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Washington Office of Superintendent of  
**PUBLIC INSTRUCTION**  
Chris Reykdal, Superintendent

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BULLETIN NO. 058-20 LEGAL AFFAIRS

TO: Educational Service District Superintendents  
School District Superintendents  
Charter School Directors  
School District Business Managers  
School District Civil Rights Compliance Coordinators  
School District Title IX Coordinators

FROM: Chris Reykdal, Superintendent of Public Instruction

RE: Guidance on the New Title IX Rules and Responding to Sexual Harassment in Washington K–12 Schools

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## PURPOSE

On August 14, 2020, [new U.S. Department of Education rules](#) implementing Title IX of the Education Amendments of 1972 (Title IX) will go into effect. These new rules represent a significant shift in federal standards for how schools respond to sexual harassment. Specifically, compared to former federal guidance on sexual harassment, the new rules include three major changes: the rules include a new definition of sexual harassment, change the standard for schools to respond to sexual harassment to “deliberate indifference,” and require schools to implement a new, prescriptive complaint process. However, Washington law also specifies standards for how schools respond to sexual harassment, so Washington school districts<sup>1</sup> may not rely on the Title IX rules alone to guide their response to sexual harassment. Therefore, Washington school districts will need to continue to comply with state law while implementing the new Title IX rules.

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<sup>1</sup> Federal and state nondiscrimination requirements also apply to Washington’s public charter schools and tribal compact schools. Where this bulletin refers to schools and school districts, the information also applies to Washington’s public charter schools and tribal compact schools.

This bulletin clarifies the standards and procedures for responding to sexual harassment in Washington K–12 schools in accordance with both state law and Title IX, and outlines some of the immediate actions that will be necessary in order to implement the new requirements. This bulletin is not intended to provide comprehensive guidance about the new Title IX rules.

OSPI understands implementing these changes by the August 14 effective date established by the U.S. Department of Education will be extremely difficult for districts, especially considering the effects of the COVID-19 pandemic on school re-openings. In addition to this bulletin, the OSPI Equity & Civil Rights Office will develop additional online resources and remote training opportunities. The Equity and Civil Rights Office is also available to provide technical assistance to school districts on implementing these new rules.

## BACKGROUND

Title IX prohibits discrimination on the basis of sex—including sexual harassment—in education programs and activities that receive federal financial assistance.<sup>2</sup> Before the release of the new Title IX rules, the U.S. Department of Education addressed schools' obligations to respond to sexual harassment primarily through a series of guidance documents, most notably the [2001 Revised Sexual Harassment Guidance](#) (2001 Guidance).

Washington law, at chapter [28A.640](#) RCW and [392-190](#) WAC, also prohibits sex discrimination, including sexual harassment, in schools.<sup>3</sup> Washington's definition of sexual harassment and standards for responding to sexual harassment are generally aligned with the 2001 Guidance, except that OSPI's rules at chapter [392-190](#) WAC define the formal complaint process that all school districts are required to implement in response to complaints of sexual harassment.

## OVERVIEW OF NEW TITLE IX RULES

The new Title IX rules specify how recipients of federal financial assistance, including K–12 public schools, must respond to allegations of sexual harassment consistent with Title IX's prohibition

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<sup>2</sup> 20 U.S.C. 1681 (“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>3</sup> See also OSPI guidelines, [Prohibiting Discrimination in Washington Public Schools: Guidelines for school districts to implement chapters 28A.640 and 28A.642 RCW and chapter 392-190 WAC](#).

against sex discrimination.<sup>4</sup> School districts are strongly encouraged to carefully review the new Title IX rules.

While Washington school districts cannot rely on Title IX rules alone to guide their response to sexual harassment, some of the significant changes in the new Title IX rules include the following:

- The Title IX rules establish a definition of sexual harassment that is narrower from previous federal guidance (as well as current Washington law). Specifically, in regards to sexual harassment that creates a hostile environment (as opposed to *quid pro quo* harassment), the new definition limits a school district's responsibility to respond to only harassment that is "determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school district's] education program or activity."<sup>5</sup>
- The Title IX rules establish a standard for responding to sexual harassment that is different than previous federal guidance (as well as current Washington law): schools must respond to sexual harassment in a manner that is not "deliberately indifferent." A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.<sup>6</sup>
- The Title IX rules require a complaint (or grievance) process for responding to complaints of sexual harassment that is more prescriptive than previous federal guidance (as well as current Washington law). For example, these changes include who can file a complaint; specific due process requirements, including written notices to parties and witnesses; an opportunity for each party to review relevant evidence; and an opportunity for each party to review the investigative report and submit written questions to the other party or witnesses before a final determination is made.<sup>7</sup>

However, because Washington law also specifies how school districts must respond to sexual harassment, school districts may not rely on the Title IX rules alone to guide their response to sexual harassment. As outlined in this bulletin, Washington schools must also ensure they are meeting state requirements to investigate and respond to sexual harassment.

