



LIEBERT CASSIDY WHITMORE

6033 WEST CENTURY BOULEVARD,  
5<sup>TH</sup> FLOOR  
LOS ANGELES, CALIFORNIA 90045  
T: (310) 981-2000  
F: (310) 337-0837

135 MAIN STREET,  
7<sup>TH</sup> FLOOR  
SAN FRANCISCO, CALIFORNIA 94105  
T: (415) 512-3000  
F: (415) 856-0306

5250 NORTH PALM AVENUE,  
SUITE 310  
FRESNO, CALIFORNIA 93704  
T: (559) 256-7800  
F: (559) 449-4535

401 WEST "A" STREET,  
SUITE 1675  
SAN DIEGO, CALIFORNIA 92101  
T: (619) 481-5900  
F: (619) 446-0015

400 CAPITOL MALL  
SUITE 1260  
SACRAMENTO, CALIFORNIA 95814  
T: (916) 584-7000  
F: (916) 584-7083

# CALIFORNIA COMMUNITY COLLEGE STUDENT AFFAIRS ASSOCIATION (CCCSAA)

## Top Ten Things to Know About the New Title IX Regulations

9/25/2020

*PRESENTED BY:*

Jenny Denny



**LCW** LIEBERT CASSIDY WHITMORE

**40** years  
1980 - 2020

## Top Ten Things to Know About the New Title IX Regulations

California Community College Student Affairs Association (CCCSAA)  
September 25, 2020

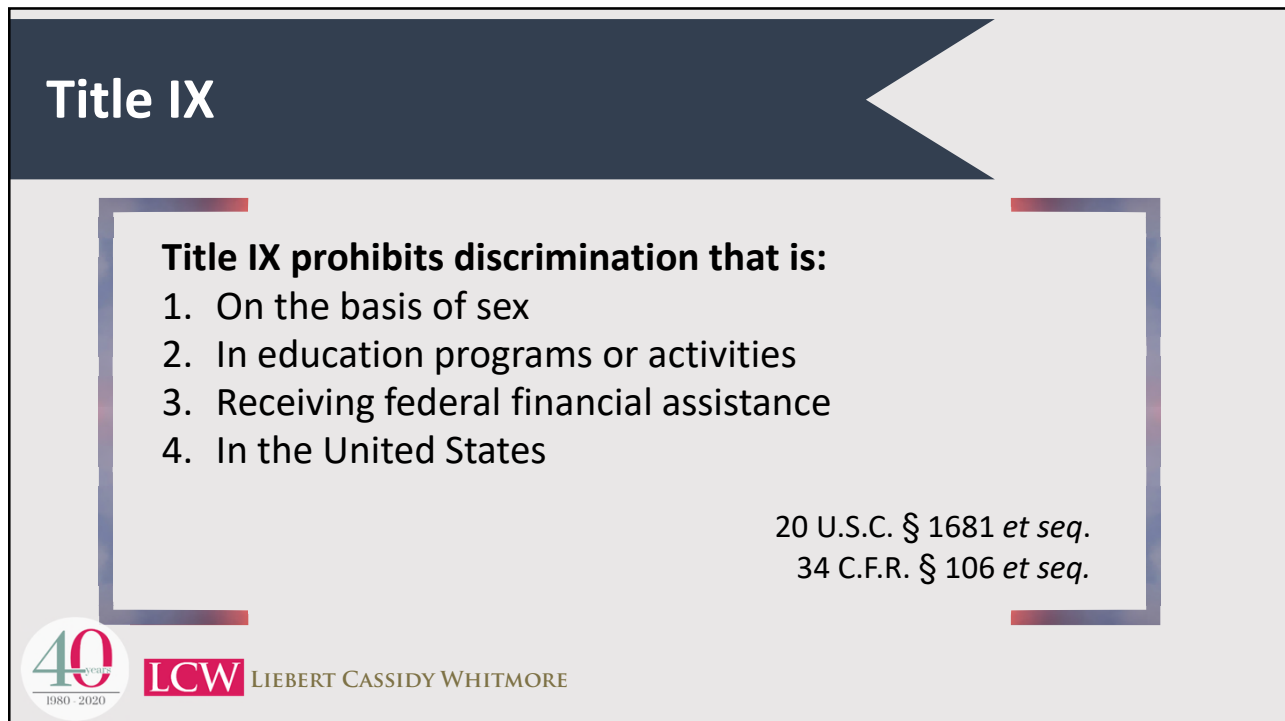
Presented By:  
Jenny Denny

## Title IX

**Title IX prohibits discrimination that is:**

1. On the basis of sex
2. In education programs or activities
3. Receiving federal financial assistance
4. In the United States

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



**40** years  
1980 - 2020

**LCW** LIEBERT CASSIDY WHITMORE

## #1 New Definition of Sexual Harassment



### Key Definitions: Sexual Harassment

- 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, dating violence, domestic violence, or stalking.

