



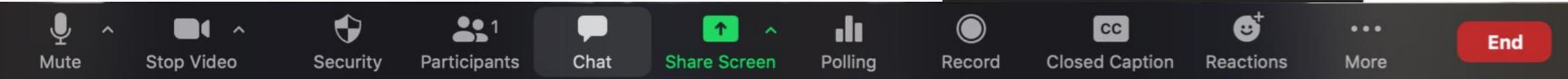
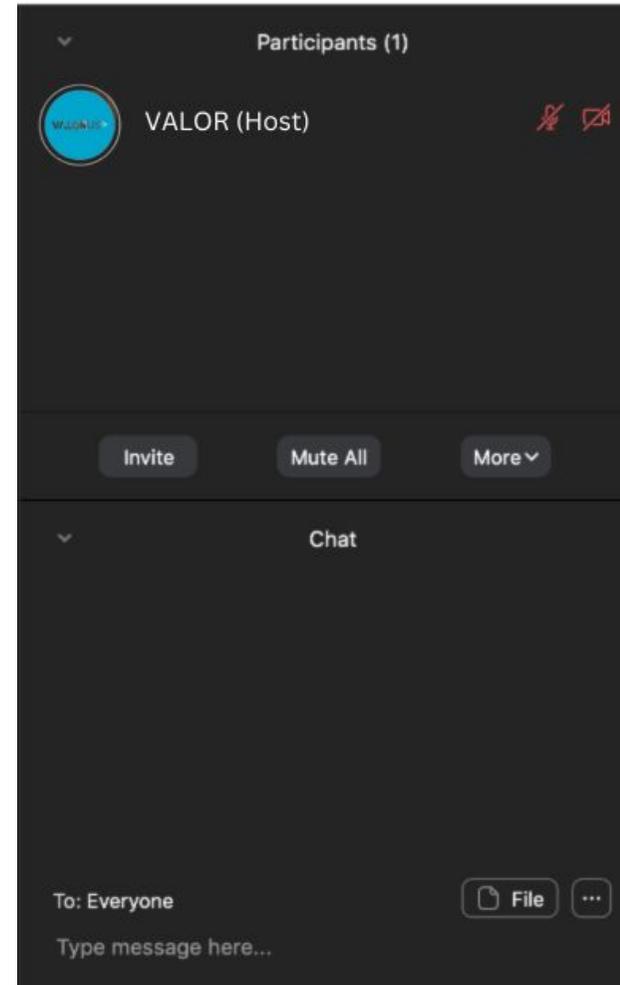
Title IX Regulations Update: A Return to Sanity?

June 25, 2024
10-11:30 am PDT

VALORUS 
Advancing Equity. Ending Sexual Violence.®

HOW TO USE ZOOM

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Meet Your Presenter



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Learning Objectives

1. Review the highlights of the 2024 Title IX Regulations.
2. Compare California legal requirements for gender equity and prohibiting sex discrimination at institutions of higher education.
3. Develop a plan for your campus on where to go from here.

BEFORE WE BEGIN

Title IX Coordinators and staff, and HR administrators...

“are **well intentioned, committed individuals** who have chosen to engage in this work because of their **commitment** to civil rights and to promoting campus environments free from discrimination and harassment.”

BUT

“In the current context and climate, we see an overgeneralization and stereotyping of the individuals who serve as Title IX Coordinators and DHR administrators, with **blame being leveled at the feet of individuals, rather than at the lack of institutional resources** and the legal constraints of the process.”

REAL PROBLEM: we are under-resourced, without sufficient personnel or budgetary support, to make effective responses, which is creating a trust gap.

2022 CSU Systemwide Report at p. 35

Please respond in
the text chat box

What is the
biggest challenge
facing your campus in
implementing the 2024
Title IX regs.?

What would help you to
overcome that challenge
and/or to implement the new
regs. by August 1, 2024?

Road Map for the Webinar

- Hit the highlights of the 2024 Title IX regulations
- Discuss how this changes law and practice at your campus
- Review SB 493 – comprehensive California law effective Jan. 1, 2022
- Compare similarities & differences in the state and federal laws



Key Changes to the Complaint Process

Who Can Make a Title IX Complaint?

