

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

LIEBERT CASSIDY WHITMORE

Title IX (2020 Regulations) and Related Statutes

Presented By:
Pilar Morin / November 15, 2024

1

Agenda

- Title IX
- Legal Challenge to the 2024 Title IX Regulations: Kansas v USDOE (Injunction)
- Title IX 2020 Regulations
- Title 5 of the California Code of Regulations
- Cal. Education Code (SB 493) Overview
- Other Overlapping Legal Obligations

LIEBERT CASSIDY WHITMORE

2

What is Title IX?

3

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

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 sexual 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.*

LIEBERT CASSIDY WHITMORE

4

Legal Challenge to the 2024 Title IX Regulations: Kansas v USDOE (Injunction)

5

New Title IX Regulations: Two Roads Diverge

- Effective August 1, 2024
- Title IX Regulations now have two grievance procedure tracks:
 - Track 1: 106.45 sex discrimination allegations (including employees, students, and third parties)
 - Track 2: 106.46 (involving student parties in sex-based harassment allegations)

LIEBERT CASSIDY WHITMORE

6

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

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

LIEBERT CASSIDY WHITMORE

7

Kansas v. USDOE (Title IX Injunction)

- List of California CCDs and schools 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>
 - Santiago Canyon College is included in the list

LIEBERT CASSIDY WHITMORE

8

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://www.ed.gov/media/document/list-of-schools-enjoined-2024-t9-rulepdf>

LIEBERT CASSIDY WHITMORE

9

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title IX 2020 Regulations

10

Preemption

- To the extent that state law already provides statutes or regulations that protect individuals from sexual harassment or discrimination, a District should comply with both the state requirements and the new regulations
- Conflicts: the Title IX regulations preempt state law

34 CFR § 106.6 (a)

LIEBERT CASSIDY WHITMORE

11

Title IX Regulations' Sexual Harassment Definitions

- Quid pro quo: An *employee* conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct
- Unwelcome conduct so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to education program or activity; or
- Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

34 CFR § 106.30

LIEBERT CASSIDY WHITMORE

12

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title IX Sexual Harassment- Unwelcome Conduct

- Determining severity, pervasiveness, and offensiveness
 - Consider surrounding circumstances, expectations, relationships
 - Reasonable person standard
 - *Factors not applicable to reports of quid pro quo sexual harassment or Clery Crimes (sexual assault, dating violence, domestic violence, or stalking)*

LIEBERT CASSIDY WHITMORE

13

Case Study – Application of Title IX

Lucy is a student at Sunshine Community College. The College organizes a study abroad program to Barcelona, Spain. Lucy travels with 10 other students and Professor Kelly to Barcelona. Professor Kelly teaches a math course as part of the program. Lucy meets with Professor Kelly during his office hours to discuss her grade. She expresses concern she won't be getting an A. Professor Kelly leans, places his hand on her thigh and kisses her on the cheek. He tells her not to worry about the class, she will be getting an A. Lucy avoids interacting with Professor Kelly for the remainder of the trip.

LIEBERT CASSIDY WHITMORE

14

Case Study – Application of Title IX

When they return to California, Lucy tells her boyfriend about the incident who encourages her to file a complaint. She meets with the Title IX coordinator.

Does Lucy's complaint against Professor Kelly fall under Title IX? Why or why not?

LIEBERT CASSIDY WHITMORE

15

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title IX - Mandatory Dismissal

Mandatory dismissal when:

- Conduct would not constitute sexual harassment;
- Conduct did not occur within the education program or activity; or
- Conduct did not occur against a person in the United States

34 CFR § 106.45(b)(3)(i)

LIEBERT CASSIDY WHITMORE

16

Title IX - Discretionary Dismissal

Discretionary dismissal when:

- Complainant withdraws complaint;
- Respondent no longer enrolled or employed; or
- Specific circumstances prevent district from gathering sufficient evidence to reach a determination

34 CFR § 106.45(b)(3)(ii)

LIEBERT CASSIDY WHITMORE

17

Title IX - Notice of Dismissal

Must provide prompt:

- Simultaneous notice of dismissal to the Parties;
- Include reasons for dismissal; and
- Appeal process

34 CFR §§ 106.45(b)(3)(iii),
106.45(b)(8)(i)

LIEBERT CASSIDY WHITMORE

18

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

**Assessing Reports of Sexual Harassment
& Determining Title IX Obligations**

19

Actual Notice – Title IX

Notice to a Title IX Coordinator or any **official with authority** to institute corrective measures.

