

# External Report re: District Response to Title IX Report

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Palo Alto Unified School District

Gina Maisto Smith, Esq.  
Leslie Gomez, Esq.



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## **I. Executive Summary**

In May 2017, the Palo Alto Unified School District (the District) engaged Cozen O'Connor to conduct an external review of the District's response to a Title IX report at the Palo Alto High School from the 2016-2017 academic year to determine how the matter was handled, and whether it was handled in accordance with applicable federal laws, state laws and Board policies.

The Title IX report in question concerned a fall 2016 report by a Palo Alto High School (PAHS or the School) student (the Complainant). In the fall semester of the 2016-2017 academic year, the Complainant reported a Title IX-related incident to members of the PAHS Administration. PAHS administrators immediately reported the incident to the Palo Alto Police Department and later that evening, to Santa Clara County Child Protective Services. The School also notified the Complainant's family, conducted an initial investigation into the incident, imposed interim and ongoing remedial and supportive measures for the Complainant, and within several days of the report, imposed protective measures and disciplinary action against the Respondent, another PAHS student.

The School did not, however, provide the Complainant with information about procedural options under the Uniform Complaint Procedures (UCP), complete the investigation into the incident, or provide the Complainant or Respondent with written notice of the outcome of the investigation, all of which are required under both Title IX of the Education Amendments of 1972 (Title IX) and the UCP. Several weeks later, when the Complainant subsequently reported concerns about harassment by other students, the School took immediate steps to address the Complainant's concerns, but did not identify the reported conduct as potential harassment or retaliation under Title IX, did not coordinate all available information, and again did not provide the Complainant with information about procedural options under the UCP. The Complainant transferred from the District for the second semester. Despite concerns that the withdrawal may have been tied to the impact of the reported Title IX incident, the School again did not provide the Complainant with information about procedural options under the UCP.

The Complainant's parent/guardian subsequently filed a UCP with the District at the end of March 2017. In early April 2017, the School engaged an external investigator to address the issues raised in the UCP. The UCP investigation was concluded in August 2017, and the findings were communicated to the parties in writing by the District's Title IX Coordinator. Relevant documents regarding the School's response to this report were also shared with the U.S. Department of Education's Office for Civil Rights (OCR).

In sum, we find that the District's response to the 2016 Title IX report did not comport with key aspects of Title IX, state law, Board policy and the District's administrative regulations. While School administrators took timely action to respond to the Complainant's report, they did not provide the Complainant with the full range of procedural options available under Title IX, state law, Board policy and administrative regulations. The initial steps, which included a limited investigation, the provision of support and remedial measures, and the imposition of a disciplinary sanction against the Respondent were insufficient to meet the District's obligations under Title IX, state law and Board policy. Moreover, this incident reflected systemic concerns about the application of Title IX and Board policy given our observations about the role of the

Title IX Coordinator, the level of supervisory authority exercised, the coordination of information and personnel, and the failure to follow written policies in practice.

## II. Scope of Engagement

Cozen O'Connor was engaged by the Palo Alto Unified School District for two matters.<sup>1</sup> First, on May 11, 2017, in connection with implementation of the voluntary Resolution Agreement with the U.S. Department of Education's Office for Civil Rights (OCR Cases Nos. 09-13-5901 and 09-14-1217), Cozen O'Connor was engaged to conduct an independent and external investigation as set forth in Section E of the Resolution Agreement, which provides that the District engage "an Independent Investigator approved by OCR in collaboration with the District's Title IX Coordinator under the District's UCP."<sup>2</sup>

Second, on May 31, 2017, Cozen O'Connor's initial engagement was expanded to include an external review of the District's response to a Title IX report at the Palo Alto High School during the 2016-2017 academic year to determine how the matter was handled, and whether it was handled in accordance with applicable federal laws, state laws and Board policies. Our engagement did not include a determination as to whether the Respondent's reported conduct in the underlying incident violated Title IX, state law or Board policy.<sup>3</sup>

This report addresses the second engagement: whether the District's response to a fall 2016 Title IX report comported with applicable federal laws, state laws and Board policies. For the reasons outlined below, we find that the District's response did not comport with applicable federal laws, state laws and Board policies.

Cozen O'Connor was engaged to conduct a thorough, fair and impartial investigation. As part of the investigation, we interviewed current and former administrators at the School and District. In addition, we reviewed all available School and District documents related to this incident. In summary, those documents included handwritten notes, letters, timelines and other materials compiled by School or District administrators; text messages and email correspondence; records of phone calls and text messages; court orders; student education records; the external investigator's report; the UCP Complaint Reporting Form; mandatory child abuse reporting

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<sup>1</sup> In addition, John DiPaolo, Esq., is currently serving at the District's Interim Title IX Coordinator.

<sup>2</sup> Section E requires the District to investigate "reports the District received during the 2013-2014 school year that the former principal at Palo Alto High School (PAHS) sexually harassed students," "reports the District received in 2007 and 2013 regarding a former teacher at PAHS who had been subject to investigations regarding alleged crossing of professional boundaries for the purpose of cultivating an inappropriate relationship with former student(s)," and "reports the District received of an off-campus sexual assault during the 2012-13 school year and the March 2014 off campus incident related to PAHS." Section E also provides that "[t]he District will review the behavioral incident reports the District received at both Gunn and Palo Alto High School for the 2012-2013, 2013-2104, 2014-2015, and 2015-2016 school years." Finally, Section E requires the District to provide relevant documentation "related to the two alleged incidents of sexual harassment reported to OCR during the spring semester of the 2015-2016 school year at Ohlone and PAHS."

<sup>3</sup> While the issues overlap, this engagement is separate and distinct from the UCP investigation in response to the March 2017 complaint by the Complainant's parent/guardian. The underlying circumstances of the initial report have been investigated by both the Palo Alto Police Department and an external investigator engaged by the District in April 2017 in response to the Complainant's UCP. The findings of both investigations have been communicated to the Complainant and the Respondent. Accordingly, this review is limited to the District's response to the report, and we make no finding as to the underlying incident.

form; Wellness Services records; interview notes; a witness' written statement; administration team meeting minutes; Board minutes; and information provided by members of the community.

We sought to speak with the Complainant, who declined to participate in the investigation. There is sufficient information in the record, however, to identify the gravamen of the Complainant's concerns about the District's response to the Title IX report. We also reviewed concerns raised by the Respondent based on issues identified in correspondence and through interviews. As noted above, we were not engaged to determine the facts of the underlying incident.

At the conclusion of our investigation, on September 13, 2017, Cozen O'Connor presented a detailed, annotated working chronology of the District's response to the Board to enable the Board to consider and evaluate personnel issues related the facts gathered in this matter.<sup>4</sup> The facts gathered in that chronology provide the foundation for the findings and observations in this report. Because the working chronology includes personally identifiable information about the Complainant, Respondent, and other students, the release of that information is precluded by the Family Educational Rights and Privacy Act (FERPA).<sup>5</sup> Accordingly, those details are not included in this report. As appropriate, and where it can be done without disclosing personally identifiable information, this report does include references to key events during the chronology to place the findings and observations in context.

### **III. Legal and Regulatory Framework**

The District's response to sexual and gender-based harassment and violence is governed by federal law and guidance, state law and Board policies. An effective response to sexual and gender-based harassment and violence requires a nuanced understanding, integration and coordination of this complex framework. This section provides a high level overview of the key provisions of each law in place at the time of the report under review. The Appendix provides a more in depth discussion of the District's obligations under these laws.

At their core, an integrated synthesis of federal law, state law and Board policies includes the following key elements for compliance:

- A written notice of non-discrimination;
- Centralized oversight of the District's response to sexual and gender-based harassment and violence;
- Written policies and procedures that govern the District's response to sexual and gender-based harassment and violence;
- Clear protocols for the reporting of sexual and gender-based harassment and violence, both internally within the School and District, and externally to law enforcement or child protective services;

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<sup>4</sup> Cozen O'Connor makes no personnel recommendations in this matter; personnel decisions are within the province of the District.

<sup>5</sup> 20 U.S.C. §§ 1232g et. seq.

- Provision of information to a complainant and respondent about resources and procedural options for the investigation and resolution of complaints sexual and gender-based harassment and violence;
- Prompt and equitable grievance procedures for the investigation and resolution of complaints involving sexual and gender-based harassment and violence;
- Written notice of outcome to the parties of the resolution of complaints involving sexual and gender-based harassment and violence;
- Documentation of all complaints of sexual and gender-based harassment and violence and their manner of resolution;
- Steps to eliminate, prevent and address the effects of sexual and gender-based harassment and violence, including the imposition of interim measures, sanctions and ongoing remedies; and,
- Education and training for students and employees.

Notwithstanding these common elements, there are jurisdictional differences between Title IX, the Education Code and Board policy, which require close and careful reconciliation as to the District's obligation to respond to and investigate reports about off campus conduct.

**A. Federal Law and Guidance: Title IX of the Education Amendments Act of 1972**

Title IX is a federal civil rights law that provides no “person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>6</sup> Title IX prohibits discrimination on the basis of sex in all of an institution's programs and activities, including an institution's education programs and activities and in employment.<sup>7</sup> Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct, and sexual violence.<sup>8</sup> Title IX's protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that create or contribute to a hostile environment.

Title IX's implementing regulations require that educational institutions publish a non-discrimination statement;<sup>9</sup> appoint a Title IX Coordinator;<sup>10</sup> and adopt grievance procedures that are prompt and equitable.<sup>11</sup> For grievance procedures to be prompt and equitable, an institution must provide notice to students and employees of the grievance procedures, including where

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<sup>6</sup> 20 U.S.C. § 1681(a).

<sup>7</sup> See generally 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106.

<sup>8</sup> U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, April 4, 2011 (2011 DCL) at 1.

<sup>9</sup> 34 C.F.R. § 106.9.

<sup>10</sup> 34 C.F.R. § 106.8(a).

<sup>11</sup> 34 C.F.R. § 106.8(b).

complaints may be filed, and that the grievance procedures apply to complaints filed by any individual alleging sexual or gender-based harassment or violence carried out by students, employees, or third parties.<sup>12</sup> The procedures must include: provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and evidence; designated and reasonably prompt time frames for the major stages of the complaint process; written notice to the complainant and respondent of the outcome of the complaint; and assurance that the institution will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.<sup>13</sup>

Once an institution has notice of an allegation of sexual or gender-based harassment or violence allegation, it must promptly take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures while the investigation is pending.<sup>14</sup> The institution's Title IX obligations exist regardless of whether the individual who was harassed makes a complaint or asks the institution to take action although the institution may consider a complainant's request for anonymity, or not to pursue an investigation, when determining an appropriate institutional response.<sup>15</sup>

Further, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile educational or working environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred; if an investigation reveals the existence of a hostile educational or employment environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile educational and employment environment, prevent its recurrence and address its effects.<sup>16</sup> An institution violates Title IX if it has "notice" of a sexually hostile educational or employment environment and fails to take immediate and corrective action. In addition, an institution's delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence may subject the complainant to a hostile environment and require the institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately.<sup>17</sup>

A criminal investigation and a Title IX investigation are two distinct processes, each with its own set of procedural protections and legal standards.<sup>18</sup> The purpose of a criminal investigation is to determine whether an individual violated a law, and if so, the individual may be imprisoned or subject to other criminal penalties.<sup>19</sup> In contrast, Title IX investigations have different procedural protections and legal standards.<sup>20</sup> Under Title IX, institutions are required to respond to all complaints of Title IX-related conduct.<sup>21</sup> The Title IX obligation to resolve all complaints

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<sup>12</sup> Title IX Q & A at 12-13.

<sup>13</sup> *Id.*

<sup>14</sup> Title IX Q & A at 32-33.

<sup>15</sup> 1997 Guidance.

<sup>16</sup> *Id.* at 4; 1997 Guidance; Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, April 29, 2014 (Title IX Q & A) at 2-3.

<sup>17</sup> Title IX Q & A at 4.

<sup>18</sup> *Id.* at 27.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

promptly and equitably and to provide a safe and nondiscriminatory environment for all students is not discretionary.<sup>22</sup>

## **B. State Law**

### **1. California Education Code**

The California Education Code contains multiple provisions that direct the District’s response to sexual and gender-based harassment and violence. The Education Code provides:

- a definition of sexual harassment;<sup>23</sup>
- a prohibition against sexual harassment and a requirement for notification of remedies through the publication and distribution of a written sexual harassment policy under the “Sex Equity in Education Act” (SEEA);<sup>24</sup>
- authority for the California State Department of Education to assess compliance with the “Safe Place to Learn Act” (SPLA),<sup>25</sup> which requires a written policy that prohibits discrimination, harassment, intimidation, and bullying based on designated protected classes in all acts related to school activity or attendance occurring within a school in that district, a process for receiving and investigating complaints of the same, documentation of complaints and their resolutions, and a prohibition against retaliation;
- preconditions to the receipt of state financial assistance, which require compliance with the Education Code and the submission of compliance reports to the State Department of Education;<sup>26</sup> and,
- the governing board of each school district has “primary responsibility” for ensuring that school district programs and activities are free from discrimination.<sup>27</sup>

With respect to the discipline of students, the Education Code specifies that a pupil may not be suspended from school or recommended for expulsion unless the principal of the school or the superintendent of the district determines that the pupil has committed an enumerated act, including sexual harassment, sexual assault and sexual battery.<sup>28</sup> Moreover, a pupil cannot be suspended or expelled for any of the above acts *unless* the act is related to a school activity or school attendance.<sup>29</sup> The Education Code clarifies that suspension, whether out-of-school or in-school, shall be imposed only when other means of correction fail, except that a pupil may be suspended upon a first offense if the principal or district superintendent determine that the pupil

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<sup>22</sup> *Id.*

<sup>23</sup> Cal. Ed. Code § 212.5.

<sup>24</sup> Cal Ed. Code §§ 221.5-231.5

<sup>25</sup> Cal. Ed. Code §§ 234-234.5.

<sup>26</sup> Cal Ed. Code §§ 250-253.

<sup>27</sup> Cal Ed. Code §§ 260-262.4.

<sup>28</sup> Cal. Ed. Code §§ 48900 (a) through (r)

<sup>29</sup> Cal Ed. Code § 48900 (s).

violated one of the first five provisions<sup>30</sup> in § 48900 or if the pupil's presence causes a danger.<sup>31</sup> Suspension or expulsion also require notice to law enforcement for certain acts.<sup>32</sup>

Finally, the Education Code requires school districts to inform teachers of pupils who have engaged in or are reasonably suspected to have engaged in designated acts.<sup>33</sup>

**2. California Code of Regulations: The Uniform Complaint Procedure – Cal. Code Regs., tit. 5, §§ 4600-4671**

California's Uniform Complaint Procedure (UCP)<sup>34</sup> specifies when and how an individual, public agency, or organization alleging a violation of federal or state education law can file a complaint to the California Department of Education (CDE). Under the UCP, the CDE processes appeals of local educational agency's (LEA) decisions on UCP complaints. In certain specified situations, the CDE may intervene directly and investigate the allegations in the complaint.<sup>35</sup>

**3. Mandatory Child Abuse Reporting Laws – Cal. Penal Code § 11164 et seq.**

The "Child Abuse and Neglect Reporting Act" (CANRA) requires certain professionals, identified in the statute as "mandated reporters," to report known or suspected instances of child abuse or neglect to law enforcement.<sup>36</sup>

Under CANRA as it applies to the K-12 school setting, teachers, instructional or teacher's aides or assistants, classified school employees, certified pupil personnel employees, administrators, social workers, counselors, school police or security officers, psychiatrists, psychologists, licensed nurses, family therapists, drug and alcohol counselors, coaches, assistant coaches, and athletic administrators.<sup>37</sup>

CANRA requires mandated reporters to make a report whenever, in their professional capacity or within the scope of their employment, they have knowledge of, or observe a child (defined as a person under 18) whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. "Reasonable suspicion" occurs when it is objectively reasonable for a person, based upon facts that could cause a reasonable person in a similar position, to suspect child abuse or neglect.

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<sup>30</sup> See Cal. Ed. Code §§ 48900 (a) through (e), addressing generally: a) physical injury, b) possession of a firearm, knife or explosive, c) possession, sale or use of a controlled substance, alcohol or other intoxicant, d) negotiation or sale of a controlled substance, alcohol or other intoxicant with delivery of the actual or a look-alike substance, or e) robbery or extortion.

<sup>31</sup> Cal Ed. Code § 48900.5.

<sup>32</sup> Cal Ed. Code § 48902.

<sup>33</sup> Cal Ed. Code § 49079.

<sup>34</sup> The UCP is codified at Cal. Code of Regs., tit. 5, §§ 4600-4671.

<sup>35</sup> See the California Department of Education's "Uniform Complaint Procedure brochure" available at <http://www.cde.ca.gov/re/cp/uc/> (last accessed Sep. 11, 2017).

<sup>36</sup> Cal. Penal Code § 11165.9.

<sup>37</sup> Cal. Penal Code § 11165.7.



#### **4. California Penal Code<sup>38</sup>**

The California Penal Code contains definitions of criminal conduct, which intersect with the Education Code and other state laws.

#### **5. Welfare and Institutions Code: Inspection of Juvenile Court Records – Cal. Welfare & Inst. Code § 827**

Under the California Welfare and Institutions Code, juvenile case files may only be inspected by designated individuals.<sup>39</sup> Notwithstanding the general proscription against releasing juvenile court files, records indicating that a minor enrolled in a public school has been found to have committed any felony or any misdemeanor involving curfew, gambling, alcohol, drugs, tobacco products, carrying weapons, a specified sex offense,<sup>40</sup> assault or battery, larceny, vandalism, or graffiti, must be released in writing from the court to the district superintendent within seven days. The superintendent must then relay the information to the school principal who will disseminate the information to teachers or administrators who directly supervise or report on the behavior of the minor in question.<sup>41</sup>

#### **C. PAUSD Board Policies (BP) and Administrative Regulations (AR)**

The District maintains numerous Board Policies (BP) that serve to implement the requirements of state law. Board Policies are accompanied by corresponding Administrative Regulations, which detail the necessary steps for compliance with Board Policies. In some instances, the language in the Board Policy and the Administrative Regulation is the same.

##### **1. Nondiscrimination in District Programs and Activities – BP 0410**

PAUSD Board Policy 0410 prohibits discrimination based on designated protected classes, including gender, sex, sexual orientation, gender identity or expression. Under BP 0410, the Superintendent<sup>42</sup> or their designee must annually review district programs and activities to ensure the removal of any barrier that may unlawfully prevent an individual or group in any protected category from accessing district programs, activities, or facilities; take prompt, reasonable

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<sup>38</sup> Under California law, a person who commits any of the below-referenced acts, except for Sexual Battery, against someone who is 14 or younger and at a time when the perpetrator is more than seven years older than the victim also commits the crime of “Aggravated Sexual Assault of a Child.” Cal. Penal Code § 269. Because the facts in this matter do not raise a potential violation of this law, it is not discussed here. Similarly, a person over 18 who engages in sexual intercourse, Sodomy, Oral Copulation, or sexual penetration with a child who is 10 or younger commits the crime of “Sexual Intercourse/Sodomy/Oral Copulation/Sexual Penetration with a Child.” Cal. Penal Code § 288.7. Because the facts do not raise a potential violation of this law, it is not discussed here.

<sup>39</sup> Cal. Welfare & Inst. Code § 827.

