



**15-DAY NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED
AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS, TITLE 5
REGARDING
UNLAWFUL DISCRIMINATION**

15-Day Notice published December 23, 2019

The Board of Governors of the California Community Colleges hereby provides notice of changes to the above-referenced proposed regulatory action that was the subject of a public hearing on November 18, 2019. Section 206, subdivision (c), of the Procedures and Standing Orders of the Board of Governors requires the Board to renote a proposed regulatory action where the proposed regulations have been previously considered, are being modified, and the modifications are “sufficiently related” to the text of the previously-proposed regulations.

CHANGES TO THE TEXT

Following the 45-day comment period that ended on December 16, 2019, and following the November 18, 2019 Board meeting, changes were made to this regulatory action in proposed sections 59311, 59320, 59327, 59336, 69337 and 59338. The California Community College Chancellor's Office will present the regulatory action to the Board of Governors at its January 13, 2020 meeting. The changes are submitted for an additional 15-day comment period effective today, December 23, 2019. Comments must be received prior to 4:00 p.m. on January 7, 2020.

The Chancellor's Office proposes additional changes to the proposed regulatory action. The changes from the original noticed regulations are denoted by double bold underline and/or double bold strikeout, as indicated below.

§ 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 or verbal and signed statement meeting the requirements of section 59328 that alleges unlawful discrimination in violation of this subchapter.

(c) "Days" means calendar days.

(d) "Unlawful discrimination" means 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.

~~(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.~~

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

Explanation:

A commenter recommended adding a definition for "unlawful discrimination" in Section 59311. The Chancellor's Office believes including this definition will be helpful to parties involved in the complaint process.

§ 59320. District Responsibilities.

~~Each eCommunity college districts has primary must responsibility to ensure that its their programs and activities are available to all persons without unlawful discrimination regard to their actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, 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 e Community college districts shall investigate complaints of unlawful discrimination in their its programs or and activities, and seek to resolve these complaints in accordance with the provisions of this subchapter.~~

Explanation:

Removal of potentially inapplicable language, as not all complaints may require resolution.

§ 59327. Informal Resolution.

~~(a) Whenever any person brings When charges of unlawful discrimination are brought to the attention of the a responsible district officer, the district may designated pursuant to section 59324, that officer shall: undertake efforts to informally resolve the charges with the complainant's consent. The district must advise complainants that they need not participate in informal resolution.~~

- ~~(1) undertake efforts to informally resolve the charges;~~
- ~~(2) advise the complainant that he or she need not participate in informal resolution;~~
- ~~(3) notify the person bringing the charges of his or her right to file a complaint, as defined in section 59311, and of the procedure for filing such a complaint pursuant to section 59328;~~
- ~~(4) advise the complainant that he or she may file his or her nonemployment-based complaint with the Office for Civil Rights of the U.S. Department of Education (OCR) where such a complaint is within that agency's jurisdiction; and~~
- ~~(5) advise the complainant that he or she may file his or her employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the California Department of Fair Employment and Housing (DFEH) where the complaint is within the jurisdiction of those agencies.~~

(b) Efforts at informal resolution pursuant to subdivision (a)(1) may, but need not include any investigation, ~~unless The responsible district officer determines that~~when an investigation is warranted, ~~by the seriousness of the charges.~~

(c) Efforts at informal resolution may continue after ~~the filing of a formal written or verbal complaint is made, but after a complaint is filed an investigation is required to be conducted pursuant to section 59334 and The investigation must be completed unless the matter is informally resolved and the complainant dismisses the formal complaint, or the complainant files with the DFEH and the Chancellor elects not to require further investigation pursuant to section 59328(f)(2). The district may proceed with an investigation notwithstanding an informal resolution.~~

(d) Any efforts at informal resolution after the filing of a written or verbal complaint is made shall not exceed the be completed within ninety (90) days ~~period for rendering the administrative determination pursuant to section 59336.~~

Explanation:

Added language makes clear that a district may continue to conduct an investigation even if an informal resolution has been reached with a complainant.

§ 59336. Administrative Determination.

(a) In any case not involving employment discrimination, within 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 to the complainant~~ setting forth all of the following ~~to both the complainant and the Chancellor:~~

~~(1) the determination of The chief executive officer's or his/her their designee's determination as to whether there is probable cause to believe unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;~~

~~(2) In the event a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar problemsacts of unlawful discrimination 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 the Chancellor pursuant to sections 59338 and 59339.; and
- (5) in matters involving student sexual misconduct, the respondent's right to appeal to the district governing board **any disciplinary sanction imposed upon the respondent.**
- (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 ~~to the complainant~~ setting forth all the following ~~to the complainant~~:
- (1) ~~the determination of The chief executive officer's or his/her their designee's determination as to whether there is probable cause to believe discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;~~
- (2) ~~if a discrimination allegation is substantiated, a description of actions taken, if any, to prevent similar problems acts of unlawful discrimination 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 Department of Fair Employment and Housing.
- (c) In any case involving unlawful discrimination, when a district provides the complainant with any information pursuant to this subdivision, the district shall also provide to the respondent the following:
- (1) The chief executive officer's or their designee's determination as to whether unlawful discrimination occurred with respect to each allegation in the complaint based on the preponderance of the evidence standard;
- (2) The proposed resolution of the complaint, including any disciplinary action against the respondent; and

(3) In matters involving misconduct governed by section 59337, subdivision (b), the respondent's right to appeal to the local governing board **any disciplinary sanction imposed upon the respondent.**

Explanation:

“Unlawful” added in subdivision (a)(1) to specify that the determination is made with respect to the adopted definition of “unlawful discrimination.”

