensure compliance with the pertinent regulations. The opinion will point out the differences between employment and non-employment (student) matters and provide clarity on the role of the district, local governing board, and the Chancellor's Office throughout the process.

This legal opinion incorporates the previous advisory, Legal Advisory 11-01 on certain discrimination complaint issues, but addresses the unlawful discrimination process in chronological order and opines on certain legal areas. The opinion is organized in the following manner:

- I. **General Overview (page 2)**
- II. **Investigation, Extension Requests, and Administrative Determination (page 5)**
- III. **Appeal Rights in Employment and Student Matters (page 8)**
- IV. **Student Appeals to the Chancellor's Office (page 10)**
- V. **Resolution (page 11)**
- VI. **Frequently Asked Questions (page 12)**

¹ All regulatory references are to Title 5 of the California Code of Regulations unless otherwise noted.

I. General Overview

Under state regulations, California community college districts must follow the procedures outlined in Sections 59300 et seq. when responding to both student and employment discrimination complaints on the basis of actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, or physical or mental disability, or on the basis of an individual's association with a person or group with one or more of these actual or perceived characteristics.

Responsible district officer's role and informal resolution

Section 59324 requires that each district identify a single person serving as the district officer responsible for receiving complaints. The responsible district officer's information shall be made public on the college and district's website. Additionally, Section 59324 charges the responsible district officer with the duty of overseeing the informal resolution process.

The informal resolution regulations are set forth in Section 59327. This section requires that the district officer attempt to informally resolve matters and advise the complainant of its right to file with other agencies if the unlawful discrimination allegations are brought informally - that is, not filed on the unlawful discrimination form created by the Chancellor's Office. This situation can arise when the complainant verbally tells the responsible officer about a problem and seeks a quick resolution.

One important distinction to note is that the effect of informally resolving complaints that lack a prescribed form is contrary to the requirements of the Office of Civil Rights (OCR). OCR does not require that complainants file a complaint on a specific form as required by Section 59328(c). OCR advises that any complaint of unlawful discrimination shall be investigated pursuant to federal law. This would effectively rule out the informal resolution requirements of the responsible district officer to resolve matters informally if the complaint is not on the prescribed form.

Complaints filed with the district or Chancellor's Office

Student and employee complainants may file an unlawful discrimination complaint with the Chancellor's Office and/or the responsible district officer (Cal. Code Regs., tit. 5 § 59328(b)). The Complainant has the option. The regulations require that the Chancellor's Office and the district immediately forward a copy of the complaint to the other upon receipt. Thus, districts must send a copy of the complaint along with an acknowledgement letter to the Chancellor's Office immediately. If a complaint is filed with the Chancellor's Office, the same procedure will take place – that is, an acknowledgment letter and copy of the complaint will be forwarded to the district's responsible officer.

When forwarding the complaint, the Chancellor's Office recommends sending a corresponding copy of the acknowledgement letter and complaint to the complainant for record keeping purposes, and to notify the complainant that the complaint has been received.

Complainants may also send the same complaint to both the Chancellor's Office and the district at the same time. When this occurs, the Chancellor's Office and the district should continue to forward a copy of the complaint as required under the regulations.

A unique situation may arise when complainants send an initial complaint to the district and a second amended complaint regarding the same matter, but with additional information, to the Chancellor's Office, or vice versa. In such situations, following the forwarding procedures set forth in the regulations ensures that both the district and Chancellor's Office are in possession of the most recent correspondence and any important amendments. Additionally, the district and Chancellor's Office should send a corresponding copy of any forwarded letter to the complainant.

Advising complainant of his/her right to file with other entities

Districts are required to notify the complainant of the right to file an additional complaint with certain entities, depending on the type of complaint. The district should send an acknowledgement letter to the complainant upon receipt of a new complaint, notifying the complainant the receipt, that a copy of the complaint was forwarded to the Chancellor's Office, an investigation and determination will be rendered within the given time period, and that the complainant has rights to pursue other claims.

Under Section 59328(f), any complainant alleging employment discrimination shall be notified that he or she may file the same complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing (DFEH). If the complainant has filed such a complaint with the EEOC or DFEH, the district should forward a copy of the complaint to the Chancellor's Office immediately.