34 CFR § 106.30

- An **official with authority** has the power to institute corrective measures on behalf of the institution; District decides who is an OWA.

LIEBERT CASSIDY WHITMORE

20

Title IX Coordinator at RSCCD

George Williams
Assistant Vice Chancellor
Telephone: (714) 480-7518
Email: titleix@rsccd.edu

LIEBERT CASSIDY WHITMORE

21

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Actual Knowledge – Title IX

If District has actual knowledge of sexual harassment in its education program or activity against a person in the United States:

Must respond in a manner that is not deliberately indifferent.

34 CFR § 106.44(a)

LIEBERT CASSIDY WHITMORE

22

Compare with SB 493: Cal. Ed. Code Duty to Respond

- 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)

LIEBERT CASSIDY WHITMORE

23

Compare Cal FEHA – Employment Protections Against Sexual Harassment

- Must respond to sexual harassment as defined by California Fair Employment and Housing Act (FEHA)
- Supervisors must report under FEHA

LIEBERT CASSIDY WHITMORE

24

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Case Study – Actual Knowledge

Professor Kelly is a member of the math program at Sandy Beach CCD and is responsible for teaching one of the mandatory courses. Lucy is in her final semester and is required to take Professor Kelly's class. Professor Kelly asks to meet with Lucy after the lecture. Lucy stays after class per his request. While they are alone in the classroom, Professor Kelly pushes Lucy against the wall and aggressively kisses her. He tells her, she's his best student and he cannot stop thinking about them in Barcelona. Lucy pushes him away and runs out of the classroom.

LIEBERT CASSIDY WHITMORE

25

Case Study – Actual Knowledge

She finds a campus police officer and files a police report. By the time the campus police officer walks over to Professor Kelly's classroom, he is gone. Lucy tells her mom and her boyfriend and refuses to attend Professor Kelly's class. She's encouraged to file another complaint against Professor Kelly. Lucy refuses, stating she was ignored before and doesn't trust the College. Lucy's mom receives a copy of the police report and emails it to the Title IX coordinator expressing her anger.

LIEBERT CASSIDY WHITMORE

26

Case Study - Actual Knowledge

Does the District have knowledge of sexual harassment in its educational program or activity?

***If yes, is the District required to take any action?
Did the District receive a Title IX complaint from Lucy's mom?***

LIEBERT CASSIDY WHITMORE

27

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

True/False/Maybe

James is the Director of the Study Abroad Program. Lucy is an administrative assistant (part time classified employee) in the department. She tells James about Professor Kelly's conduct. The District's policy says that all supervisors have a duty to report sexual harassment in the workplace.

Does the District now have actual notice of a potential Title IX matter?

LIEBERT CASSIDY WHITMORE

28

Case Study & Discussion

Rudy reports to the Title IX Coordinator that he recently broke up with Carlos, another student at the District, who he dated for two years. Carlos raped Rudy in their apartment as Rudy was trying to move out. Rudy and Carlos do not have classes together, but Rudy is afraid of Carlos.

Does the Title IX Coordinator have jurisdiction to file a complaint over the incident that took place in Carlos and Rudy's private apartment?

LIEBERT CASSIDY WHITMORE

29

Case Study – 2020 Title IX Regs.

Can the District provide any supportive measures without a complaint? What are examples of supportive measures?

LIEBERT CASSIDY WHITMORE

30

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Initiating the Title IX Grievance Process

31

Discipline: Student & Employees

Under title IX, the district can only discipline if the grievance process is followed and completed:

- The district must treat the respondent equitably... by following the grievance process before any imposition of disciplinary sanction or actions that are not supportive*

34 CFR §§ 106.44(a), 106.45(b)(1)

LIEBERT CASSIDY WHITMORE

32

Overview of Grievance Process

Phase 1

Report of Sexual Harassment → Informal Resolution (NO) / Formal Complaint* → Formal Investigation* (NO) / Supportive Measures Only (CE) → Evidence Review (NO) → Investigative Report* (NO) → Response to Report (Optional for Parties) (NO)

Phase 2

Live Hearing (NO) → Determination Regarding Responsibility & Discipline (NO) → Final Appeal (Optional for Parties) (NO)

LIEBERT CASSIDY WHITMORE

* Potential need for mandatory dismissal

33

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title IX - When Does the Grievance Process Apply?

