

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

OSPI Equity and Civil Rights Office

August 10, 2020



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# Overview of Webinar

- Background of sexual harassment law
- Overview Title IX rules changes for K–12 schools
- Standards for responding to sexual harassment
- Complaint procedures
- Title IX and student discipline
- Required actions for Washington K–12 schools
- Q&A



# Before We Get Started...

- This is not a comprehensive training on sexual harassment or the new Title IX rules.
- The bulletin focused on student, peer sexual harassment.
- OSPI understands implementing the rules by the August 14 effective date will be extremely difficult for districts, especially considering the effects of the COVID-19 pandemic on school re-openings.
- OSPI will be leading with technical assistance.
- Information on the slides is summarized. Consult cited sources.
- This webinar is not legal advice. Consult with your district's legal counsel.



# Background of Sexual Harassment Law and Guidance

Sexual Harassment is prohibited under both state and federal law.



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# Background: Title IX

“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 . . . .”

20 U.S.C. 1681

Prohibitions against ***sexual harassment*** were laid out by the U.S. Department of Education Office for Civil Rights in various guidance documents, most of which have been withdrawn.



# Background: Washington Law

“Inequality in the educational opportunities afforded women and girls at all levels of the public schools in Washington state is a breach of Article XXXI, section 1, Amendment 61, of the Washington state Constitution, requiring equal treatment of all citizens regardless of sex...Recognizing the benefit to our state and nation of equal educational opportunities for all students, discrimination on the basis of sex for any student in grades K-12 of the Washington public schools is prohibited.”

RCW 28A.640.010

Prohibitions against ***sexual harassment*** are laid out by the legislature, in chapter 28A.640 RCW, and by OSPI, in chapter 392-190 WAC and OSPI guidelines.



# Overview of New Title IX Rules

Key changes from previous federal guidance:

- Definition of sexual harassment
- “Deliberate indifference” standard for responding to sexual harassment
- Required complaint process



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# New Definition of Sexual Harassment

***Sexual harassment*** means conduct on the basis of sex that satisfies one or more of the following:

1. *[Quid Pro Quo]*
2. 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; or
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

34 CFR § 106.30(a)



# Standard for Responding to Sexual Harassment

- Once a school has actual knowledge of sexual harassment in its education program or activity, the school must respond in a manner that is not deliberately indifferent.
- Recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is “clearly unreasonable in light of the known circumstances”
- Standard adopted from civil court cases for money damages.
- New rules outline mandatory procedural steps for response to notice.



# Title IX Complaint Procedure

- New rules outline a required, detailed grievance procedure
- For example:
  - Who can file a complaint;
  - 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.



***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.***

***Washington schools must also ensure they are meeting state requirements to investigate and respond to sexual harassment.***



# Responding to Sexual Harassment in Accordance with Both State Law and Title IX

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



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# WA Sexual Harassment Definition

Unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:

- *[Quid Pro Quo]*
- 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.

RCW 28A.640.020



# WA Sexual Harassment Definition

**Unwelcome** sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication **of a sexual nature** if:

- *[Quid Pro Quo]*
- 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.**

RCW 28A.640.020



# Hostile Environment Sexual Harassment

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 the school district's course offerings, including any educational program or activity.

WAC 392-190-0555(1)(b).



# Hostile Environment is...

Under Washington Law	Under Title IX Law
<p>Sufficiently <u>severe, persistent, or pervasive</u> that it limits or denies a student's ability to participate in or benefit from the school district's course offerings, including any educational <u>program or activity</u></p> <p>RCW 28A.640.020; WAC 392-190-0555(1)(b)</p>	<p>So <u>severe, pervasive, and objectively offensive</u> that it effectively denies a person equal access to the recipient's education <u>program or activity</u></p> <p>34 CFR § 106.30(a)</p>





# When is a School “On Notice” and Required to Take Action?

Under Washington Law	Under Title IX Law
<p data-bbox="147 578 1192 939">A school 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.</p> <p data-bbox="835 1003 1251 1046">WAC 392-190-0555(2)</p>	<p data-bbox="1289 578 2346 868">A school has notice when any employee of an elementary or secondary school is aware of possible sexual harassment.</p> <p data-bbox="2048 999 2390 1042">34 CFR § 106.30(a)</p>



# When is a School “On Notice” and Required to Take Action?

**When any employee knew, or in the exercise of reasonable care should have known, about the harassment.**



# Responding to Sexual Harassment

*Upon notice of possible sexual harassment...*

## Under Washington Law

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.

