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

From: Thuy Thi Nguyen 
Interim General Counsel/Vice Chancellor

Re: Student and Employment Discrimination Complaint Procedures
Legal Opinion 16-03

The Chancellor's Office handles appeals of unlawful discrimination complaints under California Code of Regulations, title 5 sections 59300 et seq.¹ The purpose of this legal opinion is to explain the discrimination process and describe how the Chancellor's Office handles appeals. This legal opinion will serve as a guide on the steps that local districts need to follow to ensure compliance with the pertinent regulations. The opinion will point out the differences between employment and non-employment (student) matters and provide clarity on the role of the district, local governing board, and the Chancellor's Office throughout the process.

This legal opinion incorporates the previous advisory, Legal Advisory 11-01 on certain discrimination complaint issues, but addresses the unlawful discrimination process in chronological order and opines on certain legal areas. The opinion is organized in the following manner:

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¹ All regulatory references are to Title 5 of the California Code of Regulations unless otherwise noted.

I. General Overview

Under state regulations, California community college districts must follow the procedures outlined in Sections 59300 et seq. when responding to both student and employment discrimination complaints 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.

Responsible district officer's role and informal resolution

Section 59324 requires that each district identify a single person serving as the district officer responsible for receiving complaints. The responsible district officer's information shall be made public on the college and district's website. Additionally, Section 59324 charges the responsible district officer with the duty of overseeing the informal resolution process.

The informal resolution regulations are set forth in Section 59327. This section requires that the district officer attempt to informally resolve matters and advise the complainant of its right to file with other agencies if the unlawful discrimination allegations are brought informally - that is, not filed on the unlawful discrimination form created by the Chancellor's Office. This situation can arise when the complainant verbally tells the responsible officer about a problem and seeks a quick resolution.

One important distinction to note is that the effect of informally resolving complaints that lack a prescribed form is contrary to the requirements of the Office of Civil Rights (OCR). OCR does not require that complainants file a complaint on a specific form as required by Section 59328(c). OCR advises that any complaint of unlawful discrimination shall be investigated pursuant to federal law. This would effectively rule out the informal resolution requirements of the responsible district officer to resolve matters informally if the complaint is not on the prescribed form.

Complaints filed with the district or Chancellor's Office

Student and employee complainants may file an unlawful discrimination complaint with the Chancellor's Office and/or the responsible district officer (Cal. Code Regs., tit. 5 § 59328(b)). The Complainant has the option. The regulations require that the Chancellor's Office and the district immediately forward a copy of the complaint to the other upon receipt. Thus, districts must send a copy of the complaint along with an acknowledgement letter to the Chancellor's Office immediately. If a complaint is filed with the Chancellor's Office, the same procedure will take place – that is, an acknowledgment letter and copy of the complaint will be forwarded to the district's responsible officer.

When forwarding the complaint, the Chancellor's Office recommends sending a corresponding copy of the acknowledgement letter and complaint to the complainant for record keeping purposes, and to notify the complainant that the complaint has been received.

Complainants may also send the same complaint to both the Chancellor's Office and the district at the same time. When this occurs, the Chancellor's Office and the district should continue to forward a copy of the complaint as required under the regulations.

A unique situation may arise when complainants send an initial complaint to the district and a second amended complaint regarding the same matter, but with additional information, to the Chancellor's Office, or vice versa. In such situations, following the forwarding procedures set forth in the regulations ensures that both the district and Chancellor's Office are in possession of the most recent correspondence and any important amendments. Additionally, the district and Chancellor's Office should send a corresponding copy of any forwarded letter to the complainant.

Advising complainant of his/her right to file with other entities

Districts are required to notify the complainant of the right to file an additional complaint with certain entities, depending on the type of complaint. The district should send an acknowledgement letter to the complainant upon receipt of a new complaint, notifying the complainant the receipt, that a copy of the complaint was forwarded to the Chancellor's Office, an investigation and determination will be rendered within the given time period, and that the complainant has rights to pursue other claims.

Under Section 59328(f), any complainant alleging employment discrimination shall be notified that he or she may file the same complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing (DFEH). If the complainant has filed such a complaint with the EEOC or DFEH, the district should forward a copy of the complaint to the Chancellor's Office immediately.