For student matters, Section 59327(4) requires that the complainant be advised that he or she may file the same complaint with the Office of Civil Rights (OCR) where such a complaint is within the jurisdiction of that agency.

Regulatory timeline

The regulatory timelines for discrimination complaints differ depending on the type of alleged discrimination. The timelines for filing are set forth in Section 59328.

Section 59328(e) requires that employment complaints "shall be filed within 180 days of the date the alleged unlawful discrimination occurred." This period shall be extended by 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged discrimination after the 180 days. It is important to note that employment

complaints are not limited to discriminatory practices in hiring, but include all facets of employment, including but not limited to: harassment by a supervisor or fellow employee, failure to provide reasonable accommodations, or discrimination in awarding compensation and benefits.

For student complaints, Section 59328(d) requires that complaints “shall be filed within one year of the date of alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts...”

A complainant may often file more than one complaint regarding the same matter which may pose procedural issues. For example, a complainant may file an initial complaint, then file a second amended complaint with additional information two months later. In such situations, all subsequent or amended complaints involving the same matter must be filed within the timelines set forth above unless the subsequent complaints involve new allegations.

3rd party standing

Section 59328(a) requires that the complaint be filed by the person who suffered unlawful discrimination or by a faculty member or administrator who has learned of such discrimination through his or her official capacity.

It is important to note that Legal Advisory 11-01 also clarifies OCR’s stance on complaints filed by individuals who have not personally suffered unlawful discrimination. OCR requires districts to investigate 3rd party complaints under federal regulations and allows the district to follow the Title 5 procedures and timelines. However, complainants that lack standing under Title 5 do not have appeal rights to the Chancellor’s Office.

Defective complaints

In light of the procedural timelines set forth in the regulations, Section 59332 requires the district to immediately notify the complainant and the Chancellor’s Office of any complaint that was not filed within the applicable regulatory timelines.

As previously mentioned, 3rd party complaints (except for discrimination complaints made by faculty or administrators) and complaints lacking a prescribed form may be deemed defective; however, OCR still requires the district to investigate the matter under federal regulations.

II. Investigation, Extension Requests, and Administrative Determination

This aspect of the unlawful discrimination process requires the most attention, as districts often fail to follow these regulations after a complaint has been filed.

District investigation

A properly filed complaint triggers a district investigation under Section 59334. This section requires the district to commence an impartial fact-finding investigation and the completion of an investigative report that includes all of the following elements:

1. A factual description of the matter,
2. A summary of the testimony provided by each witness, including testimony made by the complainant, respondent, and any “viable witnesses,”
3. An analysis of the data or evidence collected during the investigation,
4. A probable cause determination on whether the alleged discrimination occurred with respect to each allegation in the complaint, and
5. Any other appropriate information.

A common question regarding this section is whether the Title 5 regulations require an outside investigator to meet the “impartial fact finding investigation” standard. The regulations do not require that the district hire an outside investigator; thus a district employee may be designated to investigate, so long as the investigation is impartial and fair, and all parties are interviewed pursuant to Section 59334(b).

Since the regulations require that *all* parties and witnesses be interviewed, a best practice is to document every attempt to interview throughout the investigation and highlighting the failed attempts in the investigative report. This is essential because investigations may involve witnesses that are protected by Family Education Rights and Privacy Act (FERPA), collective bargaining laws or witnesses bound by rules of non-disclosure such as the Health Insurance Portability and Accountability Act (HIPAA). In such situations, witnesses may be unavailable. Nonetheless, at the onset, if the witness is deemed “viable,” the investigator must make an effort to interview and document every attempt. When conducting interviews, the investigator must afford each witness the opportunity to present their testimony and/or any evidence regarding the allegations.

In addition to interviews, an investigation should properly document and analyze any correspondence regarding the matter. This documentation should include the original complaint, any corresponding documents such as letters and e-mails to and from the district and the complainant and/or the respondent, and any investigative notes. Such documentation is critical in formulating a complete administrative determination, and allows for a thorough review of the record in the event of an appeal.

Lastly, Section 59334 requires that the district complete its investigation within ninety (90) days of receiving a complaint unless the district is granted an extension. Completion of the investigation requires that the district issue an administrative determination along with an investigative report to both the complainant and the Chancellor's Office within 90 calendar days.