WAC 392-190-0555

## Under Title IX Law

A school must not be deliberate indifferent.

Title IX Coordinator must promptly contact the complainant to:

- discuss the availability of supportive measures
- consider the complainant's wishes with respect to supportive measures
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- explain to the complainant the process for filing a formal complaint

34 CFR § 106.44(a)



# Responding to Sexual Harassment

- ***Supportive measures*** may include counseling, modifications of class schedules, mutual restrictions on contact between parties, or increased security and monitoring of certain areas at school.
- Unlike interim measures, supportive measures are not limited to instances when an investigation is needed nor the time before the final outcome.
- If a district does not provide supportive measures as part of its response to sexual harassment, the district specifically must document why that response was not clearly unreasonable in light of the known circumstances.



# Responding to Notice of Sexual Harassment

*Whether or not a formal complaint is filed*

## State Law

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



## Title IX

### Offer Supportive Measures

- discuss supportive measures
- consider the complainant's wishes
- availability of supportive measures with or without the filing of a formal complaint
- explain the process for filing a formal complaint

### Notice of Sexual Harassment

When any employee knew, or in the exercise of reasonable care should have known, about the harassment.



# **Sexual Harassment Complaint Procedures in Accordance with Both State Law and Title IX**

While implementing the new Title IX rules, Washington school districts must continue to follow the discrimination complaint process outlined in WAC 392-190-065 and WAC 392-190-070.



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# Impact of Title IX Rules on Existing Washington Complaint Procedures

**If a complaint of sexual harassment meets the definition of a formal sexual harassment complaint under both state law and Title IX, then the district must implement the state complaint process with the Title IX procedures added in.**

**Always use state discrimination complaint process outlined in WAC 392-190-065 and WAC 392-190-070**



**Add Title IX sexual harassment complaint processes in addition to the state process, when applicable.**



# When to Use Additional Title IX Procedures

A district must implement additional Title IX grievance procedures when:

- The written complaint is filed by the victim (Complainant) of the alleged sexual harassment (or their legal guardian) or by the Title IX Coordinator.
- The complaint requests the district investigate allegation(s) of sexual harassment, as defined in the new Title IX rules.
- The complaint is against a named individual (Respondent) who, at the time of the alleged harassment, was under the control of the school district (such as a student, employee, or volunteer).
- The alleged sexually harassing conduct occurred in the United States.
- 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.





# Elements of a Formal Complaint

## Under Washington Law

- Anyone may file a complaint
- Allege a district violated chapter 392-190 or the guidelines
- Complaint must be written and describe the specific acts, conditions, or circumstances
- Filed within timeline set by school district (i.e. one year)

WAC 392-190-065

## Under Title IX Law

- The victim of the alleged sexual harassment (or their legal guardian) or by the Title IX Coordinator can file a complaint
- Allege of sexual harassment, as defined in the new Title IX rules
- Complaint must be in writing
- The complaint is against a named individual (Respondent) who, at the time of the alleged harassment, was under the control of the school district (such as a student, employee, or volunteer)
- Occurred in the United States
- Complainant must be participating in or attempting to participate in the school district's educational program or activity

# Sexual Harassment Formal Complaint Procedure with Title IX Requirements Added

## State Law



*\* Appeal Rights for Both Parties*

↓  
 Determine if Complaint is a Title IX Complaint. If so, add Title IX steps. If not, do not add Title IX steps.



