

# It's a New Academic Year in Washington—Tips and Reminders for Applying Your Revised Title IX Policy

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The days are getting shorter, students are heading back to classes (whether on campus or remote), and colleges and universities need to be ready to implement their newly crafted Title IX policies. Here are some reminders and additional guidance for Washington institutions to keep in mind to ensure that revised sexual harassment and misconduct policies and grievance procedures comply with the new Title IX regulations and Washington law.

## Not All Conduct Meets the Title IX Sexual Harassment Definition

Given the extensive procedural requirements for Title IX hearings under the new regulations, many colleges and universities have chosen to develop separate processes for Title IX sexual harassment and non-Title IX sexual harassment complaints. Focusing on the specific regulatory definition will help Title IX and other EEO staff streamline their response to complaints and allegations.

For purposes of Title IX, “sexual harassment” is:

- Quid pro quo harassment;
- Sexual assault, stalking, domestic violence, and dating violence as those terms are defined in the Clery Act and VAWA; or
- “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”

Allegations of conduct in the first two categories may be easily recognizable as Title IX conduct. But whether an institution’s Title IX policy will apply to other conduct, under the third category, may require additional interpretation. The critical word here is “and”—unless the conduct meets all three prongs, severe, pervasive, *and* objectively offensive, the Title IX grievance process will not apply.

## Clarifications from OCR

The Office of Civil Rights has issued important guidance for institutions to consider as you begin to implement your revised Title IX policy.

- **Title IX regulations are not retroactive.** The Title IX sexual harassment regulations do not apply to conduct that happened before August 14, 2020.
- **Party statements that constitute sexual harassment.** The Title IX regulations preclude institutions of higher education from relying on a party’s statement made prior to the live hearing, if that party refuses to submit to cross examination at the live hearing. But when the prior statement constitutes “all or part of the underlying allegation of sexual harassment itself,” the statement is admissible.
- **Title IX information must be posted on your website.** Institutions should post important information about their policies and procedures on their websites and all websites must include the contact information for the Title IX Coordinator, the school’s non-discrimination policy, and any materials used to train the personnel who facilitate the Title IX grievance process.

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## Decisions Regarding Roles and Responsibilities for Title IX Personnel

- Who will serve in the various roles required to conduct the Title IX grievance process?
  - » Keep in mind that the person who serves as the decision-maker may not serve as the Title IX Coordinator, or Investigator.
  - » Will different people or offices fulfill these roles depending on whether the respondent is an employee or a student?
- Who will develop training materials and perform trainings?
- Who will institutions of higher education assign as an advisor if a party does not have an advisor?

## Consider Developing Supporting Documents in Advance

- Form notices.
  - » Because Title IX requires that specific information be communicated to the parties at various times during the grievance process, institutions should consider preparing these notices before they will be put to use.
- Rules of decorum for participants to the grievance process.
  - » While the regulations require a particular grievance process, institutions have flexibility to determine how the parties and participants will behave during that process. Advisors, witnesses, and parties should be made aware of the institution's expectations at the outset.
- Checklists or templates for investigative reports and written determinations.
  - » The regulations have specific, detailed requirements for some documents created during the grievance process, including the investigative report and written determination. Ensuring that the drafters of these documents will meet these requirements can help streamline the process.
- Live hearing scripts and sample questions
  - » Guidance to decision-makers on how to conduct a hearing and collect information can help ensure that the live hearing will be clear and accessible to the parties.

## Intersection of Washington Employment Law and Title IX

Title IX applies to conduct by both students and employees. While certain aspects of the Title IX grievance process must be the same for both student- and employee-respondents, institutions will have some flexibility in responding to complaints against employees. For instance, employees may be placed on administrative leave pending an investigation. Understanding an institution's obligations when the respondent is an employee will assist the institution in responding consistently to reports of sexual harassment.

Human Resources and Title IX personnel should also be aware of the institution's obligations under SHB 2327—the new state law addressing sexual misconduct at both public and private postsecondary education institutions in Washington. While some of the reporting and disclosure requirements of the new law will not be in force until 2021 or later, several of the law's provisions are already in effect.<sup>1</sup> This includes the requirement that an institution complete its investigation into allegations of sexual misconduct committed by an employee against a student and make written findings as to whether the allegations are substantiated, even if the employee

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<sup>1</sup> For instance, Washington institutions may no longer enter into nondisclosure or other settlement agreements with employees that prohibit the employee, the institution, the complainant, or any other person from disclosing that the employee has been the subject of substantiated findings of sexual misconduct or is a subject of a pending sexual misconduct investigation. Beginning as of October 1, 2020, the new law imposes affirmative obligations on institutions to obtain releases and disclosure statements from job applicants concerning past sexual misconduct investigations or substantiated findings. As of July 1, 2021, institutions must affirmatively request and share information about sexual misconduct committed by an applicant with other institutions in Washington State.

voluntarily or involuntarily leaves the institution during the investigation. In contrast, Title IX permits, but does not require, an institution to dismiss a formal complaint when a respondent is no longer employed by an institution. Accordingly, to satisfy both state law and Title IX, Washington institutions will have two options going forward when conducting post-employment sexual misconduct investigations. First, an institution may choose to dismiss the formal complaint under Title IX and proceed with a misconduct investigation under another procedure. Alternatively, the institution may choose to continue the Title IX grievance process through completion after the employee leaves.

The education law team at Miller Nash Graham & Dunn is continuing to help our higher education clients work through these decisions and other thorny Title IX issues as revised sexual harassment policies are put into practice in both on-campus and remote settings. We would be happy to answer questions or to assist with any difficult situations that arise as you respond to sexual misconduct complaints or allegations during this unprecedented academic year.

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