

Intro to Title IX

Long Beach Community College District | September 24, 2024

Presented By: Pilar Morin

LIEBERT CASSIDY WHITMORE

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Agenda

- Addressing sex discrimination in its education program or activity;
- What is sex discrimination, including sex-based harassment; and
- Employee notification requirements under Title IX, including information to provide to pregnant students
- Overlapping California law where relevant

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Four Categories of Training (34 C.F.R. § 106.8(d))

Train at the time of hire, when position or responsibilities change, and annually thereafter:

- All employees; (This is today's training)
- Investigators, decisionmakers, and others responsible for grievance procedures or with authority to modify/terminate supportive measures;
- Facilitators of informal resolution process; and
- Title IX Coordinator and designees

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Addressing sex discrimination in the District's education program or activity

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Title IX

Title IX prohibits discrimination:

- In the United States
- On the basis of sex
- In education programs or activities
- Receiving federal financial assistance

• Discrimination on the basis of sex can include sex based harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion

20 U.S.C. § 1681 et seq.
34 C.F.R. § 106 et seq.

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**Education Program or Activity
(34 C.F.R. § 106.31)**

No person shall be excluded on the basis of sex ... from "...any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance."

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Education Program or Activity
(34 C.F.R. § 106.31)

- District must address sex discrimination incident that occurs off campus and within the U.S. if it occurs:
 - In a District program or digital platform;
 - In an official student group building; or
 - Within the school's disciplinary authority.
- Must address *sex-based hostile environment* even when conduct occurred outside of education program or activity or outside US

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Compare with SB 493: Cal. Ed. Code Duties to Students

- Primary concern must be student safety
- Must take reasonable steps to respond to incident of sexual harassment,
 - whether occurring in connection with or outside of its educational activities or programs
 - whether occurring on or off campus
- if there is any reason to believe the incident could contribute to a *hostile educational environment or otherwise interfere with a student's access to education*

Ed. Code § 66281.8(b)(3)

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Compare with FEHA Duties to Employees

California's Fair Employment and Housing Act (FEHA) also prohibits discrimination, harassment and retaliation, and requires that employers take all reasonable steps necessary to prevent discrimination and harassment from occurring.

Cal. Govt. Code §12940(k)

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Basic Requirements
(34 C.F.R. § § 106.8(a) and (b))

- Must designate at least one employee as Title IX Coordinator
- Adopt, publish, implement nondiscrimination policy and grievance procedures consistent with regulations
- Provide notice of nondiscrimination
 - To students, applicants for admission and employment, and all unions and professional organizations

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Long Beach CCD

- AP 3433 Prohibition of Sex Discrimination under Title IX
- AP 3434 Responding to Sex Discrimination under Title IX
 - Effective August 1, 2024
 - Incorporate Title IX 2024 regulations
 - For pre August 1, 2024 allegation, District will use former procedures

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Long Beach CCD
Title IX Coordinator

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Complainant (34 C.F.R. § 106.2)

- A student or employee who is alleged to have been subjected to sex discrimination; or
- Other person who is alleged to have been subjected to sex discrimination and who was participating/attempting to participate in the District's education program or activity at the time of the alleged sex discrimination
- Complaints can be verbal or written

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Who Can File Complaints (34 C.F.R. § 106.45(a)(2))

- Student/employee alleged to have been subjected to sex discrimination; or
- Person other than student/employee alleged to have been subjected to sex discrimination when that person was participating/attempting to participate in education program or activity; or
- Parent/guardian of minor, or authorized representative with legal right to act on behalf of Complainant; or
- Title IX Coordinator.
 - Note: Only person alleging to have been subjected to sex-based harassment can make a sex-based harassment complaint

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Response Requirements (34 C.F.R. § 106.44(a))

"A [Community College District] with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively..."

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Response Requirements
(34 C.F.R. § 106.44(f))

- When the Title IX Officer is notified of conduct that reasonably may constitute sex discrimination:
 - Treat the complainant and respondent equitably;
 - Offer and coordinate supportive measures;
 - Notify complainant of grievance procedures and informal resolution process

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Response Requirements
(34 C.F.R. § 106.44(f)(2))

- Not required to implement response requirements if Title IX Coordinator reasonably determines that alleged conduct could not constitute sex discrimination

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Two Roads Diverge

- Title IX now has two grievance procedures:
 - § 106.45 sex discrimination allegations (including employees, students and third parties)
 - § 106.46 (involving student parties in sex-based harassment allegations)
- The procedure that applies depends on
 - The nature of the claim (sex discrimination vs. sex-based harassment)
 - The parties involved (student party in sex-based harassment)

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When Does section 106.46 Apply?