For student matters, Section 59327(4) requires that the complainant be advised that he or she may file the same complaint with the Office of Civil Rights (OCR) where such a complaint is within the jurisdiction of that agency.

Regulatory timeline

The regulatory timelines for discrimination complaints differ depending on the type of alleged discrimination. The timelines for filing are set forth in Section 59328.

Section 59328(e) requires that employment complaints "shall be filed within 180 days of the date the alleged unlawful discrimination occurred." This period shall be extended by 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged discrimination after the 180 days. It is important to note that employment

complaints are not limited to discriminatory practices in hiring, but include all facets of employment, including but not limited to: harassment by a supervisor or fellow employee, failure to provide reasonable accommodations, or discrimination in awarding compensation and benefits.

For student complaints, Section 59328(d) requires that complaints “shall be filed within one year of the date of alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts...”

A complainant may often file more than one complaint regarding the same matter which may pose procedural issues. For example, a complainant may file an initial complaint, then file a second amended complaint with additional information two months later. In such situations, all subsequent or amended complaints involving the same matter must be filed within the timelines set forth above unless the subsequent complaints involve new allegations.

3rd party standing

Section 59328(a) requires that the complaint be filed by the person who suffered unlawful discrimination or by a faculty member or administrator who has learned of such discrimination through his or her official capacity.

It is important to note that Legal Advisory 11-01 also clarifies OCR’s stance on complaints filed by individuals who have not personally suffered unlawful discrimination. OCR requires districts to investigate 3rd party complaints under federal regulations and allows the district to follow the Title 5 procedures and timelines. However, complainants that lack standing under Title 5 do not have appeal rights to the Chancellor’s Office.

Defective complaints

In light of the procedural timelines set forth in the regulations, Section 59332 requires the district to immediately notify the complainant and the Chancellor’s Office of any complaint that was not filed within the applicable regulatory timelines.

As previously mentioned, 3rd party complaints (except for discrimination complaints made by faculty or administrators) and complaints lacking a prescribed form may be deemed defective; however, OCR still requires the district to investigate the matter under federal regulations.

II. Investigation, Extension Requests, and Administrative Determination

This aspect of the unlawful discrimination process requires the most attention, as districts often fail to follow these regulations after a complaint has been filed.

District investigation

A properly filed complaint triggers a district investigation under Section 59334. This section requires the district to commence an impartial fact-finding investigation and the completion of an investigative report that includes all of the following elements:

1. A factual description of the matter,
2. A summary of the testimony provided by each witness, including testimony made by the complainant, respondent, and any “viable witnesses,”
3. An analysis of the data or evidence collected during the investigation,
4. A probable cause determination on whether the alleged discrimination occurred with respect to each allegation in the complaint, and
5. Any other appropriate information.

A common question regarding this section is whether the Title 5 regulations require an outside investigator to meet the “impartial fact finding investigation” standard. The regulations do not require that the district hire an outside investigator; thus a district employee may be designated to investigate, so long as the investigation is impartial and fair, and all parties are interviewed pursuant to Section 59334(b).

Since the regulations require that *all* parties and witnesses be interviewed, a best practice is to document every attempt to interview throughout the investigation and highlighting the failed attempts in the investigative report. This is essential because investigations may involve witnesses that are protected by Family Education Rights and Privacy Act (FERPA), collective bargaining laws or witnesses bound by rules of non-disclosure such as the Health Insurance Portability and Accountability Act (HIPAA). In such situations, witnesses may be unavailable. Nonetheless, at the onset, if the witness is deemed “viable,” the investigator must make an effort to interview and document every attempt. When conducting interviews, the investigator must afford each witness the opportunity to present their testimony and/or any evidence regarding the allegations.

In addition to interviews, an investigation should properly document and analyze any correspondence regarding the matter. This documentation should include the original complaint, any corresponding documents such as letters and e-mails to and from the district and the complainant and/or the respondent, and any investigative notes. Such documentation is critical in formulating a complete administrative determination, and allows for a thorough review of the record in the event of an appeal.

Lastly, Section 59334 requires that the district complete its investigation within ninety (90) days of receiving a complaint unless the district is granted an extension. Completion of the investigation requires that the district issue an administrative determination along with an investigative report to both the complainant and the Chancellor's Office within 90 calendar days.