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<sup>4</sup> The scope of these rules is limited to sexual harassment. The rules do not impact a school district's obligations regarding other types of sex or gender-based discrimination, such as sex equity in athletic programs or access to courses and programs.

<sup>5</sup> See definition of sexual harassment at 34 CFR § 106.30(a).

<sup>6</sup> 34 CFR § 106.44(a).

<sup>7</sup> See 34 CFR § 106.45.

## RESPONDING TO SEXUAL HARASSMENT IN ACCORDANCE WITH BOTH STATE LAW AND TITLE IX

### STANDARDS FOR RESPONDING TO SEXUAL HARASSMENT IN WASHINGTON SCHOOLS

While implementing the new Title IX rules, Washington school districts must continue to meet the following requirements for responding to sexual harassment, as established in state law.

Washington law, at RCW [28A.640.020](#), defines sexual harassment as unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:

- Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;
- Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or
- That conduct or communication has the purpose or effect of substantially interfering with an individual's educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.

Harassing conduct creates a "hostile environment" under state law when it is sufficiently severe, persistent, or pervasive that it limits or denies a student's ability to participate in or benefit from a school district's course offerings, including any educational program or activity.<sup>8</sup>

In accordance with WAC [392-190-0555](#), upon notice of possible sexual harassment, a school district must take prompt and appropriate action to investigate and take prompt and effective steps reasonably calculated to end harassment, eliminate the hostile environment, prevent its recurrence, and as appropriate, remedy its effects.

In Washington, a school district is deemed to have notice of sexual harassment if a reasonable employee knew, or in the exercise of reasonable care should have known, about the harassment.<sup>9</sup> With the new Title IX rules, this notice standard is expanded so that a school district has notice when any employee of an elementary or secondary school is aware of

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<sup>8</sup> WAC 392-190-0555(1)(b).

<sup>9</sup> WAC 392-190-0555(2)

possible sexual harassment.<sup>10</sup> As such, the new standard for when Washington schools have notice of sexual harassment is when *any* employee knew, or in the exercise of reasonable care should have known, about the harassment.

## IMPACT OF TITLE IX RULES ON EXISTING COMPLAINT PROCEDURES UNDER CHAPTER 392-190 WAC

While the new Title IX rules include a specific complaint process that school districts must follow in response to Title IX sexual harassment complaints, state law also outlines requirements for Washington school districts in responding to sexual harassment complaints. For this reason, Washington school districts must ensure they continue to comply with state requirements while implementing the Title IX complaint process.

OSPI's rules, WAC [392-190-065](#) through [392-190-0751](#), outline the complaint process Washington school districts must use in response to formal complaints of discrimination, including sexual harassment. State complaint procedures must still be followed for complaints of sexual harassment that do not meet the Title IX standards of a formal complaint.<sup>11</sup>

School districts must respond to sexual harassment complaints filed under Title IX in accordance with the complaint process outlined in the new federal rule.<sup>12</sup> To ensure compliance with state law while implementing the Title IX complaint process, school districts *must also meet the following requirements from Chapter [392-190](#) WAC when a sexual harassment complaint is filed under Title IX:*

- When on notice of possible sexual harassment, a school district must take prompt and appropriate action to investigate and take prompt and effective steps reasonably calculated to end harassment, eliminate the hostile environment, prevent its recurrence, and as appropriate, remedy its effects.<sup>13</sup> This is true whether or not a formal Title IX complaint has been filed.

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<sup>10</sup> 34 CFR § 106.30(a).

<sup>11</sup> See the definition of a formal complaint at 34 CFR § 106.30(a). A formal complaint must be filed by the victim (the complainant) of the alleged sexual harassment (or their parent or legal guardian) or by the Title IX coordinator. The complaint must request the district investigate allegation(s) of sexual harassment (specifically, conduct that meets the definition of Title IX sexual harassment, as defined in 34 CFR § 106.30(a)) against a named individual (the respondent) who, at the time of the alleged harassment, was under the control of the school district (such as a student, employee, or volunteer). At the time of filing the formal complaint, the complainant must be participating in or attempting to participate in the school district's educational program or activity.

