



# Digest

Digest means an item that has been through internal review of the Chancellor's Office and the review entities. The item now has form and substance, and is officially "entered into Consultation." The Council reviews the item and provides advice to the Chancellor.

**Title:** Proposed Revisions to Title 5 Regulations on Nondiscrimination in Programs Receiving State Financial Assistance

**Date:** March 20, 2008

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## Background

The enactment of two recent pieces of legislation, SB 777 (Stats. 2007, ch. 569) and AB 14 (Stats. 2007, ch. 568), effective January 1, 2008, necessitates some technical changes in the regulations adopted by the Board of Governors related to the handling of discrimination complaints. Most significantly, these bills add "gender" to the list of bases on which a discrimination complaint can be filed. Under Government Code section 11135 and our current regulations implementing that section, "sex" is listed as a basis for filing complaints of unlawful discrimination and the two terms are essentially interchangeable, but in order to avoid confusion staff proposes to amend the Board's regulations to refer to "sex or gender."

While reviewing the regulations for compliance with these legislative enactments, we have concluded that certain other minor revisions are appropriate. Primarily these relate to clarifying the different rules which apply to handling complaints involving employment discrimination and those applicable to other types of discrimination complaints such as those filed by students.

In 2006, title 5, section 59339(b) was amended to eliminate appeals to the System Office in employment-related complaints and to direct such complainants who had unresolved issues to the Department of Fair Employment and Housing, the state agency charged with rendering binding decisions in employment discrimination cases.

Although section 59339 was amended to eliminate appeals to the System Office in employment-related cases, several other related provisions were not amended accordingly and this has led to confusion among districts as to how to handle complaints. For example, section 59340 still requires districts to forward their decisions related to all types of complaints to this office, but since we have no role in employment-related cases we have advised districts that it is not necessary to forward such materials in employment cases. Despite this advice, districts find it confusing and worrisome for this regulatory requirement to remain on the books. Section 59340 and other provisions are being amended to clarify the proper handling of complaints which are employment-related and those which are not.

This package also contains other minor technical changes for purposes of clarity.

## **Proposal**

This package proposes to make the changes discussed above to title 5, section 59300 et seq. It is expected that the package of proposed regulation changes will be forwarded to the Board of Governors for first reading in May and action at their July 2008 meeting.

# CALIFORNIA CODE OF REGULATIONS

## DIVISION 6, TITLE 5

### Proposed Changes to the Title 5 Regulations Nondiscrimination in Programs Receiving State Financial Assistance

1. Section 59300 of article 1 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

#### **§ 59300. Purpose.**

The purpose of this subchapter is to implement the provisions of California Government Code sections 11135 through 11139.5, the Sex Equity in Education Act (Ed. Code § 66250 et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12100 et seq.) and the Age Discrimination Act (42 U.S.C. § 6101), to the end that no person in the State of California shall, in whole or in part, on the basis of ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, or physical or mental disability, or on the basis of these perceived characteristics or based on association with a person or group with one or more of these actual or perceived characteristics, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under any program or activity that is administered by, funded directly by, or that receives any financial assistance from, the Chancellor or Board of Governors of the California Community Colleges.

Note: Authority cited: Sections 66271.1, 66700, and 70901, Education Code; and Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; Sections 11135-11139.5, Government Code; Sections 422.6 and 422.55, Penal Code; title 20, United States Code section 1681; title 29, United States Code section 794; and title 42, United States Code sections 2000d, 6101 and 12100, et seq.

2. Section 59311 of article 2 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

#### **§ 59311. Definitions.**

For purposes of this subchapter, the following definitions shall apply:

(a) "Appeal" means a request by a complainant made in writing to a community college district governing board pursuant to section 59338 and/or to the Chancellor's Office pursuant to section 59339 to review the administrative determination of a community college district regarding a complaint of discrimination.

(b) "Complaint" means a written and signed statement meeting the requirements of section 59328 that alleges unlawful discrimination in violation of this subchapter.

(c) "Days" means calendar days.

(d) Except for purposes of section 59306, "disability" means any mental or physical disability as defined in Government Code section 12926.

(e) "Discrimination on the basis of sex" means sexual harassment or discrimination on the basis of gender.

(f) "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(g) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. 'Sex' also includes, but is not limited to, a person's gender, as defined in section 422.56 of the Penal Code. Discrimination on the basis of sex or gender also includes sexual harassment.