<sup>40</sup> Cal. Welfare & Inst. Code § 827 references Cal. Penal Code § 290, which lists the sex offenses requiring registration and encompasses, generally, rape, sodomy, lewd or lascivious acts, oral copulation, forcible penetration, and related acts.

<sup>41</sup> Cal. Welfare & Inst. Code § 827(b)(2). Additional details about the confidentiality of the information and the consequences for breaching that confidentiality are detailed at § 827(b)(2)(A) through (C).

<sup>42</sup> When used in the PAUSD BP/AR context, “Superintendent” refers to the PAUSD Superintendent as opposed to the State Superintendent of Public Instruction.

actions to remove any identified barrier; report their findings and recommendations to the PAUSD Board after each review; and must notify designated community members about the PAUSD nondiscrimination policies and related complaint procedures.<sup>43</sup>

## **2. Complaints Concerning District Employees – BP/AR 1312.1**

PAUSD Board Policy 1312.1 specifies that the PAUSD Board “accepts responsibility for providing a means by which the public can hold employees accountable for their actions.”

Administrative Regulation 1312.1 states that PAUSD must notify designated community members of its complaint procedures, including the opportunity to appeal to the California Department of Education. AR 1312.1 requires that any written and signed complaint be processed in accordance with the policy if it alleges a violation of federal or state laws or regulations or unlawful discrimination on the basis of actual or perceived sex, sexual orientation, gender identity, gender expression, or other enumerated classes. The investigation and written report must be completed within 60 calendar days, although alternative means of resolution are allowed and encouraged.

## **3. Uniform Complaint Procedures (UCP) – BP/AR 1312.3**

PAUSD Board Policy 1312.3 recognizes that PAUSD “has the primary responsibility to ensure compliance with applicable state and federal laws and regulations governing educational programs.” The Board Policy and Administrative Regulations specify that the UCP will be used to investigate and resolve complaints for enumerated forms of misconduct, including any complaint alleging the occurrence of unlawful discrimination (including discriminatory harassment, intimidating, bullying or retaliation) against any person in district programs or activities based on actual or perceived characteristics of sex, sexual orientation, gender, gender identity, gender expression, or other enumerated protected characteristics.

Board Policy 1312.3 requires the following:

- The Superintendent or designee must provide training to district staff to ensure awareness and knowledge of current law and related requirements, including the steps and timelines specified in BP/AR 1312.3
- The Superintendent or designee must maintain records of all UCP complaints and investigations and must destroy those records “in accordance with applicable state law and district policy.”

Administrative Regulation 1312.3 identifies the compliance officer who “shall receive and investigate complaints” as “Associate Superintendent – Educational Services.” The Administrative Regulation states that the Superintendent or designee will ensure that the compliance officer and other designated investigators “receive training and are knowledgeable about the laws and programs for which they are responsible.”

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<sup>43</sup> This requirement is consistent with 34 CFR §§ 104.8 and 106.9.

Under AR 1312.3, complaints alleging unlawful discrimination, including discriminatory harassment, intimidation and/or bullying shall be investigated using the UCP regardless of whether the alleged harassment occurred on or off campus. Further, the UCP states that when the conduct is reported to have occurred against an individual off campus, the District Compliance Officer (Title IX Coordinator) shall investigate and document the activity and shall identify specific facts and circumstances that explain the impact or potential impact on school activity, school attendance, or the subject of the complainant's educational performance.

AR 1312.3 details the following procedural steps in resolving a UCP:

- Any student, parent/guardian, third party, or other person or organization who believes that they or another student or group has been subjected to unlawful discrimination on or off campus may 1) report the conduct orally to any school employee or administrator, and/or 2) file a written complaint under these procedures;
- A staff member who receives an oral report alleging discrimination, harassment, intimidation, or bullying, must notify the principal or site designee within one day of receiving the report;
- The principal/designee who receives such a report must inform the person who made the initial oral report of the resolution options available under the UCP, including the right to file a written complaint;
- Within two days of receiving a written complaint, the receiving administrator must send it to the District Compliance Officer;
- After a report or complaint is made, the principal, designee or Compliance Officer shall determine whether interim measures are necessary to stop, prevent, or address the effects of discrimination, including intimidation, harassment or bullying;
- After a report or complaint is made, the principal, designee or Compliance Officer may engage in informal efforts to resolve the complaint;
- If the matter is *not* going to be resolved informally, the Compliance Officer will initiate an impartial investigation within five school days of receiving a formal complaint;
- The Compliance Officer must describe the complaint procedure to the Complainant and their parent/guardian, discuss what actions are being sought in response to the complaint, provide the Complainant with an opportunity to describe the incident, identify witnesses, and provide other evidence and information, and keep the information about the complaint confidential except as necessary to carry out the investigation or take other subsequent necessary action;
- The Compliance Officer must interview individuals who have relevant information including the Respondent, witnesses, and anyone mentioned as having relevant information;
- The Compliance Officer must review any records, notes, or statements related to the complaint;
- The Compliance Officer will document their information gathering and will maintain that documentation for at least two years; and
- Within 60 calendar days of receiving the complaint, the Compliance Officer will conclude the investigation and will prepare a written report of their findings that contains

findings of fact, determination whether unlawful discrimination has occurred, the rationale, any corrective actions, the prohibition against retaliation and appeal rights.

In addition to outlining the procedural steps in the UCP, AR 1312.3 addresses 1) remedial actions that may result from a report or complaint<sup>44</sup> and 2) disciplinary actions that may result from a finding that the Respondent engaged in discriminatory conduct.<sup>45</sup>

#### **4. Conduct – BP 5131**

PAUSD Board Policy 5131 states that PAUSD “believes that all students have the right to be educated in a positive learning environment free from disruptions” and that “students should be expected to exhibit appropriate conduct that does not infringe upon the rights of others or interfere with the school program” while on school grounds, going to or from school, while at school activities, while using school transportation, or off-campus during non-school hours if such conduct poses a threat or danger to the safety of students, staff or district property or substantially disrupts school.

Board Policy 5131 requires the Superintendent or designee to ensure that each school 1) develops standards of conduct and discipline consistent with board policies and administrative regulations and 2) notifies students and parents/guardians about the district and school rules related to conduct.

Board Policy 5131 defines enumerated forms of prohibited student conduct, including discrimination, harassment and/or intimidation of students or staff, sexual harassment, or any other verbal, written or physical conduct that causes or threatens to cause violence, bodily harm or substantial disruption. Under BP 5131, a student who violates school rules or regulations may be subject to discipline in the forms of suspension, expulsion, transfer to alternative programs, referral to a student success team or counseling services, denial of participation in extracurricular or co-curricular activities or other privileges, or other measures as appropriate.

#### **5. Bullying Prevention – BP/AR 5131.2**

BP/AR 5131.2 prohibits bullying, defined consistent with California law as “any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of electronic act, and including one or more acts committed by a pupil or group of pupils that constitutes sex harassment, hate violence or creates an intimidating or hostile educational environment directed at one or more pupils<sup>46</sup>:

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<sup>44</sup> Remedial actions include interventions for the Respondent such as parental notification, counseling, training, or discipline, and interventions for the Complainant such as counseling and academic support. Remedial actions also include separating the Complainant and Respondent (as long as such separation does not penalize the Complainant), following up to ensure that the discriminatory conduct has stopped, training, and other interventions for the larger school community to ensure that all community members understand the types of behavior that constitute discrimination.

<sup>45</sup> Disciplinary actions include warnings, mandatory training, counseling, suspension, transfer, and expulsion. Suspension and recommendations for expulsion must follow applicable law.

<sup>46</sup> Defined consistent with Cal. Ed. Code 48900(r), discussed above.

BP 5132.2 specifically addresses “cyberbullying,” defined as the transmission of harassing communications, direct threats, or other harmful texts, sounds or images or breaking into another person’s electronic account and assuming that person’s identity to cause harm to that person’s reputation.<sup>47</sup> BP 5132.2 also prohibits “sexting” with a minor (i.e. sending a message to a minor where the message contains matter that is sexual in nature with the intent of seducing the minor).<sup>48</sup> BP 5132.2 specifies that complaints alleging bullying based on a protected characteristic (see list in BP 0410) will be addressed under BP/AR 1312.3 (UCP).

Under BP 5132.2, students who are found to be engaged in bullying (which includes sexual harassment) on school premises or off-campus in a manner that causes or is likely to cause a substantial disruption of a school activity or school attendance will be subject to discipline, which may include suspension or expulsion.

## **6. Child Abuse Prevention and Reporting – BP/AR 5141.4**

Board Policy 5141.4 sets forth the Board’s commitment to “supporting the safety and well-being of district students and desires to facilitate the prevention of and response to child abuse and neglect.” The operative definitions, procedures and obligations regarding child abuse and neglect are set forth in Administrative Regulation 5141.4.

AR 5141.4 requires mandated reporters to report child abuse or neglect. As noted above, California law defines “mandated reporter” broadly and inclusively; in the context of a school setting, the term captures, *inter alia*, teachers, instructional aides, teacher’s assistants, classified employees, athletic coaches, directors and administrators. Child abuse and neglect includes, when committed by anyone against a person under the age of 18, sexual abuse, including sexual assault or sexual exploitation, physical injury or death inflicted by other than accidental means, neglect, willful harming or injuring of a child, and unlawful corporal punishment.<sup>49</sup> Sexual assault includes rape, statutory rape, rape in concert, incest, sodomy, lewd or lascivious acts upon a child, oral copulation, sexual penetration and child molestation.

A mandated reporter must report when, in their professional capacity or in the scope of their employment, they have knowledge of or observe a child who they know or reasonably suspect has been the victim of child abuse or neglect. Reasonable suspicion is an objective reasonable person standard; the obligation does not require certainty. A mandated reporter must immediately or as soon as practicable make an initial report to the appropriate agency or to law enforcement including any police department (except the school district’s police department), the sheriff’s department, the county probation department or the county welfare department. Employees reporting child abuse or neglect are encouraged, but not required, to notify their principal of the report. The principal, if notified, shall inform the district’s superintendent.

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<sup>47</sup> BP 5131.2 also prohibits conduct in violation of Cal. Penal Code §§ 653.2, which makes it a crime for a person to distribute personal identity information electronically with the intent to cause harassment by a third party or to threaten a person’s safety by posting personal information online (e.g. placing a person’s picture or address online so that he receives harassing messages).

<sup>48</sup> BP 5131.2’s prohibition against “sexting” with a minor refers to Cal. Penal Code § 288.2 which is discussed below.

<sup>49</sup> Any mandated reporter who knows or reasonably suspects that a child is suffering serious emotional damage may make a report.

## 7. Discipline – BP/AR 5144

Board Policy 5144 states the Board’s commitment to “providing a safe, supportive, and positive school environment which is conducive to student learning and to preparing students for responsible citizenship by fostering self-discipline and personal responsibility.” The operative definitions, procedures and obligations regarding discipline are found in Administrative Regulation 5144.

AR 5144 allows each school to establish “site-level” rules that are consistent with district policies and administrative regulations. AR 5144 contains a list of suggested “disciplinary strategies” for use in resolving alleged violations of school rules. The Administrative Regulation contains the following statement:

*To the extent possible, staff shall use disciplinary strategies that keep students in school and participating in the instructional program. Except when a student’s presence causes a danger to himself/herself or others or he/she commits a single act of a grave nature or an offense for which suspension or expulsion is required by law, suspension or expulsion shall be used only when other means of correction have failed to bring about proper conduct.*

## 8. Suspension and Expulsion Due Process – BP/AR 5144.1 and 5144.2

Board Policy 5144.1 states “the grounds for suspension and expulsion and the procedures for considering, recommending, and/or implementing suspension and expulsion shall be only those specified in law and the accompanying administrative regulation.” Consistent with BP/AR 5144, BP 5144.1 limits the availability of suspension and expulsion to specified circumstances or instances in which other interventions have failed. The definitions, procedures and obligations regarding suspension and expulsion are found in Administrative Regulation 5144.1 (related to all students) and Administrative Regulation 5144.2 (related to students with disabilities).

AR 5144.1 also provides that the Superintendent, principal or designee shall immediately suspend any student found at school or at a school activity to be: committing or attempting to commit a sexual assault as defined in Penal Code 261, 266c, 286, 288, 288a or 289, or committing a sexual battery as defined in Penal Code 243.4. In addition, the Superintendent, principal or designee may impose a suspension upon a first offense if they determine the student’s presence causes a danger to persons.

Under AR 5144.1, acts for which a student—including a student with disabilities—may be suspended or expelled are limited to the enumerated categories of behavior.<sup>50</sup> AR 5144.2 outlines procedures that apply for students with disabilities pursuant to the Individuals with Disabilities Education Act (IDEA). Under AR 5144.2, students with disabilities are provided with additional protections in the suspension and expulsion processes, including a “manifestation

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<sup>50</sup> These categories are the same as those discussed above in section B.1(c), discussing Cal. Ed. Code §§ 48900 et seq.

determination” for a suspension lasting more than 10 consecutive school days. A manifestation hearing examines the relationship between the student’s disability and the behavior subject to the disciplinary action.

**9. Questioning and Apprehension by Law Enforcement – BP/AR 5145.11**

Board Policy 5145.11 states that “law enforcement officers may interview and question students on school premises and may remove them when appropriate.” BP 5145.11 permits law enforcement officers to interview students on campus, but states that the principal or designee must request the officer’s identity, their official capacity, and the legal authority under which the interview is to be conducted. The principal or designee must maintain a record of all documentation relative to law enforcement interviews of students. Except in cases of alleged child abuse or neglect, the principal or designee must attempt to notify the student’s parent/guardian as soon as possible if the student is interviewed by law enforcement or removed from school into the custody of law enforcement.

**10. Nondiscrimination / Harassment – BP/AR 5145.3**

Board Policy 5145.3 prohibits “at any district or school activity ... unlawful discrimination, including harassment, intimidation and/or bullying of any student, based on actual or perceived characteristics of race or ethnicity, color, nationality, national origin, ethnic group identification, age, religion, physical or mental disability, sex, sexual orientation, gender, gender identity, gender expression, or any other [protected] characteristic or based on association with a person or group with one or more of these actual or perceived characteristics.”

For incidents of alleged harassment, intimidation, and/or bullying that occur off campus, if the effects of the conduct result in harassment, intimidation or bullying at school that is sufficiently serious to interfere with or limit the targeted student’s ability to participate in or benefit from the education program, the school must respond promptly and effectively to eliminate the harassment that occurs at school, prevent its recurrence, and address its effects. Such response may include discipline of the alleged harasser in accordance with applicable law and as provided in BP/AR 5144.

AR 5145.3 requires the Superintendent or designee to publicize the district’s nondiscrimination policy and related complaint procedures and provide students, employees, volunteers and parents/guardians with age-appropriate training and information about the district’s nondiscrimination policy.

**11. Sexual Harassment – BP 5145.7**

Board Policy 5145.7 contains the same definition of sexual harassment that appears at Cal. Ed. Code § 212.5. BP 5145.7 lists examples of conduct that may constitute sexual harassment, including but not limited to unwelcome leering, unwelcome sexual slurs, sexual jokes, derogatory posters, spreading sexual rumors, unwanted grabbing or fondling, displaying sexually suggestive objects, sexual assault or sexual battery, dating violence, stalking, and relationship abuse.

BP 5145.7 requires the Superintendent or designee to ensure that all District students receive age-appropriate instruction and information on sexual harassment, including:

- What acts constitute sexual harassment,
- A clear message that students do not have to endure sexual harassment,
- Encouragement for bystanders to report instances of sexual harassment,
- Information about the district's procedure for investigating complaints (the UCP), and
- Information about the rights of students and parents/guardians to file a criminal complaint, as applicable.

BP 5145.7 requires the Superintendent or designee to maintain records of all reported cases of sexual harassment to enable the District to monitor, address, and prevent repetitive harassing behavior in its schools.

BP 5145.7, Sexual Harassment, provides that any student who engages in sexual harassment or sexual violence at school or at a school sponsored or school-related activity shall be subject to disciplinary action, which may include suspension and/or expulsion.

Like BP 5145.3, BP 5145.7 provides that for incidents of alleged harassment, intimidation, and/or bullying that occur off campus, if the effects of the conduct result in harassment, intimidation or bullying at school that is sufficiently serious to interfere with or limit the targeted student's ability to participate in or benefit from the education program, the school must respond promptly and effectively to eliminate the harassment that occurs at school, prevent its recurrence, and address its effects. Such response may include discipline of the alleged harasser in accordance with applicable law and as provided in BP/AR 5144.

#### **IV. Findings and Observations**

During the 2016-2017 academic year, and at all relevant time periods in this review, the District's Title IX response was overseen by the District's Assistant Superintendent for School Support Services, who also served as the District's Title IX Coordinator.<sup>51</sup> The Title IX Coordinator reported to the Superintendent, and worked closely with the administrative teams at the schools within the District, including the Principal and Assistant Principals at PAHS.

##### **A. Ongoing Monitoring by OCR**

During the course of the District's response to this matter, the U.S. Department of Education's Office for Civil Rights (OCR) was engaged in an active investigation of the District's compliance with Title IX. As part of that investigation, the District was required to produce documents, including policies and investigation records. District employees were also interviewed by OCR, and as part of the resolution of the complaint, District employees worked with OCR to negotiate a Resolution Agreement.

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<sup>51</sup> As of June 9, 2017, the Assistant Superintendent for School Support Services is no longer employed by the District.



On March 8, 2017, OCR resolved the Title IX investigation of PAUSD. As noted above, the resolution included a Resolution Agreement requiring the District to take certain actions and enter into a monitoring period by OCR. As part of its monitoring responsibilities, OCR reviewed the documents related to Title IX report that is the subject of this investigation and on August 14, 2017, OCR made the following observations:

- After receiving notice of the Complainant’s concerns about the incident with the Respondent, “the District conducted its own prompt investigation and immediately alerted local law enforcement;”
- The District completed its investigation within seven days and imposed disciplinary consequences under the Education Code for the Respondent;
- The District did not communicate the findings of the investigation to the Complainant or the Respondent;
- The District did not inform the Complainant or their parent/guardian of the available grievance procedures under the UCP, but rather “in consultation with counsel but not with the parent/guardian, the District determined that a formal investigation was not necessary;”
- The District took several interim and remedial measures, including moving the Complainant out of shared classes with the Respondent, offering counseling services to the Complainant, changing the Respondent’s schedule, limiting the Respondent’s access to certain campus activities, prohibiting the Respondent from communicating with the Complainant, and taking steps to enforce a civil temporary restraining order issued against the Respondent;
- In response to a subsequent concern raised by the Complainant, the District interviewed relevant students, instructed the students to refrain from certain actions, and followed up with the Complainant to assess whether the conduct had stopped;
- The District did not, however, inform the Complainant or their parent/guardian of the available grievance procedures under the UCP related to this subsequent concern;
- Upon learning that the Complainant was moving to a different district, the District spoke with the Complainant’s parent/guardian, but again, did not inform the Complainant or their parent/guardian of the available grievance procedures under the UCP related to circumstances underlying the withdrawal; and,
- Upon receipt of additional information about the Respondent, the District did not conduct a timely assessment of the impact of that information on its Title IX obligation to prevent further harassment and ensure a nondiscriminatory environment.<sup>52</sup>

**B. Cozen O’Connor’s Observations**

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<sup>52</sup> OCR stated that upon receipt of additional information, it may revise or amend the issues identified and information provided.

Cozen O'Connor's conclusions, in large part, align with the conclusions reached by OCR. Because our lens is broader than Title IX compliance, however, our conclusions are broader in scope.