- **NEW:** a current or **former** student or employee or **a person participating or attempting to participate in an education-based program or activity**
- **Or a volunteer, guest speaker, or attendees of programs/events on campus**
- New categories (in bold) are not retroactive § 106.2

How to Make a Title IX Complaint - § 106.2

2020 regs. – Formal complaint signed & filed with Title IX Coordinator

NEW:

A complaint can be made by **oral or written request** that can objectively be understood as a request to investigate and make a determination.

School's response to a request to investigate

NEW:

Response must be prompt & effective. Removes the “**deliberate indifference**” standard of the 2020 regs. which gave the school a pass unless its response was deliberately indifferent to the conduct.

2024 Regs. Expand Types of Harassment -- §§ 106.10-11

5 kinds of sex-based harassment/ discrimination:

- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Gender Identity
- Pregnancy or related conditions

NEW: applies to **off-campus conduct** if the school also disciplines other types of off-campus misconduct.

Title IX Violations -- §§ 106.2, 106.10

NEW: hostile environment standard (replaces 2020 *Davis* standard)

- Applies to conduct in school buildings or subject to school's disciplinary authority which is offensive & **so severe OR pervasive** that it limits or denies the ability to participate in/benefit from the education program or activity. [2020 – “and” pervasive]

Who can cause a hostile environment for which the school is responsible?

An agent, employee or independent contractor of the school can be responsible for a Title IX violation as well as other students.

The conduct can be explicit or implicit in creating a hostile environment or it can be quid pro quo harassment.

What If a Hostile Environment Occurs Off-Campus?

NEW: Even if a sex-based hostile environment is happening OFF-CAMPUS, if it impacts the education program or an educational activity, it is covered by Title IX.

- **Now the same as CA law**

- Broader jurisdiction:

- This means school must address the issue even if some conduct contributing to the hostile environment occurred outside the U.S. or outside the educational program or activity.

§ 106.11

Proving a Hostile Environment Exists - § 106.2

Consider:

The degree to which complainant's access to the education program/activity was affected.

Type, frequency and duration of the conduct.

Parties' ages, roles in the education program/activity, previous interactions and other relevant factors about each part;

Location of the conduct and context in which it occurred.

Other sex-based harassment in the program/activity.

OR: Consider sex-based offenses that occurred, including sexual assault, dating violence/DV and stalking.

Prompt & Effective Action Necessary

Trump 2020 Reg. – Only liability for T9 violation if campus responded in a manner “deliberately indifferent,” meaning clearly unreasonable in the circumstances

2024 Regs. – reinstates the requirement that the school, upon notice, take prompt and effective action to end the sexual violence, prevent recurrence, and provide remedies for its effects...**whether or not a complaint is filed**

CA Law re Liability – Wider Scope

- Campus will be presumed to know of SH if a responsible employee *knew or reasonably should have known* of the SH
- Campus may rebut this presumption if it shows:
 - Campus provides training & requires all non-confidential employees to report SH
 - Each non-confidential responsible employee with actual or constructive knowledge of the conduct in question was provided training and direction to report SH
 - A non-confidential responsible ee with actual or constructive knowledge of SH failed to report it

Ed. Code 66281.6, eff. 1-1-22

Who Must Report to the Title IX Coordinator?

Title IX: at postsecondary schools, **non-confidential employees with the authority to take corrective measures OR who have teaching, administrative leadership or advisor roles** must notify the Title IX Coordinator of a disclosure.

- If the employee is not in those roles, the employee can simply tell the student about the Title IX Coordinator and how to make a complaint.

CA Law: Broader definition of responsible employee includes RAs, housing, athletic & student life directors/coordinators/deans, coaches, faculty, graduate student instructors, in/externship & study abroad directors/coordinators -- **must report to Title IX**

Confidential Employees Under Title IX 2024 - § 106.2

NEW definition of confidential employee:

- Employee whose communications are privileged under state/federal law
- Employees **whom the school designates as confidential** for the purpose of providing services related to sex discrimination [but only if the communication was received while providing those services (if the employee has multiple roles).]

Confidential employees & those not designated as responsible can now share info. about the Title IX Coordinator & supportive measures without revealing the PII of the student to Title IX.