~~(g)~~(h) "Sexual orientation" means heterosexuality, homosexuality, or bisexuality.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; Section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; sections 11135 and 12926, Government Code; and sections 422.6 and 422.55, Penal Code.

3. Section 59320 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59320. District Responsibility.**

Each community college district has primary responsibility to insure that its programs and activities are available to all persons without regard to their actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, ~~sex~~, color, ancestry, sexual orientation, ~~ancestry~~, or physical or mental disability, or to their association with a person or group with one or more of these actual or perceived characteristics. Therefore, each community college district shall investigate complaints of unlawful discrimination in its programs or activities, and seek to resolve those complaints in accordance with the provisions of this subchapter.

Note: Authority cited: Sections ~~66271.7~~, 66271.1, 66700 and 70901, Education Code; and section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; sections 11135 and 12926, Government Code; and sections 422.6 and 422.55, Penal Code.

4. Section 59322 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59322. District Regulations.**

Each community college district shall establish and adopt written policies consistent with this subchapter. When the policies are adopted or amended, they shall be submitted to the Chancellor ~~for review and approval~~ within 90 days of the effective date of the adoption or amendment(s). If, at any time, the Chancellor finds that a district's policies are inconsistent with the requirements of this subchapter, the Chancellor may require the district to appropriately modify its policies.

Note: Authority cited: Sections ~~66271.7~~, 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and section 11135, Government Code.

5. Section 59324 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59324. Responsible District Officer.**

Each community college district shall identify to the Chancellor and to the public a single person as the district officer responsible for receiving complaints filed pursuant to section 59328 and for coordinating their investigation. Informal charges of unlawful discrimination should be brought to the attention of the responsible district officer, who shall oversee the informal resolution process pursuant to section 59327. The actual investigation of complaints may be assigned to other staff or to outside persons or organizations under contract with the district. Such procedures shall be used whenever the officer designated to receive complaints is named in the complaint or is implicated by the allegations in the complaint.

Note: Authority cited: Sections ~~66271.7~~, 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and section 11135, Government Code.

6. Section 59329 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59329. Complaints Filed with Chancellor.**

Upon receiving a complaint filed pursuant to section 59328, the Chancellor will immediately forward a copy of the complaint to the appropriate community college district responsible officer who shall respond pursuant to section 59332 or initiate the investigation required by section 59334. ~~In any complaint filed alleging employment discrimination, the Chancellor shall notify the complainant that he or she has the right to file with the Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of that agency.~~

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and sections 11135 and 11136, Government Code.

7. Section 59330 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59330. Notice to Chancellor.**

Immediately upon receiving a complaint filed in accordance with section 59328, regardless of whether the complaint is brought by a student or by an employee, the district shall forward a copy of the complaint to the Chancellor.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and sections 11135 and 11136, Government Code.

8. Section 59332 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59332. Defective Complaint.**

When a district receives a complaint which it finds does not meet the requirements of section 59328, the district shall immediately notify the complainant and the Chancellor that the complaint does not meet the requirements of section 59328 and shall specify in what requirement the complaint is defective.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and sections 11135 and 11136, Government Code.

9. Section 59336 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59336. Administrative Determination.**

(a) In any case not involving employment discrimination, w~~W~~ithin ninety (90) days of receiving a complaint, the district shall complete its investigation and forward a copy of the investigative report required pursuant to section 59334 to the Chancellor, a copy or summary of the report to the complainant, and written notice setting forth all of the following to both the complainant and the Chancellor:

~~(a)-(1)~~ the determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint;

~~(b)-(2)~~ a description of actions taken, if any, to prevent similar problems from occurring in the future;

~~(c)-(3)~~ the proposed resolution of the complaint; and

~~(d)-(4)~~ the complainant's right to appeal to the district governing board and the Chancellor pursuant to sections 59338 and 59339.

(b) In any case involving employment discrimination, within 90 days of receiving a complaint, the district shall complete its investigation and forward a copy or summary of the report to the complainant, and written notice setting forth all the following to the complainant:

(1) the determination of the chief executive officer or his/her designee as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint;

(2) a description of actions taken, if any, to prevent similar problems from occurring in the future;

(3) the proposed resolution of the complaint; and

(4) the complainant's right to appeal to the district governing board and to file a complaint with the Department of Fair Employment and Housing.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq., and 72011, Education Code; and sections 11135 and 11136, Government Code.