- Any complaint of sex-based harassment that involves a student party
- Student can be the Complainant or the Respondent (or both)
- Special case of student employees – context-specific

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Student employees (34 C.F.R. § 106.46(b))

- When a Party is both a student and an employee, conduct fact-specific inquiry to determine whether the District will process the Complaint using the Grievance Procedures for Complaints of Sex-Based Harassment Involving Student Complainants or Student Respondents (.46) or the Grievance Procedures for Complaint of Sex Discrimination (.46)
- At a minimum, consider whether the Party's primary relationship with the District is to receive an education and whether the alleged sex-based harassment occurred while the Party was performing District employment-related work

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What is sex discrimination, including sex-based harassment?

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Discrimination
(34 C.F.R. § 106.10)

- Discrimination on the basis of sex includes:
 - on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity

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Gender Identity / Expression

Districts **Must:**

- Permit people to use the restroom that corresponds to the employee's gender identity/expression
- Refer to people using preferred name, gender, and pronouns
- Cal. Law: Designate single occupancy facilities using gender-neutral signage

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Gender Identity / Expression

Must Not:

- Enforce dress codes more harshly against an employee based on their gender identity/expression
- In Employment, discriminate against an applicant for failing to designate a gender or designating a gender that is inconsistent with the applicant's sex assigned at birth
- Inquire about or require documentation or proof of an individual's sex or gender

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Cal. Law: Student Records

Public Higher Ed Institutions:

- Must update a former student's records to include the student's updated legal name or gender upon receipt of government-issued documentation supporting the name or gender change
- As of 2023-24 graduating class, must provide graduating students option to specify student name on diploma without requiring legal documentation to support the chosen name or gender change

Ed. Code § 66271.4

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Sex-Based Harassment (34 C.F.R. § 106.2)

Quid pro quo harassment - Conduct by an employee, agent, or other person authorized by the District

- Job or education benefits promised:
 - Explicitly or implicitly
 - In exchange for sexual favors or denied if sexual favors are not given

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Sex-Based Harassment (34 C.F.R. § 106.2)

- *Hostile environment harassment.*
 - Broader definition compared to 2020 regulations
 - Unwelcome sex-based conduct that is subjectively and objectively offensive and is so severe or pervasive (based on totality of circumstances) that it limits or denies
 - List of fact-specific factors to consider

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Sex-Based Harassment: factors to consider (34 C.F.R. § 106.2)

- Whether a hostile environment has been created depends on:
 - Degree conduct affected complainant's access;
 - Type, frequency, and duration of conduct;
 - Parties' ages, roles, previous interactions, other factors about each;
 - Location of conduct and context; and
 - Other sex-based harassment in education program or activity

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Sex-Based Harassment (34 C.F.R. § 106.2)

Hostile Environment Examples:

- Physical contact
- Sexual rumors/ratings/jokes/proposals/slurs
- Sexually explicit or offensive language
- Refusal to use preferred name or pronouns
- Remarks about body, appearance, dress

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Sex-Based Harassment (34 C.F.R. § 106.2)

- Clery Crimes (rape, fondling, incest and statutory rape)
- Violence Against Women Act Crimes (sexual assault, dating violence, domestic violence, stalking)

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Case Study– Verbal Conduct

Although Georgette was assigned at birth as a male, she recently began presenting as a female, consistent with her gender identity. She notified her co-workers of her new gender identity as she previously identified as a male named George. Rick and John refuse to refer to Georgette by her name or female pronouns and still call her “George” and frequently ask “him” why “he” uses the Women’s Restroom and wears skirts.

Have Rick and John created a hostile work environment?

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Sexual Harassment under the State Law

- "Sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:
- Quid pro quo (a condition of or affecting employment, academic status, or progress)
- Hostile Environment: Conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment
 - Includes sexual battery, sexual violence, and sexual exploitation

Cal. Ed. Code §§ 212.5, 66262.5

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Cal. Affirmative Consent Standard

Affirmative, Conscious, and Voluntary Agreement to Engage in Sexual Activity

- Responsibility of each party
- Lack of protest/resistance does not mean consent
- Silence does not mean consent
- Must be ongoing throughout
- Can be revoked at any time

Ed. Code § 67386(a)(1)

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Retaliation (34 C.F.R. § 106.2)

- Intimidation, threats, coercion, or discrimination
- By the District, a student, or an employee or other person authorized by the District to provide aid, benefit, or service
- For the purpose of interfering with any right or privilege secured by Title IX, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in an investigation, proceeding, or hearing, or informal resolution
- Includes peer retaliation

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Case Study

Rudy is a member of the College's business club. The business club hosts its annual gala at a private residence two blocks away from the College. The business club only pays for the advisement and provides student volunteers. Carlos attends the gala and sees Rudy enter the bathroom. Carlos follows Rudy into the bathroom. While in the bathroom, Carlos sexually assaults Rudy. Carlos threatens to hurt Rudy if he tells anyone.