## 1. Systemic Observations

While this engagement was limited to a close look at the District's response to a specific report, we are able to offer systemic observations about the coordination and integration of Title IX, state law and Board policy compliance functions at the District level. Under AR 5145.3, Nondiscrimination/Harassment, the District's Compliance Officer (Title IX Coordinator) is designated as the employee responsible for coordinating the district's efforts to comply with federal and state civil rights laws, including Title IX. Further, under AR 1312.3, the District's UCP, the "compliance officer shall receive and investigate complaints and shall ensure district compliance." In addition, under the UCP, "[t]he Superintendent or designee shall ensure that the compliance officer and any other employees designated to investigate complaints or otherwise resolve complaints receive training and are knowledgeable about the laws and programs for which they are responsible."<sup>53</sup> As noted above, at the time of this incident, the District had a designated Title IX Coordinator whose responsibility included oversight of all Title IX compliance responsibilities. In light of these provisions, and the facts gathered in our review, we find that the Superintendent and the Title IX Coordinator failed to exercise sufficient oversight of the District's compliance responsibilities under Title IX, state law and Board policy. This lack of oversight is particularly concerning given the context at the time, which involved an ongoing OCR investigation where the District, and in particular, PAHS, were subject to a several year inquiry into how they responded to Title IX complaints.

In addition, Title IX, the Education Code (SPLA) and BP/AR 1312.3 (the UCP) all require that the District maintain appropriate documentation to demonstrate compliance with federal law, state law and Board policy.<sup>54</sup> The SPLA provides that local education agencies must maintain documentation of complaints and their resolutions for a specified period of time. Under the UCP, the Superintendent or designee must maintain records of all UCP complaints and investigations. In addition, BP 5145.11 requires that the principal or designee maintain a record of all documentation relative to law enforcement interviews of students. We find significant concerns in the nature and manner of the District and School's documentation, which impeded the ability to achieve – and evaluate – compliance.

Based on our review of this matter, and the nature and the manner of the District's response to this report, we observe:

- The Title IX Coordinator did not exercise sufficient supervision and centralized oversight over the District's Title IX responsibilities as it relates to the investigation and resolution of Title IX-related reports;

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<sup>53</sup> AR 1312.3.

<sup>54</sup> Title VI's implementing regulations, 34 C.F.R. § 100.6(b) and (c), require that a recipient of Federal financial assistance make available to OCR information that may be pertinent to reach a compliance determination. This requirement is incorporated by reference in the Title IX implementing regulations at 34 C.F.R. § 106.71.

- The District did not coordinate and integrate the application of federal law and guidance, state law and Board policies in its response to reported Title IX conduct;
- With the exception of Board policies and Administrative Regulations, the District did not maintain written or formally developed protocols at the site level for a consistent institutional response to each Title IX report, identification of appropriate steps and application of law, guidance and policy;
- The District maintained insufficient documentation and centralized record keeping, required under both Title IX and Board policy. The lack of sufficient documentation and centralized record keeping impacted the Title IX Coordinator's ability to effectively track and monitor patterns, climate and culture; and,
- School administrators maintained inconsistent formal documentation of Title IX reports and actions taken at the site level:
  - While information was shared at administrative team meetings, there were no efforts to maintain centralized records or consistent documentation that would inform future steps or allow the institution to track patterns or identify potential retaliation or harassment;
  - Some administrators maintained personal notes, timelines and other records, which in some instances, were not contemporaneous or maintained as official School records;
  - The personal notes, timelines and other records were not shared contemporaneously with the Title IX Coordinator;
  - The Wellness Center maintained detailed and contemporaneous notes;
  - Based on training and practice, a common practice was to communicate by telephone or text message to avoid creating documentation that could potentially be publicly released.

We note that since the inception of this investigation, the District has taken steps to begin to remedy these deficiencies. In June 2017, the District appointed an interim Title IX Coordinator, who is exercising supervision and authority over all Title IX reports that are shared with the Title IX Coordinator. The Title IX Coordinator is maintaining documentation of all reports; and, the Title IX Coordinator is offering the UCP to students and their parents/guardians for any reported sexual or gender-based harassment or violence. The District has also provided significant training for District and School employees over the course of the summer, and is working to revise policies and procedures consistent with the requirements of the OCR Resolution Agreement.

## **2. Observations Related to the Specific Response to this Title IX Report**

**a. Internal Reporting**

With respect to the District’s response to the report that is the subject of this review, we find that staff and administrators promptly reported the incident within the supervisory structure at the School and District. This internal reporting was consistent with Title IX, which requires that responsible employees share all reports of sexual and gender-based harassment and violence with the Title IX Coordinator, and with the requirements of the UCP, BP/AR 1312.3, which requires that the receiving administrator forward the report to the principal/designee and the Title IX Coordinator (the District Compliance Officer).

Staff and administrators at the School promptly reported the incident within the supervisory structure as follows:

- An instructional staff member and counselor in the Wellness Center took immediate and responsive action to elevate the Complainant’s report within the School by bringing the report to the attention of the School Resource Officer and Assistant Principal 1;
- Assistant Principal 1 immediately informed the Principal of the report of a “possible sexual assault that occurred on campus;”
- The Principal and two Assistant Principals (1 and 2) informed the Title IX Coordinator of the report on the same day they received the report;
- The Principal promptly informed the Superintendent of the report (with 24 hours of receipt);
- The Superintendent identified the potential need to pursue a UCP and took steps to ensure that the Title IX Coordinator had been informed;
- The Superintendent also informed the Board, within days of the incident, that a student disciplinary issue at the Palo Alto High School was being investigated and may result in a sexual harassment complaint through the UCP;

**b. External Reporting**

We find that staff and administrators at the School promptly reported the incident externally. This external reporting was consistent with state law requirements under CANRA and BP/AR 5141.4:

- The School Resource Officer notified the Palo Alto Police Department, who responded and interviewed the Complainant on the same afternoon the report was shared with the counselor and Assistant Principal 1;

- A school employee made a mandatory report of suspected child abuse to Santa Clara Child Protective Services on the same evening the report was shared with the Palo Alto Police Report.

**c. Centralized Oversight and Determination of Appropriate Response**

We find that the Title IX Coordinator did not exercise oversight or supervision of the District's response to this report, but instead deferred to the administrators on site to investigate and evaluate the appropriate institutional response. As outlined above, once on notice, the District had an independent obligation to investigate or otherwise determine what occurred in light of its Title IX obligation to resolve all complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students. This obligation exists whether or not the complainant makes a complaint or asks the institution to take action.<sup>55</sup> While the Title IX Coordinator did seek legal advice from outside counsel as to the appropriateness of offering the Complainant the UCP, this advice appears to contradict Title IX, Education Code and UCP requirements. Under Title IX, the District was required to investigate or otherwise determine what occurred, to provide the Complainant with information about the District's grievance procedures and available Title IX rights, and to evaluate the appropriate institutional response to eliminate, prevent and address the effects of any sexual and gender-based harassment. Similarly, under the UCP, BP/AR 1312.3, at the beginning of an investigation, the District's Compliance Officer is required to describe the complaint procedure to the Complainant and their parent/guardian, discuss what actions are being sought in response to the complaint, and review records, notes or statements related to the complaint.

Specifically, we find the following:

- While the Title IX Coordinator engaged in conversations and discussion with School and District personnel, the Title IX Coordinator did not create a file, properly evaluate the institution's Title IX responsibilities in light of the report, or conduct a Title IX investigation to determine whether a hostile environment had been created for the Complainant;
- The Title IX Coordinator did not communicate directly with the Complainant, the Respondent or their parents to provide procedural options or resources, including the availability of the UCP, or to discuss Title IX's prohibition against retaliation;
- The Title IX Coordinator did not seek to identify pattern information, evaluate the appropriateness of interim measures, evaluate whether a UCP investigation should be initiated even absent a request by the Complainant, or evaluate whether sufficient information had been gathered to inform steps to eliminate, prevent or address a potential hostile environment.

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<sup>55</sup> See also AR 5145.3, which provides that even if the student chooses not to file a formal complaint, the principal or compliance officer shall implement immediate measures necessary to stop the discrimination and to ensure all students have access to the educational program and a safe educational environment.

We also find that the Principal/designee did not inform the Complainant and their parent/guardian of the resolution options under the UCP, including the right to file a written complaint, as required by AR 1312.3 (the UCP) and AR 5145.3 (Nondiscrimination/Harassment).<sup>56</sup>

#### **d. Investigation**

Along with the failure to offer or pursue the UCP in this matter, we find that the District failed to conduct an investigation as required by Title IX, the Education Code and the UCP. Under Title IX, the District was required to conduct an adequate, reliable and impartial investigation to determine whether sexual harassment and/or a hostile environment have occurred.<sup>57</sup> Similarly, the UCP states that “[t]he District Compliance Officer shall initiate an impartial investigation.”<sup>58</sup> Under the UCP, the Title IX Coordinator (the District’s Compliance Officer) is required to provide the Complainant with an opportunity to describe the incident, identify witnesses, and provide other evidence and information; interview individuals who have relevant information including the Respondent, witnesses, and anyone mentioned as having relevant information; review any records, notes, or statements related to the complaint; and prepare a written report of the findings. Here, none of those steps occurred. While there was an initial investigation at the site level, this does not constitute a formal investigation under the UCP.

We find the following:

- Assistant Principal 1 took appropriate initial steps to triage and identify the nature of the concern raised by the Complainant, but did not conduct a thorough, informed or reliable investigation as required by Title IX, state law and Board policy:
  - School administrators did not use trauma-informed or effective investigation practices;
  - School administrators participated in law enforcement interviews, but did not maintain formal documentation as required by Board policy;
  - School administrators did not conduct a thorough interview of either the Complainant or Respondent that would allow the School to evaluate issues of consent, the potential impact of a power differential between the parties based on age, grade or status, or the welcomeness of the conduct;

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<sup>56</sup> AR 5145.3 provides that the principal or compliance officer must inform the student or parent/guardian of the right to file a formal complaint under the UCP.

<sup>57</sup> The determination as to whether a hostile environment existed is a much broader analysis than whether the underlying conduct occurred.

<sup>58</sup> AR 1312.3. See also BP/AR 5145.3, both of which state, “Upon receiving a complaint of unlawful discrimination, including discriminatory harassment, intimidation, retaliation or bullying of a protected class, the Compliance Officer shall immediately investigate the complaint in accordance with the district’s uniform complaint procedures specified in AR 1312.3 – Uniform Complaint Procedures.” Similarly, under BP 5145.7, “[t]he Superintendent or designee shall ensure that any complaints regarding sexual harassment of students are immediately investigated in accordance with the Uniform Complaint Procedures AR 1312.3”

- Assistant Principal 1 conducted a follow up interview of the Complainant by telephone with the Complainant's parent/guardian present (who had already demonstrated in the presence of this Assistant Principal, conduct that could potentially influence the nature and amount of information presented by the Complainant);
- The interviews of the Complainant and the Respondent were not contemporaneously documented or recorded;
- Assistant Principal 1 required that the parties prepare written statements, but did not ultimately obtain written statements from either the Complainant or the Respondent;<sup>59</sup>
- The School did not interview all relevant witnesses (including the first witness to whom the Complainant disclosed);
- The School relied upon written summaries from witnesses (a student and staff members), rather than conducting interviews;
- The School did not gather available documentary evidence (text messages);
- The School did not create an investigation report or maintain detailed records of the investigation in a central place;<sup>60</sup>
- There is no indication that the School evaluated or assessed the complaint for the potential of pattern conduct by the Respondent;
- The School did not conclude the initial investigation or reach a determination, by a preponderance of the evidence, as to whether the underlying conduct violated Title IX, the Education Code or Board policy;
  - The School did not synthesize or critically analyze the available information to evaluate the totality of the circumstances, welcomeness, the severity of the reported conduct, or whether the conduct created a hostile environment or otherwise interfered with the Complainant's education;

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<sup>59</sup> While not a violation of Title IX, state law or Board policy, we do not view the requirement that students write their own statements in this context to be an effective or informed investigative practice.

<sup>60</sup> The Title IX Coordinator prepared a draft of an after-the-fact memo to file in late March 2017, purporting to classify the site level inquiry as a "District Initiated UCP" handled at the site level. This does not comport with UCP requirements and in fact, the District initiated a UCP based on the oral complaint by the Complainant's parent/guardian received six days after this draft memo.

- Instead, the School relied upon a determination by law enforcement as to the nature of the incident, which involves a different analysis (different elements and different standard of proof);<sup>61</sup>

In sum, the District failed to fulfill its obligation under Title IX, the Education Code, and Board policy to conduct an investigation into conduct as reported by the Complainant. Although the District later initiated a UCP investigation, the nearly five month delay in initiating the complaint does not constitute a prompt response to the report raised by the Complainant in the fall of 2016.

#### **e. Written Notice of Outcome**

Contrary to the requirements of Title IX, the Education Code and the UCP, the District did not provide the Complainant or Respondent with written notice of the outcome. Title IX requires written notice to the complainant and respondent of the outcome of the complaint,<sup>62</sup> as do the Education Code and UCP.<sup>63</sup>

#### **f. Interim Measures**

Consistent with the requirements of Title IX, the Education Code and the UCP, we find that the School provided reasonably available and appropriate interim measures designed to facilitate the Complainant's access to educational opportunities. The School provided remedial measures for the Complainant, including counseling, scheduling accommodations, and took action to enforce the provisions of a temporary restraining order issued against the Respondent. The School also provided interim protective measures for the Respondent, including provisions prohibiting the Respondent from communicating with the Complainant, ensuring that they had no classes together or in the same building, and limiting the Respondent's participation in certain campus activities. In addition, the School provided interim support measures for the Respondent.

#### **g. Sanctions**

The School imposed disciplinary action against the Respondent for related conduct with the Complainant, although not for the specific conduct at issue in the reported incident.

#### **h. Subsequent Report of Harassment**

With respect to a subsequent report by the Complainant of harassing conduct by other students, approximately three weeks after the underlying incident, we find that the District took insufficient action to investigate the concerns raised by the Complainant, to initiate or offer the UCP, or to consider the potential impacts on the reported conduct on the Complainant's educational environment, as follows:

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<sup>61</sup> As noted above, law enforcement investigations are separate and distinct from Title IX investigations. The District's obligation to respond to all Title IX complaints, even where there is a concurrent law enforcement investigation, is not discretionary.

<sup>62</sup> Title IX Q & A at 12-13.

<sup>63</sup> Under Cal. Code of Regs., tit. 5 § 4632, the LEA should issue a decision, which should be in writing and sent to the complainant within 60 days from receipt of the complaint. Similarly, under AR 1312.3, "[t]he district's decision shall be in writing and sent to the complainant."



- Assistant Principal 3, to whom the information was reported, took timely action to address the concern, spoke with the students whose behavior was at issue, and admonished them to stop the conduct;
- However, Assistant Principal 3, who was aware of the prior report involving the Complainant and Respondent, did not make a connection between the current concerns and the prior incident, elevate the information at an administrative team meeting or share the information with Assistant Principal 1, who had overseen the response to the initial report;
- Assistant Principal 3 did not evaluate whether the conduct could potentially constitute harassment, retaliation, or the continuation of a hostile environment under Title IX;
- Assistant Principal 3 did not connect the Complainant to the Title IX Coordinator or offer the option to pursue a UCP complaint;
- Assistant Principal 3 did follow up with the Complainant within a week, but there is no documentation or indication that the information was shared with the administrative team or with those working directly with the Complainant.

We note that Title IX, the Education Code and the UCP require that the District protect complainants from retaliation, that complainants be advised of the prohibition against retaliation, and that a complainant and their parent/guardian be given notice to immediately report retaliation to the District's Compliance Officer, principal or designee. There is no evidence that occurred here.

**i. The Complainant's Withdrawal from School**

With respect to School's actions at the end of the semester, when the School was informed that the Complainant was contemplating withdrawing from the District, we also find that the District took insufficient action to investigate the concerns raised by the Complainant, to initiate or offer the UCP, or to consider the potential impacts on the reported conduct on the Complainant's educational environment, as follows:

- Assistant Principal 1 and Assistant Principal 3 were informed that the Complainant was considering leaving the District because of the impact of the incident and subsequent rumors;
- Assistant Principal 1 communicated the circumstances of the Complainant's potential departure from the School to the Title IX Coordinator and inquired of the Title IX Coordinator whether the School should offer the UCP;
- Assistant Principal 3, who was copied on this communication, did not use this opportunity to share information about the Complainant's earlier concerns about harassing conduct, which may have provided a fuller context in which to evaluate the

District's responsibilities under Title IX, state law and Board policy as they relate to harassment, retaliation or the existence of a hostile environment;

- The Title IX Coordinator advised Assistant Principal 1 to gather additional information from the Complainant's parent/guardian, which Assistant Principal 1 did;
- Based on the additional information gathered and legal advice reportedly received from outside counsel, the Title Coordinator advised Assistant Principal 1 that the School did not need to offer the UCP;
- The statements by the Complainant's parent/guardian constituted notice of a potential hostile environment and should have triggered an investigation into whether harassment or other environmental concerns had created a hostile environment for the Complainant;

#### **j. Evaluation of Risk**

Finally, in response to additional information the District received about the Respondent in February 2017, we find the following:

- The District did not take steps to assess or understand the import of the information that was provided to the School by an external authority;
- The District did not properly investigate to determine whether the additional information provided by the external authorities involved on or off-campus conduct by the Respondent; whether the conduct was connected to a PAHS student; whether the conduct may have had continuing effects at PAHS; whether as a result of the conduct, the Respondent may have represented a danger to persons; or whether the additional information presented a potential pattern of conduct that may warrant further action or triggered obligations under BP 5144.1, Suspension and Expulsion/Due Process.

Moreover, the District had no protocol for the tracking and monitoring of information received from external authorities, or compliance with directives from external authorities.

#### **V. Conclusion**

As part of Cozen O'Connor's broader engagement with the District, Cozen O'Connor is conducting an external investigation as set forth in Section E of OCR's Resolution Agreement. At the conclusion of that review, and in connection with this engagement, Cozen O'Connor will make recommendations for effective implementation of the regulatory requirements based on the information gathered in the review.

### **Appendix: Legal and Regulatory Framework**

## I. Legal and Regulatory Framework

The District's response to sexual and gender-based harassment and violence is governed by federal law and guidance, state law and Board policies. An effective response to sexual and gender-based harassment and violence requires a nuanced understanding, integration and coordination of this complex framework.

### A. Federal Law and Guidance: Title IX of the Education Amendments of 1972

Title IX is a federal civil rights law that provides no “person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>64</sup> Title IX applies to all educational institutions that receive federal financial assistance, either directly or indirectly, including public and private elementary and secondary schools, school districts, colleges, and universities.<sup>65</sup>

Title IX is accompanied by implementing regulations that have the force and effect of law.<sup>66</sup> In addition to the implementing regulations, the U.S. Department of Education's Office for Civil Rights (OCR) has issued guidance documents that provide policy guidance to assist educational institutions in meeting their Title IX obligations. Early guidance documents include the 1997 Sexual Harassment Guidance (1997 Guidance) and the 2001 Revised Sexual Harassment Guidance (2001 Guidance).<sup>67</sup> In more recent years, OCR has designated the April 4, 2011 Dear Colleague Letter (2011 DCL) and the April 29, 2014 Questions and Answers on Title IX and Sexual Violence (Title IX Q&A) as significant guidance documents.<sup>68</sup> These guidance documents provide information and examples to inform educational institutions about how OCR evaluates compliance with legal obligations under Title IX.<sup>69</sup> While these significant guidance documents do not purport to create or add legally binding requirements to applicable law, recent enforcement efforts by OCR have held institutions accountable for the tenets set forth in these guidance documents.

