

**CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE**

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Date: September 2, 2011

To: District Officers for Unlawful Discrimination Complaints
Chief Human Resources Officers
Equal Employment Opportunity Officers
Community College Attorneys

From: Steven Bruckman
Executive Vice Chancellor for Operations and General Counsel

Re: Discrimination Complaint Procedures
Legal Advisory 11-01

Effectively responding to unlawful discrimination complaints is an important process that each California community college district must observe under federal and state law. The federal civil rights laws and regulations prohibiting discrimination on the basis of race, color, national origin, sex, disability, and age specifically require colleges and universities to respond appropriately and effectively to complaints of unlawful discrimination.¹ Under state regulations, community college districts must also follow the procedures and guidelines outlined in title 5, section 59300 et seq. when responding to complaints of unlawful discrimination on the basis of actual or perceived 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 an individual's association with a person or group with one or more of these actual or perceived characteristics.

¹ The regulations implementing Title IX of the Education Amendments of 1972 (at 34 C.F.R. §106.8(b)), the Age Discrimination Act of 1975 (at 34 C.F.R. §110.25(c)), Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §104.7(b)), and Title II of the Americans with Disabilities Act of 1990 (at 28 C.F.R. §35.107(b)) all require the adoption of prompt and equitable grievance procedures. The regulations implementing Title VI of the Civil Rights Act of 1964 do not specifically require a written grievance procedure, although they do require an appropriate institutional response to notice of discrimination.

While the title 5 regulations outline state-prescribed procedures for discrimination complaints to be processed through our office, this does not preclude district offices from accepting and investigating discrimination complaints that fall outside those guidelines. To ensure a district's compliance with legal requirements that are not within the jurisdiction of the Chancellor's Office, discrimination complaints should still be reviewed and responded to appropriately, even if they are presented outside the scope of the title 5 regulations.

The Office for Civil Rights of the U.S. Department of Education (OCR) has brought to our attention several areas where there may be some confusion regarding how best to comply with both state and federal regulations when responding to unlawful discrimination complaints. This advisory addresses these issues and has identified some areas of misunderstanding regarding the respondent's rights within the title 5 process.

Who May File a Complaint

Title 5, section 59328(a) requires a formal investigation if the complaint is filed by "one who alleges that he or she has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his or her official capacity as a faculty member or administrator." However, under federal requirements, districts must also resolve complaints alleging any action that would be prohibited by federal laws or regulations; this could include complaints filed on behalf of another individual or class of individuals. OCR advised this office that, under federal law, the definition of "complainant" in section 59328(a) unduly limits the scope of individuals who may file legitimate allegations of discrimination.

This advisory therefore clarifies that while section 59328(a) restricts formal title 5 complaints to those filed by specified parties, a district is not precluded from investigating complaints filed by other parties that fall outside the scope of that definition, and, in fact, is required to do so by federal regulations. A district may use its informal title 5 complaint process to investigate and resolve complaints filed by such other parties, which could include a peer, a family member, or another third party.² It is also within a district's discretion to utilize the title 5 complaint process up to and including a first level appeal to the local district board of trustees. However, complainants that do not meet the requirements of title 5, section 59328(a) have no

² For complaints involving discrimination against an individual, a district may require consent from the injured party on behalf of whom a complaint is filed. It is desirable to obtain such consent in writing and consent should include the scope of disclosure made to the complaint filer acting in the place and stead of the injured party. This is particularly advisable in cases where the privacy of the alleged injured party is at stake. For example, under FERPA, a parent is not the "eligible student" for purposes of disclosure of "educational records." (34 C.F.R. § 99.3, "eligible student.")

appeal rights to the State Chancellor. If the district provides a summary of an investigation report to a third party, it must also be mindful of privacy issues such as FERPA, collective bargaining agreements, and the right of privacy under the California Constitution.

In addition, title 5 requires that all complainants be advised that they may file a nonemployment based complaint with OCR (§ 59327(a)(4)), or an employment-based complaint with the California Department of Fair Employment and Housing or the U.S. Equal Employment Opportunity Commission (§ 59327(a)(5)).

