

TITLE IX INVESTIGATIONS

BY: RYAN L. CHURCH, CHAFFEY CCD CHIEF LEGAL OFFICER & GENERAL COUNSEL

WHAT IS TITLE IX?

-Title IX of the Education Amendments of 1972 is a federal law that prohibits discrimination on the basis of sex in education programs that receive federal funding. Title IX specifically states:

- *"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance."*
- Title IX regulations, which are promulgated by the Department of Education, instruct institutions how to implement Title IX, including how to respond to certain sexual harassment complaints.

-The U.S. Department of Education's Office for Civil Rights is the primary body tasked with oversight and enforcement of Title IX.

DEFINITION OF SEX-BASED HARASSMENT PURSUANT TO TITLE IX REGULATIONS

According to § 106.30, Sexual Harassment means conduct on the basis of sex under one or more of following:

I. Quid Pro Quo Harassment

Employee conditions the provision of an aid, benefit, or service of the recipient on the Complainant's participation in unwelcome sexual conduct

2. Hostile Environment Sexual Harassment

Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies Complainant equal access to the recipient's education program or activity

DEFINITION OF SEX-BASED HARASSMENT PURSUANT TO TITLE IX REGULATION 34 C.F.R. § 106.2 (CONT.)

Conduct on the basis of sex under one of following:

3. Other Sexual Acts

- Sexual assault per 20 U.S.C. 1092(f)(6)(A)(v): Includes Forcible and Nonforcible Sex Offenses
- Dating violence per 34 U.S.C. 12291(a)(10)
- Domestic violence per 34 U.S.C. 12291(a)(8)
- Stalking per 34 U.S.C. 12291(a)(30)

GENERAL STEPS IN THE TITLE IX COMPLAINT AND GRIEVANCE PROCESS

1. Receipt of complaint and Coordinator meets with the complainant
2. Coordinator reviews the complaint to determine if it meets the requirements set forth in the Title IX regulations. Coordinator must determine:
 - A. Does the alleged conduct, if proven, meet one of the definitions of Title IX sexual harassment?
 - B. Does the College have jurisdiction over the matter and parties? If not, does some other College policy apply?
 - C. An education program or activity includes locations, events, or circumstances over which the recipient (College) exercised substantial control over both the Respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. At time of filing the formal complaint, the Complainant must be participating or attempting to participate in recipient's education program or activity.

GENERAL STEPS IN THE TITLE IX COMPLAINT AND GRIEVANCE PROCESS (CONT.)

D. Current Title IX Regulations require that the College must dismiss the formal complaint if the conduct alleged:

- Would not constitute sexual harassment as defined in §106.30 even if proved
- Did not occur in the recipient's education program or activity
- Did not occur against a person in the United States

Such dismissal does not preclude action under another provision of recipient's Code of Conduct, Board Policy/Administrative Procedure or California law

GENERAL STEPS IN THE TITLE IX COMPLAINT AND GRIEVANCE PROCESS (CONT.)

3. The Coordinator informs a Complainant of the right to file or not to file a formal complaint and the right to supportive measures even if a formal complaint is not filed. If no formal complaint is filed, the Title IX Coordinator informs Complainant of right to file a formal complaint at a later time. The Title IX Coordinator also assesses, despite Complainant's decision, whether to independently initiate a complaint if the failure to initiate an investigation would be clearly unreasonable considering the circumstances (e.g. based on a safety threat).
4. If the matter shall proceed to the formal process, Coordinator will notify both parties of the complaint via a "Notice of Allegations." The NOA is a comprehensive document that explains the Title IX grievance process in detail. It also contains anti-retaliation language and information regarding securing advisors. We cover the NOA in more detail later in this training.
5. Investigation of the Complaint – this can be done by a trained College employee or by a trained third-party investigator
6. Evidence Review by parties and submission of comments
7. Hearing and written decision by the impartial decision-maker. Parties shall receive the written decision at the same time.
8. Appeal

The Coordinator may work with parties to achieve a mutually agreed upon informal resolution, in writing, at any time throughout the process (but before the decision-maker's decision as to whether sex discrimination has occurred). Both parties must agree to the informal resolution. Informal resolution is not available for employee on student harassment matters.