#### 1. Scope

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<sup>64</sup> 20 U.S.C. § 1681(a).

<sup>65</sup> 20 U.S.C. § 1681(a); 34 C.F.R. § 106.11.

<sup>66</sup> These implementing regulations are codified at 34 C.F.R. § 106.

<sup>67</sup> The 2001 Guidance replaced the *1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. 62 Fed. Reg. 12,034 (Mar. 13, 1997). The 1997 guidance was “the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers” and the document was made available for public comment. The 2001 Guidance was also published in the Federal Register, at 62 Fed. Reg. 66,092 (Nov. 2, 2000), and was available for public comment. The 2001 Guidance is available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>68</sup> Recent announcements by the U.S. Secretary of Education suggest that the 2011 and 2014 guidance documents will soon be replaced with interim guidance that will be subject to notice and comment. At the time of the incidents in this report, however, these guidance documents were in force.

<sup>69</sup> See 2011 DCL at n. 1.

Title IX prohibits discrimination on the basis of sex in all of an institution's programs and activities, including both education and employment programs and activities.<sup>70</sup> Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct, and sexual violence.<sup>71</sup> Title IX's protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that create or contribute to a hostile environment. Finally, Title IX applies equally to students, employees and third parties.<sup>72</sup>

## 2. Non-Discrimination Statement

Title IX requires that institutions publish a non-discrimination statement.<sup>73</sup> The statement must notify students, parents and others that the institution does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. Educational institutions must also implement specific and continuing steps to inform students and others about the protections against discrimination on the basis of sex. The notice must make clear that the requirement of non-discrimination in educational programs covers employment and admission, and it must indicate that questions about Title IX may be referred to the institution's Title IX Coordinator or OCR. Institutions must include in the notice of non-discrimination the name, office address, telephone number and email address of the designated Title IX Coordinator.<sup>74</sup>

## 3. Title IX Coordinator<sup>75</sup>

Under Title IX, institutions are required to appoint a Title IX Coordinator to oversee the institution's Title IX compliance efforts, including the centralized review, investigation, and resolution of reports of sexual and gender-based harassment and violence under the institution's complaint processes, and to identify and address any patterns or systemic problems that arise during the review of such complaints. The Title IX Coordinator should be available to meet with

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<sup>70</sup> See generally 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106.

<sup>71</sup> U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, April 4, 2011 (2011 DCL) at 1.

<sup>72</sup> See 34 C.F.R. § 106.8(b) (requiring schools to adopt and publish grievance procedures for students and employees); 34 C.F.R. § 106.51 (prohibiting discrimination on the basis of sex in employment in education programs or activities); *see also* 2011 DCL at n. 11 ("Title IX also protects employees of a recipient from sexual harassment."). The nature of the third party's relationship to the educational institution, including whether the third party is a complainant or respondent, may dictate the manner in which the institution's policies and procedures are applicable. For example, an educational institution may have limited ability to discipline a third party, but in contrast, may be deemed to be on notice of discriminatory conduct by a student or employee based on the report of a third party. As a result, an educational institution's legal and policy obligations may not apply to a third party complainant or respondent in the same manner in which they apply to a student or employee.

<sup>73</sup> 34 C.F.R. § 106.9.

<sup>74</sup> Office for Civil Rights, U.S. Dept. of Education, *Notice of Non-Discrimination*, <http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>.

<sup>75</sup> For further description of the responsibilities of the Title IX Coordinator, see Office for Civil Rights, Dear Colleague Letter on Title IX Coordinators, April 24, 2015, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

students, employees and third parties as needed.<sup>76</sup> The Title IX Coordinator's role and responsibilities should be clearly defined, and the Title IX Coordinator's contact information should be easily accessible by students and staff.<sup>77</sup>

Institutions must take steps to ensure that employees designated to serve as Title IX Coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the institution's Title IX procedures operate.<sup>78</sup> Where an institution chooses to designate more than one Title IX Coordinator, it should ensure that one individual has ultimate oversight responsibility, and the others should have titles that clearly show that they are in a deputy or supporting role to the senior coordinator. Finally, the Title IX Coordinator(s) should not have other job responsibilities that would potentially create a conflict of interest.<sup>79</sup>

#### **4. Prompt and Equitable Grievance Procedures**

Title IX requires that an institution's grievance procedures be prompt and equitable.<sup>80</sup> To meet this requirement, an institution must provide notice to students and employees of the grievance procedures, including where complaints may be filed, and that the grievance procedures apply to complaints filed by any individual alleging sexual or gender-based harassment or violence carried out by students, employees or third parties.<sup>81</sup> The procedures must include: provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and evidence; designated and reasonably prompt time frames for the major stages of the complaint process; written notice to the complainant and respondent of the outcome of the complaint; and assurance that the institution will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.<sup>82</sup> Grievance procedures should also include: a statement of the institution's jurisdiction over Title IX complaints; adequate definitions of sexual and gender-based harassment and violence and an explanation as to when such conduct creates a hostile environment; reporting policies and protocols, including provisions for requesting confidentiality when making a report; identification of the employee or employees responsible for evaluating requests for confidentiality; notice that Title IX prohibits retaliation; notice of an individual's right to file a criminal complaint and a Title IX complaint simultaneously; notice of available interim measures that may be taken to protect the student in the educational setting; the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint; notice of potential remedies for the complainant; notice of potential sanctions against respondents; and sources of counseling, advocacy, and support.<sup>83</sup>

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<sup>76</sup> 2011 DCL at 7.

<sup>77</sup> 34 C.F.R. § 106.8(a); 2011 DCL at 6.

<sup>78</sup> 2011 DCL at 7.

<sup>79</sup> *Id.*

<sup>80</sup> 34 C.F.R. § 106.8(b).

<sup>81</sup> Title IX Q & A at 12-13.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

## 5. Obligation to Eliminate, Prevent and Address Hostile Environment

Under Title IX, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile educational or working environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred.<sup>84</sup> If an investigation reveals the existence of a hostile educational or employment environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile educational or employment environment, prevent its recurrence and address its effects.<sup>85</sup> An institution violates Title IX if it has “notice” of a sexually hostile educational or employment environment and fails to take immediate and corrective action. In addition, an institution’s delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence may subject the complainant to a hostile environment and require the institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately.<sup>86</sup>

## 6. Notice

An institution is deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment. A responsible employee includes any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe has the authority or responsibility to take action.<sup>87</sup> To facilitate the institution’s compliance with Title IX, responsible employees are required to share with the Title IX Coordinator all relevant details about the reported incident, including identifying information about the complainant, respondent, other witnesses, and relevant facts, including the date, time, and location.<sup>88</sup> Notice may come from a direct report or complaint by a student, employee or third party victim, or a responsible employee may observe or witness prohibited conduct. Notice may also come from indirect sources: a parent, friend or third party witness; social networking sites; the media; an open, pervasive or widespread pattern; or other facts and circumstances that should cause an institution, in the exercise of reasonable care, to initiate an investigation that would lead to the discovery of additional incidents.<sup>89</sup> The institution’s Title IX obligations exist regardless of whether the individual who was harassed makes a complaint or asks the institution to take action although the institution may consider a complainant’s request for anonymity, or not to pursue an investigation, when determining an appropriate institutional response.<sup>90</sup>

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<sup>84</sup> *Id.* at 4; 1997 Guidance; Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, April 29, 2014 (Title IX Q & A) at 2-3.

<sup>85</sup> *Id.*

<sup>86</sup> Title IX Q & A at 4.

<sup>87</sup> Title IX Q & A at 15-16.

<sup>88</sup> Title IX Q & A at 16.

<sup>89</sup> Title IX Q & A at 2.

<sup>90</sup> 1997 Guidance.

## 7. Interim Measures

Once an institution has notice of an allegation of sexual or gender-based harassment or violence allegation, it must promptly take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures while the investigation is pending.<sup>91</sup> The institution should notify the complainant of reasonably available measures and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance.<sup>92</sup> The institution should also inform the complainant of their Title IX rights and the right to report a crime to campus or local law enforcement.<sup>93</sup>

The institution should consider a range of factors when determining the appropriate interim measures: the facts and circumstances of each case; the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the alleged harassment; any continuing effects on the complainant; any intersections between the complainant and respondent (e.g., shared residence hall, dining hall, class, transportation, or job location); and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).<sup>94</sup> In addition, OCR has advised that when taking interim measures, an institution should minimize the burden on the complainant and carefully consider the facts of the case when determining who to remove from a shared class or residence hall.<sup>95</sup>

## 8. Investigation

OCR uses the term “investigation” to refer to the process an institution uses to resolve sexual violence complaints, including the fact-finding investigation and any hearing and decision-making process the institution uses to determine whether the conduct occurred by a preponderance of the evidence and, if so, the appropriate sanctions and remedies to eliminate the sexual harassment or hostile environment, prevent its recurrence and address its effects.<sup>96</sup> While an investigation may include a hearing to determine whether the conduct occurred, Title IX does not require a hearing.<sup>97</sup>

According to the 2011 Dear Colleague Letter, Title IX requires adequate, reliable and impartial investigations that are conducted by investigators with sufficient experience or training.<sup>98</sup> OCR expanded on this guidance in the 2014 Title IX Q&A, outlining significant training requirements for investigators and noting that “provisions for adequate, reliable, impartial and prompt investigation of complaints require: the opportunity for both parties to present witnesses and evidence; interim measures to be implemented before the final outcome of the investigation; periodic updates on the status of the investigation to be presented to the parties; and the

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<sup>91</sup> Title IX Q & A at 32-33.

<sup>92</sup> Title IX Q & A at 32-33.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Title IX Q & A at 24-25.

<sup>97</sup> Title IX Q & A at 25.

<sup>98</sup> 2011 DCL at 9-12.

application of the preponderance of the evidence standard.”<sup>99</sup> OCR has also noted that “a balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.”<sup>100</sup> Notably, OCR has not provided specific standards of care for investigations beyond broadly capturing concepts such as adequate, reliable, impartial and thorough, and institutions are free to designate investigators of their choosing, whether they be employees of the institution or external resources.

A criminal investigation and a Title IX investigation are two distinct processes, each with its own set of procedural protections and legal standards.<sup>101</sup> The purpose of a criminal investigation is to determine whether an individual violated a law, and if so, the individual may be imprisoned or subject to other criminal penalties.<sup>102</sup> In contrast, Title IX investigations have different procedural protections and legal standards.<sup>103</sup> Under Title IX, institutions are required to respond to all complaints of Title IX-related conduct.<sup>104</sup> The Title IX obligation to resolve all complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students is not discretionary.<sup>105</sup>

In all cases, the institution should notify the complainant of the right to file a criminal complaint and should not dissuade a complainant from doing so at any stage of the institution’s Title IX investigation.<sup>106</sup> While Title IX does not require an institution to report alleged incidents of sexual violence to law enforcement, an institution may have reporting obligations under state, local or other federal laws.<sup>107</sup> Where there are concurrent investigations, an institution should coordinate investigations and establish appropriate fact-finding roles for each investigator.<sup>108</sup> An institution should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event.<sup>109</sup> However, an institution should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation.<sup>110</sup> Although an institution may need to delay temporarily the fact-finding portion of a Title IX investigation while law enforcement is gathering evidence, the institution must still take interim measures to protect the complainant and the community.<sup>111</sup>

## 9. Alternative Resolution

In response to a request for confidentiality, an institution may offer an alternative form of resolution.<sup>112</sup> Often referred to as voluntary, informal or remedies-based resolution, an

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<sup>99</sup> Title IX Q & A at 3, 12-14.

<sup>100</sup> *Id.* at 24-26.

<sup>101</sup> *Id.* at 27.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Title IX Q & A at 27.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 24-26.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 28.

<sup>111</sup> *Id.*

<sup>112</sup> 2011 DCL at 8.



alternative form of resolution can effectively eliminate a hostile environment without taking disciplinary action against a respondent. The inclusion of a remedies-based form of resolution may aid complainants or third parties who are seeking anonymity or confidentiality, or for whom pursuing formal disciplinary action may be a barrier to reporting or moving forward. It may also provide an institution with additional mechanisms to tailor a response that recognizes the unique facts and circumstances of a particular incident, particularly in cases where there is not a broader threat to individual or campus safety, or address conduct that might not rise to the level of a hostile environment.

Participation in an alternative form of resolution must be voluntary, and a complainant must be able to request to end voluntary resolution and initiate an investigation at any time.<sup>113</sup> While an institution may offer mediation in appropriate cases, mediation should not be used in cases involving sexual assault.<sup>114</sup> In addition, an institution should not compel a complainant to engage in mediation, to directly confront the respondent, or to participate in any particular form of alternative resolution.<sup>115</sup> The institution should maintain records of all reports and conduct referred for alternative resolution, and ensure that the resolution is completed within an appropriate time frame following the initial report.

An institution may take immediate and corrective action through the imposition of individual and community remedies designed to maximize the complainant's access to the educational, extracurricular and employment activities and to eliminate a hostile environment, prevent its recurrence and address its effects. Potential remedies include: providing increased monitoring, supervision, or security; providing training and educational materials for students and employees; changing and publicizing institutional policies on sexual and gender-based harassment and violence; conducting climate surveys regarding sexual violence; imposing short- or long-term protective measures for a complainant; and other measures that can be tailored to the facts and circumstances.<sup>116</sup>

### **C. State Law**

#### **1. California Education Code**

##### **a) Definition of Sexual Harassment – *Cal Ed. Code § 212.5***

Cal. Ed. Code § 212.5 provides the following definition of sexual harassment<sup>117</sup>:

*“Sexual harassment” means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual*

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<sup>113</sup> 2011 DCL at 8.

<sup>114</sup> 2011 DCL at 8.

<sup>115</sup> 2011 DCL at 8.

<sup>116</sup> Title IX Q & A at 20.

<sup>117</sup> See also Cal. Code of Regs, tit. 5, § 4916, which contains slightly different language, and specifies that it applies between people of the same or “opposite sexes.” The Regulation also specifies under (c) that conduct creates a hostile environment if it is “sufficiently severe, persistent, pervasive or objectively offensive” so as to “limit the individual’s ability to participate in or benefit from an education program or activity.” The Regulation also specifies that the “educational environment” includes, but is not limited to, the campus or school grounds, properties owned by the district, and off-campus during an activity sponsored by the district or conducted by organizations sponsored by or under the jurisdiction of the district.

*nature, made by someone from or in the work or educational setting, under any of the following conditions:*

- (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.*
- (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.*
- (c) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.*
- (d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.*

**b) Educational Equity Provisions**

**(1) Sex Equity in Education Act – Cal. Ed. Code §§ 221.5-231.5**

The “Sex Equity in Education Act,”<sup>118</sup> (SEEA) enacted in 1982, defines its purpose as follows:

It is the policy of the State of California ... that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state. The purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies.<sup>119</sup>

The SEEA contains the following specific requirements,<sup>120</sup> each of which were in place at the time of the incident in question:

- Each school must have a written policy on sexual harassment;
- The school’s policy must include information on “where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies;”
- The school must display a copy of its policy in a “prominent location;”

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<sup>118</sup> Cal Ed. Code §§ 221.5-231.5.

<sup>119</sup> Cal. Ed. Code § 231.5; Cal. Code of Regs, tit. 5, § 4917.

<sup>120</sup> Cal. Ed. Code § 231.5(b)-(g).

- The school must provide a copy of its policy as part of any orientation program for new students;
- The school must provide a copy of its policy to each faculty member, all administrators, and all support staff at the beginning of the school year and to all new employees; and
- The school must include a copy of its policy in any publication that sets forth the “comprehensive rules, regulations, procedures, and standards of conduct for the institution.”

The 2016 amendments to the SEEA imposed additional requirements on schools. Although those requirements were not in place at the time of the matter in question, we summarize them here to reflect recent developments: on or before July 1, 2017, schools must prominently display on their website the name and contact information of the Title IX coordinator, the rights of pupils and the public under Title IX, the responsibilities of the school under Title IX, web links to federal agency information about those rights and responsibilities, a description of how to file a complaint under Title IX including an explanation of the statute of limitations, the applicable investigative process, and links and explanatory information about the United States Department of Education’s Office for Civil Rights.<sup>121</sup>

## **(2) Safe Place to Learn Act – Cal Ed. Code §§ 234-234.5**

In 2007, California enacted the “Safe Place to Learn Act,”<sup>122</sup> (SPLA) to combat bias and harassment in schools. In 2011, SPLA was expanded to address “intimidation and bullying” in addition to “discrimination, harassment, [and] violence.”<sup>123</sup> The current version of SPLA is identical in all relevant aspects to the version that was in place at the time of the incident in question. The SPLA gives the California State Department of Education the power to assess whether local educational agencies have done all of the following:<sup>124</sup>

- Adopted a policy that prohibits discrimination, harassment, intimidation and bullying based on actual or perceived characteristics including disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion or sexual orientation, and included in that policy a statement that it applies to all acts related to school activity or attendance occurring within a school in that district;<sup>125</sup>
- Adopted a process for receiving and investigating complaints of discrimination, harassment, intimidation and bullying based on the enumerated characteristics, where such process includes:

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<sup>121</sup> Cal. Ed. Code §§ 221.61 and 221.8

<sup>122</sup> Cal. Ed. Code §§ 234-234.5.

<sup>123</sup> Cal. Ed. Code § 234(a), amended by Stats.2011, c. 723 (A.B.9), § 1, operative July 1, 2012.

<sup>124</sup> Cal. Ed. Code § 234.1 (a)-(h); See also, generally, Cal. Code of Regs., tit. 5, §§ 4960-4965.

<sup>125</sup> See also Cal. Code of Regs, tit. 5, § 4900, which prohibits discrimination and harassment on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability in any program or activity conducted by an “educational institution” or other “local agency” (i.e. district) funded by the state. Cal. Code of Regs, tit. 5, § 4914 adds “parental, family, or marital status” and “pregnancy” as additional protected characteristics. See also Cal. Code of Regs, tit. 5, § 4950.

- A requirement that, if school personnel witness an act of discrimination, harassment, intimidation, or bullying, they must take immediate steps to intervene when safe to do so;
- A timeline to investigate and resolve complaints;
- An appeal process afforded to the complainant; and
- Language translation of all forms developed pursuant to the above process.
- Publicized to pupils, parents, employees, agents of the governing board, and members of the general public anti-discrimination, anti-harassment, anti-intimidation, and anti-bullying policies that include information about the manner in which to file a complaint;
- Provided to certified school site employees who serve students in grades 7-12 information about school and community resources for LGBTQ (lesbian, gay, bisexual, transgender and queer) pupils or related to support for students who may face bullying on the basis of their actual or perceived religious affiliation;
- Posted the policy in all school offices, including staff lounges and pupil government meeting rooms;
- Maintained documentation of complaints and their resolutions for a minimum of one review cycle;
- Ensured that complainants are protected from retaliation and that the identity of a complainant alleging discrimination, harassment, intimidation, or bullying remains confidential, as appropriate; and
- Identified a responsible local educational agency officer for ensuring compliance.

