

Berkeley Unified School District Administrative Regulation

Title IX Sexual Harassment Complaint Procedures

AR 4119.12/4219.12/4319.12

Personnel

The district does not discriminate on the basis of sex in any of its programs or activities, and it complies with Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations (34 C.F.R. Part 106). The district is committed to maintaining an educational and workplace environment free from sexual harassment.

Title IX Sexual Harassment Prohibited

Sexual Harassment as defined in Title IX (Title IX Sexual Harassment) is prohibited in district education programs or activities. Title IX Sexual Harassment is conduct on the basis of sex in an education program or activity that satisfies one or more of the following:(34 CFR 106.30, 106.44)

1. A district employee conditioning the provision of a district aid, benefit, or service on a person's participation in unwelcome sexual conduct.
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity.
3. Sexual assault as defined in 20 U.S.C. §1092(f)(6)(A)(v)

For the purpose of this AR, the district defines "consent" as defined in California Penal Code Section 261.6 Section 261.6 of the California Penal Code defines consent as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 287, or 289, or former Section 288a."

4. Dating violence as defined in 34 U.S.C. §12291(a)(10)
5. Domestic violence as defined in 34 U.S.C. §12291(a)(8)
6. Stalking as defined in 34 U.S.C. §12291(a)(30).

(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)

Term Definitions (34 C.F.R. §106.30)

The following Title IX definitions apply to the following terms used in this Administrative

Regulation:

Complainant - an individual who is alleged to be the victim of conduct that could constitute Title IX Sexual Harassment.

Education program or activity - locations, events, or circumstances where the district has substantial control over both respondent(s) and the context in which alleged Title IX Sexual Harassment occurred.

Formal Complaint - a document filed by a complainant (or a complainant's parent or guardian) or signed by the Title IX Coordinator alleging Title IX Sexual Harassment against a respondent(s) and requesting that the District investigate the allegation.

Respondent - an individual who has been reported to be the perpetrator of the conduct that could constitute Title IX Sexual Harassment.

Supportive measures - non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to complainant(s) or respondent(s) before or after the filing of a formal complaint or where no formal complaint has been filed.

Title IX Sexual Harassment Complaints

The complaint procedures set forth in this Administrative Regulation will be used to address any report of Title IX Sexual Harassment in a district education program or activity to the extent required by Title IX.

Should the Title IX Regulations be modified or repealed, the district will implement only the aspects of these procedures required by law. If permitted by law, the district will address reports of sexual harassment, including Title IX Sexual Harassment, in accordance with AR 4030, Nondiscrimination in Employment, or AR 1312.3, Uniform Complaint Procedure, as applicable.

Non-Title IX Sexual Harassment Complaints

Reports of sexual harassment not covered by the definition of Title IX Sexual Harassment will be addressed in accordance with AR 4030 – Nondiscrimination in Employment, or AR 1312.3 - Uniform Complaint Procedures, as applicable. The determination of whether the allegations meet the definition of Title IX Sexual Harassment under Title IX shall be made by the district's Title IX Coordinator.

(cf. 1312.3 - Uniform Complaint Procedures)
(cf. 4030 Nondiscrimination in Employment)

Reporting Title IX Sexual Harassment

Anyone who believes they have experienced, witnessed or received a report of Title IX Sexual Harassment is strongly encouraged to report the incident to the district's Title IX Coordinator, district administrator, or any district employee with whom the person is comfortable.

District employees receiving a report of or witnessing Title IX Sexual Harassment are required to report it to the Title IX Coordinator. An employee who fails to promptly report or forward a report of Title IX Sexual Harassment to the Title IX Coordinator may be disciplined, up to and including dismissal.