<sup>12</sup> See 34 CFR § 106.45.

<sup>13</sup> WAC 392-190-0555(1)(c).

- When a complaint is filed, a school district must provide parties a copy of the district's sexual harassment complaint procedures.
- A school district must complete its investigation and provide parties a written decision within 30 days unless agreed upon by the parties or if an exceptional circumstance require an extension.<sup>14</sup> If an extension to this timeline is necessary, the school district must notify the parties in writing of the reasons for the extension and the anticipated response date. For purposes of administrative enforcement, OSPI may consider implementation of the Title IX complaint process as an exceptional circumstance that may require a reasonable timeline extension.
- The district's written decision must include all components outlined in WAC [392-190-065\(6\)](#).
- Any corrective measures must be instituted as expeditiously as possible but no later than 30 days after the school district's written response, unless otherwise agreed to by the complainant.<sup>15</sup>
- A school district must provide an option to appeal the determination in accordance with WAC [392-190-070](#). The right to appeal is not limited to the allowable appeal bases identified in [34 CFR § 106.45\(b\)\(8\)](#). Following an appeal, the school district must also provide an option to file a complaint with OSPI in accordance with WAC [392-190-075](#). All complaint and appeal options available to complainants must also be available to the individual who is alleged to have engaged in the sexual harassment (the respondent).<sup>16</sup>
- If a Title IX formal complaint is dismissed in accordance with [34 CFR § 106.45\(b\)\(3\)](#), a school district may be required to continue its investigation in accordance with the state complaint process outlined in WAC 392-190-065.

For purposes of administrative enforcement, OSPI will continue to apply the preponderance of the evidence as the standard of proof in determining whether a school district has complied with Chapter [392-190](#) WAC and OSPI's [Civil Rights Guidelines](#).

## IMPACT OF TITLE IX RULES ON STATE STUDENT DISCIPLINE DUE PROCESS RULES, CHAPTER 392-400 WAC

The Title IX rules will also impact how a school district may administer discipline to a student who has allegedly engaged in sexually harassing behavior. Specifically, the Title IX rules prohibit a school or school district from imposing any disciplinary sanctions, or other actions that are not

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<sup>14</sup> WAC 392-190-065(5).

<sup>15</sup> WAC 392-190-065(6)(d).

<sup>16</sup> 34 CFR § 106.45(8).

supportive measures, against a student until the district has followed the Title IX complaint process and determined the student was responsible for the sexual harassment.<sup>17</sup> Supportive measures must be nondisciplinary and may include, for example, counseling, modifications of class schedules, mutual restrictions on contact between parties, and increased security and monitoring of certain areas at school.<sup>18</sup>

School districts must still comply with Chapter [392-400](#) WAC, Washington's student discipline rules, when administering discipline to a student who has engaged in sexual harassment.

The Title IX rules' limitation on schools imposing disciplinary sanctions against a student does not preclude a school from removing the student from the school district's education program or activity on an emergency basis, provided that the district undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the student with notice and an opportunity to challenge the decision immediately following the removal.<sup>19</sup> In situations where a school district determines it is necessary to emergency expel a student accused of sexual harassment, the district must comply with Washington's student discipline rules for emergency expulsions, at WAC [392-400-510](#) through WAC [392-400-530](#).

The Title IX rules' student discipline provisions do not modify any rights under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973.<sup>20</sup> This includes a school district's obligation to conduct a manifestation determination before a student who is eligible, or deemed eligible, for special education or Section 504 services is removed from school for 10 school days or more.

## **ACTIONS REQUIRED TO IMPLEMENT NEW TITLE IX RULES**

To implement the new Title IX rules in light of the U.S. Department of Education's August 14 effective date, immediate action will be necessary in the following areas:

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<sup>17</sup> 34 CFR § 106.44(a).

<sup>18</sup> See definition of supportive measures at 34 CFR § 106.30(a).

<sup>19</sup> 34 CFR § 106.44(c).