**(3) Preconditions to the Receipt of State Financial Assistance – Cal Ed. Code §§ 250-253**

Under Sections 250-253 of the California Education Code, educational institutions must fulfill two requirements before receiving state financial assistance or state student financial aid. Schools must: 1) provide assurance to the agency administering state funds that each program or activity conducted by the school will be conducted in compliance with the Education Code; and 2) submit timely, complete and accurate compliance reports to the State Department of Education “as that entity may require,” with acknowledgement that the State Department of Education may make those reports available to the public.<sup>126</sup> Additionally, Section 253 instructs the Superintendent of Public Instruction<sup>127</sup> to review twenty school districts per year for compliance with sex discrimination laws and regulations contained in the California Education Code, if sufficient funding has been appropriated for that purpose.<sup>128</sup>

**(4) Enforcement Provisions – Cal Ed. Code §§ 260-262.4**

Sections 260-262.4 of the California Education Code place “primary responsibility” for ensuring that school district programs and activities are free from discrimination with the governing board

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<sup>126</sup> Cal. Ed. Code §§ 250-253.

<sup>127</sup> The State Superintendent of Public Instruction is a state official elected by the people on a nonpartisan ballot for a four-year term.

<sup>128</sup> Cal Ed. Code § 253.

of each school district.<sup>129</sup> Section 262.3 allows a party to file a written complaint of prohibited discrimination to appeal a governing board’s decision to the State Department of Education. Section 262.3(b) requires schools to notify complainants that “civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders may be available.” Sections 262.3(c) and (d), read together and in light of relevant case law,<sup>130</sup> provide that a complainant may seek injunctive relief immediately and need not exhaust the administrative complaint process, but a complainant must wait until at least sixty days after filing an appeal under the Uniform Complaint Procedures<sup>131</sup> to the State Department of Education to seek monetary relief for alleged violations of the California Education Code’s prohibitions against discrimination.

**c) Pupil Rights and Responsibilities – Cal. Ed. Code §§ 48900 et seq.**

Sections 48900 et seq. of the California Education Code specify that a pupil may not be suspended from school or recommended for expulsion unless the principal of the school or the superintendent of the district determines that the pupil has committed one of the below acts:<sup>132</sup>

- Caused, attempted to cause, or threatened to cause physical injury to another person, or willfully used force of violence upon another person, except in self-defense;
- Possessed, sold, or furnished a firearm, knife, explosive or “other dangerous object” without prior written permission of a school employee and the principal or their designee;
- Unlawfully possessed, used, sold, furnished, or was under the influence of a controlled substance, alcoholic beverage or intoxicant of any kind;
- Unlawfully offered, arranged or negotiated to sell a controlled substance, alcoholic beverage or intoxicant of any kind *and* actually completed the sale or delivery by providing the other person with the substance or a look-alike;
- Committed or attempted to commit robbery or extortion;
- Caused or attempted to cause damage to school<sup>133</sup> or private property;
- Stole or attempted to steal school or private property;
- Possessed or used tobacco products, except where the pupil has a prescription;
- Committed an obscene act or engaged in habitual profanity or vulgarity;

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<sup>129</sup> Similarly, Cal. Code of Regs., tit. 5, § 4960 states that school districts have primary responsibility to ensure nondiscrimination. The Regulation specifies that boards have the responsibility to investigate complaints of unlawful discrimination in their programs and activities, and to publicize their nondiscrimination policies to students, parents, employees, board members and agents, and the general public. Cal. Code of Regs., tit. 5, § 4961 requires each district to identify a single person as the responsible local agency officer for ensuring district compliance and to publicize that person’s name, office address and office telephone number.

<sup>130</sup> Donovan v. Poway Unified School District, 167 Cal.App.4<sup>th</sup> 567, 594-596 (rules of statutory construction support interpreting 263.3 (c) and (d) to permit immediate injunctive relief but a 60-day “cooling-off” period before the availability of monetary relief).

<sup>131</sup> The Uniform Complaint Procedures (UCP) are discussed below in this report. The UCP is codified at Cal. Code of Regs., tit. 5, §§ 4600 through 4671.

<sup>132</sup> Cal. Ed. Code § 48900 (a) through (r).

<sup>133</sup> Throughout this section, “school property” includes school databases and electronic files. Cal Ed. Code § 48900 (u).

- Unlawfully possessed, offered, arranged, nor negotiated to sell drug paraphernalia as defined in the Health and Safety Code;<sup>134</sup>
- Disrupted school activities or otherwise willfully defied valid school authorities (except that K-3 students cannot be suspended and K-2 students cannot be expelled under this provision);
- Knowingly received stolen school or private property;
- Possessed an imitation firearm;
- Committed or attempted to commit a sexual assault,<sup>135</sup> or committed a sexual battery;<sup>136</sup>
- Harassed, threatened or intimidated a pupil who is a complaining witness or witness in a school disciplinary proceeding for purposes of preventing that pupil from being a witness or retaliating against that person for being a witness;
- Unlawfully offered, arranged or negotiated to sell, or sold the prescription drug Soma;
- Engaged in or attempted to engage in hazing, where “hazing” is defined as “a method of initiation or preinitiation into a pupil organization or body, whether or not the organization or body is recognized by an educational institution, that is likely to cause serious bodily injury or personal degradation or disgrace resulting in physical or mental harm to a former, current, or prospective pupil,” and where “hazing” does not include athletic or school-sanctioned events;
- Engaged in an act of bullying, where “bullying” is defined as “any severe or pervasive<sup>137</sup> physical or verbal act or conduct, including written and electronic communications or acts,<sup>138</sup> directed at one or more pupils that has or can be reasonably predicted to:
  - Place a reasonable pupil in fear of harm to that pupil’s person or property;
  - Cause a reasonable pupil to experience a substantially detrimental effect on their physical or mental health;
  - Cause a reasonable pupil to experience substantial interference with their academic performance; or
  - Cause a reasonable pupil to experience substantial interference with their ability to participate in or benefit from the services, activities or privileges provided by a school.
- Committed sexual harassment<sup>139</sup> that a reasonable person of the same gender of the victim would find sufficiently severe or pervasive to have a negative impact on the

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<sup>134</sup> Cal. Health & Safety Code § 11014.5.

<sup>135</sup> As defined by Cal. Penal Code §§ 261, 266c, 286, 288, 288a, or 289. See discussion and definition below in this report.

<sup>136</sup> As defined by Cal. Penal Code §§ 243.4. See discussion and definition below in this report.

<sup>137</sup> Under this section, an act is not “pervasive” solely because it has been transmitted on the Internet or is currently posted on the Internet. Cal. Ed. Code § 48900(r)(2)(B).

<sup>138</sup> “Electronic acts” are defined as including 1) texts, sounds, and images (with “videos” being added in 2017), or 2) posts on social media or elsewhere that creates an impersonation of another actual pupil or creates an impersonation of another and uses that impersonation to engage in bullying. See Cal. Ed. Code §§ 48900(r)(1)-(2). In 2017, the statute also prohibits engaging in “cyber sexual bullying,” defined as disseminating or soliciting/inciting the dissemination nude, semi-nude or sexually explicit photos or videos of a minor where the minor is identifiable and where the transmission can be reasonably predicted to have one or more of the effects of “bullying” as defined above. Cal. Ed. Code §§ 48900(r)(2)(A)(iii).

<sup>139</sup> Cal. Ed. Code § 48900.2. “Sexual harassment” is given the definition found in Cal. Ed. Code § 212.5 (discussed above in this report).

individual's academic performance or to create an intimidating, hostile, or offensive educational environment (except that this provision does not apply to K-3 pupils);

- Committed "hate violence,"<sup>140</sup> defined as willfully injuring, intimidating, interfering with, oppressing or threatening a person based in whole or in part on their actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation or association with a person or group with one or more of these actual or perceived characteristics; or
- Engaged in harassment, threats or intimidation directed at school personnel or pupils that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment.<sup>141</sup>

Section 48900(s) specifies that a pupil cannot be suspended or expelled for any of the above acts *unless* the act is related to a school activity or school attendance. "Related to a school activity or school attendance" includes, but is not limited to, acts that occur:

- While on school grounds;
- While going to or from school;
- During the lunch period whether on or off campus;
- During or while going to or coming from a school-sponsored activity.

Section 48900.5 clarifies that suspension, whether out-of-school or in-school,<sup>142</sup> shall be imposed only when other means of correction fail, except that a pupil may be suspended upon a first offense if the principal or district superintendent determine that the pupil violated one of the first five provisions<sup>143</sup> in § 48900 or if the pupil's presence causes a danger. Section 48900.5 contains a non-exhaustive list of other means of correction<sup>144</sup> and states that the school may keep documentation of attempted means of correction in a student's file.

Section 48902 provides conditions that must be fulfilled in all cases of suspension or expulsion:

- Prior notice to law enforcement of any act that may violate Cal. Penal Code § 245 (related to assault with a deadly weapon);
- Within one school day after suspension or expulsion, notice to law enforcement of any act that may violate Cal. Ed. Code §§ 48900 (c) or (d) (related to controlled substances);

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<sup>140</sup> Cal. Ed. Code § 48900.3, citing Cal. Ed. Code § 233 which cites Cal. Penal Code §§ 422.55 (protected characteristics), and 422.6 (definition of "hate violence").

<sup>141</sup> Cal. Ed. Code § 48900.4

<sup>142</sup> See Cal. Ed. Code § 48911.1 for a discussion of "supervised" or in-school suspension.

<sup>143</sup> See Cal. Ed. Code § 48900 (a) through (e), addressing generally: a) physical injury, b) possession of a firearm, knife or explosive, c) possession, sale or use of a controlled substance, alcohol or other intoxicant, d) negotiation or sale of a controlled substance, alcohol or other intoxicant with delivery of the actual or a look-alike substance, or e) robbery or extortion.

<sup>144</sup> E.g. parent-teacher conference, referrals to school or external counselors or social workers, psychosocial or psychoeducational assessments, anger management, restorative justice, behavior support, after-school programs.

- Notice (without a specified timeframe) to law enforcement of any act that may involve the possession or sale of narcotics or controlled substances or the possession of a firearm or ammunition within a “school zone.”<sup>145</sup>

Section 48902(d) gives principals or their designee immunity for making good faith reports to law enforcement under this section.

Section 48902(e) states that, in cases of reports to law enforcement where the pupil has “exceptional needs,”<sup>146</sup> the principal or their designee must also send to law enforcement copies of the pupil’s special education and disciplinary record, to the extent permitted by the Family Educational Rights and Privacy Act (FERPA) at 20 U.S.C. §§ 1232g et seq.

Effective 2017, section 48929 permits districts to transfer a pupil who has been convicted of a “violent felony”<sup>147</sup> or specific misdemeanor<sup>148</sup> to another school when the victim of the subject crime and the convicted pupil attend the same school and if the following conditions are met:

- The school board has a policy that:
  - Requires pupil and parent notification and the right to request a meeting with a school principal or designee;
  - Requires the school to attempt to resolve the conflict without a transfer;
  - Provides for the periodic review of transfer decisions and specifies the procedure for review; and
  - Provides a mechanism for the school board to consider and approve or disapprove the school principal’s or designee’s recommendations about transfers.
- The school board has provided annual notice of the policy to all parents/guardians.

#### **d) Privacy of Pupil Records – Cal Ed. Code § 49079**

Section 49079 requires school districts to inform teachers of pupils who have engaged in or are reasonably suspected have engaged in the acts described in Cal. Ed. Code §§ 48900,<sup>149</sup> 48900.2 (sexual harassment), 48900.3 (hate violence), 48900.4 (harassment, threats, or intimidation that

<sup>145</sup> “School Zone” is defined in the “Gun Free School Zone Act” at Cal. Penal Code §§ 626.9 or 626.10.

<sup>146</sup> See Cal. Ed. Code § 56026 (defines “exceptional needs” to mean pupils with disabilities under 20 U.S.C. § 1401). Generally, this includes pupils who have intellectual disabilities, physical, sensory, or speech impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, specific learning disabilities, or other health impairments that necessitate special education and related services.

<sup>147</sup> See Cal. Penal Code 667.5. Lists “violent felonies” which include, generally, murder, manslaughter, rape, sodomy, oral copulation, lewd or lascivious acts, any crime punishable by death or life imprisonment, a felony involving the infliction of great bodily injury on someone who is not a co-conspirator, robbery, arson, and the like.

<sup>148</sup> See Cal. Penal Code § 29805. Specific misdemeanors include, generally, threatening a public or school official, witness intimidation, possession of a deadly weapon with intent to use it, and possession of a weapon in school.

<sup>149</sup> Includes the list of acts in Section B.4.(c) of this Appendix, except for the provision related to the use of tobacco products. In summary, that list includes: physical injury; possession of a firearm, knife or explosive; possession, sale or use of a controlled substance, alcohol or other intoxicant; sale of a controlled substance, alcohol or other intoxicant or a look-alike; robbery or extortion; damage to or theft of school or private property; obscene acts; possession or sale of drug paraphernalia; disruption of school activities; receiving stolen school or private property; possession of an imitation firearm; attempted or completed sexual assault or sexual battery; harassment, threats, or intimidation of a witness or complainant; sale of controlled substance Soma; hazing; bullying.



create a hostile educational environment), and 48900.7 (terroristic threats against school property or officials).

Section 49079(b) states that a district official who provides this information to a teacher is not civilly or criminally liable for provide such information unless it is proven that the information was false and that the district or the official knew or should have known it was false or if the information was provided with a reckless disregard for its truth or falsity.

Section 49079(c) states that a district officer or employee who fails to provide this information is guilty of a misdemeanor, punishable by up to six months' imprisonment and/or a fine of up to one thousand dollars.

Section 49079(d) obligates the district to provide the above-referenced information about pupils related to the previous three school years.

Section 49079(e) states that teachers must keep the information in confidence and not further disseminate it.

#### **4. California Code of Regulations: The Uniform Complaint Procedure – Cal. Code Regs., tit. 5, §§ 4600-4671**

California's Uniform Complaint Procedures (UCP)<sup>150</sup> specifies when and how an individual, public agency or organization alleging a violation of federal or state education law can file a complaint to the California Department of Education (CDE). Under the UCP, the CDE processes appeals of local educational agency's (LEA) decisions on UCP complaints. In certain specified situations, the CDE may intervene directly and investigate the allegations in the complaint.<sup>151</sup>

The UCP's purpose is to "establish a uniform system of complaint processing for specified programs or activities that receive state or federal funding."<sup>152</sup> The UCP applies to many different types of complaints, but for purposes of this matter, the UCP applies to complaints alleging unlawful discrimination, harassment, intimidation or bullying against any person based on actual or perceived characteristics including disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion or sexual orientation, in any program or activity conducted by a LEA that receives state financial assistance.

The UCP does *not* apply to the following types of complaints, all of which are to be referred to appropriate agencies for resolution:<sup>153</sup>

- Allegations of child abuse;
- Health and safety complaints regarding a Child Development Program;
- Employment discrimination complaints;

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<sup>150</sup> The UCP is codified at Cal. Code of Regs., tit. 5, §§ 4600-4671.

<sup>151</sup> See the California Department of Education's "Uniform Complaint Procedure brochure" available at <http://www.cde.ca.gov/re/cp/uc/> (last accessed Sep. 11, 2017).

<sup>152</sup> Cal. Code of Regs., tit. 5, § 4610.

<sup>153</sup> Cal. Code of Regs., tit. 5 § 4611.

- Allegations of fraud.

Under the UCP, LEAs have certain enumerated responsibilities, including:<sup>154</sup>

- Ensure compliance with applicable federal and state laws and regulations;
- Adopt local UCP complaint policies and procedures consistent with the UCP;
- Designate a staff member to be responsible for receiving, investigating and resolving complaints and make sure the staff member is knowledgeable about the laws/programs he or she is assigned;
- Give the filing party an opportunity to present information and/or evidence relevant to the complaint;
- Protect complainants from retaliation;
- Resolve the complaint and complete a written report within 60 days of receipt of the complaint unless extended by written agreement of the complainant;<sup>155</sup>
- Issue a decision in writing, which should be in writing and sent to the complainant within 60 days of receipt of the complaint;<sup>156</sup> and
- Advise the complainant of the right to appeal the LEA's decision to the CDE within 15 calendar days of receiving the decision.

To file a complaint under the UCP, a complainant at the LEA-level:

- Must file a complaint within six months from the date of the alleged unlawful discrimination, harassment, intimidation, or bullying;<sup>157</sup>
- Must file a written complaint by following the steps described in the LEA's local UCP complaint procedures;<sup>158</sup> and
- Should participate in the investigation and provide the LEA investigator with information and other evidence related to the allegations in the complaint.<sup>159</sup>

To appeal to the CDE, a complainant:

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<sup>154</sup> Cal. Code of Regs. tit. 5 §§ 4620-4622, 4640.

<sup>155</sup> Cal. Code of Regs, tit. 5 § 4631 states that the LEA "should issue a decision based on the evidence." It contains a list of things that the decision "should" include, including: 1) the findings of fact based on the evidence gathered, 2) conclusions of law, 3) the disposition of the complaint, 4) the rationale, 5) corrective actions, if any, 6) notice of the complainant's right to appeal, and 7) procedures for initiating an appeal to the CDE.

<sup>156</sup> Cal. Code of Regs., tit. 5 § 4632.

<sup>157</sup> Cal. Code of Regs., tit. 5, § 4630. Board Policy/Administrative Regulation 1312.3 does not incorporate a six month time limit.

<sup>158</sup> *Id.*

<sup>159</sup> Cal. Code of Regs, tit. 5 § 4631. This subsection notes that, "refusal by the complainant to provide the investigator with documents or other evidence related to the allegations in the complaint, or to otherwise fail or refuse to cooperate, may result in the dismissal of the complaint because of a lack of evidence to support the allegations."

- Must file a written appeal to the CDE within 15 calendar days of receiving the LEA's decision if they believe the LEA's decision is incorrect;<sup>160</sup> and
- Must specify the basis for the appeal and whether the LEA's facts are incorrect and/or the law is misapplied. The appeal packet must contain a copy of the original complaint to the LEA and a copy of the LEA's decision.<sup>161</sup>

Sections 4632-4633 describe the CDE's process for resolving appeals of LEA decisions under the UCP.

Sections 4640-4650 describe the circumstances under which the CDE may investigate a complaint directly—i.e. without the matter first being filed through the LEA. In the ordinary course, if the CDE receives a UCP complaint that has not first been adjudicated at the LEA level, the CDE will send the complaint to the LEA and request that they investigate and adjudicate the complaint.<sup>162</sup> However, the CDE may directly intervene in a complaint under the following circumstances:<sup>163</sup>

- The complaint includes an allegation that an LEA failed to comply with the UCP;
- The complaint relates to an agency that is not covered by the UCP;
- The Complainant requests anonymity because they would be in danger of retaliation and would suffer immediate and irreparable harm if they filed a complaint with the LEA;
- The Complainant alleges that the LEA failed or refused to implement the final decision that resulted from the LEA's investigation or a mediation agreement;
- The Complainant alleges, and the CDE verifies that through no fault of the Complainant, no action has been taken by the LEA within 60 calendar days of the complaint;
- The Complainant alleges and the CDE verifies that the Complainant would suffer immediate and irreparable harm as a result of an application of district-wide policy that is in conflict with state or federal law covered by this chapter and that the filing of a complaint with the LEA would be futile; or
- The complaint relates to special education and other specified conditions have been fulfilled.<sup>164</sup>

Sections 4660-4665 describe the CDE's process for resolving complaints when the CDE intervenes directly.