Confidential Employees Under CA Law

California law designates as **confidential**:

- Therapist, sexual assault counselor, DV counselor, CARE director, advocate or employee; CSU Victim advocate, or “an individual acting in a professional capacity for which confidentiality is mandated by law.”
- Omits designated confidential campus advocates who are not on UC or CSU campuses, so must be therapist, SA or DV Counselor to be a confidential employee at community colleges/private schools – or designated confidential.
- Upon disclosure of SH, the employee must tell the student about the ability to report to a responsible employee and direct the student to those specific reporting resources.

Cal. Educ. Code 66281.8, eff. 1-1-22

Which Law Controls – Title IX or California?

Generally, if CA law requires more than federal law (Title IX) then CA law controls.

BUT a new provision in Title IX now states:

“The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.” - § 106.6

The new Title IX regs. state that only non-confidential employees with the authority to take corrective measures OR who have teaching, administrative leadership or advisor roles must notify the Title IX Coordinator of a disclosure. The rest can simply tell a student how to contact Title IX to make a complaint.

CA law says a much bigger group of employees must notify Title IX of a disclosure.

WHICH LAW CONTROLS?

Evidentiary Privilege

A rape crisis center advocate holds an “evidentiary privilege” under CA law.

Mental health counselors hold a qualified privilege under CA law.*

Victim’s statement is privileged—disclosure cannot be compelled by anyone but a court.

A court can compel disclosure only if:

- Survivor made a complaint of sexual assault
- Information received by the counselor is relevant to the criminal proceeding
- Court finds probative value outweighs potential effect of disclosure on the victim, the treatment relationship and treatment services.



New Regulations for Nursing and Pregnancy

Pregnancy & Related Conditions

- 1 in 4 undergraduates are PARENTS
- 180,000 students give birth each SEMESTER
- Only 1/3 of parents graduate w/n 6 years even though they have higher GPAs than their childless peers
- Under the 2020 regs., pregnant students were kicked out of programs, campus housing, externships & scholarships

NEW: Title IX protects against gender stereotyping; requires the school to **INFORM PREGNANT STUDENTS** (when known to the school) of their rights under Title IX.

(Natl. Women's Law Ctr./Advocate Perspectives)

Please answer
the Zoom poll.

What kind of
lactation spaces
does your
school have?

- Bathrooms only
- Other clean, safe, private,
and accessible spaces
- Unsure

Pregnancy/Related Medical Conditions -- § 106.40

Protections absent from 2020 regs. - only regulated by disability policies

NEW:

- Clear right to reasonable accommodation for pregnancy-related needs
- School CANNOT require doctor's certification that a student is "physically or emotionally" able to stay in school*
- School cannot release PII/protecting privacy
- Title IX is responsible for coordinating the accommodation process
- Title IX's notice & complaint process must integrate the new pregnancy regs.; mandated reporter employees must report violations

LGBTQI+ - Protection Now Based on Identity

NEW: Expanded protections for gender identity, sexual orientation, sex characteristics

2020 regs. - "Sexual assault/harassment" only

NEW: "Sex-based harassment"

□ 5 legal challenges to new regs. already filed by red states & orgs.

WHY the new protections?

83% face bullying, harassment and assault at school

62% never report to the school (don't believe school will do anything)

33% avoid school due to safety concerns

(Natl. Women's Law Ctr./Advocate Perspectives)



Decision Makers, Investigators and Title IX Coordinators

Title IX Coordinator & Policy - § 106.8

☐ **One Coordinator must have ultimate oversight.**

NEW: A notice of nondiscrimination must be in every announcement, bulletin and application form in addition to your handbook catalog & web site

This can be a brief statement about sex discrimination being prohibited & state that concerns can be reported to Title IX Coordinator & provide the location (hyperlink if digital) of the notice on the campus web site.

Training requirements

NEW: Annual training for all employees about duty to address sex discrimination, the scope & notification requirements

☐ Must be done promptly upon hiring/changing positions if change affects duty under Tit. IX

Please answer
the Zoom poll.

