

KERN COUNTY SUPERINTENDENT OF SCHOOLS

PERSONNEL

TITLE IX SEXUAL HARASSMENT COMPLAINT PROCEDURES

The complaint procedures described in this Superintendent’s Policy shall be used to address any complaint governed by Title IX of the Education Amendments of 1972 alleging that an employee of the Office of the Kern County Superintendent of Schools (“Office”) was subjected to one or more of the following forms of sexual harassment: (34 C.F.R. § 106.30)

1. An Office employee conditioning the provision of an Office 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 Office's education program or activity.
3. Sexual assault, dating violence, domestic violence, or stalking as defined in 20 U.S.C. § 1092 or 34 U.S.C. § 12291.

(cf. 4119.11 - Sexual Harassment Policy and Complaint Procedure)

All other sexual harassment complaints shall be investigated and responded to pursuant to SP 4030 - Nondiscrimination in Employment.

(cf. 4030 - Nondiscrimination in Employment)

A report of sexual harassment shall be submitted directly to or forwarded to the Office's Title IX Coordinator using the contact information listed in SP 4119.11 - Sexual Harassment Policy and Complaint Procedure.

Upon receiving such a report, the Title IX Coordinator shall inform the complainant of the process for filing a formal complaint.

Even if the alleged victim chooses not to file a formal complaint, the Title IX Coordinator shall file a formal complaint in situations in which a safety threat exists. In addition, the Title IX Coordinator may file a formal complaint in other situations as permitted under the Title IX regulations. In such cases, the alleged victim is not a party to the case, but will receive notices as required by the Title IX regulations at specific points in the complaint process.

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 any other method authorized by the Office. (34 C.F.R. § 106.30)

The Superintendent or designee shall ensure that the Title IX Coordinator, investigator, decision-maker, or a facilitator of an informal resolution process does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, and that such persons receive training in accordance with 34 C.F.R. § 106.45. (34 C.F.R. § 106.45)

Supportive Measures

Upon receipt of a report of Title IX sexual harassment, even if a formal complaint is not filed, the Title IX Coordinator shall promptly contact the complainant to discuss the availability of supportive measures, which are nondisciplinary, nonpunitive, and do not unreasonably burden the other party. Such measures may include, but are not limited to, counseling, extensions of deadlines, modifications of work schedules, mutual restrictions on contact, changes in work locations, leaves of absence, increased security, and monitoring of certain areas of the campus. The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures. (34 C.F.R. § 106.30, 106.44)

Emergency Removal

If an Office employee is the respondent, the employee may be placed on administrative leave during the pendency of the formal complaint process. (34 C.F.R. 106.44)

If the respondent is a student, the Office may, on an emergency basis, remove the student from the Office's education program or activity, provided that the Office conducts an individualized safety and risk analysis, determines that removal is justified due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations, and provides the student with notice and an opportunity to challenge the decision immediately following the removal. This authority to remove a student does not modify a student's rights under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973. (34 C.F.R. § 106.44) Should also consider the student's rights under California Education Code when considering removing a student from school.

Dismissal of Complaint

The Title IX Coordinator shall dismiss a formal complaint if the alleged conduct would not constitute sexual harassment as defined in 34 C.F.R. § 106.30 even if proved. The Title IX Coordinator shall also dismiss any complaint that did not occur in the Office's education program or activity or did not occur against a person in the United States, and may dismiss a formal complaint if the complainant notifies the Office in writing that the complainant would like to withdraw the complaint or any allegations in the complaint, the respondent is no longer employed by the Office, or sufficient circumstances prevent the Office from gathering evidence sufficient to reach a determination with regard to the complaint. (34 C.F.R. § 106.45)

Upon dismissal, the Title IX Coordinator shall promptly, and simultaneously to the parties, send written notice of the dismissal and the reasons for the dismissal. (34 C.F.R. § 106.45)

If a complaint is dismissed on the grounds that the alleged conduct does not constitute sexual harassment as defined in 34 C.F.R. § 106.30, the conduct may still be addressed pursuant to AR 4030 - Nondiscrimination in Employment as applicable.

Informal Resolution Process

When a formal complaint of sexual harassment is filed, the Office may offer an informal resolution process, such as mediation, at any time prior to reaching a determination regarding responsibility. The Office 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 C.F.R. § 106.45)

The Office may facilitate an informal resolution process provided that the Office: (34 C.F.R. § 106.45)

1. Provides the parties with written notice disclosing the allegations, the requirements of the informal resolution process, the right to withdraw from the informal process, resume the formal complaint process, and any consequences resulting from participating in the informal resolution process, including that records will be maintained or could be shared.
2. Obtains the parties' voluntary, written consent to the informal resolution process.