Processing Reports of Title IX Sexual Harassment

Upon receiving such a report, the Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures, inform the complainant of the right to file a formal complaint and explain the process for filing a formal complaint. (34 CFR 106.44)

Supportive Measures

Upon receipt of a report of Title IX Sexual Harassment, the Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures and will consider the complainant's wishes with respect to the supportive measures implemented. Supportive measures must be offered as appropriate, as reasonably available, and without charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures must be non-disciplinary, non-punitive, and designed to restore or preserve equal access to the district's education program and activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the district's educational environment or to deter sexual harassment. Supportive measures may include, but are not limited to, counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escorts, mutual restrictions on contact between parties, changes in work locations, leaves of absence, increased security, and monitoring of certain areas of the campus, and other similar measures to complainants and respondents. (34 CFR 106.30, 106.44)

The district will maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the district's ability to provide the supportive measures. (34 CFR 106.30)

Administrative Leave

If a district employee is the respondent, the employee may be placed on administrative leave during the pendency of the formal complaint process. (34 CFR 106.44)

Formal Complaint

A formal complaint, with the complainant's physical or digital signature, may be filed with the Title IX Coordinator in person, by mail, or by email (34 CFR 106.30)

Even if the alleged victim chooses not to file a formal complaint, the Title IX Coordinator may sign file a formal complaint in situations when a safety threat exists and in other situations as permitted under Title IX, including as part of the district's obligation to not be deliberately indifferent to known allegations of Title IX Sexual Harassment. In such cases, the Title IX Coordinator is not a party to

the formal complaint. The Title IX Coordinator will provide notices to the complainant as required by Title IX.

The district may consolidate formal complaints of Title IX Sexual Harassment against more than one respondent, or by more than one complainant, or by one party against another, where the allegations of Title IX Sexual Harassment arise out of the same facts or circumstances.

Formal Complaint Process

The district treats complainants and respondents engaging in the formal complaint process equitably. Respondents are presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of this formal complaint process. (34 CFR 106.45(b)(1)(iv)) The district complies with this formal complaint process before imposing disciplinary sanctions or other actions that are not supportive measures against a respondent. (34 CFR 106.45(b)(1)(i))

Anyone designated by the district as a Title IX Coordinator, investigator, decisionmaker, appeal decisionmaker or informal resolution facilitator will not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, and will receive training in accordance with 34 CFR 106.45. (34 CFR 106.45(b)(1)(iii))

Written Notice of Allegations

Upon receipt of a formal complaint, the Title IX Coordinator will provide the known parties with written notice of allegations including the following: (34 CFR 106.45)

1. Notice of this formal complaint process, including any informal resolution process.
2. The allegations potentially constituting Title IX Sexual Harassment with sufficient details known at the time, including the identities of parties involved in the incident, if known, the conduct allegedly constituting Title IX Sexual Harassment, and the date and location of the alleged incident if known. Such notice shall be provided with sufficient time for the parties to prepare a response before any initial interview.

If, during the course of the investigation, new Title IX Sexual Harassment allegations arise about the complainant or respondent that are not included in the initial notice of allegations, the Title IX Coordinator must provide notice of the additional allegations to the parties.

3. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the complaint process.
4. Notice that the parties may have an advisor of their choice who may be, but is not required to be, an attorney.
5. Notice that the parties and their advisors, if any, will have an opportunity to inspect and review evidence.

6. Advise the parties that the district prohibits knowingly making false statements or knowingly submitting false information during the formal complaint process.
7. When possible, the name of the investigator, informal resolution facilitator, decisionmaker and appeal decisionmaker, and inform the parties that, if at any time a party has concerns regarding a conflict of interest or bias regarding any of these persons, the party should immediately notify the Title IX Coordinator.

Dismissal of Formal Complaint

The Title IX Coordinator must dismiss a formal complaint if the alleged conduct: (1) would not constitute Title IX Sexual Harassment as defined in 34 CFR 106.30 even if proved, (2) did not occur in the district's education program or activity, or (3) did not occur against a person in the United States. Such conduct may still be address pursuant to other district Board policies and administrative regulations including, but not limited to, AR 4030 - Nondiscrimination in Employment, or BP/AR 1312.3, Uniform Complaint Procedure, as applicable.