“Any disciplinary sanction imposed upon the respondent” added in subdivision (a)(5) to specify that a respondent’s right to appeal is limited to cases in which discipline will be imposed.

Removal of “problems” and insertion of “acts of unlawful discrimination” in subdivision (b)(2) to remove vagueness of term “problems” and specify that focus of any remedial measures should address “unlawful discrimination” as defined.

“Any disciplinary sanction imposed upon the respondent” inserted in subdivision (c)(3) to again specify that respondent’s right to appeal arises only as a result of the imposition of disciplinary action.

§ 59337. Title IX and Student Discipline Procedures.

(a) In cases of student sexual misconduct subject to Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688, districts must comply with the federal Department of Education’s Title IX regulations, 34 C.F.R. Part 106.

(b) In cases of student sexual misconduct that **does not meet the procedural requirements of** **are not subject to** Title IX, when an accused student is subject to severe disciplinary sanctions, and the credibility of witnesses ~~is~~ **was** central to the investigative findings, district student discipline procedures must provide the following:

(1) An opportunity for the accused student to cross-examine witnesses, including the complainant;

(2) An opportunity for the accused student to cross-examine witnesses indirectly at a live hearing, either in person or by videoconference; and

(3) (2) A live hearing conducted by a neutral decision-maker other than the investigator.

(c) For purposes of this section, “indirect” cross-examination shall be conducted as follows:

(1) Any question to the witness shall be asked by a neutral party appointed by the district for the sole purpose of asking questions. The neutral party shall not be the accused student, the accused student’s representative, or a member of the hearing panel; and

(2) The accused student may submit written questions before and during the cross-examination, including any follow-up questions. The neutral party asking questions shall not exclude any questions unless there is an objection to the question by the hearing panel.

(d) Nothing in this section shall prohibit a district from providing a live hearing or neutral decision-maker for other student discipline proceedings, including for other forms of discrimination.

Explanation:

Removal of “does not meet the procedural requirements of” and insertion of “are not subject to” in subdivision (b) clarifies the standard that applies, since the question is not should be simply whether or not Title IX applies more broadly rather than if the circumstances meet procedural requirements.

Removal of entire subdivision (b)(1) so specify that all witnesses may be cross-examined indirectly, including the complainant. In addition, since this concept is more broadly communicated in subdivision (b)(2), removal of (b)(1) for redundancy is appropriate. This procedure is consistent with the Court of Appeal’s decision in *Doe v. University of Southern California (USC) (2018) 29 Cal.App.5th 1212.*

§ 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 ~~or respondent in student sexual misconduct cases~~ may submit a written appeal to the district governing board within fifteen (15)~~thirty~~ (30) days from the date of the notice pursuant to ~~required by~~ section 59336 that sets forth the administrative determination and the complainant’s appeal rights. ~~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. In student sexual misconduct cases subject to section 59337, subdivision (b), respondents who are not satisfied with the results of the administrative determination rendered pursuant to section 59336, subdivision (a), may submit a written appeal to the district governing board within thirty (30) days from the date of the notice required by section 59336.~~ The governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision within forty-five (45) days after receiving the appeal.

~~(b)(1) If the governing board does not act within forty-five (45) days the administrative determination shall be deemed approved on the forty-sixth (46) day and shall become the final district decision. (2) The district shall promptly notify the complainant and the respondent of the board's action, or if that the board took no action and that the administrative determination is deemed approved.~~

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

~~(d) 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.~~

~~(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.~~

Explanation:

Removal of “or respondent in student sexual misconduct cases” in subdivision (a) clarifies ambiguous language regarding the circumstances for a complainant to appeal an administrative determination.

Removal of “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” in subdivision (a) because the language is redundant as it is restated later in the same subdivision.

Insertion of “In student sexual misconduct cases subject to section 59337, subdivision (b), respondents who are not satisfied with the results of the administrative determination rendered pursuant to section 59336, subdivision (a), may submit a written appeal to the district governing board within thirty (30) days from the date of the notice required by section 59336” in subdivision (a) clarifies that respondents only have the right to appeal in cases of student sexual misconduct as specified in Section 59336.

Insertion of “and the respondent” in subdivision (c) specifies that the respondent is also entitled to a copy of the final decision rendered by the district’s governing board.