- Formal complaints
 - Not for informal complaints
- Sexual harassment as defined in the Title IX Regulations
 - For conduct falling outside of Title IX definition follow California Law
- Not for discrimination: treating individual differently/unfavorably because of that person's sex

LIEBERT CASSIDY WHITMORE

34

Title IX - Grievance Procedures: Triggers

A recipient must follow procedures consistent with section 106.45 in response to a **formal complaint**

34 CFR § 106.44(b)(1)

LIEBERT CASSIDY WHITMORE

35

Title IX: Formal Complaint

- Document filed by the **Complainant** OR signed by the Title IX Coordinator
- Alleging sexual harassment AND requesting investigation

34 CFR §106.30(a)

LIEBERT CASSIDY WHITMORE

36

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title IX: Complainant

- The alleged *victim* of sexual harassment
 - Must be participating in or attempting to participate in the district's education program or activity
 - 3rd parties can report, but no 3rd party complaints

34 CFR 106.30(a)

LIEBERT CASSIDY WHITMORE

37

Title IX: No Formal Complaint Signed by Complainant

- If the alleged conduct falls under Title IX but the Complainant refuses to submit a formal complaint, the Coordinator must:
 - Become the signatory (sign the complaint but will not become the complainant) OR
 - Close the report

LIEBERT CASSIDY WHITMORE

38

Formal Complaint by Title IX Coordinator

Considerations

- Complainant's wishes
- Ability to conduct investigation without Complainant's participation
- District's need to protect campus safety
 - Respondent in position of authority
- Nature of alleged harassment
 - Multiple reports against same respondent

LIEBERT CASSIDY WHITMORE

39

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Case Study

Three days after Lucy takes her last final exam and before commencement, Lucy's mom emails the Title IX Coordinator a copy of the police report and asks that the District please protect her daughter. The Title IX Coordinator contacts Lucy and talks to her on the phone. Professor Kelly is scheduled to participate in commencement.

LIEBERT CASSIDY WHITMORE

40

Case Study

After numerous discussions between Lucy and the Title IX Coordinator, Lucy refuses to file a complaint. However, she agrees to participate in the District's investigation.

LIEBERT CASSIDY WHITMORE

41

Grievance Procedures: Triggers

Should the Title IX Coordinator sign the complaint?

LIEBERT CASSIDY WHITMORE

42

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Grievance Procedures

- Grievance process (your District policies and procedures) must:
 - Provide remedies
 - Presume respondent is not responsible
 - Require objective evaluation of all relevant evidence

34 CFR § 106.45(b)(1)

LIEBERT CASSIDY WHITMORE

43

Grievance Procedures

- Grievance process must: (cont'd)
 - Include reasonably prompt time frames
 - Describe the range of possible remedies and disciplinary sanctions
 - Identify the evidentiary standard (in California the preponderance of the evidence is required)
 - Not use privileged info (unless waived in writing)

34 CFR § 106.45(b)(1)

LIEBERT CASSIDY WHITMORE

44

**The Title IX Grievance Process –
Notice, Emergency Removal and Administrative
Leave, Advisors**

45

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title IX – Student Emergency Removal

- Available at any point in grievance process
- Possible after an individualized analysis
- Appropriate when **non-employee** Respondent poses immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Must provide notice to Respondent & appeal
- Can be used to remove from class or campus

34 CFR § 106.44(c)

LIEBERT CASSIDY WHITMORE

46

Title IX or Ed Code: Employee Paid Administrative Leave

- District has authority to place **employee** Respondents on administrative leave during Title IX grievance process or under SB 493 (Ed. Code)
 - Coordinate with HR to ensure compliance with CBAs and Ed Code
 - Example: faculty admin. leave per Ed. Code 87623

District is required to complete investigation in 90 days and can extend 30 calendar days with agreement with employee

LIEBERT CASSIDY WHITMORE

47

Title IX - Notice of Allegations

Must provide written notice to the parties:

- Notice of the grievance process
- Presumption that Respondent is not responsible
- Statement that determination occurs at end of grievance process
- Notice of the allegations (date, location if known)
- Sufficient time to prepare before interview
- Right to advisor
- Right to Evidence Review
- Code of conduct provisions re: false statements and false information

34 CFR § 106.45(b)(2)(i)

LIEBERT CASSIDY WHITMORE

48

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Role of Advisors Before Hearing