At any time during the investigation, the Title IX Coordinator may dismiss a formal complaint of Title IX Sexual Harassment if: (1) the complainant notifies the district in writing that the complainant would like to withdraw the formal complaint or any allegations in the formal complaint, (2) the respondent is no longer enrolled or employed by the district, or (3) sufficient circumstances prevent the district from gathering evidence sufficient to reach a determination with regard to the formal complaint. (34 CFR 106.45)

Upon dismissal, the Title IX Coordinator will promptly send written notice of the dismissal and the reasons for the dismissal simultaneously to the parties and inform them of their right to appeal the dismissal of a formal complaint or any allegation in the formal complaint in accordance with the appeal procedures described in the "Appeals" section below. (34 CFR 106.45)

Informal Resolution

After a formal complaint of Title IX Sexual Harassment is filed, but at any time before a determination regarding responsibility is reached, the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication. The district shall not require a party to participate in the informal resolution process or to waive the right to an investigation and adjudication of a formal complaint. (34 CFR 106.45) Prior to facilitating an informal resolution process, the district must: (34 CFR 106.45(b)(9))

1. Provide the parties with written notice disclosing:
 - a. the allegations;
 - b. the requirements of the informal resolution process including the circumstances under which the parties are precluded from resuming the formal complaint process arising from the same allegations;
 - c. the right of either party to withdraw from the informal resolution process and resume the formal complaint process at any time prior to agreeing to a resolution; and

- d. that the district's informal resolution process is confidential and any consequences resulting from participating in the informal resolution process, including the records of the informal resolution process that will be maintained or could be shared.
2. Obtain the parties' voluntary, written consent to the informal resolution process

Informal resolution is not available to resolve allegations of Title IX Sexual Harassment by a student against an employee.

Investigation Procedures

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rest on the district and not the parties.

Unless a party provides voluntary, written consent, the district cannot access, consider, disclose, or otherwise use a party's records maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in their professional capacity, which are made and maintained in connection with the provision of treatment to the party. (34 CFR 106.45(b)(5)(i))

During the investigation process, the district's designated investigator will: (34 CFR 106.45)

1. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

Inculpatory: evidence favorable to the complainant.

Exculpatory: evidence favorable to the respondent.

2. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
3. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
4. Not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance proceeding. All party advisors are limited to providing support and may not be direct participants. This conduct expectation applies equally to complainants and respondents.
5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all investigative interviews or other meetings, with sufficient time for the party to prepare to participate.
6. Prior to the completion of the investigative report, provide the parties, and their advisors, if any, an equal opportunity to inspect and review any evidence directly related to the allegations in the formal complaint including evidence the district does

not intend to rely in reaching a determination, and provide the parties at least 10 days to submit a written response for the investigator to consider prior to the completion of the investigative report.

7. Objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and determine credibility in a manner that is not based on a person's status as a complainant, respondent, or witness.
8. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to the determination of responsibility, send to the parties and their advisors, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

The district's investigator must not require, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under legally recognized privilege unless the person holding the privilege has waived the privilege. (34 CFR 106.45(b)(1)(x))

If the complaint is against an employee, rights conferred under an applicable collective bargaining agreement shall be applied to the extent they do not conflict with Title IX.

Written Determination

The Title IX Coordinator shall designate a decisionmaker to determine responsibility for the alleged conduct, who shall not be the Title IX Coordinator, investigator or appeal decisionmaker on the formal complaint. (34 CFR 106.45(b)(7))

After the investigative report has been sent to the parties but before reaching a determination of responsibility, the decisionmaker will afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

The decisionmaker will notify the parties and witnesses of the following applicable timelines for the submission of questions and responses:

1. The parties have 7 calendar days to submit their questions to the decisionmaker after receiving notice of the opportunity to submit questions from the decisionmaker.
2. After receipt of the questions, the parties and witnesses will have 7 calendar days to submit their responses to the questions to decisionmaker.
3. When providing the questions and responses to both parties, the decisionmaker must explain to the party proposing the questions any decision to exclude a question as not relevant. Upon receipt of the responses to the questions, the parties will have 5 calendar days to submit limited follow-up questions.