Section 4670 specifies that, if an LEA is found in violation of the provisions of this chapter, the CDE may direct the LEA to take corrective action. If the LEA fails to do so, the CDE may use "any means authorized by law" to effect compliance, including but not limited to withholding state and federal funds, placing the LEA's eligibility for future state or federal support on probationary status or initiating court proceedings to compel compliance.

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<sup>160</sup> Cal. Code of Regs., tit. 5 § 4632.

<sup>161</sup> *Id.*

<sup>162</sup> Cal. Code of Regs., tit. 5 § 4640.

<sup>163</sup> Cal. Code of Regs., tit. 5 § 4650.

<sup>164</sup> Cal. Code of Regs., tit. 5 § 4650(7).

**5. Mandatory Child Abuse Reporting Laws – Cal. Penal Code § 11164 et seq.**

The “Child Abuse and Neglect Reporting Act” (CANRA) requires certain professionals, identified in the statute as “mandated reporters,” to report known or suspected instances of child abuse or neglect to law enforcement.<sup>165</sup>

Under CANRA as it applies to the K-12 school setting, teachers, instructional or teacher’s aides or assistants, classified school employees, certified pupil personnel employees, administrators, social workers, counselors, school police or security officers, psychiatrists, psychologists, licensed nurses, family therapists, drug and alcohol counselors, coaches, assistant coaches and athletic administrators.<sup>166</sup>

CANRA requires mandated reporters to make a report whenever, in their professional capacity or within the scope of their employment, they have knowledge of, or observe a child (defined as a person under 18) whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. “Reasonable suspicion” occurs when it is objectively reasonable for a person, based upon facts that could cause a reasonable person in a similar position, to suspect child abuse or neglect. Mandated reporters must make two reports: first, the mandated reporter must report by telephone immediately. Then, within 36 hours, the mandated reporter must file a written report.<sup>167</sup>

CANRA requires mandated reporters to report the following types of child abuse and neglect:

- Sexual abuse, including sexual assault<sup>168</sup> and sexual exploitation;<sup>169</sup>
- Neglect;<sup>170</sup>
- Physical abuse, including the willful harming or injuring of a child or the endangering of the person or health of a child, unlawful corporal punishment or injury, or non-accidental physical injury;<sup>171</sup>
- Emotional maltreatment;<sup>172</sup>

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<sup>165</sup> Cal. Penal Code § 11165.9.

<sup>166</sup> Cal. Penal Code § 11165.7

<sup>167</sup> Cal. Penal Code § 11166.

<sup>168</sup> See Cal. Penal Code § 11165.1, defining “sexual assault” as conduct in violation of Cal. Penal Code §§ 261 (rape), 261.6(d) (statutory rape), 264.1 (rape in concern), 285 (incest), 286 (sodomy), 288 (lewd or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration) or 647.6 (child molestation).

<sup>169</sup> See. Cal. Penal Code § 11165.1, defining “sexual exploitation” as conduct involving matter depicting a minor (under 18) engaged in obscene acts in violation of Ca. Penal Code § 311.2 (preparing, selling or distributing obscene matter) or 311.4(a) (employment of a minor to perform obscene acts).

<sup>170</sup> See Cal. Penal Code § 11165.2, defining “neglect” as acts or omissions constituting negligent treatment or maltreatment of a child by a person responsible for the child’s welfare under circumstances indicating harm or threatened harm to the child’s health or welfare.

<sup>171</sup> See Cal. Penal Code §§ 11165.3-11165.4.

<sup>172</sup> See Cal. Penal Code § 11166.05, defining the suffering of or risk for “serious emotional damage” as being evidenced by “severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others.”

- Abuse or neglect in out-of-home care.<sup>173</sup>

Under CANRA, the identity of a person reporting child abuse or neglect is kept confidential except that it is shared among agencies and people tasked with receiving and investigating such reports.<sup>174</sup>

CANRA provides for civil and criminal immunity for mandated reporters who report known or suspected child abuse or neglect.<sup>175</sup> CANRA also provides for penalties that apply to mandated reporters who fail to report.<sup>176</sup>

## 6. California Penal Code<sup>177</sup>

### a) Sexual Battery – *Cal. Penal Code § 243.4*

Under the California Penal Code, a person is guilty of “misdemeanor sexual battery” if they touch the intimate part of a person against the will of the person touched and the touching is for the purpose of sexual arousal, sexual gratification or sexual abuse.<sup>178</sup>

Similarly, a person is guilty of “sexual battery” if they touch the intimate part of a person while unlawfully restraining them, or if they cause the restrained person to masturbate or touch an intimate part of the accused or a third person, if the touching is for the purpose of sexual arousal, sexual gratification or sexual abuse.<sup>179</sup>

### b) Rape – *Cal. Penal Code § 261*

Under the Penal Code, the crime of “rape” has the following elements:<sup>180</sup>

- An act of sexual intercourse<sup>181</sup> accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

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<sup>173</sup> Cal. Penal Code § 11165.5.

<sup>174</sup> Cal. Penal Code § 11167.

<sup>175</sup> Cal. Penal Code § 11172.

<sup>176</sup> Cal. Penal Code § 11166 (misdemeanor conviction punishable by up to six months imprisonment or a fine of \$1000 or both; it is a continuing offense to intentionally conceal one’s failure to report known abuse or severe neglect).

<sup>177</sup> Under California law, a person who commits any of the below-referenced acts, except for sexual battery, against someone who is 14 or younger and at a time when the perpetrator is more than seven years older than the victim also commits the crime of “Aggravated Sexual Assault of a Child.” Cal. Penal Code § 269. Because the facts in this matter do not raise a potential violation of this law, it is not discussed here. Similarly, a person over 18 who engages in sexual intercourse, Sodomy, Oral Copulation, or sexual penetration with a child who is 10 or younger commits the crime of “Sexual Intercourse/Sodomy/Oral Copulation/Sexual Penetration with a Child.” Cal. Penal Code § 288.7. Because the facts do not raise a potential violation of this law, it is not discussed here.

<sup>178</sup> Cal. Penal Code § 243.4(e).

<sup>179</sup> Cal. Penal Code § 243.4(c)-(d).

<sup>180</sup> Cal. Penal Code § 261.

<sup>181</sup> Cal. Penal Code § 263 states that “sexual intercourse” consists of “any sexual penetration, however slight;” the California Model Jury Instructions contain the same statement. Under California law, a person cannot consent to sexual intercourse if they are under the age of 18. Cal. Penal Code § 261.5.

- Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent and this is known or reasonably should be known to the person committing the act;
- Where it is accomplished against a person's will using force, violence, duress, menace or fear of immediate and unlawful bodily injury;
- Where a person is prevented from resisting by any intoxicating or anesthetic substance or controlled substance and this condition is known or reasonably should be known to the person committing the act;
- Where the person is at the time unconscious of the nature of the act, and this is known to the accused;
- Where a person submits under the belief that the person committing the act is someone known to the victim other than the accused and this belief is intentionally induced by the accused;
- Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or another person and there is a reasonable possibility that the perpetrator will execute the threat;
- Where the act is accomplished against the victim's will by threatening to use authority to incarcerate, arrest or deport the victim or another person and the victim has a reasonable belief that the perpetrator is a public official.

**c) Unlawful Sexual Intercourse – *Cal. Penal Code § 261.5***

Under the Penal Code, the crime of “unlawful sexual intercourse” is defined as “an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor [under the age of 18 years].”<sup>182</sup> Under section (b), “[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.”<sup>183</sup> Under section (c) “[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony.”<sup>184</sup> Under section (d), “[a]ny person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony.” Mandatory minimum terms of imprisonment apply under sections (c) and (d).

**d) Sodomy – *Cal. Penal Code § 286***

Under the Penal Code, the crime of “sodomy” is defined as “sexual conduct consisting of contact between the penis of one person and the anus of another person.”<sup>185</sup> Mandatory minimum terms of imprisonment for sodomy apply in various circumstances (related to relating to lack of consent, the age of the parties, or other special circumstances), all of which are listed in the Penal Code.<sup>186</sup>

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<sup>182</sup> Cal. Penal Code § 261.5.

<sup>183</sup> Cal. Penal Code § 261.5 (b).

<sup>184</sup> Cal. Penal Code § 261.5 (c).

<sup>185</sup> Cal. Penal Code § 286.

<sup>186</sup> Cal. Penal Code § 286 (b)-(k). See also Cal. Penal Code § 289.

**e) Lewd or Lascivious Acts – Cal. Penal Code § 288**

Under the Penal Code, “lewd and lascivious acts” are willful acts upon or with the body upon a child who is under 14 with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.<sup>187</sup> A conviction carries a mandatory minimum term of imprisonment, which is enhanced if the act is completed by use of force, violence, duress or fear or if the person committing the act is a caretaker and the child acted upon is in their care.

**f) Harmful Matter Sent to Minors – Cal. Penal Code § 288.2**

The Penal Code prohibits the sending of “harmful matter” to minors.<sup>188</sup> The crime has the following elements:

- Knowingly distributing to a minor any “harmful matter;”<sup>189</sup>
- With the intent of arousing, appealing to or gratifying the lust, passions or sexual desires of that person or the minor; and
- With the intent to or for the purposes of engaging in sexual intercourse, sodomy or oral copulation with the other person, or with the intent that either person touches an intimate body part of the other.

**g) Oral Copulation – Cal. Penal Code § 288a**

Under the Penal Code, the crime of “oral copulation” is defined as “the act of copulating the mouth of one person with the sexual organ or anus of another person.”<sup>190</sup> Non-consent and force are not elements of the crime.

Mandatory minimum terms of imprisonment for oral copulation apply in various circumstances, all of which are listed in the Penal Code.<sup>191</sup>

**h) Forcible Sexual Penetration – Cal. Penal Code § 289**

Under the Penal Code, a person commits a crime if they commit an act of sexual penetration<sup>192</sup> against the victim’s will under any of the following circumstances:<sup>193</sup>

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<sup>187</sup> Cal. Penal Code § 288.

<sup>188</sup> Cal. Penal Code § 288.2.

<sup>189</sup> This term refers to the definition set forth in Cal. Penal Code § 313, which defines “harmful matter” as “matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.”

<sup>190</sup> Cal. Penal Code § 288a.

<sup>191</sup> *Id.* See also Cal. Penal Code § 289.

<sup>192</sup> Sexual penetration is defined as “penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.” Cal. Penal Code § 289(k)(1).

<sup>193</sup> Cal. Penal Code § 289.

- Where it is accomplished against a person's will using force, violence, duress, menace, or fear of immediate and unlawful bodily injury;
- Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent and this is known or reasonably should be known to the person committing the act;
- Where a person is prevented from resisting by any intoxicating or anesthetic substance or controlled substance and this condition is known or reasonably should be known to the person committing the act;
- Where the person is at the time unconscious of the nature of the act, and this is known to the accused;
- Where a person submits under the belief that the person committing the act is someone known to the victim other than the accused and this belief is intentionally induced by the accused;
- Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or another person and there is a reasonable possibility that the perpetrator will execute the threat;
- Where the act is accomplished against the victim's will by threatening to use authority to incarcerate, arrest, or deport the victim or another person and the victim has a reasonable belief that the perpetrator is a public official.

**5. Welfare and Institutions Code: Inspection of Juvenile Court Records  
– Cal. Welfare & Inst. Code § 827**

Under the California Welfare and Institutions Code, juvenile case files may only be inspected by:<sup>194</sup>

- Court personnel;
- The district attorney, city attorney or prosecutor authorized to prosecute criminal or juvenile cases;
- The minor who is the subject of the proceeding;
- The minor's parents or guardian;
- The attorneys for the parties, judges, referees or other hearing officers, probation officers and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor;
- The county or city attorney or other attorneys representing the petitioning agency in a dependency action;
- The superintendent or designee of the school district where the minor is attending or enrolled in school;
- Members of the applicable child protective services agency;
- The State Department of Social Services;

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<sup>194</sup> Cal. Welfare & Inst. Code § 827.



- Authorized legal staff or special investigators who are authorized representatives of the Department of State, as necessary to perform their duties;
- Members of children’s multidisciplinary teams, persons or agencies providing treatment or supervision of the minor;
- A judge, commissioner, or other hearing officer assigned to a family law case involving the minor;
- A statutorily-authorized or court-appointed investigator acting within the scope of their duties and conducting an investigation pursuant to the Family Code or who is participating in guardianship proceedings involving the minor;
- A local child support agency for the purpose of establishing paternity or enforcing child support orders;
- Juvenile justice commissioners; or
- Any other person designated by the court upon the filing of a petition.

Prior to the release of a juvenile case file, the court must afford due process, including notice and an opportunity to file an objection. All interested parties must have the opportunity to object to the release of the juvenile case file.<sup>195</sup>

Notwithstanding the general proscription against releasing juvenile court files, records indicating that a minor enrolled in a public school has been found to have committed any felony or any misdemeanor involving curfew, gambling, alcohol, drugs, tobacco products, carrying weapons, a specified sex offense,<sup>196</sup> assault or battery, larceny, vandalism or graffiti, must be released in writing from the court to the district superintendent within seven days. The superintendent must then relay the information to the school principal who will disseminate the information to teachers or administrators who directly supervise or report on the behavior of the minor in question.<sup>197</sup>

#### **D. PAUSD Board Policies (BP) and Administrative Regulations (AR)**

##### **1. Nondiscrimination in District Programs and Activities – BP 0410**

PAUSD Board Policy 0410 prohibits discrimination based on gender, sex, race, color, religion, ancestry, national origin, ethnic group identification, age, marital or parental status, physical or mental disability, sexual orientation, gender identity or expression, genetic information, the perception of one or more such characteristics or the association with a person or group with one or more of these actual or perceived characteristics.

Board Policy 0410 mandates the following:

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<sup>195</sup> *Id.*

<sup>196</sup> Cal. Welfare & Inst. Code § 827 references Cal. Penal Code § 290, which lists the sex offenses requiring registration and encompasses, generally, rape, sodomy, lewd or lascivious acts, oral copulation, forcible penetration, and related acts.

<sup>197</sup> Cal. Welfare & Inst. Code § 827(b)(2). Additional details about the confidentiality of the information and the consequences for breaching that confidentiality are detailed at § 827(b)(2)(A) through (C).

- Annually, the Superintendent<sup>198</sup> or their designee must review district programs and activities to ensure the removal of any barrier that may unlawfully prevent an individual or group in any protected category from accessing district programs, activities or facilities. The Superintendent must take prompt, reasonable actions to remove any identified barrier. The Superintendent or their designee must report their findings and recommendations to the PAUSD Board after each review;
- The Superintendent or their designee must notify students, parents/guardians, employees, employee organizations, applicants for admission and employment and sources of referral for applicants about the PAUSD nondiscrimination policies and related complaint procedures in each announcement, bulletin, catalog, handbook, application form or other distributed material;<sup>199</sup>
- PAUSD must publish its nondiscrimination policy and related materials in a format that parents/guardians can understand. When 15 percent or more of the district's students speak a single primary language other than English, the materials must be translated into that other language.

## **2. Complaints Concerning District Employees – BP/AR 1312.1**

PAUSD Board Policy 1312.1 specifies that the PAUSD Board “accepts responsibility for providing a means by which the public can hold employees accountable for their actions.” The Board Policy specifies that the Board prohibits retaliation against complainants and states that “the Superintendent or [their] designee at may keep a complainant’s identity confidential except to the extent necessary to investigate the complaint.” The Board Policy further states, “the district will not investigate anonymous complaints unless it so desires.”

Administrative Regulation 1312.1 states:

- Annually, PAUSD must notify its students, employees, parents/guardians, district advisory committee, school advisory committees and other interested parties of its complaint procedures including the opportunity to appeal to the California Department of Education. The notice summarizing the complaint procedures will be prepared by district administration and published in secondary student handbooks, staff handbooks, and the annual notice of parent/guardian rights, and will be provided to members of school site councils;
- Any written and signed statement will constitute a complaint and will be processed in accordance with the policy if it alleges a violation of federal [or] state laws or regulations or unlawful discrimination on the basis of actual or perceived sex, ethnic group identification, race, national origin, religion, mental or physical disability, sexual orientation, gender identity, gender expression, or association with a group or person with one or more of these actual or perceived characteristics;
- An investigation and written report must be completed within 60 calendar days unless the complainant agrees to extend the deadline;
- Alternative means of resolution are allowed and encouraged;

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<sup>198</sup> When used in the PAUSD BP/AR context, “Superintendent” refers to the PAUSD Superintendent as opposed to the State Superintendent of Public Instruction. The current PAUSD Superintendent is Glenn “Max” McGee, Ph.D.

<sup>199</sup> This requirement is consistent with 34 CFR §§ 104.8 and 106.9.

- The complainant may bypass the PAUSD’s process and file their complaint directly with the California Department of Education, or the complainant may appeal PAUSD’s decision to the California Department of Education if they are dissatisfied with the result;
- The complaint process does not prevent complainants from attempting to address issues “informally” – i.e. by raising concerns directly with the employee(s) in question or with their immediate supervisor. Complainants are encouraged to raise their concerns directly with the involved personnel, if they wish. If they do so, they should meet with the employee to try to resolve the identified issue. Complainants are also encouraged to meet with the employee’s supervisor to try to resolve the identified issue;
- If informal attempts at resolution are unsuccessful, complainants may make a “formal” report by putting their concern in writing and directing it to the employee’s immediate supervisor and the principal/instructional supervisor. The immediate supervisor will review the complaint with the employee and attempt to resolve it. If the complaint is not in writing, PAUSD will be “unable to take formal action;”
- Within 10 working days, the employee’s supervisor will respond in writing to the person filing the complaint. The response will also go to the employee(s) and, at the secondary level, the principal. The response will propose a resolution;
- If the proposed resolution is unsatisfactory, the complainant may request in writing that the matter be forwarded to the Superintendent’s designee who must respond within 10 working days;
- If the designee’s proposed resolution is unsatisfactory, the complainant may request in writing that the matter be forwarded to the Superintendent who must respond within 20 working days;
- Appeals of the Superintendent’s decision may be made to the PAUSD Board.

### **3. Uniform Complaint Procedures (UCP) – BP/AR 1312.3**

PAUSD Board Policy 1312.3 recognizes that PAUSD “has the primary responsibility to ensure compliance with applicable state and federal laws and regulations governing educational programs.” The Board Policy and Administrative Regulations specify that the UCP will be used to investigate and resolve the following complaints:

1. Any complaint alleging that the PAUSD violated a state or federal law or regulation governing adult education programs, consolidated categorical aid programs, migrant education, technical education and training programs, child care and development programs, child nutrition programs and special education programs;
2. Any complaint alleging the occurrence of unlawful discrimination (including discriminatory harassment, intimidating or bullying) against any person in district programs or activities based on actual or perceived characteristics of race, ethnicity, color, ancestry, nationality, national origin, ethnic group identification, age, religion, marital or parental status, physical or mental disability, sex, sexual orientation, gender, gender identity, gender expression, genetic information or any other protected characteristic or based on association with a person or group with one or more of the perceived or actual characteristics;
3. Any complaint alleging PAUSD noncompliance with the requirements regarding lactating/breastfeeding students; fees, deposits or charges for participating in educational

activities; school transfer credits, graduation requirements or other issues related to foster youth; transfer credits or other issues related to homeless students; course repeats; or physical education requirements;

4. Any complaint alleging retaliation against a complainant or other participant in the complaint process; and
5. Any other complaint as specified in PAUSD policy.