Have your decision makers
on Title IV been trained
on your campuses:

- Recipient's response to sexual discrimination
- Recipient's grievance procedures - § 106.45
- How to serve impartially
- Definition of "relevant & types of evidence"

Additional Training Requirements - § 106.8

Investigators, decisionmakers, p. responsible for implementing grievance proc. or who have authority to modify/terminate supportive measures must also be trained on:

Recipient's response to sexual discrimination - § 106.44

Recipient's grievance procedures - § 106.45

How to serve impartially

Definition of "relevant & types of evidence that are impermissible - § 106.45, 106.46

Facilitators of informal resolution process under § 106.44(k) must be trained on those rules, practices and how to serve impartially

CA Training Requirements – Grievance Procedures

CA law adds that employees engaged in grievance procedures on sex discrimination have training on:

- trauma-informed investigatory and hearing practices
- best practices for assessment of a SH or SV complaint
- best practices for questioning of the complainant, respondent and witnesses
- implicit bias & racial inequities, both broadly & in school disciplinary processes

Also: “trauma-informed” training for residential life staff if the campus has on-campus housing

Recordkeeping - § 106.8

Keep for 7 years:

- For complaints of sex discrimination, keep records documenting the IFR process or grievance procedures & resulting outcome.
- For each notification Title IX Coord. Receives about conduct that reasonably may be sex discrim., retain records documenting the actions the school took to meet its obligations under § 106.44.

NEW:

All materials used to provide required trainings , **which must be made available upon request for inspection by members of the public.**

- No longer required to be posted on campus web site.

Title IX Coordinator & Investigators - § 106.45

NEW:

Decisionmaker can be the Title IX Coordinator or investigator, so a single investigator-adjudicator model is possible now under Title IX.

CA Law

Prior CA cases had held this model was a denial of due process, but in *Boermeester v. Carry* the Cal. Supreme Court sent the case back to the Court of Appeal on this issue, **which held it is NOT a denial of due process to use the single investigator-adjudicator model.**

[Boermeester v. Carry, 15 Cal. 5th 72, 79-80 \(2023\), on remand, 100 Cal. App. 5th 383, 387 \(2024\).](#)

Reporting to Campus & Title IX

Consequences of reporting to Title IX Coordinator (if disclosure is authorized by the survivor or if the report was not made to a confidential employee or advocate)

Campus must:

- Weigh timely warning
- Weigh whether to initiate student conduct proceeding if conduct falls under Title IX or under school's own conduct code

Survivor's wishes must be considered but are not binding on the campus

Even If Campus Honors Complainant's Wish for Confidentiality & No Investigation...

- Campus must take reasonable steps to limit effects of the SH & to prevent recurrence w/o revealing C's identity
- Increase monitoring, supervision or security at locations or activities where SH occurred
- Provide additional training/educational materials to students and employees
- Conduct climate surveys re sexual violence
- Take immediate steps to provide for C's safety

Cal. Ed. Code, 66281.8, eff. 1-1-22

Notice of Nondiscrimination – § 106.8

NEW: School must post a nondiscrimination notice in each:

--**announcement, bulletin, & application form**

--in addition to handbook, catalog & web site

Can provide a brief statement about sex discrimination being prohibited, refer Qs/reports to Title IX, and provide hyperlink to school web site



Title IX Hearings

Grievance Procedures

- Complaints are no longer called “formal”
- Decisionmaker may be Title IX Coordinator or investigator
- Campus must establish “reasonable” time frames for major stages of the process:
 - Investigation, determination, appeal
- **NEW:** Informal Resolution: can be alternative to T9 process
 - Title IX Coordinator determines IR is not appropriate despite a party’s wishes
 - Title IX must still take steps to prevent continued occurrence/re-occurrence

All Complaints Must Be Investigated – §106.44

- If sex discrimination (SH/SV) comes to the attention of Title IX at the school, the Title IX Coordinator/investigator:
 - Must investigate
 - Must make a fact-specific determination of responsibility
 - Must take steps to remedy/prevent recurrence

Whether or not a formal complaint is filed or initiated or in the absence of termination of an informal resolution proceeding.