Title IX investigations

Title IX of the Education Amendments of 1972 ("Title IX") is a federal civil rights law that prohibits sex/gender discrimination in federally funded education programs and activities.² The Office of Civil Rights at the U.S. Department of Education has issued guidelines on the requirements and standards of such claims.³ For purposes of our Title 5 discrimination process, there may be situations when a Title 5 investigation overlaps with a Title IX investigation. This situation can occur when a district encounters a sex/gender discrimination, harassment or sexual violence claim that falls under both sets of laws.

The U.S. Department of Education has made it clear that when investigating incidents that fall within Title IX, districts should coordinate with other ongoing school or criminal investigations, including any unlawful discrimination claims. In doing so, districts should consider whether certain information may be shared to expedite the process and to prevent complainants from unnecessarily providing multiple statements about the allegations.

The U.S. Department of Education emphasizes that a district does not need to conduct two separate investigations – that is, a Title 5 investigation and a Title IX investigation, if a district's own procedures to resolve sex/gender discrimination complaints meets all of the Title IX obligations. These obligations include: responding promptly and effectively to the discrimination, ending the discrimination, eliminating any hostile environment, and preventing future discrimination.

In regards to timeliness of the investigation, the Office of Civil Rights has indicated in their "Dear Colleague Letter"⁴ and "Questions and Answers on Title IX and Sexual Violence"⁵ that a typical Title IX investigation should be concluded within 60 calendar days. This is shorter than the 90-day requirement under Title 5 because Title IX claims, especially sexual violence allegations, may require immediate attention and resolution for the safety and protection of the complainants. The Chancellor's Office does not evaluate whether a Title 5 investigation meets the requirements of Title IX on appeal.

² This Legal Opinion does not discuss every requirement of Title IX in detail. Districts should consult with legal counsel and/or Title IX coordinator regarding the requirements not mentioned in this opinion.

³ The U.S. Department of Education's "Revised Sexual Harassment Guidance" can be found at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

⁴ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

⁵ <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

Extension requests

A district may request up to a 90-day extension from the Chancellor's Office to submit an administrative determination (Cal. Code Regs., tit. 5 § 59342). The district must send a written request to the Chancellor's Office no later than ten (10) days prior to the expiration of the original deadline. Additionally, the extension request must contain the following:

1. The reason why an extension is necessary,
2. The date by which the district expects the determination to be completed,
3. Notice that a corresponding copy was sent to the complainant,
4. Notice to the complainant that he or she has the right to send a written objection to the Chancellor's Office within five (5) days of receipt.

Failure to include any of the four aspects above will result in a denial of the extension. The Chancellor's Office may grant the extension unless any delay would be prejudicial to the investigation (Cal. Code Regs., tit. 5 § 59342(c)). Examples of prejudice may include loss of witness testimony through delay or utilizing an extension to prevent the complainant from seeking remedies through other outlets in a timely manner.

Administrative determination

Within 90 days of the complaint (unless an extension has been granted), a copy or summary of the investigative report *and* an administrative determination must be forwarded to the complainant and the Chancellor's Office. The administrative determination letter should attach the investigative report (or a summary of the report) and both documents are required to be sent by the district within 90 days.

The administrative determination letter shall include all the pertinent information listed in Section 59336, including:

1. The ultimate determination on probable cause,
2. A description of any actions taken to prevent similar allegations in the future (if applicable),
3. The proposed resolution of the complaint (if any), and
4. The complainant's right to appeal.

The complainant's right to appeal hinges on whether the matter involves employment or non-employment allegations. Both are discussed in detail below.

III. Appeal Rights in Employment and Student Matters

Every administrative determination letter, regardless of the alleged discrimination, must contain the information mentioned above. However, Section 59336 requires that the determination must also advise the complainant of certain appeal rights. The appeal rights of employment versus student matters differ and districts must correctly advise complainants of their appeal options.

Employment complaints

Section 59336(b) requires that in cases involving alleged employment discrimination, the district shall notify the complainant of its right to appeal to the district's local governing board and/or to file the same complaint with the Department of Fair Employment and Housing (DFEH). This notice must be in the administrative determination letter.

Any appeal to the local governing board must be filed within fifteen (15) days from the date of the district's administrative determination. The governing board shall review the original complaint, the investigative report, the administrative determination and the appeal, before issuing a final district decision within forty-five (45) days of receiving the appeal.