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Case Study con't

Rudy meets with the Title IX Coordinator and asks them to please help him. Rudy states he is afraid for his life and doesn't want to be on campus while Carlos is there. Rudy refuses to attend class.

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Case Study

Does the Title IX Coordinator have jurisdiction to file a complaint over the incident that took place at the private residence?

Does this allegations fall into section .45 or .46?

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Employee Notification Requirements Under Title IX, Including Information To Provide To Pregnant Students

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Employee Reporting Requirements (34 C.F.R. § 106.44(c))

- Any employee, *who is not a confidential employee*, with authority to institute corrective measures or has responsibility for administrative leadership, teaching, or advising:
 - Must notify Title IX Coordinator
- All other employees:
 - Notify Title IX Coordinator; or
 - Provide contact information for Title IX Coordinator and information about how to make a complaint

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Confidential Employees Requirements
(34 C.F.R. § 106.44(d))

- Confidential employees must explain:
 - Status as confidential, including circumstances in which employee is not required to notify the Title IX Coordinator;
 - How to contact Title IX Coordinator and make complaint; and
 - Title IX Coordinator may be able to offer and coordinate supportive measures and initiate informal resolution process or investigation.

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Case Study

You are a faculty member, in class a student shares that an incident where she suffered a sexual assault that occurred the first day of classes while she was tutoring another student. At the end of class, she asks to speak to you and tell you not to tell anyone.

What do you do?

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Answer to Case Study:

- Listen without judgment
- Explain your duty to report
 - Contact the Title IX Coordinator
 - The Title IX Coordinator will reach out for support

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Employee Notification Requirements to Pregnant Students
(34 C.F.R. § 106.40(b)(2))

- Unless employees reasonably believe that the Title IX Coordinator has already received notice, *employees who are directly informed of a student's pregnancy/related conditions* must:
 - Provide student the Title IX Coordinator's contact information;
 - Tell student about Coordinator's ability to take/coordinate specific actions & ensure equal access

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Nondiscrimination
(34 C.F.R. § 106.40(a), (b)(1))

- Cannot discriminate against student based on student's current, potential, or past pregnancy or related conditions
 - May provide option to voluntarily participate in separate portion of education program or activity
- Cannot adopt or implement policy, practice, or procedure concerning student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex

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Pregnancy or Related Condition
(34 C.F.R. § 106.2)

- Pregnancy, childbirth, termination of pregnancy, or lactation;
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

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Specific Actions to Prevent Discrimination
(34 C.F.R. § 106.40(b)(3))

- Provide information
- Make reasonable modifications
- Voluntary access to separate and comparable portion of program or activity
- Voluntary leaves of absence
- Lactation space
- Limitation on supporting documentation

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Preemption (34 C.F.R. § 106.6)

- *Effect of State or local law or other requirements* Obligation to comply with Title IX not obviated or alleviated by State or local law or other requirement that conflicts with Title IX
 - Personnel Rules
 - Collective Bargaining Agreements
 - Department Rules/Procedures
 - Board Policies and Administrative Procedures
 - Codes (Ed. Code, POBR, FERPA)

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Kansas v. USDOE (Title IX Injunction)

- On July 2, 2024, a federal judge in Kansas enjoined the Department of Education's enforcement of the 2024 Title IX regulations in Alaska, Kansas, Utah and Wyoming and also schools attended by members of the plaintiff groups or their children throughout the country
- California schools are affected by the court order against the DOE's enforcement of the 2024 Title IX regulations
 - <https://storage.courtlistener.com/recap/gov.uscourts.ksd.152561/gov.uscourts.ksd.152561.67.2.pdf>

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DOE - OCR

- “Per Court order, this list of schools may be supplemented in the future. The Final Rule and these resources do not currently apply in those states and schools. Pending further court orders, the Department’s Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.”
 - <https://www2.ed.gov/policy/rights/reg/ocr/index.html>

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Thank you!

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