10. Section 59338 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59338. Final District Decision; Appeals to Local Governing Board.**

(a) If the complainant is not satisfied with the results of the administrative determination rendered pursuant to section 59336, the complainant may submit a written appeal to the district governing board within fifteen (15) days from the date of the administrative determination. The governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision in the matter within forty-five (45) days after receiving the appeal.

(b) In any case not involving employment discrimination, the district shall promptly forward to the complainant and to the Chancellor a copy of the final district decision rendered by the governing board that includes complainant's right to appeal the district's decision to the Chancellor pursuant to section 59339 ~~shall be forwarded to the complainant and to the Chancellor.~~

(c) In any case involving employment discrimination, the district shall promptly forward to the complainant a copy of the final district decision rendered by the governing board that includes the complainant's right to file a complaint with the Department of Fair Employment and Housing (DFEH), where the case is within the jurisdiction of that agency.

~~(e)~~-(d) If the governing board does not act within forty-five (45) days the administrative determination shall be deemed approved and shall become the final district decision in the matter.

(1) The district shall promptly notify the complainant and, in any case not involving employment discrimination, the Chancellor, that the board took no action and the administrative determination is deemed approved pursuant to this section.

(2) In any case not involving employment discrimination, the complainant shall also be notified of his or her right to appeal the district's decision to the Chancellor pursuant to section 59339.

(3) In any case involving employment discrimination, the complainant shall also be notified of his or her right to file a complaint with the Department of Fair Employment and Housing (DFEH), where the case is within the jurisdiction of that agency.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and sections 11135 and 11136, Government Code.

11. Section 59340 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59340. ~~Forward~~ Provision of Information to Chancellor.**

(a) Within 150 days of receiving a complaint which does not involve employment discrimination, the district will either:

(1) forward the following to the Chancellor:

(a)-(A) A copy of the final district decision rendered by the governing board or a statement indicating the date on which the administrative determination became final pursuant to section 59338(a);

(b)-(B) A copy of the notice to the complainant required pursuant to section 59338(a);

(C) A copy of the complainant's appeal of the district's administrative determination pursuant to section 59338(a); and

(e)-(D) Such other information as the Chancellor may require; or

(2) Notify the Chancellor that the complainant has not filed an appeal with the district governing board and that the district has closed its file.

(b) For a period of at least three years after closing a case, including a case involving employment discrimination, the district shall retain and make available to the Chancellor upon request the original complaint, the documents referenced in sections 59336 and 59338, and the documents identified in subdivision (a) of this section.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and sections 11135 and 11136, Government Code.

12. Section 59342 of article 3 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59342. Extensions; Failure to Comply.**

(a) If a district, for reasons beyond its control, is unable to comply with the 90-day or 150-day deadline specified in sections 59336 or 59340, the district may file a written request that the Chancellor grant an extension of the deadline. Where an extension is deemed necessary by the district, it must be requested from the Chancellor regardless of whether or not the case involves employment discrimination. The request shall be submitted no later than ten (10) days prior to the expiration of the deadline established pursuant to sections 59336 or 59340 and shall set forth the reasons for the request and the date by which the district expects to be able to submit the required materials.

(b) A copy of the request for an extension shall be sent to the complainant, who shall be notified that he or she may file written objections with the Chancellor within five (5) days of receipt.

(c) The Chancellor may grant the request unless delay would be prejudicial to the investigation. If the Chancellor grants an extension of the 90-day deadline, the 150-day deadline is automatically extended by an equal amount.

(d) If a district fails to comply with the requirements of sections 59336 or 59340 by the required deadline, including any extension granted pursuant to this section, the Chancellor may proceed to review the case as provided in article 4 (commencing with section 59350) of this subchapter based on the original complaint and any other relevant information then available.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and sections 11135 and 11136, Government Code.

13. Section 59351 of article 4 of subchapter 5 of chapter 10 of division 6 of title 5 of the California Code of Regulations is amended to read:

**§ 59351. New Issues Raised on Appeal.**

If, upon review of the materials submitted by the complainant pursuant to section 59339(a), the Chancellor's Office finds that issues or facts not included in the complaint have been raised for the first time on appeal, the Chancellor's Office will provide the district a reasonable opportunity to respond to the new issues or facts raised by the complainant.

Note: Authority cited: Sections 66271.1, 66700 and 70901, Education Code; section 11138, Government Code. Reference: Sections 66250 et seq. and 72011, Education Code; and sections 11135 and 11136, Government Code.