Additionally, the district is required to promptly forward a copy of the final district decision rendered by the local governing board to the complainant and notify the complainant of his or her right to file a complaint with DFEH. Please be aware that the Title 5 regulations do not afford employment complainants the right to appeal to the Chancellor's Office. Section 59339 ("Appeal to the Chancellor") explicitly states that cases involving employment discrimination may be filed with DFEH where the complaint is within the jurisdiction of that agency, but does not grant appeal rights to the Chancellor's Office.

Appeals to the Chancellor's Office are strictly reserved for student complaints. As such, the Chancellor's Office is not in a position to render any decisions on employment appeals. When an employment appeal is sent to the Chancellor's Office, the appeal will be sent back to the complainant with instructions to file with the appropriate federal entities.

Student complaints

For student complaints, the district is required to apprise the complainant that he or she may appeal the administrative determination to the local governing board and the Chancellor's Office (Cal. Code Regs., tit. 5 § 59336(a)). The time limitation for student appeals to the local governing board is the same as in employment matters. The complainant is allowed fifteen (15) days from the date of the determination to appeal to the local governing board, and the board shall review all pertinent documents and render a final decision within forty-five (45) days after receiving an appeal.

After the board's final decision, a copy of the decision shall be forwarded to the complainant and the Chancellor, along with notice that the complainant may now directly appeal the district's decision to the Chancellor's Office within thirty (30) days from the date the governing board issues the final decision or from the date the district provides notice to the complainant of such a decision (Cal. Code Regs., tit. 5 § 59339(a)).

An appeal to the Chancellor's Office must be accompanied by a copy of the local governing board's decision or evidence that the complainant filed an appeal with the governing board and that no response was received within forty-five (45) days.

IV. Student Appeals to the Chancellor's Office

The Title 5 regulations only authorize the Chancellor's Office to review student (non-employment) matters. Pursuant to Section 59350, once a student appeal reaches the Chancellor's Office, the appeal will be reviewed to determine if there is reasonable cause to believe the district has violated any requirements of Title 5. If there is evidence of a violation, then the Chancellor's Office will launch its own probable cause investigation to determine the validity of the allegations.

Reasonable cause review

A timely appeal to the Chancellor's Office initiates a reasonable cause review to examine the complainant's issues raised on appeal. This review is limited to an examination of the district's actions to determine if the procedures were adequately followed. Such a review does not look at the substance of the allegations, but instead focuses on the district's role throughout the process. In the event the complainant raises new facts or issues on appeal, Section 59351 allows the Chancellor's Office to remand new issues to the district to provide the district a reasonable opportunity to respond.

The Chancellor's Office will provide a reasonable cause determination after reviewing all the pertinent documents. The determination will provide a review of the applicable Title 5 requirements and an analysis of the district's actions, along with an ultimate decision on whether every applicable regulation was followed. If a violation of a procedure occurred, then the Chancellor's Office will launch its own probable cause investigation to determine the validity and merits of the allegations.

Probable cause investigation

Section 59352 requires that "if the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred." A probable cause investigation requires the Chancellor's Office to look at the allegations and interview all parties, including the complainant, respondent(s), and any witnesses concerning the matter. The Chancellor's Office will reach out to the responsible district officer to gather any information regard the parties before conducting separate interviews.

V. Resolution

A probable cause violation may be resolved through informal resolution with a written conciliation agreement or through formal resolution via a probable cause determination.

Informal resolution

Section 59354 allows the Chancellor's Office the option of informally resolving the alleged violation(s) if possible. When attempting to informally resolve the matter, the "resolution shall be set forth in a written conciliation agreement" and "a copy of the written agreement shall be sent to the complainant."

Informal resolution may occur when there is a probable cause violation (i.e. a finding that the discrimination allegations did occur) and the proposed remedy may be easily awarded without contest. Such situations may include providing confirmation of a violation to a student who has already obtained what they initially sought in the complaint, or allowing the district an opportunity to resolve the complaint if the factual circumstances have changed since the original filing.

Formal resolution

If informal resolution is not an option, then Section 59356 requires that the Chancellor's Office complete its probable cause investigation within 120 days of the reasonable cause finding by notifying the district and the complainant.