Hearings

- **NEW:** live hearings are optional – not required
 - Up to each campus to decide whether to allow/require a hearing
- If hearings are used:
 - Cross-examination is NOT required
 - Advisors, not parties, must ask the questions – or adjudication panel can ask the questions
 - Parties must be able to submit questions before and during the hearing
 - Parties can have a support person instead of an advisor present

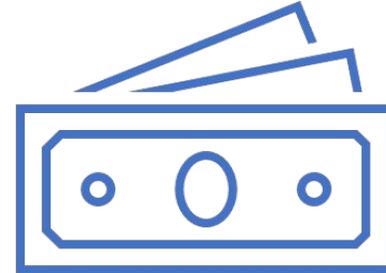
Standard of Proof

- **NEW:** Schools must use the preponderance standard (>50% of the evidence supports finding the conduct happened)
 - UNLESS the school uses a clear & convincing evidence standard for every other type of misconduct proceeding
- Relevant evidence means evidence which aids the decision maker in determining if sex discrimination occurred

Advisors



Providing an Advisor: If a party to a Title IX proceeding does not have a representative the school (higher ed.) must appoint one, but it can be a campus employee and does not have to be an attorney.
Could be an advocate!



If the respondent does not find a suitable advisor and only wants to be represented by an attorney, does the postsecondary institution have to pay for the party's attorney?

Answer: No. The postsecondary institution is not required to pay for a party's attorney.

Restorative Justice Alternatives Allowed Under New Title IX Regs.

- Restorative Justice (RJ) alternatives are offered on a few California campuses
- USD is pioneering these alternatives at its institute for RJ

RJ requires:

- Voluntary participation by both parties
- Freedom to withdraw from process at any time
- Agreement nothing said in RJ process can be used against the person in any future proceeding

Time Lines & Appeals – § 106.46

- No more 10-day periods required for review/response
- School sets “reasonable” deadlines for stages of the investigation

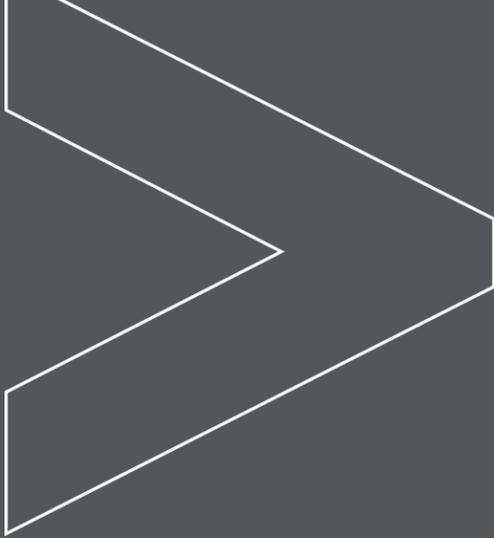
NEW: Appeals must be based on *new evidence which would change the outcome of the proceeding* and which was not available at the time of the determination or hearing

Informal Resolutions Can Include Restorative Justice – Not Mediation

- RJ gives a complainant a voice, more power and control to tell own story
- Acknowledges *up front* that the SV happened
- Allows restoration to the whole community harmed, not just the survivor
 - E.g. – stalking/police station incident
- Gives respondent a way to make amends as part of sanctions
- Mediation is a just different way to resolve responsibility & **is prohibited**

When RJ is Appropriate

- Only used when someone accused of causing harm acknowledges the harmful behavior (although they may not grasp the full impact) and commits to taking responsibility
- Mediation is not RJ. Mediation does not require that a party take responsibility for their role in causing harm. Acceptance of responsibility is essential for preventing adversarial confrontation and victim-blaming
- RJ facilitators meet extensively with participants to assess whether the case should include a face-to-face dialogue and to prepare participants



Reviewing Your Title IX Policy: Strengths, Weaknesses, And Opportunities

Thinking Through Your T9 Policy

Strengths vs. Weaknesses: check format, ease of locating it online and navigation, explanation of consent & parties' rights, prehearing procedures, role of parents

Consider:

language level

recording interviews

discussing commitment to prevention education in policy

TO DO List

- Outline (or obtain outline from counsel) state laws
- Note intersections/conflicts (e.g., collective bargaining, employee contracts)
- Determine which will govern
- Decide: who will write the revised policy? Review it (for consistency, clarity, inclusivity?) Approve it?
- Consider--Should we go back to the single investigator model?

August 1 is coming fast! So is the new school year...

Getting Their Attention

- Use fear tactics: liability (\$\$\$), damage to school reputation
- Appeal to our mission – caring for our students: we must be proactive to create a safe community
- Requires investing \$\$ to train/hire investigators/hire employees dedicated to prevention education and training
- Identify obstacles & develop a game plan

Good luck!

Success

- Did you learn what you needed?
- What else would you like to know?



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