

# Student Sexual Misconduct

How to Comply with Both Title IX and Education Code in Student Discipline Matters



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# Title IX & California Education Code

## The Overall Goal of Federal and State Law

To ensure that all students, regardless of sex or gender, have an equal opportunity to participate and receive the benefits of an education.

Educational Institutions must prevent or address hostile educational environments based on sex or gender.

# WHAT IS STUDENT SEXUAL MISCONDUCT?

# Sexual Misconduct

- What is Sexual Misconduct?
  - Harassment, violence or other misconduct based on sex
- Who Is **Responsible** for Addressing It?
  - Responsible Employees, administrators, and Title IX Coordinator
- How Should It Be **Addressed**?
  - Take immediate steps to investigate, end sexual misconduct (if any), prevent its recurrence, and address its effects

# Possible Sexual Misconduct Violations

- Sexual Harassment
  - “Quid Pro Quo”
  - “Hostile Environment” – including severe act and/or repetitive conduct
- Sexual Violence
  - Rape, sexual assault, sexual battery, and sexual coercion
  - Other misconduct based on sex or gender (e.g. stalking, dating violence, exploitation)

# Education Code Definitions of Sexual Misconduct for Discipline Purposes

- **Ed. Code § 48900(n)** – committed or attempted to commit a sexual assault or committed a sexual battery as defined in Penal Code §§ 243.4, 261, 266c, 286, 288, 288a, or 289.
- **Ed. Code § 48900(a)** – physical acts (based on sex)
- **Ed. Code § 48900(i)** – obscene act or habitual profanity or vulgarity (based on sex)

# Education Code Definitions of Sexual Misconduct for Discipline Purposes

- **Ed. Code § 48900.2** – sexual harassment, as defined in **Ed. Code § 212.5**, when a reasonable person of the same gender as victim finds it severe or pervasive to have a negative impact as defined
- **Ed. Code § 48900.4** – intentionally engaged in severe or pervasive harassment, threats or intimidation (based on sex) which create an intimidating or hostile educational environment

# TWO SCENARIOS



# Two Scenarios/Different Approach

## FIRST SCENARIO

- Parents email Principal about an incident involving their 8<sup>th</sup> grade son, Jorge.
- Two weeks prior, Tyler grabbed Jorge's genitals in the school bathroom and said something sexual. Other boys observed and laughed.
- The parents want the Principal to take disciplinary action against Tyler.
- What do you, as the Principal, do?

# Two Scenarios/Different Approach

## SECOND SCENARIO

- Campus supervisor noticed that Jorge left the bathroom quickly, looking disheveled and upset.
- Supervisor asked Jorge if he was okay.
- Jorge's said Tyler grabbed his crotch in the bathroom and said something sexual. Other boys saw it, laughed.
- Campus supervisor takes Jorge to the Principal.
- What do you, as the Principal, do?

# Two Scenarios/Different Approach

## Why do we see a different approach?

- One is presented as a complaint or report of something happening in the past and tends to be investigated differently, with some sort of written conclusion reported to the families of Jorge and Tyler.
- The other is presented as a current event observed and reported by an employee and tends to be treated solely as a discipline matter, without the same level of investigation or notification.

# **RECONCILABLE DIFFERENCES BETWEEN TITLE IX AND EDUCATION CODE**

# Differences in Title IX and Ed. Code

## Investigations and Notifications when Addressing Reports or Complaints

- Under Title IX, school must promptly investigate, determine what occurred, notify the parties of the outcome, eliminate the problem (if any), remedy the effects, and take corrective action
- Under Ed. Code § 48900, school must promptly investigate, determine what occurred, allow response; suspend; extend suspension; move to expel

# Differences in Title IX and Ed. Code

## Title IX Interim Measures

- School may need to make changes to the academic, transportation, and working situations of the parties, if requested and reasonably available, regardless of whether a formal report is made
- Measures must be immediate, clear, adaptable, address others, and not used to delay resolution
- How does the school comply under both scenarios?

# Differences in Title IX and Ed. Code

## Examples of Title IX Interim Measures:

- Change schedules (class and/or work)
- No-contact directives
- Protection against retaliatory harassment from respondent and/or friends
- All measures must balance interests and rights:
  - Avoid penalizing the complainant
  - Avoid taking disciplinary action until investigation complete
  - Avoid depriving any student of education

# Differences in Title IX and Ed. Code

- Title IX Notice of Investigation
  - Under interim OCR guidance, if an investigation can lead to discipline, the respondent should receive notice of allegations and policy implications with sufficient details and time to prepare a response before the initial interview
    - *See 2017 OCR Q&A, Question 6*
- How does the school comply under both scenarios?



# Differences in Title IX and Ed. Code

- Under Title IX Written Response to Complainants and Respondents
  - Both complainant and respondent shall receive a written notice of outcome after the investigation
- How does the school comply under both scenarios?

# Differences in Title IX and Ed. Code

## Expulsion Procedures:

- Under Title IX, the parties to an expulsion hearing must have timely and equal access to any information that will be used during disciplinary meetings and hearings.
- Under Ed. Code § 48918(b), the respondent must receive notice of the right to inspect and obtain copies of all documents to be used at the hearing
- How does the school comply with both laws?

# Differences in Title IX and Ed. Code

## Expulsion Hearings:

- Ability to seek modification in manner of confronting complainant
- Support persons
- Substantial Evidence standard vs. Preponderance of the Evidence standard
- Appeal rights
- Other

# Differences in Title IX and Ed. Code

- Revisit: Under Title IX Written Response to Complainants and Respondents
  - Both complainant and respondent shall receive a written communication about the corrective plan
  - Can you tell the complainant about the results of the expulsion hearing?
    - FERPA authorization
    - General principles of liability for failing to eliminate hostile environment

# TIPS FOR SUCCESSFUL OUTCOMES

# Practical Tips

- How you approach and engage in the intake interview and respondent's interview
- How well you stay in contact with the relevant parties
- How well you follow-up after the end of the investigation and implementation of a corrective plan, if any

# Conclusion

## School Districts can and must comply with federal and state law

- Are your policies compliant with both?
- Do your administrators have clear procedures for addressing sexual misconduct allegations?
- Do you provide regular training to employees and administrators about addressing sexual misconduct?
- Do your students and parents understand how to seek help?

**If the answer to any of these questions is NO, your District could be at risk.**

Question & Answer  
Session



# Thank You

For questions or comments, please contact:

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