
New Amendments to Title 5 Regulations Impact How Community Colleges Must Process Unlawful Discrimination Complaints, Including Student Complaints of Sexual Misconduct

November 4, 2020

Number 80

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On September 18, 2020, amendments to title 5 of the California Code of Regulations (Title 5), which were previously adopted by the Board of Governors of the California Community Colleges, took effect. The changes impact the procedures community colleges must follow when addressing employee and student complaints of unlawful discrimination, including complaints under Title IX of the Educational Amendments Act of 1972 (Title IX). The stated purpose for the changes is to address concerns raised by the United States Department of Education that relate to the rights of those accused of sexual misconduct, comport with recent developments in state law, reduce unnecessary processes, and improve clarity. These amendments are not retroactive, and some highlights are listed below.

- **“Unlawful Discrimination” Defined.** “Unlawful discrimination” is now defined, under Section 59311(d) of Title 5, as “unfair or unequal treatment of an individual (or group) based upon an actual or perceived characteristic related to ethnic group identification, national origin, immigration status, religion, age, sex, or gender, gender identification, gender expression, military and veteran status, marital status, medical condition, race, color, ancestry, sexual orientation, or physical or mental disability, or any other characteristic protected under applicable federal or state law.”
- **Complaints May Be Verbal or Written and Brought on Behalf of an Employee or Student.** The definition of “Complaint” under Section 59328 was amended to permit verbal complaints. However, verbal complaints must be documented in writing by the employee designated to receive the complaint. A district may also request, but may not require, that complaints be filed on a prescribed form. Additionally, a complaint may now be brought by “a student, an employee, a parent of a minor, or an individual with legal authority on behalf of a student or employee, who alleges that the student or employee has suffered unlawful discrimination.” Previously, complaints could only be filed by an individual who personally suffered unlawful discrimination, or who learned of unlawful discrimination in their official capacity as a faculty member or administrator.
- **Notice and Disclosures to the Chancellor.** Districts are no longer required to submit complaints or investigation reports to the California Community College Chancellor’s Office (Chancellor). Instead, Section 59340 of Title 5 requires districts to disclose, upon

a request from the Chancellor: (1) the complaint; (2) the investigation report, if not privileged; (3) the final district decision; (4) the notice to the complaint; and (5) the complainant's appeal to the district. Separately, on an annual basis, districts must report to the Chancellor: (1) the number of employment and non-employment discrimination complaints and informal charges received in the previous academic year; (2) the number of employment and non-employment discrimination complaints and informal charges resolved in the previous academic year; (3) the number of complaints received in the previous academic year, and the number of those complaints that were sustained in whole or in part; and (4) any other information requested by the Chancellor. Districts must also retain all records arising from informal and formal discrimination complaints for a period of at least five years.

- **Informal Resolution.** Under Section 59327 of Title 5, informal resolution efforts are now optional and may only be implemented with the complainant's consent. The complainant must be advised that they need not participate in informal resolution. Additionally, the following standards now apply: (1) informal resolution efforts must be completed within 90 days; (2) an investigation must be completed unless the matter is informally resolved and the complainant dismisses the complaint; and (3) even if an informal resolution has been reached, an investigation may be conducted if deemed warranted by the responsible district officer.
- **Extension of Timelines for Investigating Complaints.** The Title 5 Regulations, at Section 59336, retain a 90-day timeline for a district to complete its investigation and to notify the complainants and respondents of the outcome. If a district is unable to comply with the 90-day timeline to complete its investigation, the district may extend the time by 45 days with proper written notice to the parties. Any extension beyond the additional 45 days must be granted by the Chancellor and based one of the reasons delineated in Section 59342 of Title 5, which include (1) a need to interview a party or witness who has been unavailable; (2) a need to review or analyze additional evidence, new allegations, or new complaints related to the matter; or (3) to prepare and finalize an administrative determination.
- **Preponderance of the Evidence Standard.** In Section 59334 of Title 5, the applicable standard of proof in making findings of fact is now the preponderance of the evidence standard, replacing the prior probable cause standard.
- **Notice of Administrative Determination for Complainants and Respondents.** Section 59336 of Title 5 now requires that when a district provides the complainant with an administrative determination, the district must also provide the respondent with the determination and the proposed resolution of the complaint, including any disciplinary action against the respondent.
- **Title IX and Student Discipline Procedures.** Section 59337 of Title 5 was added to require that districts comply with the Title IX regulations for sexual misconduct complaints that fall under Title IX. Where a sexual misconduct complaint does not fall under Title IX, but the respondent is subject to severe disciplinary sanctions, and the credibility of witnesses was central to the investigative findings, the district must provide: (1) an opportunity for the accused student to cross-examine witnesses

indirectly at a live hearing, either in person or by videoconference; and (2) a live hearing conducted by a neutral decision-maker, who is someone other than the investigator.

- **Appeal Rights to the Local Governing Board and Chancellor.** Under Section 59337 of Title 5, the amendments extend the timeline for a complainant to appeal the results of the administrative determination to the district's governing board from 15 to 30 days. Additionally, respondents now have the right to appeal the results of the administrative determination in student sexual misconduct cases where disciplinary action is imposed. A respondent's appeal must also be filed within 30 days. Section 59339 of Title 5 still only provides the complainant with the right to file a written appeal to the Chancellor for cases not involving employment discrimination, within 30 days from the date of the district's notice of the final decision rendered by the governing board.
- **Chancellor's Review and Remand Procedures.** On appeal of a district's final decision, under Section 59350 of Title 5, the Chancellor's review is limited to: (1) whether there was a procedural error; (2) whether there was a defect in the investigation; (3) whether new evidence unavailable during the investigation would substantially impact the outcome of the investigation; (4) whether the correct legal standards were applied; and (5) whether the district's determination was an abuse of discretion. The Chancellor must respond to the appeal within 90 days. Section 59325 of Title 5 provides the circumstances under which a matter may be remanded, and provides that the district must take necessary action and issue a decision after remand within 60 days.

Takeaways

The complete amended regulations are available [here](#).

The Title 5 amendments are now one of several significant changes to the requirements for how districts handle unlawful discrimination complaints, particularly those based on sex. Community college districts will need to review their policies and procedures to ensure they comply the new Title 5 regulations. In addition, with respect to complaints based on sex, districts will also need to ensure that their policies and procedures comply the new Title IX regulations that took effect on August 14, 2020 (See [2020 Client News Brief Number 49](#)), and SB 493, which adopted detailed new state law requirements for handling sex discrimination complaints (See [2020 Client News Brief Number 81](#)).

Our Title IX practice group provides in-depth training to institutions on all aspects unlawful discrimination in addition to policy and procedure audits to ensure legal compliance.

For more information about the new amendments to Title 5, and districts' obligations under Title 5, SB 493 and Title IX please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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