Board Policy 1312.3 prohibits “any form of retaliation against any individual who has filed or participated in the UCP.” The Board Policy specifies that participating in the complaint process “shall not in any way affect the status, grades, or work assignments” of the complainant. The Board Policy further provides, “[i]n investigating complaints, the confidentiality of the parties involved shall be protected as required by law.” The Board Policy directs the PAUSD Superintendent or their designee to keep the identity of the complainant or reporting party alleging unlawful discrimination or retaliation confidential, “as long as the integrity of the complaint process is maintained.”

Board Policy 1312.3 requires the following:

- The Superintendent or designee must provide training to district staff to ensure awareness and knowledge of current law and related requirements, including the steps and timelines specified in BP/AR 1312.3;
- The Superintendent or designee must maintain records of all UCP complaints and investigations and must destroy those records “in accordance with applicable state law and district policy;”
- The following complaints should *not* be subject to the UCP and should be referred to the specified agency:
  - Any complaint alleging child abuse or neglect must be referred to the County Department of Social Services, the County Protective Services Division, and the appropriate law enforcement agency;
  - Any complaint alleging health and safety violations in a licensed child development program must be referred to the appropriate Child Development regional administrator;
  - Any complaint alleging employment discrimination must be sent to the California Department of Fair Employment and Housing and the compliance officer must notify the complainant by first class mail of the transfer;
  - Any complaint alleging fraud must be referred to the California Department of Education;
  - Any complaint related to the sufficiency of textbooks or other instructional materials, emergency or urgent facilities or conditions that threaten the health or safety of students or staff or teacher vacancies or misassignments must be reported and processed in accordance with PAUSD’s Williams Uniform Complaint Procedures (AR 1312.4).

Administrative Regulation 1312.3 identifies the compliance officer who “shall receive and investigate complaints” as “Associate Superintendent – Educational Services.” The Administrative Regulation states that the Superintendent or designee will ensure that the

compliance officer and other designated investigators “receive training and are knowledgeable about the laws and programs for which they are responsible.” Further, the “compliance officer shall receive and investigate complaints and shall ensure district compliance.”

Administrative Regulation 1312.3 requires:

- Annual “written/online” notification by the Superintendent or designee of PAUSD’s UCP to students, employees, parents/guardians, the district advisory committee, school advisory committees and other interested parties;
- Posting of BP/AR 1312.3 in all district schools and offices including staff lounges and student government meeting rooms;
- If 15 percent or more of students enrolled in a particular school speak a primary language other than English, the policy and procedures and all related forms and notices concerning the UCP must be translated into that language;
- The notice must:
  - Identify the person(s), position(s) or unit(s) responsible for receiving complaints;
  - Explain any civil law remedies that may be available to a victim of discrimination under state or federal discrimination laws;
  - Describe the appeals process including, if applicable, a complainant’s right to take the complaint directly to the California Department of Education<sup>200</sup> or to pursue remedies before civil courts or other public agencies;<sup>201</sup>
  - Include statements that:
    - PAUSD has primary responsibility to ensure compliance with applicable state and federal laws and regulations governing educational programs;
    - The complaint review must be completed within 60 calendar days from the date of receipt of the complaint unless the complainant agrees in writing to an extension;
    - A complaint alleging unlawful discrimination must be filed no later than six months from the date it occurred or six months from the date the complainant first obtained knowledge of the facts;
    - A complainant has a right to appeal PAUSD’s decision to the California Department of Education by filing a written appeal within 15 days of receiving the district’s decision;
    - The appeal to the California Department of Education must include a copy of the complaint filed with PAUSD and a copy of the district’s decision; and
    - Copies of the district’s UCP procedures are available free of charge.

Under Administrative Regulation 1312.3, complaints alleging unlawful discrimination, including discriminatory harassment, intimidation and/or bullying shall be investigated using the district’s UCP regardless of whether the alleged harassment occurred on or off campus. Further, the UCP states that when the conduct is reported to have occurred against an individual off campus, the District Compliance Officer (Title IX Coordinator) shall investigate and document the activity

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<sup>200</sup> AR 1312.3 describes how to file an appeal to the California Department of Education.

<sup>201</sup> AR 1312.3 describes other civil remedies available and provides a link to and information about filing a complaint with OCR.

and shall identify specific facts and circumstances that explain the impact or potential impact on school activity, school attendance, or the subject of the complainant's educational performance.

AR 1312.3 details the following procedural steps in resolving a UCP:

- Any student, parent/guardian, third party, or other person or organization who believes that they or another student or group has been subjected to unlawful discrimination on or off campus may 1) report the conduct orally to any school employee or administrator, and/or 2) file a written complaint under these procedures:
  - Oral reports:
    - A staff member who receives an oral report alleging discrimination, harassment, intimidation or bullying must notify the principal or site designee within one day of receiving the report;
    - The principal/designee who receives such a report must inform the person who made the initial oral report of the resolution options available under the UCP, including the right to file a written complaint;
    - If the reporting student wishes to file a written complaint but is unable, staff must assist them in the filing of the complaint.
  - Written complaints:
    - Within two days of receiving a written complaint, the receiving administrator must send it to the District Compliance Officer.
- After a report or complaint is made, the principal, designee or Compliance Officer must determine whether interim measures are necessary to stop, prevent or address the effects of discrimination, including intimidation, harassment or bullying;
- After a report or complaint is made, the principal, designee or Compliance Officer may engage in informal efforts to resolve the complaint;
- If the matter is *not* going to be resolved informally, the Compliance Officer will initiate an impartial investigation within five school days of receiving a formal complaint. The five-day time period may be extended if informal resolution is undertaken, but in all cases investigation must begin within ten days of receipt of the complaint unless the Compliance Officer has confirmed that the complaint has been resolved informally to the satisfaction of the Complainant<sup>202</sup> and their parent/guardian;
- The Compliance Officer must describe the complaint procedure to the Complainant and their parent/guardian, discuss what actions are being sought in response to the complaint, provide the Complainant with an opportunity to describe the incident, identify witnesses, and provide other evidence and information, and keep the information about the complaint confidential except as necessary to carry out the investigation or take other subsequent necessary action;

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<sup>202</sup> Note that in the AR, PAUSD uses the phrase “subject of the complaint” to refer to the Complainant and uses “person accused of unlawful discrimination” to refer to the Respondent. For brevity, this summary uses “Complainant” and “Respondent.”

- The Compliance Officer must interview individuals who have relevant information including the Respondent, witnesses and anyone mentioned as having relevant information;
- The Compliance Officer must review any records, notes or statements related to the complaint;
- The Compliance Officer must document their information gathering and maintain that documentation for at least two years;
- Within 60 calendar days of receiving the complaint, the Compliance Officer must conclude the investigation and prepare a written report of their findings that contains:
  - The findings of fact based on evidence gathered;
  - As to each allegation, the District’s conclusion as to whether unlawful discrimination has occurred;
  - Rationale for such conclusion(s);
  - Corrective actions, if applicable;
  - Notice that the Complainant and their parent/guardian should immediately report the reoccurrence of the conduct or retaliation to the Compliance Officer, principal or designee;
  - Notice of the Complainant’s right to appeal within 15 days to the CDE and the procedures for initiating an appeal; and
- The district’s decision shall be in writing and sent to the complainant.

In addition to outlining the procedural steps in the UCP, Administrative Regulation 1312.3 addresses 1) remedial actions that may result from a report or complaint<sup>203</sup> and 2) disciplinary actions that may result from a finding that the Respondent engaged in discriminatory conduct.<sup>204</sup> Administrative Regulation 1312.3 also prohibits knowingly filing false complaints of discrimination and provides for possible outcomes if a person is found to have engaged in such conduct.

## **12. Conduct – BP 5131**

PAUSD Board Policy 5131 states that PAUSD “believes that all students have the right to be educated in a positive learning environment free from disruptions” and that “students should be expected to exhibit appropriate conduct that does not infringe upon the rights of others or interfere with the school program” while on school grounds, going to or from school, while at school activities, while using school transportation or off-campus during non-school hours if such conduct poses a threat or danger to the safety of students, staff or district property or substantially disrupts school.

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<sup>203</sup> Remedial actions include interventions for the Respondent such as parental notification, counseling, training, or discipline, and interventions for the Complainant such as counseling and academic support. Remedial actions also include separating the Complainant and Respondent (as long as such separation does not penalize the Complainant), following up to ensure that the discriminatory conduct has stopped, training, and other interventions for the larger school community to ensure that all community members understand the types of behavior that constitute discrimination.

<sup>204</sup> Disciplinary actions include warnings, mandatory training, counseling, suspension, transfer, and expulsion. Suspension and recommendations for expulsion must follow applicable law.

Board Policy 5131 requires the Superintendent or designee to ensure that each school 1) develops standards of conduct and discipline consistent with board policies and administrative regulations and 2) notifies students and parents/guardians about the district and school rules related to conduct.

Board Policy 5131 states that prohibited student conduct includes, but is not limited to:

- Conduct that endangers students, staff, or others, including but not limited to, physical violence, possession of a weapon or terroristic threats;
- Conduct that disrupts the orderly classroom or school environment;
- Discrimination, harassment and/or intimidation of students or staff, including bullying, sexual harassment, hate-motivated behavior, cyberbullying, hazing or initiation activity, extortion or any other verbal, written or physical conduct that causes or threatens to cause violence, bodily harm or substantial disruption;
- Damage to or theft of property belonging to students,<sup>205</sup> staff or the district;
- Possession or use of a laser pointer, unless for a valid school-related purpose;
- Obscene acts or use of profane, vulgar or abusive language;
- Plagiarism or dishonesty on schoolwork or tests;
- Inappropriate attire;
- Tardiness or unexcused absence from school;
- Failure to remain on school premises in accordance with school rules;
- Possession, use, or being under the influence of tobacco, alcohol or other prohibited drugs; and
- Use of a cell phone during instructional time.

BP 5131 requires employees to provide appropriate supervision to enforce standards of conduct and to immediately intervene or call for assistance if they observe or receive a report of a violation of the standards. BP 5131 grants school officials the right to search students and their belongings, consistent with BP/AR 5145.12, if they “suspect that [such a search] will turn up evidence of the student’s violation of the law or school rules.”

Under BP 5131, a student who violates school rules or regulations may be subject to discipline in the forms of suspension, expulsion, transfer to alternative programs, referral to a student success team or counseling services, denial of participation in extracurricular or co-curricular activities or other privileges or other measures as appropriate.

### **13. Bullying Prevention – BP/AR 5131.2**

BP/AR 5131.2 prohibits bullying, defined consistent with California law as “any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of electronic act, and including one or more acts committed by a pupil or group of pupils that constitutes sex harassment, hate violence or creates an intimidating or hostile educational

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<sup>205</sup> BP 5131 states that PAUSD is not responsible for students’ personal belongings brought onto campus or to a school activity and are lost, stolen or damaged.



environment directed at one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:<sup>206</sup>

1. Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property;
2. Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health;
3. Causing a reasonable pupil to experience a substantial interference with his or her academic performance; or
4. Causing a reasonable pupil to experience a substantial interference with his or her ability to participate in or benefit from the services, activities or privileges provided by a school."

BP 5132.2 specifically addresses "cyberbullying," defined as the transmission of harassing communications, direct threats or other harmful texts, sounds or images or breaking into another person's electronic account and assuming that person's identity to cause harm to that person's reputation.<sup>207</sup> BP 5132.2 also prohibits "sexting" with a minor (i.e. sending a message to a minor where the message contains matter that is sexual in nature with the intent of seducing the minor).<sup>208</sup>

BP 5132.2 requires school staff who witness bullying to immediately intervene when it is safe to do so. The Board Policy also states that, "when appropriate," the Superintendent or designee must notify the parents/guardians of alleged bullying "targets" and "aggressors." The Superintendent may also involve school counselors, mental health counselors and/or law enforcement.

BP 5132.2 specifies that complaints alleging bullying based on a protected characteristic (see list in BP 0410) will be addressed under BP/AR 1312.3 (UCP) while complaints of bullying based on a non-protected status (i.e. weight) will be addressed under separate procedures at AR 5132.2.

Under BP 5132.2, students who are found to be engaged in bullying on school premises or off-campus in a manner that causes or is likely to cause a substantial disruption of a school activity or school attendance will be subject to discipline, which may include suspension or expulsion.

BP 5132.2 prohibits retaliation against a student who reports or participates in an investigation regarding bullying. BP 5132.2 also prohibits knowingly making a false complaint or statement regarding bullying.

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<sup>206</sup> Defined consistent with Cal. Ed. Code 48900(r), discussed above.

<sup>207</sup> BP 5131.2 also prohibits conduct in violation of Cal. Penal Code §§ 653.2, which makes it a crime for a person to distribute personal identity information electronically with the intent to cause harassment by a third party or to threaten a person's safety by posting personal information online (e.g. placing a person's picture or address online so that he receives harassing messages).

<sup>208</sup> BP 5131.2's prohibition against "sexting" with a minor refers to Cal. Penal Code § 288.2 which is discussed below.

AR 5132.2 provides examples of conduct that may qualify as bullying.<sup>209</sup> AR 5132.2 also specifies the complaint procedure that applies in cases of alleged bullying not having to do with a protected class. AR 5132.2 details the following procedural steps in resolving such a complaint:

- At each school, the principal or designee is responsible for receiving oral or written complaints about bullying that are not based on a protected status;
- Any member of the school community who has credible information may report an act of bullying;
- A staff member who witnesses bullying or receives a complaint must report it to the principal or designee within one school day;
- The principal or designee must document all oral and written complaints of bullying and must maintain those records for two years;
- The principal or designee must provide that documentation to the Coordinator of Student Services for recordkeeping;
- After a report of bullying is made, the principal or designee must determine whether interim measures are necessary to stop, prevent or address the bullying behaviors;
- The principal or designee must investigate all allegations of bullying not based on a protected status; the investigation should begin as soon as possible upon receiving notification of a report or complaint and must be concluded within 15 school days of receiving the complaint;
- The principal or designee must provide immediate notification to the parent/guardian of both the alleged “target” and the alleged “aggressor;”
- The principal or designee may take any action necessary to protect the complainant, alleged target, other students or employees consistent with the requirements of applicable law and regulations;
- The alleged “target” and alleged “aggressor” may not be interviewed together;
- The name of the complainant may not be revealed during the investigation;
- At the conclusion of the investigation, the principal/designee must provide the complainant and the alleged aggressive with notice of the decision. If either party disagrees, they may appeal within 15 calendar days to the Student Services Coordinator;
- A student who has been determined to be the “target” of bullying will be given priority and/or additional consideration for an inter-district transfer if that student’s parent/guardian requests such a transfer.

AR 5131.2 provides factors to be used in reaching a decision about the complaint. Those factors include:

- Statements made by the complainant, the individual accused and other people with knowledge about the allegations;
- The details and consistency of each person’s account;
- Evidence of how the alleged target reacted to the alleged bullying event;
- Evidence of any past instances of bullying behaviors by the alleged aggressor and the type, frequency, and duration of those behaviors; and

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<sup>209</sup> AR 5132.2 separates such behavior into 5 categories: 1) verbal, 2) nonverbal, 3) physical, 4) emotional/psychological, and 5) cyberbullying. See AR 5132.2, p. 2.

- The relationship between the alleged aggressor and the alleged target.

AR 5131.2 lists remedial and disciplinary actions that may be used, as appropriate, in response to a complaint about bullying. Under AR 5131.2, students who are found to be engaged in bullying (which includes sexual harassment) on school premises or off-campus in a manner that causes or is likely to cause a substantial disruption of a school activity or school attendance will be subject to discipline, which may include suspension or expulsion.

#### **14. Child Abuse Prevention and Reporting – BP/AR 5141.4**

Board Policy 5141.4 sets forth the Board’s commitment to “supporting the safety and well-being of district students and desires to facilitate the prevention of and response to child abuse and neglect.” The operative definitions, procedures and obligations regarding child abuse and neglect are set forth in Administrative Regulation 5141.4.

AR 5141.4 requires mandated reporters to report child abuse or neglect. As noted above, California law defines “mandated reporter” broadly and inclusively; in the context of a school setting, the term captures, among other individuals, teachers, instructional aides, teacher’s assistants, classified employees, athletic coaches, directors and administrators. Child abuse and neglect includes, when committed by anyone against a person under the age of 18: sexual abuse, including sexual assault or sexual exploitation; physical injury or death inflicted by other than accidental means; neglect; willful harming or injuring of a child; and unlawful corporal punishment.<sup>210</sup> Sexual assault includes rape, statutory rape, rape in concert, incest, sodomy, lewd or lascivious acts upon a child, oral copulation, sexual penetration and child molestation.

A mandated reporter must report when, in their professional capacity or in the scope of their employment, they have knowledge of or observe a child who they know or reasonably suspect has been the victim of child abuse or neglect. Reasonable suspicion is an objective reasonable person standard; the obligation does not require certainty. A mandated reporter must immediately or as soon as practicable make an initial report to the appropriate agency or to law enforcement including any police department (except the school district’s police department), the sheriff’s department, the county probation department or the county welfare department. Within 36 hours, the mandated reporter must prepare and send to the appropriate agency a written report, including a complete DOJ SS 8572 form; the information to be included in the report is specified in AR 5141.4. Employees reporting child abuse or neglect are encouraged, but not required, to notify their principal of the report. The principal, if notified, shall inform the district’s superintendent.

Using the online training module provided by the California Department of Social Services, PAUSD employees who are mandated reporters are to be provided training within the first six weeks of each school year or initial hiring. Proof of training completion is to be maintained by the district superintendent.

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<sup>210</sup> Any mandated reporter who knows or reasonably suspects that a child is suffering serious emotional damage may make a report.

BP 5141.4 specifies that, whenever the department of Social Services or other government agency is investigating suspected child abuse or neglect, the student may be interviewed by an agency representative during school hours on school premises. The Superintendent or their designee must give the student the choice of being interviewed in private or in the presence of an adult school employee or aide selected by the student. If school personnel accompanies the child during their interview, the principal or designee must inform that selected person of the items listed in BP 5141.4.

When a child is released to a peace officer and taken into custody as a victim of suspected child abuse or neglect, the Superintendent or designee may *not* notify the parent/guardian, but must give the peace officer the address and phone number of the child's parent/guardian.

Upon request, the Superintendent or designee must provide parents/guardians with the procedures for reporting suspected child abuse occurring at a school site. For parents/guardians whose primary language is not English, the procedures must be in their primary language and an interpreter must be used when communicating orally. The procedures for reporting a PAUSD employee or other person suspected of child abuse or neglect at a school site are identified in AR 5141.4.

AR 5141.4 requires the Superintendent or designee to provide all new employees who are mandated reporters with a statement that informs them of their status and their reporting obligations under Cal. Penal Code § 11166 and their confidentiality rights under Cal. Penal Code § 11167. The new employee must sign a statement indicating that they have knowledge of the reporting obligations and stating that they will comply. The Superintendent or designee must retain those signed statements.

The Superintendent or designee must also notify all employees about:

- Immunity from civil and criminal liability for making reports of known or suspected child abuse, except when it can be proven that the person made the report knowing it was false or with reckless disregard for the truth or falsity of the report;
- Civil and/or criminal penalties for failure to report as mandated; and
- Immunity from employment sanctions by PAUSD for making reports of known or suspected child abuse, except when it can be proven that the person made the report knowing it was false or with reckless disregard for the truth or falsity of the report.