Title IX investigations

Title IX of the Education Amendments of 1972 ("Title IX") is a federal civil rights law that prohibits sex/gender discrimination in federally funded education programs and activities.² The Office of Civil Rights at the U.S. Department of Education has issued guidelines on the requirements and standards of such claims.³ For purposes of our Title 5 discrimination process, there may be situations when a Title 5 investigation overlaps with a Title IX investigation. This situation can occur when a district encounters a sex/gender discrimination, harassment or sexual violence claim that falls under both sets of laws.

The U.S. Department of Education has made it clear that when investigating incidents that fall within Title IX, districts should coordinate with other ongoing school or criminal investigations, including any unlawful discrimination claims. In doing so, districts should consider whether certain information may be shared to expedite the process and to prevent complainants from unnecessarily providing multiple statements about the allegations.

The U.S. Department of Education emphasizes that a district does not need to conduct two separate investigations – that is, a Title 5 investigation and a Title IX investigation, if a district's own procedures to resolve sex/gender discrimination complaints meets all of the Title IX obligations. These obligations include: responding promptly and effectively to the discrimination, ending the discrimination, eliminating any hostile environment, and preventing future discrimination.

In regards to timeliness of the investigation, the Office of Civil Rights has indicated in their "Dear Colleague Letter"⁴ and "Questions and Answers on Title IX and Sexual Violence"⁵ that a typical Title IX investigation should be concluded within 60 calendar days. This is shorter than the 90-day requirement under Title 5 because Title IX claims, especially sexual violence allegations, may require immediate attention and resolution for the safety and protection of the complainants. The Chancellor's Office does not evaluate whether a Title 5 investigation meets the requirements of Title IX on appeal.

² This Legal Opinion does not discuss every requirement of Title IX in detail. Districts should consult with legal counsel and/or Title IX coordinator regarding the requirements not mentioned in this opinion.

³ The U.S. Department of Education's "Revised Sexual Harassment Guidance" can be found at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

⁴ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

⁵ <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

Extension requests

A district may request up to a 90-day extension from the Chancellor's Office to submit an administrative determination (Cal. Code Regs., tit. 5 § 59342). The district must send a written request to the Chancellor's Office no later than ten (10) days prior to the expiration of the original deadline. Additionally, the extension request must contain the following:

1. The reason why an extension is necessary,
2. The date by which the district expects the determination to be completed,
3. Notice that a corresponding copy was sent to the complainant,
4. Notice to the complainant that he or she has the right to send a written objection to the Chancellor's Office within five (5) days of receipt.

Failure to include any of the four aspects above will result in a denial of the extension. The Chancellor's Office may grant the extension unless any delay would be prejudicial to the investigation (Cal. Code Regs., tit. 5 § 59342(c)). Examples of prejudice may include loss of witness testimony through delay or utilizing an extension to prevent the complainant from seeking remedies through other outlets in a timely manner.

Administrative determination

Within 90 days of the complaint (unless an extension has been granted), a copy or summary of the investigative report *and* an administrative determination must be forwarded to the complainant and the Chancellor's Office. The administrative determination letter should attach the investigative report (or a summary of the report) and both documents are required to be sent by the district within 90 days.

The administrative determination letter shall include all the pertinent information listed in Section 59336, including:

1. The ultimate determination on probable cause,
2. A description of any actions taken to prevent similar allegations in the future (if applicable),
3. The proposed resolution of the complaint (if any), and
4. The complainant's right to appeal.

The complainant's right to appeal hinges on whether the matter involves employment or non-employment allegations. Both are discussed in detail below.

III. Appeal Rights in Employment and Student Matters

Every administrative determination letter, regardless of the alleged discrimination, must contain the information mentioned above. However, Section 59336 requires that the determination must also advise the complainant of certain appeal rights. The appeal rights of employment versus student matters differ and districts must correctly advise complainants of their appeal options.

Employment complaints

Section 59336(b) requires that in cases involving alleged employment discrimination, the district shall notify the complainant of its right to appeal to the district's local governing board and/or to file the same complaint with the Department of Fair Employment and Housing (DFEH). This notice must be in the administrative determination letter.

Any appeal to the local governing board must be filed within fifteen (15) days from the date of the district's administrative determination. The governing board shall review the original complaint, the investigative report, the administrative determination and the appeal, before issuing a final district decision within forty-five (45) days of receiving the appeal.