- Purpose: provide assistance and support to Party
- Individual of the party's choosing: family member, friend, an attorney, a neighbor
- May not obstruct interview or disrupt grievance process
- District may require confidentiality agreement

LIEBERT CASSIDY WHITMORE

49

Role of Advisor – DOE Q&A (July 2021)

- District only required to provide advisor for cross exam, but party has a right to advisor of choice at all times
- District can limit role of advisor:
 - Can attend meetings but may not be proxy for party
 - No role outside of cross examination
 - Party must author questions
- District can allow advisor role to be active:
 - Can conduct opening statement/closing argument
 - Provide guidance through hearing
 - May author questions, may make objections

LIEBERT CASSIDY WHITMORE

50

The Title IX The Grievance Process – Informal Resolution and Formal Investigation

51

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title IX Investigator

- Title IX Coordinator can serve as the Title IX Investigator
- The Title IX Investigator cannot be the Decision-Maker or the Informal Resolution Facilitator

LIEBERT CASSIDY WHITMORE

52

The Investigator

The investigator must:

- Be free of biases and conflicts of interest
- Conduct the investigation– gather inculpatory and exculpatory evidence
- Be trained on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Write the report

LIEBERT CASSIDY WHITMORE

53

Evidence Review

Complainant and respondent:

- At least 10 days time
- Right to inspect and review evidence *directly related to the allegations*
- Right to submit written response to evidence
- Investigator must consider response before completing report

34 CFR §106.45 (b)(5)(vi)

LIEBERT CASSIDY WHITMORE

54

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

The Grievance Process – The Hearing and Determination Regarding Responsibility

55

True/False/Maybe

After the District provided the parties notice of the hearing, Professor Kelly contacted the decision-maker and stated he accepted responsibility and wanted to bypass the hearing in order to expedite the disciplinary decision.

Because Professor Kelly admitted responsibility, the decision-maker can issue the determination regarding responsibility without the hearing?

LIEBERT CASSIDY WHITMORE

56

Hearing

- Opportunity for Parties to appear before a decision maker to respond to the evidence gathered during the investigation
- Neither Party may unilaterally waive the right to a live hearing
 - Can choose whether to participate in the hearing and whether to answer cross-examination questions
- Must presume Respondent is not responsible for alleged conduct

LIEBERT CASSIDY WHITMORE

57

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Role of Decision-Maker

- Conduct hearing
 - May ask Parties and witnesses questions
- Must objectively evaluate all relevant evidence
 - Including inculpatory and exculpatory evidence
 - No credibility determinations based on status as Complainant, Respondent, or witness
- Must independently reach a determination regarding responsibility
 - Without giving deference to the investigative report

LIEBERT CASSIDY WHITMORE

58

Responsibilities of Decision-Maker

- Must ensure hearing process is impartial, objective, unbiased, neutral, and independent
 - Cannot have conflict of interest or bias
 - Must be independent from Title IX Coordinator and Investigator
- Can be one person or panel, internal or external

LIEBERT CASSIDY WHITMORE

59

Determination Regarding Responsibility

To both parties simultaneously:

- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;

34 CFR § 106.45 (b)(7)(ii)

LIEBERT CASSIDY WHITMORE

60

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Determination Regarding Responsibility

To both parties simultaneously:

- Statement and rationale for each determination regarding responsibility;
- Statement regarding whether District will provide remedies for complainant;
- Appeal procedures for complainants and respondents.

34 CFR § 106.45 (b)(7)(ii)

LIEBERT CASSIDY WHITMORE

61

Title IX - Appeals

- Must offer both parties an appeal from dismissal of a formal complaint/allegations based on:
 - Procedural irregularity;
 - Newly discovered evidence; or
 - A conflict of interest or bias by Title IX personnel
- May offer appeal to both parties on additional bases

34 CFR §106.45 (b)(8)(i) and (ii)

LIEBERT CASSIDY WHITMORE

62

Retaliation

- Protects everyone who participates from retaliation
 - Such as intimidation, threats, coercion, or discrimination
- Cannot take action against anyone for refusing to participate
 - No threats of discipline for insubordination
- No additional charges for code of conduct violations that arise out of the same circumstances as Title IX report or complaint

34 CFR § 106.71

LIEBERT CASSIDY WHITMORE

63

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Confidentiality

- The District must keep confidential the identity of
 - The complainant, respondent, or witness
 - Except as may be permitted by FERPA; or
 - As required by law

LIEBERT CASSIDY WHITMORE

64

Record Retention

Retain for at least 7 years:

- Report or complaint
- Actions taken in response
- Investigative report including all evidence and responses from the parties
- Determination regarding responsibility

34 CFR §106.45(c)(10)

LIEBERT CASSIDY WHITMORE

65

Record Retention

Retain for at least 7 years:

- Recording or transcript from hearing
- Records of sanctions and remedies
- Any appeal and result
- Any informal resolution and result
- Materials used to train Title IX personnel

34 CFR §106.45(c)(10)

LIEBERT CASSIDY WHITMORE

66

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title 5 Regulations

67

Title 5 – Protected Characteristics 5 CCR § 59311(d)

“Unlawful discrimination” means unfair or unequal treatment of an individual (or group) based upon an actual or perceived characteristic related to:

<ul style="list-style-type: none">• Ethnic group identification,• National origin• Immigration status• Religion• Age• Sex, gender, gender identification, gender expression• Military and veteran status• Marital status	<ul style="list-style-type: none">• Medical condition• Race• Color• Ancestry• Sexual orientation• Physical or mental disability,• Any other characteristic protected under applicable federal or state law
---	--

LIEBERT CASSIDY WHITMORE

68

Title 5 Regulations – Section 59311 Definitions

“Neutral investigator”
Outside investigator or an internal investigator

- not in the chain of command of the respondent,
- not substantially implicated by the allegations in the complaint,
- and who is otherwise impartial.
- properly trained

5 CCR § 59311(d)

LIEBERT CASSIDY WHITMORE

69

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Title 5 Regulations

- Definition of “complaint” includes verbal complaints
- Districts must comply with Title IX regulations
- 90 day timeline and process for obtaining extensions
- Parties get copy of report or administrative determination of findings, action to prevent sustained allegations, proposed resolution, and complainant right to appeal

LIEBERT CASSIDY WHITMORE

70

**California Education Code
Senate Bill 493**

71

**Senate Bill 493:
Effective Jan. 1, 2022**

- Adds additional protections re sexual harassment
- Applies to institutions receiving state financial assistance including California community colleges
- Amended the definition of “sexual harassment” (Cal. Ed. Code § 66262.5.)
- Added procedural requirements for responding to notice of sexual harassment (Cal. Ed. Code § 66281.8.)

LIEBERT CASSIDY WHITMORE

72

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Definition of "Sexual Harassment" Under the Education Code

- "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 certain conditions
- Includes sexual battery, sexual violence, and sexual exploitation

Cal. Ed. Code §§ 212.5

LIEBERT CASSIDY WHITMORE

73

Knowledge of Sexual Harassment

"A postsecondary institution shall be presumed to know of sexual harassment if a **responsible employee** knew, or, in the exercise of reasonable care, should have known, about the sexual harassment."

An institution may rebut this presumption of knowledge if certain elements are met.

Cal. Ed. Code § 66281.8(b)(3)(C)

LIEBERT CASSIDY WHITMORE

74

Definition of "Responsible Employee" Under the Education Code

A "responsible employee" includes an employee:

- With authority to take action to redress sexual harassment or provide supportive measures; or
- With a duty to report sexual harassment to an employee with such authority.

LIEBERT CASSIDY WHITMORE

75

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Who is a Responsible Employee?

- “Responsible employee” includes the following positions or positions with similar job duties (regardless of title):
 - Title IX Coordinator
 - Residential advisors
 - Housing directors, coordinators, or deans
 - Athletic directors, coordinators, or deans
 - Athletic and academic coaches
 - Faculty, associated faculty, teachers, instructors, or lecturers
 - Graduate student instructors
 - Laboratory directors, coordinators, or principal investigators
 - Internship/externship directors or coordinators
 - Study abroad program directors or coordinators

Cal. Ed. Code § 66281.8(a)(2)(B)

LIEBERT CASSIDY WHITMORE

76

Duty to Respond

- 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)

LIEBERT CASSIDY WHITMORE

77

Case Study

Darius Biers is an probationary faculty member who teaches a biology lab class. Tony is a part time employee in the lab and a biology student at the College. Darius assigns Tony work such as which labs to set up and what materials are needed. Tony tells Professor Biers that for the past week, Professor Angela Smith commented on his looks right after class and texted him several sexually explicit jokes while he is working in the lab.

LIEBERT CASSIDY WHITMORE

78

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Case Study con't

Professor Biers does not want to get involved because Professor Smith is on his tenure faculty review committee.