WHY A COMPREHENSIVE NOTICE OF ALLEGATIONS IS VITAL TO THE PROCESS

The Notice of Allegations is critical part of the Title IX process. The Coordinator's Notice of Allegations to the parties should include, among other things:

- Description of the allegations
- Statement that Respondent is presumed not to be responsible for the alleged conduct until a determination is made at the conclusion of the grievance procedures.
- That the Complainant and Respondent will be treated equitably.
- Explain the grievance process in a meaningful and thorough manner (investigation, evidence review, hearing & decision, appeal)

COORDINATOR'S NOTICE OF ALLEGATIONS (NOA) TO THE PARTIES OF THE TITLE IX COMPLAINT (CONT.)

- Establish reasonable timeframes for the process moving forward
- Remind parties about supportive services
- Inform parties about anti-retaliation policies
- Identify parties' rights and responsibilities
- Let parties know about informal resolution options

WHO CAN SERVE AS A TITLE IX INVESTIGATOR?

- The Title IX regulations do not prohibit the Title IX Coordinator from serving as the investigator
- The College can use properly trained employees to serve as the investigator, but that person cannot be the decision-maker for the matter
- The College can also use external trained professionals, like attorney investigators, to serve as the Title IX investigator for a matter

INVESTIGATOR POOLS

- Chaffey typically uses a pool of impartial and trained attorney investigators for investigation of Title IX complaints
- Having a pool of investigators ensures that a timely completion of the process is met. It gives the College flexibility should an investigator have a conflict of interest, suffer unexpected illness/scheduling conflicts, etc.
- Third-party attorney investigators that Chaffey uses run a comprehensive conflict check before accepting the case
- All attorney investigators that Chaffey uses have proper knowledge and training in investigations and in Title IX.

WHAT DO INVESTIGATORS DO AS PART OF THEIR TITLE IX INVESTIGATION?

- ✓ Federal regulations require that the investigation report fairly summarizes relevant evidence (34 C.F.R. § 106.45(b)(5)(vii))
- ✓ The Investigator shall interview all relevant witnesses
- ✓ The Investigator shall obtain and assess all evidence that is available
- ✓ The Investigator shall write a comprehensive initial report and deliver it to the parties and their advisor
- ✓ The Investigator shall allow for parties to review the report and submit a written response

WHAT DO INVESTIGATORS DO AS PART OF THEIR TITLE IX INVESTIGATION? (CONT.)

- ✓ The Investigator will submit a final report and share it with the parties (and their advisor)
- ✓ Investigator does not make decision about whether the Respondent is “responsible” for violation of sexual harassment policy – the decision-maker makes this determination.
- ✓ The Investigator shall provide a copy of the final report to the decision-maker
- ✓ The Investigator shall submit the final report to parties at least 10 days prior to the hearing. We recommend that the investigator submit the final report to the decision-maker at the same time they submit it to the respective parties. The Coordinator can assist with this.
- ✓ The Coordinator serves as a liaison with the Investigator.
- ✓ The investigator often relies on the Coordinator to send witness notifications, discuss timelines, help with investigation obstacles (often witness availability issues)

ADDITIONAL INFORMATION REGARDING THE INVESTIGATOR

- The Title IX regulations contemplate that the investigator may be called to testify at the hearing. There are some limitations, though. (34 C.F.R. § 106.45(b)(6)(i).)
- The investigator can make a recommendation in the report, but the decision-maker has an independent obligation to objectively evaluate evidence
- The Investigator should maintain a comprehensive Investigation File, which should include the NOA and any supplemental NOA, copies of District policies relied upon, transcripts, notes, witness contact logs, and evidence files.
- The Title IX Coordinator should be a valuable resource for the Investigator and assist with sending witness notices, gathering policies upon request, etc.

TITLE IX RESOURCES

- American Council on Education: <https://www.acenet.edu/Policy-Advocacy/Pages/Campus-Safety/Resources-on-Title-IX-Regulations.aspx>
- California Department of Education: <https://www.cde.ca.gov/re/di/eo/genequitytitleix.asp>
- U.S. Dept. of Education: <https://www.ed.gov/laws-and-policy/civil-rights-laws/sex-discrimination/sex-discrimination-2>
- Association of Title IX Administrators (ATIXA): <https://www.atixa.org/>