Additionally, the district is required to promptly forward a copy of the final district decision rendered by the local governing board to the complainant and notify the complainant of his or her right to file a complaint with DFEH. Please be aware that the Title 5 regulations do not afford employment complainants the right to appeal to the Chancellor's Office. Section 59339 ("Appeal to the Chancellor") explicitly states that cases involving employment discrimination may be filed with DFEH where the complaint is within the jurisdiction of that agency, but does not grant appeal rights to the Chancellor's Office.

Appeals to the Chancellor's Office are strictly reserved for student complaints. As such, the Chancellor's Office is not in a position to render any decisions on employment appeals. When an employment appeal is sent to the Chancellor's Office, the appeal will be sent back to the complainant with instructions to file with the appropriate federal entities.

Student complaints

For student complaints, the district is required to apprise the complainant that he or she may appeal the administrative determination to the local governing board and the Chancellor's Office (Cal. Code Regs., tit. 5 § 59336(a)). The time limitation for student appeals to the local governing board is the same as in employment matters. The complainant is allowed fifteen (15) days from the date of the determination to appeal to the local governing board, and the board shall review all pertinent documents and render a final decision within forty-five (45) days after receiving an appeal.

After the board's final decision, a copy of the decision shall be forwarded to the complainant and the Chancellor, along with notice that the complainant may now directly appeal the district's decision to the Chancellor's Office within thirty (30) days from the date the governing board issues the final decision or from the date the district provides notice to the complainant of such a decision (Cal. Code Regs., tit. 5 § 59339(a)).

An appeal to the Chancellor's Office must be accompanied by a copy of the local governing board's decision or evidence that the complainant filed an appeal with the governing board and that no response was received within forty-five (45) days.

IV. Student Appeals to the Chancellor's Office

The Title 5 regulations only authorize the Chancellor's Office to review student (non-employment) matters. Pursuant to Section 59350, once a student appeal reaches the Chancellor's Office, the appeal will be reviewed to determine if there is reasonable cause to believe the district has violated any requirements of Title 5. If there is evidence of a violation, then the Chancellor's Office will launch its own probable cause investigation to determine the validity of the allegations.

Reasonable cause review

A timely appeal to the Chancellor's Office initiates a reasonable cause review to examine the complainant's issues raised on appeal. This review is limited to an examination of the district's actions to determine if the procedures were adequately followed. Such a review does not look at the substance of the allegations, but instead focuses on the district's role throughout the process. In the event the complainant raises new facts or issues on appeal, Section 59351 allows the Chancellor's Office to remand new issues to the district to provide the district a reasonable opportunity to respond.

The Chancellor's Office will provide a reasonable cause determination after reviewing all the pertinent documents. The determination will provide a review of the applicable Title 5 requirements and an analysis of the district's actions, along with an ultimate decision on whether every applicable regulation was followed. If a violation of a procedure occurred, then the Chancellor's Office will launch its own probable cause investigation to determine the validity and merits of the allegations.

Probable cause investigation

Section 59352 requires that "if the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred." A probable cause investigation requires the Chancellor's Office to look at the allegations and interview all parties, including the complainant, respondent(s), and any witnesses concerning the matter. The Chancellor's Office will reach out to the responsible district officer to gather any information regard the parties before conducting separate interviews.

V. Resolution

A probable cause violation may be resolved through informal resolution with a written conciliation agreement or through formal resolution via a probable cause determination.

Informal resolution

Section 59354 allows the Chancellor's Office the option of informally resolving the alleged violation(s) if possible. When attempting to informally resolve the matter, the "resolution shall be set forth in a written conciliation agreement" and "a copy of the written agreement shall be sent to the complainant."

Informal resolution may occur when there is a probable cause violation (i.e. a finding that the discrimination allegations did occur) and the proposed remedy may be easily awarded without contest. Such situations may include providing confirmation of a violation to a student who has already obtained what they initially sought in the complaint, or allowing the district an opportunity to resolve the complaint if the factual circumstances have changed since the original filing.

Formal resolution

If informal resolution is not an option, then Section 59356 requires that the Chancellor's Office complete its probable cause investigation within 120 days of the reasonable cause finding by notifying the district and the complainant.