Section 59356(a) allows the district to acquiesce to the findings prior to the Chancellor's Office filing an accusation against the district, should the complainant's allegations be found to have merit. In such situations, the Chancellor's Office will send a written notice to the district that it has violated certain regulations and allow the district a reasonable time to respond to the findings. Should the district fail to acquiesce to the probable cause finding, the Title 5 regulations provide the Chancellor's Office with the authority to hold a hearing pursuant to the Government Code to determine if the violation did occur (Cal. Code Regs., tit. 5 § 59358).

Enforcement

Section 59360 provides the Chancellor's Office with enforcement tools to ensure that the districts follow the Title 5 regulations. These means to effect compliance include:

1. Withholding all or part of the district's state support;
2. Making eligibility for future state support conditioned on compliance with specific conditions regarding the violations; or
3. Proceeding in a court of competent jurisdiction for an appropriate order to compel compliance.

VI. Frequently Asked Questions

Multiple complaints

Q: A Complainant has filed numerous complaints regarding the same matter, but different incidents. Typically, the latter complaints just provide new facts and allegations. Should I treat all the complaints as one complaint? Or should every complaint be treated as its own separate complaint?

A: Generally, if all the complaints involve the same matter – that is, facts that relate to the same underlying type of discrimination or facts that stem from the initial allegation, then the complaints may be treated as one complaint. This may occur when a complainant files subsequent complaints due to ongoing discrimination from the first incident.

However, if the subsequent complaints involve a different type of discrimination that is separate from the initial allegation, then the complaints should be treated separately. The key here is whether an investigation of the complaints as one matter would be appropriate. If the answer is no, then the complaints should be separated so each matter should be properly investigated and resolved individually.

Employee v. non-employee/student complaints

Q: An employee has filed an unlawful discrimination complaint against another fellow employee. Would this be a non-employment complaint since it doesn't involve discrimination in the hiring, compensation/benefits or post-hiring process?

A: No, any employment complaint, including those brought by employees against a fellow employee, should be treated as an employment complaint. The Title 5 regulations require that the district notify employment complainants of the right to file the same complaint with the Department of Fair Employment and Housing (DFEH). If the complaint is a matter that the DFEH would normally handle, such as workplace hostility or harassment, then the matter should be considered as an employment complaint.

Multiple extension requests

Q: Can a district request multiple extensions to complete an investigation and render the administrative determination?

A: Yes, a district may request for multiple extensions because the Title 5 regulations do not expressly limit the number of extension requests a district may make. However, when presented with a second 90-day extension request, the Chancellor's Office must review the

reasoning for the request to determine if a second extension would be prejudicial to the investigation.

Interviewing witnesses

Q: Will the Chancellor’s Office find a reasonable cause violation if a witness is not interviewed?

A: Possibly, depending on whether the witness is viable. The regulations require that a district interview all “viable witnesses” during its investigation. In determining whether this requirement is met, the Chancellor’s Office will look at the witnesses mentioned in the complaint and determine whether each witnesses would be deemed viable – that is, would the witness be able available and willing to provide substantive and valuable information on the matter, and would it be practical to interview the witness?

The viability analysis is threefold. First, the district must ask whether a witness is available to provide testimony. Is the district privy to the witness’ information and can the witness be located to give testimony? If a witness cannot be located, then the witness is unavailable and thus not viable.

Secondly, if the witness is available, would the witness be able to provide relevant and material information? If the answer is no, then districts should not be required to interview the witness because investigations should be prompt and help promote resolution.

Lastly, investigators need to determine if it is practical to interview the witness. As previously mentioned, witnesses may be protected by certain employment or non-disclosure laws. When dealing with a protected witness, the Title 5 regulations do not grant districts subpoena power, nor do the regulations require districts to invoke the judicial process to comply with this requirement.

Districts should list all witnesses in their investigative report and notate if the witnesses were interviewed or not, along with the justification for not interviewing a particular witness.

Local governing board’s decision

Q: Does the local governing board need to give a justification for its acceptance or denial of the district’s administrative determination?

A: No, the local governing board’s role is to review all the necessary documents regarding the matter and render a decision to either uphold or reverse the district’s determination. Title 5 does not require the board to provide its justification or reasoning.

TTN/PVK