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant or if the questions and evidence

concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. (34 CFR 106.45(b)(6)(ii)) The district's decisionmaker must not require, rely upon, allow, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under legally recognized privilege unless the person holding the privilege has waived the privilege. (34 CFR 106.45(b)(1)(x))

The written determination shall be issued within 120 calendar days of the receipt of the formal complaint. However, the time for completing the formal complaint process will be temporarily delayed during school recess periods exceeding three days. The timeline may be extended for good cause with written notice to the complainant and respondent of the extension and the reasons for the action. Good cause may include, but is not limited to, absence of a party, witness, or party advisor; concurrent law enforcement activity; participation in the informal resolution process; or need for language assistance or disability accommodation. (34 CFR 106.45(b)(1)(v))

The decisionmaker shall issue, and simultaneously provide to both parties, a written determination as to whether the respondent is responsible for the alleged conduct. (34 CFR 106.45(b)(7))

In making this determination, the decisionmaker shall use the "preponderance of the evidence" standard for all formal complaints of Title IX Sexual Harassment. (34 CFR 106.45(b)(1)(vii)) The decisionmaker will objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and determine credibility in a manner that is not based on a person's status as a complainant, respondent, or witness. (34 CFR 106.45(b)(1)(ii))

The written determination shall include the following: (34 CFR 106.45(b)(7))

1. Identification of the allegations potentially constituting Title IX Sexual Harassment as defined in 34 CFR 106.30
2. A description of the procedural steps taken from receipt of the formal complaint through the written determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence
3. Findings of fact supporting the determination.
4. Conclusions regarding the application of the district's code of conduct or policies to the facts
5. A statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions the district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's educational program or activity will be provided by the district to the complainant.
6. The district's procedures and permissible bases for the complainant and respondent to appeal.

Unless a party provides voluntary, written consent, the district cannot access, consider, disclose, or otherwise use a party's records maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in their professional capacity, which are made and maintained in connection with the provision of treatment to the party. (34 CFR 106.45(b)(5)(i))

Appeals

Either party may appeal the district's decision or dismissal of a formal complaint or any allegation in the formal complaint, if: (1) the party believes that a procedural irregularity affected the outcome, (2) new evidence is available that could affect the outcome, or (3) a conflict of interest or bias by the Title IX Coordinator, investigator(s), or decisionmaker(s) affected the outcome. An appeal must be filed in writing with the Title IX Coordinator within 10 calendar days of receiving the written determination or dismissal, stating the grounds for the appeal and including any relevant documentation in support of the appeal. Appeals submitted after this deadline are not timely and shall not be considered.

If an appeal is timely filed, the district shall: (34 CFR 106.45(8))

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
2. Ensure that the appeal decisionmaker is trained in accordance with 34 CFR 106.45 and is not the decisionmaker(s) who reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
3. Give both parties 10 calendar days to submit a written statement in support of or challenging the outcome
4. Issue a written decision describing the result of the appeal (e.g., affirms, reverses, remands, or amends the written determination regarding responsibility) and the rationale for the result within 20 calendar days from the deadline for the parties to submit their written statement in support of or challenging the outcome
5. Provide the written decision simultaneously to both parties within 5 business days of issuing the decision

Either party has the right to file a complaint with the U.S. Department of Education's Office for Civil Rights within 180 days of the date of the most recently alleged misconduct.

The complainant shall be advised of any civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders that may be available under state or federal antidiscrimination laws, if applicable.