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

## REVISE SEXUAL HARASSMENT POLICY AND PROCEDURE

Washington school districts must have an adopted sexual harassment policy and procedure that aligns with state law.<sup>21</sup> School districts must update their sexual harassment policy and procedure to ensure they also align with the new Title IX rules.<sup>22</sup>

## RE-DESIGNATE TITLE IX COORDINATOR (IF CURRENTLY SUPERINTENDENT)

The new Title IX rules impose limitations as to who may be designated as a school district's Title IX Coordinator. Specifically, the Title IX Coordinator may not be the same person as the decision-maker in a Title IX sexual harassment formal complaint.<sup>23</sup>

Because Washington's discrimination complaint process, at WAC [392-190-065\(5\)](#), designates a school district's superintendent (or their designee) as the decision-maker in a complaint, the new Title IX rules effectively prohibit the superintendent from serving as the Title IX Coordinator.

Moving forward, Washington school districts that currently have the superintendent designated as the Title IX Coordinator will need to designate a different employee as Title IX Coordinator, ensure that individual is trained in their role as Title IX Coordinator, and update their contact information in the district's nondiscrimination notices.

## IMPLEMENT TRAINING FOR TITLE IX STAFF

In addition to training requirements in WAC [390-190-020](#), the new Title IX rules require school districts to ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on the Title IX definition of sexual harassment; the scope of the district's education program or activity; how to conduct an investigation and complaint process, including hearings, appeals, and informal resolution processes, as applicable; and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.<sup>24</sup>

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<sup>21</sup> RCW 28A.640.020; WAC 392-190-057.

<sup>22</sup> 34 CFR § 106.8(c).

<sup>23</sup> 34 CFR § 106.45(b)(7)(i). The Title IX rules also clarify that any individual designated as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally, or an individual complainant or respondent. 34 CFR § 106.45(b)(1)(iii).

<sup>24</sup> 34 CFR § 106.45(b)(3)(iii). If using training resources from national organizations or the U.S. Department of Education, school districts should be aware that such trainings likely will not incorporate the Washington-specific requirements addressed in this bulletin.



School districts must also ensure that decision-makers receive training on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant, and any technology to be used at a live hearing.<sup>25</sup>

Additionally, school districts must ensure any staff who conduct investigations receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.<sup>26</sup>

The new Title IX rules require school districts to make all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on its website or, if the district does not maintain a website, the district must make these materials available upon request for inspection by members of the public.<sup>27</sup>

## RESOURCES

**Upcoming Informational Webinar and Training Opportunities:** On Monday, August 10 at 11:00 am, the Equity and Civil Rights Office will host an informational webinar regarding the contents of this bulletin and implementing Title IX in Washington public schools. [Register for the webinar.](#)

Later this fall, OSPI also intends to develop additional training to address the new training requirements for Title IX staff (see above).

**More OSPI Information:** For more information on responding to sexual harassment in Washington schools, visit the Equity and Civil Rights webpage on [Discriminatory and Sexual Harassment](#). OSPI will continue to update this page with additional resources about implementing the new Title IX rules in line with Washington law, rules, and guidance.

**Public School Employees:** While the information in this bulletin is specific to sexual harassment against students, the Title IX Rules also apply to sexual harassment against employees. OSPI may follow up this bulletin with additional guidance for school districts specific to the new Title IX

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<sup>25</sup> While the Title IX rules require live hearings for postsecondary institutions, they are not required for K–12 school districts. If a school district chooses to incorporate live hearings into their Title IX complaint process, the above training requirement must be met, along with the requirements outlined in 34 CFR § 106.45(b)(6).

<sup>26</sup> 34 CFR § 106.45(b)(3)(iii).

<sup>27</sup> 34 CFR § 106.45(b)(10)(i)(D).

rules' impact on employee sexual harassment. In the meantime, school districts should contact their legal counsel for advice on what additional changes may be necessary specific to their situation.

**New Title IX Rules Resources:** The U.S. Department of Education, Office for Civil Rights (OCR) has provided the below guidance to assist schools in understanding the requirements and standards in the new Title IX rules. As noted throughout this bulletin, complying with these resources alone will not meet state law requirements.

- [Title IX: Fact Sheet: Final Title IX Regulations](#) (PDF)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#) (PDF)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#) (PDF)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM](#) (PDF)
- [OCR Webinar: Title IX Regulations Addressing Sexual Harassment](#)
- [Title IX Regulations Addressing Sexual Harassment \(Unofficial Copy\)](#) (PDF)

## INFORMATION AND ASSISTANCE

For questions regarding this bulletin, please contact the Equity and Civil Rights Office at 360-725-6162 or email [equity@k12.wa.us](mailto:equity@k12.wa.us). OSPI's TTY line is 360-664-3631.

This bulletin is also available on the [Bulletins](#) page of the OSPI website.

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