The Informal Resolution Process is prohibited if the complainant is a student and the respondent is an employee.

Formal Complaint Process

If a formal complaint is filed, the Title IX Coordinator shall provide the known parties with written notice of the following: (34 C.F.R. § 106.45)

1. The Office's complaint process, including any informal resolution process.
2. The allegations potentially constituting sexual harassment with sufficient details known at the time, including the identity of parties involved in the incident if known, the conduct allegedly constituting 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, the Office investigates allegations about the complainant or respondent that are not included in the initial notice, the Title IX Coordinator shall 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. The opportunity for the parties to have an advisor of their choice who may be, but is not required to be, an attorney, and the ability to inspect and review evidence.
5. The prohibition against knowingly making false statements or knowingly submitting false information during the complaint process.

The above notice shall also include the name of the investigator, facilitator of an informal process, and decision maker and shall provide either party with no less than three calendar days to raise concerns of conflict of interest or bias regarding any of these persons.

When investigating a formal complaint, the burden of proof rests on the Office and not on the parties. In order to use a party's records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional, which are made and maintained in connection with the provision of treatment to the party, the party's voluntary, written consent to access, consider, disclose, or otherwise use must be obtained. (34 C.F.R. § 106.45)

During the investigation process, the Office shall: (34 C.F.R. § 106.45)

1. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
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, although the Office may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties.
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. Send in an electronic format or hard copy to both parties and their advisors, if any, the evidence that is directly related to the allegations raised in the complaint, 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.
9. After sending the investigative report to the parties and before reaching a determination regarding responsibility, afford each party the opportunity to submit written, relevant questions that the 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.

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.

Privacy rights of all parties to the complaint shall be maintained in accordance with applicable state and federal laws.

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 the Title IX requirements.

Written Decision

The Superintendent shall designate an employee as the decision maker to determine responsibility for the alleged conduct, who shall not be the Title IX Coordinator or a person involved in the investigation of the matter. (34 C.F.R. § 106.45)

The decision-maker shall issue, and simultaneously provide to both parties, a written decision as to whether the respondent is responsible for the alleged conduct. (34 C.F.R. § 106.45)

The written decision shall be issued within a reasonable time after receipt of the complaint.

The timeline may be temporarily extended for good cause with written notice to the complainant and respondent of the extension and the reasons for the action. (34 C.F.R. § 106.45)

In making this determination, the Office shall use the "preponderance of the evidence" standard for all formal complaints of sexual harassment. (34 C.F.R. § 106.45)

The written decision shall include the following: (34 C.F.R. § 106.45)

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

Appeals

Either party may appeal the Office's decision or dismissal of a formal complaint or any allegation in the complaint, if the party believes that a procedural irregularity affected the outcome, new evidence is available that could affect the outcome, or a conflict of interest or bias by the Title IX Coordinator, investigator(s), or decision maker(s) affected the outcome. If an appeal is filed, the Office shall: (34 C.F.R. § 106.45)

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.
2. Ensure that the decision maker(s) for the appeal is trained in accordance with 34 C.F.R. § 106.45 and is not the same decision maker(s) who reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
4. Issue a written decision describing the result of the appeal and the rationale for the result.
5. Provide the written decision simultaneously to both parties.

An appeal must be filed in writing within 15 business days of receiving the determination, 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. Either party has the right to file a complaint with the U.S. Equal Employment Opportunity Commission.

A written decision shall be provided to the parties within 20 calendar days from the receipt of the appeal.

Remedies

When a determination of responsibility for sexual harassment has been made against the respondent, the Office shall provide remedies to the complainant. Such remedies may include the same individualized services described above in the section "Supportive Measures," but need not be nondisciplinary or nonpunitive and need not avoid burdening the respondent. (34 C.F.R. § 106.45)

Disciplinary Actions

The Office 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 complaint procedure has been completed and a determination of responsibility has been made. (34 C.F.R. § 106.44)

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

Recordkeeping

The Superintendent or designee shall maintain for a period of seven years a record of all reported cases and Title IX investigations of sexual harassment, any determinations of responsibility, any audio or audiovisual recording and transcript if applicable, any disciplinary sanctions imposed, any remedies provided to the complainant, any appeal or informal resolution and the results therefrom, and responses made pursuant to 34 C.F.R. § 106.44. (34 C.F.R. § 106.45)

The Superintendent or designee shall also maintain for a period of seven years all materials used to train the Title IX Coordinator, investigator(s), decision maker(s), and any person who facilitates an informal resolution process. The Office shall make such training materials publicly available on its website. (34 C.F.R. § 106.45)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

48900 Grounds for suspension or expulsion

48900.2 Additional grounds for suspension or expulsion; sexual harassment

48985 Notices, report, statements and records in primary language

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

CALIFORNIA 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

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