Does Darius have any reporting obligations under the Education Code?

Does it matter that he is worried Professor Randall may retaliate against him?

What consequences does the District face if he fails to report?

LIEBERT CASSIDY WHITMORE

79

Education Code Grievance Procedures

- Grievance procedures must outline:
 - Possible interim measures pending an investigation;
 - Supportive measures that may be provided in the absence of an investigation; and
 - The disciplinary outcomes, remedial measures, and systemic remedies that may follow the final finding of responsibility.

Cal. Ed. Code § 66281.8(b)(4)(A)(xxi)

LIEBERT CASSIDY WHITMORE

80

Education Code Grievance Procedures: Student Harassment

- Any hearing shall be subject to the following rules:
 - Cross-examination of either party or any witness *shall not* be conducted directly by a party or a party's advisor
 - Either party or any witness may request testimony via video from a remote location
 - Student parties shall have the opportunity to submit written questions to the hearing officer in advance. At the hearing, the other party can object
 - Parties may not introduce evidence available, but not identified during the investigation. Hearing officer has discretion

Cal. Ed. Code § 66281.8(b)(4)(A)(viii)

LIEBERT CASSIDY WHITMORE

81

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Education Code Grievance Procedures: Student Harassment

- Cannot mandate mediation to resolve allegations of sexual harassment
- Cannot allow mediation to resolve allegations of sexual violence

Ed Code § 66281.8(b)(4)(A)(xxi)(I)

LIEBERT CASSIDY WHITMORE

82

Grievance Procedures – Outcome of Complaint and Next Steps

- District must provide written notice to parties of the outcome of the complaint, including:
 - Whether a policy violation was found to have occurred;
 - The basis for that determination, including factual findings; and
 - Any discipline imposed.
- Grievance procedures must provide assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate

Cal. Ed. Code § 66281.8(b)(4)(A)(xiv)-(xv)

LIEBERT CASSIDY WHITMORE

83

Other Overlapping Legal Obligations

84

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Compliance Issues: Overlapping Legal Requirements

State Law Mandates

• "Yes" means "Yes" Policy	Ed Code § 67386
• District Nondiscrimination	Ed Code § 220
• Student Orientation	Ed Code § 67385.7
• District Safety Plans	Ed Code § 67380
• Coordination with Law Enforcement	Ed Code § 67381
• Confidentiality of Sexual Assault Victims	Ed Code § 67385
• Mandated Reporting	Pen Code § 11164 et seq.
• Data Collection, analysis, notice	Ed Code § 67380
• Student Discipline Procedures	
• Collective Bargaining Agreements	

LIEBERT CASSIDY WHITMORE

85

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

Education Code § 67386(a)(1)

LIEBERT CASSIDY WHITMORE

86

Mandated Reporter

Child Abuse and Neglect:

1. Physical Abuse
2. Sexual Abuse
3. Neglect
4. Emotional Abuse

LIEBERT CASSIDY WHITMORE

87

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: Pilar Morin

Who Is A Mandated Reporter?

- All faculty members, teachers, instructors at a community college district
- Counselors
- Coaches
- Medical staff at campus clinic
- Campus safety and police
- Child care center workers
- Head Start teachers
- Administrators and classified employees of a community college district if the scope of employment places them in contact with children on a regular and continuous basis such that evidence of child abuse or neglect would be readily apparent

LIEBERT CASSIDY WHITMORE

88

Mandated Reporter – Child Abuse

- “Teacher” Is Broadly Defined
- California Community Colleges Chancellor’s Office, the Act considers community college instructors, classified employees, and counselors whose duties place them in a position to observe potential instances of child abuse or neglect as “mandated reporters.”

(Legal Opinion 02-03 (Feb. 25, 2002).)

LIEBERT CASSIDY WHITMORE

89

Mandated Reporter – Child Abuse

When?

- Telephone report:
 - Immediately or...
 - as soon as practicably possible
- Internet Report:
 - only available in some jurisdictions
- Written report:
 - can now do online
 - within 36 hours of receiving information

LIEBERT CASSIDY WHITMORE

90

Title IX (2020 Regulations) and Related Statutes

Rancho Santiago Community College District | November 15, 2024

Presented By: *Pilar Morin*

Thank You!

Pilar Morin
Partner | Los Angeles
310.981.2004 | pmorin@lcwlegal.com
www.lcwlegal.com/our-people/pilar-morin

LIEBERT CASSIDY WHITMORE