Remedies:

When a determination of responsibility for Title IX Sexual Harassment has been made against the respondent, the district shall provide remedies to the complainant. Remedies must be designed to restore or preserve equal access to the district's education program or activity. Such remedies may include the same individualized services described above in the section "Supportive Measures," but need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. (34 CFR 106.45) The Title IX Coordinator is responsible for effective implementation of any remedies. (34 CFR 106.45(b)(7)(iv))

Sanctions/Disciplinary Actions/Corrective Actions

The district shall not impose any disciplinary sanctions or other actions against a respondent, other than supportive measures as described above in the section "Supportive Measures," until the formal complaint process has been completed and a determination of responsibility has been made. (34 CFR 106.44)

When an employee is found to have committed sexual harassment or retaliation, the district shall take appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement.

(cf. 4117.7/4317.7 - Employment Status Report)
(cf. 4118/4218 - Dismissal/Suspension/Disciplinary Action)
(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)

Recordkeeping

The Title IX Coordinator shall maintain records of the following for a period of seven years: (34 CFR 106.45(b)(10))

1. All reported allegations and Title IX Sexual Harassment investigations, any determinations of responsibility, any disciplinary sanctions imposed on respondent, and any remedies provided to the complainant designed to restore equal access to the District's education program or activity
2. Any appeal and the result
3. Any informal resolution and the results
4. Any actions, including any supportive measures, taken in response to a report or formal complaint of Title IX Sexual Harassment. In each instance, the district must document the basis for its conclusion that its response was not deliberately indifferent and the measures taken that were designed to restore or preserve equal access to the education program or activity. If no supportive measures were provided to the complainant, the district must document the reasons that such a response was not unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the district from providing additional explanations or detailing additional measures in the future.

5. All materials used to train the Title IX Coordinator, investigator(s), decisionmaker(s), and informal resolution facilitators. The district shall make such training materials publicly available on its website.

(cf. 1113 - District and School Web Sites)

(cf. 3580 - District Records)

Legal References:

Civil Code:

51.9 - Liability for sexual harassment; business, service and professional relationships 1714.1 - Liability of parents/guardians for willful misconduct of minor

Government Code:

12950.1 - Sexual harassment training

Code of Regulations, Title 5:

4600-4670 - Uniform complaint procedures

4900-4965 - Nondiscrimination in elementary and secondary education programs

United States Code, Title 20:

1092 - Definition of sexual assault 1221 - Application of laws

1232g - Family Educational Rights and Privacy Act

1681-1688 - Title IX of the Education Amendments of 1972

United States Code, Title 34:

12291 - Definition of dating violence, domestic violence, and stalking

United States Code, Title 42:

1983 - Civil action for deprivation of rights

2000d-2000d-7 - Title VI, Civil Rights Act of 1964

2000e-2000e-17 - Title VII, Civil Rights Act of 1964 as amended

Code of Federal Regulations, Title 34:

99.1-99.67 - Family Educational Rights and Privacy

106.1-106.82 - Nondiscrimination on the basis of sex in education programs

Court Decisions:

Donovan v. Poway Unified School District, (2008) 167 Cal.App.4th 567 Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130 Reese v. Jefferson School District, (2000, 9th Cir.) 208 F.3d 736

Davis v. Monroe County Board of Education, (1999) 526 U.S. 629 Gebser v. Lago Vista Independent School District, (1998) 524 U.S. 274 Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473

Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:

CSBA Publications:

Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014

Safe Schools: Strategies for Governing Boards to Ensure Student Success, 2011

Federal Register:

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, May 19, 2020, Vol. 85, No. 97, pages 30026-30579

U.S. Department of Education, Office for Civil Rights Publications:

Q&A on Campus Sexual Misconduct, September 2017

Examples of Policies and Emerging Practices for Supporting Transgender Students, May 2016

Dear Colleague Letter: Title IX Coordinators, April 2015

Sexual Harassment: It's Not Academic, September 2008

Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001

Web Sites:

CSBA: <http://www.csba.org>

California Department of Education: <http://www.cde.ca.gov>

U.S. Department of Education, Office for Civil Rights: <http://www.ed.gov/about/offices/list/ocr>

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