Complaint Form

The title 5 regulations include certain procedural requirements that are intended to ensure consistent processing of discrimination complaints. For example, title 5, section 59328(c) requires that complaints be filed on a form prescribed by the Chancellor's Office. OCR has advised us that a district's discrimination complaint procedure would not be considered equitable and sufficient under federal requirements if legitimate complaints are rejected merely because they are not presented on a particular form. While every effort should be made to have complaints filed on the proper form and to obtain complainant's signature, complaints should not be summarily dropped or ignored solely because of this procedural issue. While a complaint filed on the improper form is still procedurally defective under title 5 standards, the merits of the complaint itself may still be valid and must be addressed. Where a complainant has indicated that he or she wishes to pursue the formal complaint process, a complaint should not be rejected solely based on the failure to file the complaint on this form.

If a complaint of unlawful discrimination is presented in another written format, such as a letter, a district may request that the complainant complete the form. If there is a delay in obtaining a completed form, or the complainant refuses to transfer the information to the form but wishes to pursue the formal complaint process, a district may attach the letter to the form and open a formal investigation. The timelines for filing complaints set forth in title 5, sections 59328(d) and (e) should be calculated based on the initial complaint regardless of the form in which it is filed. Finally, districts should provide assistance in completing the form, as necessary, to individuals with disabilities or with limited English proficiency.

Respondent's Rights

The Chancellor's Office wishes to clarify that the subject of a complaint, known as the respondent or the accused, is entitled the opportunity to address the complaint that has been filed, but those rights and entitlements are not covered by title 5. Such rights are generally the subject of local collective bargaining agreements and should not work to

cause a district, or its policies, to be in violation of title 5. Therefore, there are limitations on what a respondent can do or expect to be provided.³

First, while respondents may be informed of the nature of the discrimination allegations, under title 5 they are not entitled access to a copy of the complaint itself. OCR has advised us that there are significant concerns about unwarranted invasions of the privacy of the complainant and witnesses named in the complaint, as well as fears of reprisal, which can occur if a copy of the complaint is given to the respondent. Information contained in the complaint should be provided to the respondent as necessary to provide sufficient notice of and fully investigate the allegation(s).

Second, although the title 5 regulations are silent with regard to the rights of the respondent, the OCR has advised that it is certainly permissible for respondents to be informed of the outcome of the investigation and the basis for the complaint determination. However, there is no provision in the title 5 regulations allowing respondents to receive a copy of the investigative report. Regarding nonemployment complaints, title 5, section 59336(a) also specifically calls for an investigative report or summary to be forwarded only to the complainant and the complete report to the Chancellor's Office.⁴

Third, the Chancellor's Office has noted that in some cases local boards have improperly considered written responses presented by the respondents following an administrative determination. Title 5, section 59338(a) states that following the administrative determination and a subsequent written appeal by the complainant, the governing board shall review "the original complaint, the investigative report, the administrative determination, and the appeal." If a respondent wishes to file a written response, he or she may do so during the initial investigation. That document can then be preserved in the investigative report and the administrative determination thereon, and thus be weighed among the other evidence for the governing board to review. After the administrative determination is made, respondents are not entitled to add any additional information for local board review.

Fourth, respondents do not have the right to appeal an administrative determination under the title 5 discrimination complaint process. Title 5, section 59338(a) allows for only the complainant to submit a written appeal to the district governing board following notice of the administrative determination.

³ See Legal Opinions E 01-38, L 04-16.

⁴ In employment-related complaints the full report or summary must be provided to the complainant. (See title 5, section 59336(b).)

Conclusion

The title 5 discrimination complaint process has been established both to protect the due process rights of complainants and to provide districts with a framework to address compliance with state and federal discrimination laws. The title 5 process may not operate as a bar to claims of discrimination under federal law. We advise each district to review its current unlawful discrimination procedures and modify the procedures consistent with this legal advisory. Both OCR and the Chancellor's Office encourage districts to use the model policy and procedures posted on our web page both as "safe harbor" language and as a guideline for any future compliance questions that may arise. The model policy and procedures document has been modified consistent with this legal advisory. A copy of the updated model policy and procedures can be found at this link:

<http://www.cccco.edu/ChancellorsOffice/Divisions/Legal/Discrimination/tabid/294/Default.aspx>

If there are any further questions regarding this advisory or the title 5 discrimination process in general, feel free to email our office at legallaffairs@cccco.edu.

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