WRITTEN COMMENT PERIOD

Any interested person may submit written comments relevant to the changes to the proposed regulatory action subject to this 15-day notice. Comments must be limited to title 5, California Code of Regulations, sections 59311, 59320, 59327, 59336, 59337 and 59338. We will accept comments concerning the changes outlined above in this 15-day notice until January 7, 2020. Comments should be addressed to:

Regulations Coordinator
California Community Colleges
Chancellor's Office
1102 Q Street, Suite 636
Sacramento, CA 95811-6549
Email: regcomments@cccco.edu

Comments must be received by the Regulation Coordinator prior to 4:00 p.m. on January 7, 2020. All written comments received by CCCCO staff during the public comment period are subject to disclosure under the Public Records Act.

CHANGES OR MODIFICATIONS TO PROPOSED TITLE 5 AMENDMENTS

Following the public hearing and considering all timely and relevant comments received, the Board of Governors may adopt the proposed regulations substantially as described in this Notice or may modify the proposed regulations if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified regulation will be available for 15 days prior to its adoption, and will be provided to those persons who have requested or are required to receive notification of regulatory actions, or who have provided written or oral comments relevant to the proposed regulatory action.

AUTHORITY AND REFERENCE

Authority: Education Code sections 66271.1, 66700 and 70901. Government Code section 11138.

Reference: Education Code sections 66250 et seq., 72011; Government Code sections 11135-11139.5, 11136, 11138, 12926; Penal Code sections 422.6, 422.55; Title 20, U.S. Code section 1681; Title 29, U.S. Code section 794; and Title 42, U.S. Code, Sections 2000d, 6101, 12100 et seq.

INFORMATIVE DIGEST

California Code of Regulations, title 5, sections 59300, et seq., implement various provisions of federal and state law which prohibit unlawful discrimination against persons or groups in any program or activity administered by the Board of Governors. The regulations apply to students at California community colleges and employees at local colleges and districts. The unlawful discrimination regulations have not been updated since 2008.

This regulatory action was prompted by a complaint filed against the Chancellor's Office by the United States Department of Education's Office of the Civil Rights in 2016. OCR filed the complaint after reviewing a student's allegations against Santa Rosa Junior College. After the student's complaint with Santa Rosa was denied, the student filed an appeal with the Chancellor's Office which was also ultimately denied. The student then filed the same complaint with OCR, attaching her complaint and appeal. After review of the documents, OCR did not dispute the Chancellor's Office decision, but opened a case to review our discrimination regulations due to an asserted lack of clarity in our standard of review. The case was dormant for more than two years until OCR renewed its efforts to resolve this matter in early 2019. After negotiations with OCR and demonstrating a good faith commitment to amend the discrimination regulations, OCR dismissed the complaint against the Chancellor's Office on September 26, 2019.

In our review of the Board's unlawful discrimination regulations, the Office of the General Counsel identified a number of provisions that needed revision to ensure our regulations cover the full range of protected classifications now recognized by California law, remove unduly bureaucratic and unproductive noticing requirements, and provide clarity on standards of review and the appellate process.

ESTIMATED COST OR SAVINGS OF PROPOSED AMENDMENTS

The estimated cost or savings of the proposed amendments are anticipated to be as follows:

Mandate on local agencies or community college districts: *None. Although the amendments to Section 59337 (Title IX and Student Discipline Procedures) may result in increased costs of investigation and adjudication of complaints of sexual misconduct, any such increased costs will be attributable to heightened due process protections mandated by federal Title IX regulations, 34 C.F.R. Part 106, as well as the California Court of Appeal's decision in Doe v. University of Southern California (2018) 29 Cal.App.5th 1212.*

Cost or savings to state agencies: *None*

Costs to local agencies or community college districts for which reimbursement would be required pursuant to part 7 (commencing with section 17500) of division 4 title 2 of the Government Code: *None*

Other non-discretionary cost or savings imposed on community college districts: *None*

Cost or savings in federal funding to state agencies: *None*

The proposed amendments to title 5 would result in no fiscal impact to local or state governments. Nor will it have any fiscal impact on any federal funding.

CONTACT PERSON

Inquiries concerning the content of these regulations may be directed to:

Marc LeForestier, General Counsel
California Community Colleges
Chancellor's Office
regcomments@cccco.edu

Inquiries concerning the regulatory process may be directed to the Regulations Coordinator, at regcomments@cccco.edu.

TEXT OF PROPOSED REGULATIONS AND CORRESPONDING DOCUMENTS

Copies of the exact language of the proposed regulatory action subject to this 15-day notice is set forth above. All of the information upon which the proposal is based, may be obtained online at:

[Board of Governors Meeting Agenda](#)

[Recent Regulatory Action](#)

Those who receive the Board of Governors Agenda package for the January 13, 2020 meeting can find a further description of the proposal and the full text of the regulations. You may also request a copy of the proposal from the Regulations Coordinator using the contact information provided above.