34 CFR § 106.30



**LCW** LIEBERT CASSIDY WHITMORE

## #2 Preemption of State Law/Regulations and District Policies/Procedures/Union Agreement



### 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
  - This preemption might affect collective bargaining agreements

34 CFR § 106.6 (a)



**LCW** LIEBERT CASSIDY WHITMORE

## #3 Districts Must Follow One Grievance Procedure (Investigation and Hearing) for Both Students and Employees Before Imposing Any Discipline



### Discipline: Student & Employees

If the allegations meet the definition of Title IX sexual harassment then district can only discipline if the grievance process is followed:

- 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)



**LCW** LIEBERT CASSIDY WHITMORE

## Grievance Procedures

- **Grievance process must:**

- Provide remedies on finding of Title IX violation
- Presume the respondent is not responsible for a Title IX violation
  - Only on a finding that respondent violated Title IX;
- Require an objective evaluation of all relevant evidence
- Avoid credibility determinations based on a person's status as a complainant, respondent, or witness
  - No "Complainants never lie" or "Respondents never tell the truth"

34 CFR § 106.45(b)(1)



**LCW** LIEBERT CASSIDY WHITMORE

## Grievance Procedures

- **Grievance process must: (cont'd)**

- Require Title IX personnel to receive training
- Be free from conflicts of interest or bias
- Post Title IX training materials on district's website
- Include reasonably prompt time frames
- Describe the range of possible remedies and disciplinary sanctions
- Identify the evidentiary standard
  - Either "preponderance of the evidence" or "clear and convincing evidence"
- Not use privileged info
  - Unless privilege waived

34 CFR § 106.45(b)(1)



**LCW** LIEBERT CASSIDY WHITMORE

## Investigations

- Gag Orders no longer permitted
- Both parties must receive opportunity to review evidence before investigation concluded
- Both parties have at least ten (10) days to respond to evidence after receiving it. Both parties receive investigative report.

34 CFR 106.45(b)(5)



**LCW** LIEBERT CASSIDY WHITMORE

## #4 Districts Should Identify Employees Who Must Report Sexual Harassment



## Key Definitions: Official with Authority

Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official with authority to institute corrective measures on behalf of the recipient. (Note if the OWA is a Respondent, then the district will not be deemed to have actual notice)

- District has discretion to determine which employees will be required to make reports
- We recommend "supervisors" under Cal. Fair Employment and Housing Act; administrators that enforce policy and procedures

34 CFR § 106.30



**LCW** LIEBERT CASSIDY WHITMORE

## #5 Only A Formal Complaint Triggers an Investigation



**LCW** LIEBERT CASSIDY WHITMORE



## Key Definition: Complainant

### Formal complainant

- An individual alleged to be the *victim* of conduct
  - Must be an individual participating in or attempting to participate in the district's education program or activity
  - No 3<sup>rd</sup> party complaints

34 CFR 106.30(a)



**LCW** LIEBERT CASSIDY WHITMORE

## Key Definitions: Formal Complaint

### Formal complaint

- Document filed by the **complainant** OR signed by the Title IX Coordinator
- Alleging sexual harassment AND requesting investigation
- Requires that the district follow the grievance procedures

34 CFR §106.30(a); 106.44(b)(1)



**LCW** LIEBERT CASSIDY WHITMORE

## #6 Informal Resolution is Allowed



### Grievance Procedures: Informal Resolution

May facilitate an informal resolution process that does not involve a full investigation and adjudication any time prior to determination regarding responsibility. *(Cannot use for student against employee or condition on a waiver)*

34 CFR § 106.45(b)(9)



**LCW** LIEBERT CASSIDY WHITMORE

## #7 A Hearing is Required and Only Advisors Can Cross Examine Parties



### Hearing Procedures

- Live cross examination by party's advisor of choice
  - If party doesn't have advisor, district must provide an advisor free of cost for *cross-examination*; not necessarily an attorney
- Decision-maker must explain why question excluded
- Can cross examine virtually

34 CFR 106.45(b)(6)(i)



**LCW** LIEBERT CASSIDY WHITMORE

## Cross-Examination by Advisors

- If a party or witness does not submit to cross-examination, or refuses to answer a relevant cross-examination question, decision-maker cannot rely on his/her/their statement
  - Decision-maker(s) cannot draw an inference based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

34 CFR 106.45(b)(6)(i)



**LCW** LIEBERT CASSIDY WHITMORE

## #8 A Written Determination of Responsibility Must Be Issued to the Parties



## Grievance Procedures: Determinations

**To both parties:**

- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;
- Rationale, including sanctions and remedies provided to complainant; and
- Appeal procedures for complainants and respondents.

34 CFR § 106.45 (b)(7)(ii)



**LCW** LIEBERT CASSIDY WHITMORE

## #9 Parties Have the Right to Appeal Dismissals and Determinations of Responsibility



## Grievance Procedures

### **Mandatory dismissal:**

- 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)



**LCW** LIEBERT CASSIDY WHITMORE

## Grievance Procedures

### **Discretionary dismissal:**

- If the complainant withdraws the complaint
- If the respondent is no longer enrolled or employed
- Specific circumstances prevent the institution from gathering sufficient evidence to reach a determination regarding the allegations

34 CFR §  
106.45(b)(3)(ii)



**LCW** LIEBERT CASSIDY WHITMORE

## Grievance Procedures

### Dismissals:

Must provide prompt:

- Simultaneous notice of dismissal to the parties
- Include reasons for dismissal
- Appeal Process for dismissal

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



**LCW** LIEBERT CASSIDY WHITMORE

## Grievance Procedures: Appeals

### Appeals:

**Must** offer both parties an appeal, and 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)



**LCW** LIEBERT CASSIDY WHITMORE

## #10 Protections Against Retaliation



### Retaliation

- Protects everyone who participates in the complaint, investigation, and hearing from retaliation
  - Such as intimidation, threats, coercion, or discrimination
- Cannot take action against anyone for refusing to participate or refusing to testify
  - **FLAGGED ISSUE:** We now cannot direct employees to participate under the threat of discipline for insubordination

34 CFR § 106.71(a)



**LCW** LIEBERT CASSIDY WHITMORE



**Thank You!**

**Jenny Denny**

Associate | Los Angeles

310.981.2048 |

[jdenny@lcwlegal.com](mailto:jdenny@lcwlegal.com)

[www.lcwlegal.com/our-people/jenny-denny](http://www.lcwlegal.com/our-people/jenny-denny)



**LCW** LIEBERT CASSIDY WHITMORE