Section 59356(a) allows the district to acquiesce to the findings prior to the Chancellor's Office filing an accusation against the district, should the complainant's allegations be found to have merit. In such situations, the Chancellor's Office will send a written notice to the district that it has violated certain regulations and allow the district a reasonable time to respond to the findings. Should the district fail to acquiesce to the probable cause finding, the Title 5 regulations provide the Chancellor's Office with the authority to hold a hearing pursuant to the Government Code to determine if the violation did occur (Cal. Code Regs., tit. 5 § 59358).

Enforcement

Section 59360 provides the Chancellor's Office with enforcement tools to ensure that the districts follow the Title 5 regulations. These means to effect compliance include:

1. Withholding all or part of the district's state support;
2. Making eligibility for future state support conditioned on compliance with specific conditions regarding the violations; or
3. Proceeding in a court of competent jurisdiction for an appropriate order to compel compliance.

VI. Frequently Asked Questions

Multiple complaints

Q: A Complainant has filed numerous complaints regarding the same matter, but different incidents. Typically, the latter complaints just provide new facts and allegations. Should I treat all the complaints as one complaint? Or should every complaint be treated as its own separate complaint?

A: Generally, if all the complaints involve the same matter – that is, facts that relate to the same underlying type of discrimination or facts that stem from the initial allegation, then the complaints may be treated as one complaint. This may occur when a complainant files subsequent complaints due to ongoing discrimination from the first incident.

However, if the subsequent complaints involve a different type of discrimination that is separate from the initial allegation, then the complaints should be treated separately. The key here is whether an investigation of the complaints as one matter would be appropriate. If the answer is no, then the complaints should be separated so each matter should be properly investigated and resolved individually.

Employee v. non-employee/student complaints

Q: An employee has filed an unlawful discrimination complaint against another fellow employee. Would this be a non-employment complaint since it doesn't involve discrimination in the hiring, compensation/benefits or post-hiring process?

A: No, any employment complaint, including those brought by employees against a fellow employee, should be treated as an employment complaint. The Title 5 regulations require that the district notify employment complainants of the right to file the same complaint with the Department of Fair Employment and Housing (DFEH). If the complaint is a matter that the DFEH would normally handle, such as workplace hostility or harassment, then the matter should be considered as an employment complaint.

Multiple extension requests

Q: Can a district request multiple extensions to complete an investigation and render the administrative determination?

A: Yes, a district may request for multiple extensions because the Title 5 regulations do not expressly limit the number of extension requests a district may make. However, when presented with a second 90-day extension request, the Chancellor's Office must review the

reasoning for the request to determine if a second extension would be prejudicial to the investigation.

Interviewing witnesses

Q: Will the Chancellor’s Office find a reasonable cause violation if a witness is not interviewed?

A: Possibly, depending on whether the witness is viable. The regulations require that a district interview all “viable witnesses” during its investigation. In determining whether this requirement is met, the Chancellor’s Office will look at the witnesses mentioned in the complaint and determine whether each witnesses would be deemed viable – that is, would the witness be able available and willing to provide substantive and valuable information on the matter, and would it be practical to interview the witness?

The viability analysis is threefold. First, the district must ask whether a witness is available to provide testimony. Is the district privy to the witness’ information and can the witness be located to give testimony? If a witness cannot be located, then the witness is unavailable and thus not viable.

Secondly, if the witness is available, would the witness be able to provide relevant and material information? If the answer is no, then districts should not be required to interview the witness because investigations should be prompt and help promote resolution.

Lastly, investigators need to determine if it is practical to interview the witness. As previously mentioned, witnesses may be protected by certain employment or non-disclosure laws. When dealing with a protected witness, the Title 5 regulations do not grant districts subpoena power, nor do the regulations require districts to invoke the judicial process to comply with this requirement.

Districts should list all witnesses in their investigative report and notate if the witnesses were interviewed or not, along with the justification for not interviewing a particular witness.

Local governing board’s decision

Q: Does the local governing board need to give a justification for its acceptance or denial of the district’s administrative determination?

A: No, the local governing board’s role is to review all the necessary documents regarding the matter and render a decision to either uphold or reverse the district’s determination. Title 5 does not require the board to provide its justification or reasoning.

TTN/PVK