#### **15. Discipline – BP/AR 5144**

Board Policy 5144 states the Board's commitment to "providing a safe, supportive, and positive school environment which is conducive to student learning and to preparing students for responsible citizenship by fostering self-discipline and personal responsibility." The operative definitions, procedures and obligations regarding discipline are found in Administrative Regulation 5144.

AR 5144 allows each school to establish "site-level" rules that are consistent with district policies and administrative regulations. In developing site level rules under AR 5144, the

principal or designee must solicit the participation, views and advice of one representative from each of the following groups:

- Parents/guardians;
- Teachers;
- School administrators;
- School security personnel, if any; and
- For middle or high schools, students.

AR 5144 states that “school rules shall be communicated to students clearly and in an age-appropriate manner.” AR 5144 places responsibility for enforcing the school rules on “each employee of the school.” AR 5144 contains a list of suggested “disciplinary strategies” for use in resolving alleged violations of school rules. The Administrative Regulation contains the following statement:

*To the extent possible, staff shall use disciplinary strategies that keep students in school and participating in the instructional program. Except when a student’s presence causes a danger to himself/herself or others or he/she commits a single act of a grave nature or an offense for which suspension or expulsion is required by law, suspension or expulsion shall be used only when other means of correction have failed to bring about proper conduct.*

AR 5144 contains specific information about restricting a student’s recess time, after-school detention, community service and the prohibition against using corporal punishment.

AR 5144 requires the Superintendent or designee to notify parents/guardians, in writing, at the beginning of the school year or upon transfer into the district, of the availability of district rules about discipline.

## **16. Suspension and Expulsion Due Process – BP/AR 5144.1 and 5144.2**

Board Policy 5144.1 states “the grounds for suspension and expulsion and the procedures for considering, recommending and/or implementing suspension and expulsion shall be only those specified in law and the accompanying administrative regulation.” Consistent with BP/AR 5144, BP 5144.1 limits the availability of suspension and expulsion to specified circumstances or instances in which other interventions have failed. BP 5144.1 contains specific information regarding removal from a class by a teacher, parental attendance and in-school suspension. BP 5144.1 requires the Superintendent or designee to maintain and monitor outcome disaggregated data related to particular subgroups of students.

The definitions, procedures and obligations regarding suspension and expulsion are found in Administrative Regulation 5144.1 (related to all students) and Administrative Regulation 5144.2 (related to students with disabilities).

AR 5144.1 defines “suspension” as the removal of a student from ongoing instruction for adjustment purposes and defines “expulsion” as the removal of the student from the immediate supervision and control or general supervision of school personnel.

AR 5144.1 requires school principals to notify all enrolled students and their parents/guardians in writing of all school rules related to discipline including suspension and expulsion.

Under AR 5144.1, acts for which a student—including a student with disabilities—may be suspended or expelled are limited to the enumerated categories of behavior.<sup>211</sup>

AR 5144.1 allows a teacher to remove a student from their class for the remainder of the day only for behaviors that provide grounds for suspension and expulsion. A teacher who removes a student from class must immediately report this action to the principal or designee and send the student to the principal or designee for appropriate action. As soon as possible after a student is removed from class, the teacher must ask the student’s parent/guardian to attend a parent-teacher conference regarding the removal.

AR 5144.1 allows the Superintendent, principal or designee to immediately suspend a student found at school or at a school activity to be possessing a firearm, brandishing a knife, selling a controlled substance, committing or attempting to commit a sexual assault or committing a sexual battery, or possessing an explosive. AR 5144.1 also allows the Superintendent, principal or designee to suspend a student for one of the first five grounds for suspension or expulsion or if the student’s presence causes a danger to persons. For all other offenses, a student may be suspended only when the Superintendent or principal determines that other means of correction have failed to bring about proper conduct in the student. AR 5144.1 provides maximum periods of time for suspensions (5 consecutive school days unless extended pending expulsion; a maximum of 20 school days in any school year unless transferred to or enrolled in another school, in which case the maximum number of days per year is 30).

AR 5144.1 allows the Board to suspend a student for any of the acts listed in Cal. Ed. Code §§ 48900 et seq., within the limits that apply to suspensions by the Superintendent, principal or designee. Under AR 5144.1, when the Board is considering a suspension, disciplinary action or any other action except expulsion against a student, it must hold a closed session if a public hearing would lead to disclosure of information violating a student’s right to privacy under Cal. Ed. Code §§ 49073-49079. Before the Board may suspend a student, it must provide the student and their parent/guardian with written notice of the closed session by registered or certified mail or personal service. Upon receiving the notice, the student or parent/guardian may request a public meeting under AR 5144.1.

AR 5144.1 contains requirements for how “supervised suspension” (i.e. in-school suspension) must be administered.

Under AR 5144.1, suspensions must be imposed in accordance with the following procedures:

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<sup>211</sup> These categories are the same as those discussed above in section B.4.(c), discussing Cal. Ed. Code §§ 48900 et seq.

- An informal conference<sup>212</sup> conducted by the Superintendent, principal or designee with the student and, whenever practicable, the teacher, supervisor or school employee who referred the student to the principal. At the conference, the student must be provided with the reason for the disciplinary action, presented with them evidence against them, and given the opportunity to present their version and evidence in support of their defense;
- Administrative action (i.e. suspension is imposed);
- Notice to Parents/Guardians at the time of the suspension;
- Parent/Guardian conference as outlined in AR 5144.1;
- Extension of suspension, if applicable, as specified in AR 5144.1.

Only the PAUSD Board may expel a student. The Board must expel a student found to have committed any of the offenses listed under “mandatory expulsion” in Cal. Ed. Code § 48915.<sup>213</sup> Other than the offenses listed as “mandatory,” the Board must expel a student upon the recommendation of the Superintendent, principal or designee *only* if the Board makes a finding of either or both of the following:

1. That other means of correction are not feasible or have repeatedly failed to bring about proper conduct;
2. That due to the nature of the violation, the presence of the student causes a continuing danger to the physical safety of the student or others.

Under AR 5144.1, any student recommended for expulsion is entitled to a hearing to determine whether they should be expelled. The hearing must be held within 30 school days<sup>214</sup> after the Superintendent, principal or designee determines that the student has committed one of the enumerated acts that may result in suspension or expulsion. A student and their parent may also waive the hearing and stipulate to the expulsion in a written and signed stipulation agreement.

AR 5144.1 states that, in expulsion hearings involving allegations of sexual assault or sexual battery, the Superintendent or designee must give the Complainant a copy of the district’s suspension and expulsion policy and provide the Complainant with the right to:

1. Receive five days’ notice of their scheduled testimony at the hearing;
2. Have up to two adult support persons of their choosing at the hearing during their testimony;

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<sup>212</sup> This step may be omitted if the Superintendent, principal or designee determines that an emergency exists involving a clear and present danger to the lives, safety or health of students or school personnel. If the suspension occurs without this conference, the parent/guardian and student must be notified of the student’s right to return to school for the conference which shall be held within 2 school days unless the student waives their right or is physically unable to attend for any reason, in which case the conference will be held as soon as possible.

<sup>213</sup> Cal. Ed. Code § 48915 mandates expulsion for the following acts if they occur at school or at a school activity off school grounds: 1) possessing, selling or otherwise furnishing a firearm without permission, 2) brandishing a knife at another person, 3) unlawfully selling a specified controlled substance, 4) committing or attempting to commit a sexual assault or committing a sexual batter, and 5) possessing an explosive.

<sup>214</sup> A student may request, in writing, one postponement of an expulsion hearing for a period of not more than 30 calendar days. Any subsequent requests for postponement may be granted at the Board’s discretion. The Board may also delay the expulsion hearing if it “finds it impractical during the regular school year to comply with the time requirements.” The mechanics of a Board delay to an expulsion hearing are in AR 5144.1.

3. Have a closed hearing during the time they testify.

Evidence of specific instances of prior conduct of a complainant are not admissible and cannot be heard unless the person conducting the hearing determines that extraordinary circumstances require the evidence to be heard. Before such a determination is made, the complainant must be given notice and the opportunity to oppose the introduction of such information. Additional information about complainants in sexual assault or sexual battery cases is included in AR 5144.1 (e.g. concerning maintaining separate break rooms for complainants, seating arrangements during the hearing, and the like).

AR 5144.1 mandates that written notice of the expulsion hearing must be forwarded to the student facing expulsion and their parent at least 10 calendar days before the hearing. AR 5144.1 enumerates what must be in such a notice.

Under AR 5144.1, the Board must conduct the expulsion hearing in a closed session unless the student requests in writing at least five days in advance that the hearing be public and holding a public hearing would not violate another student's privacy rights. AR 5144.1 outlines other considerations regarding whether the session should be open or closed and, when closed, who should be permitted to be present. AR 5144.1 requires the board to make a record of the hearing. The Board may issue subpoenas for the personal appearance of witnesses, if appropriate and in accordance with the California Code of Civil Procedure §§ 1985-1985.2. At an expulsion hearing, the proceedings are not subject to the technical rules of evidence, but relevant evidence may be admitted and used as proof "only if it is the kind of evidence on which reasonable persons can rely in the conduct of serious affairs." The decision of the Board to expel must be supported by "substantial evidence that the student committed the acts alleged" and that the acts otherwise qualify for expulsion (i.e. that they are among the acts enumerated in Cal. Ed. Code § 48900). The Board's decision on whether to expel a student must be made within 40 school days after the student is removed from their school.

AR 5144.1 provides for an alternative expulsion hearing to be conducted by a county or state hearing officer or other impartial administrative panel of three or more certified personnel. Hearings conducted by other officials must follow the same procedures as hearings by the Board.

Whether the expulsion hearing is conducted in closed or public session by the Board, a hearing officer or an administrative panel, the final action to expel must be taken by the Board at a public meeting. If the Board decides not to expel, the decision is final and the student must be reinstated immediately. If the Board decides to expel, it must set a date when the student is eligible to be reviewed for readmission. AR 5144.1 contains specific information about timeframes for readmission in "mandatory" expulsion cases. At the time of an expulsion, the Board must recommend a plan for the student's rehabilitation. The Superintendent or designee must send written notice of the decision to expel to the student or parent/guardian that includes:

1. The specific offense committed;
2. The fact that a description of readmission procedures will be made available to the student and their parent/guardian;
3. Notice of the right to appeal to the County Board of Education within 30 days;



4. Notice of the alternative educational placement to be provided during the time of expulsion; and
5. Notice of the student's or parent/guardian's obligation to inform any new district of the expulsion.

A Board may choose to suspend the enforcement of an expulsion order as described in AR 5144.1.

AR 5144.1 provides conditions that must be fulfilled in all cases of suspension or expulsion:

- Prior notice to law enforcement of any act that may violate Cal. Penal Code § 245 (related to assault with a deadly weapon);
- Within one school day after suspension or expulsion, notice to law enforcement of any act that may violate Cal. Ed. Code §§ 48900 (c) or (d) (related to controlled substances);
- Notice to law enforcement of any act that may involve the possession or sale of narcotics or controlled substances or the possession of a firearm or ammunition within a “school zone.”<sup>215</sup>

The Board must refer expelled students to a program of study that is: 1) appropriately prepared to accommodate students with discipline problems; 2) not provided at a comprehensive middle, junior or senior high school or at any elementary school, less the program is offered at a community day school established at such a site; and 3) not housed at the school site attended by the student at the time of suspension.

AR 5144.1 provides the procedure for readmission after expulsion. AR 5144.1 specifies that no student may be denied readmission into the district based solely upon the student's arrest, adjudication by a juvenile court, formal or informal supervision by a probation officer, detention in a juvenile facility, enrollment in a juvenile school or other such contact with the juvenile justice system.

Under AR 5144.1, the District is required to maintain records of all suspensions and expulsions and to provide those records under circumstances specified in AR 5144.1.

AR 5144.2 outlines procedures that apply for students with disabilities pursuant to the Individuals with Disabilities Education Act (IDEA). Students who have not been identified as having a disability pursuant to IDEA and who have engaged in behavior that violates the district's code of student conduct may assert the protections under IDEA *only if* the district had knowledge that the student was disabled before the behavior that precipitated the disciplinary action. AR 5144.2 outlines how to evaluate whether the district had such knowledge.

Under AR 5144.2, students with disabilities are provided with additional protections in the suspension and expulsion processes, including, *inter alia*:

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<sup>215</sup> “School Zone” is defined in the “Gun Free School Zone Act” at Cal. Penal Code §§ 626.9 or 626.10.

- If a disabled student is to be suspended and the suspension would result in a change of placement as defined by 34 CFR § 300.536, the student’s IEP<sup>216</sup> team must determine the appropriate educational services;
- If a disabled student engages in dangerous behavior (i.e. carrying or possessing a weapon, using or selling illegal drugs or causing serious bodily injury upon another person) the student may be immediately removed from school and placed in an interim alternative educational setting, but the setting must be determined by the student’s IEP team and the student receives notice and certain procedural safeguards codified at 34 CFR § 300.504; and
- If a disabled student is suspended for more than 10 consecutive school days, the student is entitled to notice and a “manifestation determination” which examines the relationship between the student’s disability and the behavior subject to the disciplinary action.

If a disabled student’s parent/guardian disagrees with any decision regarding placement or the manifestation determination, they may request an appeal hearing.

Suspension and expulsion procedures for students with disabilities are the same as for all students. Upon readmission, a disabled student’s IEP team will be convened.

Under AR 5144.2, prior to the suspension or expulsion of a disabled student, the principal or their designee must also send to law enforcement copies of the pupil’s special education and disciplinary record, to the extent permitted by the Family Educational Rights and Privacy Act (FERPA) at 20 U.S.C. §§ 1232g et seq.

#### **17. Questioning and Apprehension by Law Enforcement – BP/AR 5145.11**

Board Policy 5145.11 states that “law enforcement officers may interview and question students on school premises and may remove them when appropriate.” BP 5145.11 permits law enforcement officers to interview students on campus, but states that the principal or designee must request the officer’s identity, their official capacity and the legal authority under which the interview is to be conducted. The principal or designee must maintain a record of all documentation relative to law enforcement interviews of students. Except in cases of alleged child abuse or neglect, the principal or designee must attempt to notify the student’s parent/guardian as soon as possible if the student is interviewed by law enforcement or removed from school into the custody of law enforcement.

#### **18. Nondiscrimination / Harassment – BP/AR 5145.3**

Board Policy 5145.3 prohibits “at any district or school activity ... unlawful discrimination, including harassment, intimidation and/or bullying of any student, based on actual or perceived characteristics of race or ethnicity, color, nationality, national origin, ethnic group identification, age, religion, physical or mental disability, sex, sexual orientation, gender, gender identity, gender expression or any other [protected] characteristic or based on association with a person or group with one or more of these actual or perceived characteristics.”

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<sup>216</sup> “IEP” stands for Individualized Education Program. It is a written plan developed through a team effort for each public school child who needs special education.

Discrimination is defined by BP 5145.3 as “harassment, intimidation or bullying, consisting of physical, verbal, nonverbal or written conduct, based on one of the categories listed above, that is so severe or pervasive that it: affects a student’s ability to participate in or benefit from an educational program or activity; creates an intimidating, threatening, hostile, or offensive educational environment; has the effect of substantially or unreasonably interfering with a student’s academic performance; or otherwise adversely affects a student’s educational opportunities.” For incidents of alleged harassment, intimidation and/or bullying that occur off campus, if the effects of the conduct result in harassment, intimidation or bullying at school that is sufficiently serious to interfere with or limit the targeted student’s ability to participate in or benefit from the education program, the school must respond promptly and effectively to eliminate the harassment that occurs at school, prevent its recurrence and address its effects. Such response may include discipline of the alleged harasser in accordance with applicable law and as provided in BP/AR 5144.

AR 5145.3 requires the Superintendent or designee to implement the following measures:

- Publicize the district’s nondiscrimination policy and related complaint procedures to students, parents/guardians, employees, volunteers and the public;
- Provide students with a handbook that contains age-appropriate information that clearly describes the district’s nondiscrimination policy, procedures for filing a complaint and the resources available to students who feel they have been the alleged target of such behavior;
- Annually notify all students and parents/guardians of the nondiscrimination policy;
- Ensure that all students and parents/guardians, including those with limited English language proficiency, are notified of how to access the relevant information provided in the district’s nondiscrimination policy, procedures, notices and forms in a language they can understand;
- Provide students, employees, volunteers and parents/guardians with age-appropriate training and information about the district’s nondiscrimination policy, including what constitutes conduct in violation of the policy, how to guard against segregating or stereotyping students when providing instruction, how and when to report an incident and guidelines for addressing issues related to transgender and gender-nonconforming students;
- At the beginning of each school year, inform school employees that any employee who witnesses an act of discrimination, harassment, intimidation or bullying is required to intervene if it is safe to do so; and
- At the beginning of each school year, inform each principal or designee of the district’s responsibility to provide appropriate assistance or resources to protect student’s privacy rights and to ensure their safety from threatened or potentially discriminatory behavior.

Under AR 5145.3, the District’s Compliance Officer (Title IX Coordinator) is designated as the employee responsible for coordinating the district’s efforts to comply with federal and state civil rights laws, including Title IX. AR 5145.3 provides that any student should immediately contact the Compliance Officer, the principal or any other staff member to report unlawful discrimination, including discriminatory harassment, intimidation, retaliation or bullying.

School employees are also required to report conduct they observe to the Compliance Officer or principal, whether or not the student files a complaint. AR 5145.3 also provides that the principal or compliance officer must inform the student or parent/guardian of the right to file a formal complaint under the UCP. Further, “Upon receiving a complaint of unlawful discrimination, including discriminatory harassment, intimidation, retaliation or bullying of a protected class, the Compliance Officer shall immediately investigate the complaint in accordance with the district’s uniform complaint procedures specified in AR 1312.3 – Uniform Complaint Procedures.” Even if the student chooses not to file a formal complaint, the principal or compliance officer shall implement immediate measures necessary to stop the discrimination and to ensure all students have access to the educational program and a safe educational environment.

### **19. Sexual Harassment – BP 5145.7**

Board Policy 5145.7 contains the same definition of sexual harassment that appears at Cal. Ed. Code § 212.5. BP 5145.7 lists examples of conduct that may constitute sexual harassment, including but not limited to unwelcome leering, unwelcome sexual slurs, sexual jokes, derogatory posters, spreading sexual rumors, unwanted grabbing or fondling, displaying sexually suggestive objects, sexual assault or sexual battery, dating violence, stalking and relationship abuse.

BP 5145.7 requires the Superintendent or designee to ensure that all District students receive age-appropriate instruction and information on sexual harassment, including:

- What acts constitute sexual harassment;
- A clear message that students do not have to endure sexual harassment;
- Encouragement for bystanders to report instances of sexual harassment;
- Information about the district’s procedure for investigating complaints (the UCP); and
- Information about the rights of students and parents/guardians to file a criminal complaint, as applicable.

BP 5145.7 requires the district to include copies of its sexual harassment policy in the annual notifications to parents/guardians, to post copies of the policy in the main administrative building or other prominent areas, to provide information on the policy as part of new student orientation, to publicize the policy in the student handbook and other district publications, and to be provided to employees and employee organizations.

Under BP 5145.7, all complaints and allegations of sexual harassment must be kept confidential “except as necessary to carry out the investigation or take other subsequent necessary action.”

BP 5145.7 requires the Superintendent or designee to maintain records of all reported cases of sexual harassment to enable the District to monitor, address and prevent repetitive harassing behavior in its schools.