- Written Notices
- Supportive Measures

- Written notice of all meetings
- Review of Evidence
- Review of Draft Investigation Report
- Written Questions

- Findings of Fact
- Application to Conduct Code
- Result of Each Allegation
- Discipline and Supportive Measures

## Title IX

# Acknowledging of a Formal Complaint

Under Washington Law	Under Title IX Law
<ul style="list-style-type: none"><li><input type="checkbox"/> Provide a copy of the school's discrimination complaint procedure in a language the parties can understand.</li></ul> <p style="text-align: right;">WAC 392-190-0065</p>	<ul style="list-style-type: none"><li><input type="checkbox"/> Notice of the complaint process</li><li><input type="checkbox"/> Written, detailed notice of the allegations</li><li><input type="checkbox"/> Written notice of the right to an advisor</li><li><input type="checkbox"/> Written notice the respondent is presumed not responsible</li><li><input type="checkbox"/> Written Notice of any provision in the student conduct code that prohibits false statements or submitting false information</li><li><input type="checkbox"/> Offer supportive measures to both parties</li></ul> <p style="text-align: right;">34 CFR § 106.45(b)(2)</p>

***When a complaint meets the requirements for a formal Title IX Complaint, in addition to the state requirements add the Title IX requirements (listed in the yellow box).***

# Investigation (1 of 2)

Under Washington Law	Under Title IX Law
<ul style="list-style-type: none"><li>❑ Conducts a prompt and thorough investigation into the allegations in the complaint</li></ul> <p>WAC 392-190-065</p>	<ul style="list-style-type: none"><li>❑ Provide an equal opportunity for the parties to present evidence and witnesses (including fact and expert witnesses)</li><li>❑ Not restrict either party's ability to discuss the allegations or to gather and present evidence</li><li>❑ Provide parties the same opportunities to have others present during any grievance proceeding, including advisors</li><li>❑ Provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare to participate</li></ul> <p>34 CFR § 106.45(b)(5)</p>

***When a complaint meets the requirements for a formal Title IX Complaint, in addition to the state requirements add the Title IX requirements (listed in the yellow box).***

# Investigation (2 of 2)

## Under Washington Law

- ❑ Conducts a prompt and thorough investigation into the allegations in the complaint.

## Under Title IX Law

- ❑ Prior to completion of the investigative report, the school must send to each party the evidence to inspect and review, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report
- ❑ Create an investigative report and, at least 10 days prior to a determination regarding responsibility, send to each party, the investigative report, for their review and written response
- ❑ After sending the investigation report, but before reaching a determination, the decision-maker give each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party

34 CFR § 106.45(b)(5); 34 CFR § 106.45(b)(6)



# Superintendent's Response

Under Washington Law	Under Title IX Law
<ul style="list-style-type: none"><li><input type="checkbox"/> A summary of the results of the investigation</li><li><input type="checkbox"/> Whether the school failed to comply with chapter 392-190 WAC or the OSPI guidelines</li><li><input type="checkbox"/> Notice of the right to appeal, including where and to whom the appeal must be filed</li><li><input type="checkbox"/> Corrective measures, if deemed necessary to correct the noncompliance</li></ul> <p style="text-align: right;">WAC 392-190-065</p>	<ul style="list-style-type: none"><li><input type="checkbox"/> Identification of the allegations</li><li><input type="checkbox"/> A description of the procedural steps taken</li><li><input type="checkbox"/> Findings of fact supporting the determination</li><li><input type="checkbox"/> Conclusions regarding the application of the code of conduct to the facts</li><li><input type="checkbox"/> A statement of, and rationale for, the result as to each allegation, including any disciplinary sanctions remedies designed to equal access to the complainant</li><li><input type="checkbox"/> Procedures and bases for appeal</li></ul> <p style="text-align: right;">34 CFR § 106.45 (b)(7)(ii)</p>

# Impact of Title IX Rules on Existing Washington Complaint Procedures

School districts must meet chapter [392-190](#) WAC requirements from when a sexual harassment complaint is filed under Title IX:

- 1. Response to Notice of Sexual Harassment.** 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. This is true whether or not a formal Title IX complaint has been filed.



# Impact of Title IX Rules on Existing Washington Complaint Procedures

- 2. Provide Complaint Procedures.** When a complaint is filed, a school district must provide parties a copy of the district's sexual harassment complaint procedures.
- 3. Investigation Timeline.** A school respond within 30 days, unless agreed upon by the parties or if an exceptional circumstance require an extension. For purposes of administrative enforcement, OSPI may consider implementation of the Title IX complaint process as exceptional circumstances that may require a reasonable timeline extension.
- 4. Written Decision.** The written decision must include all components outlined in WAC [392-190-065\(6\)](#).



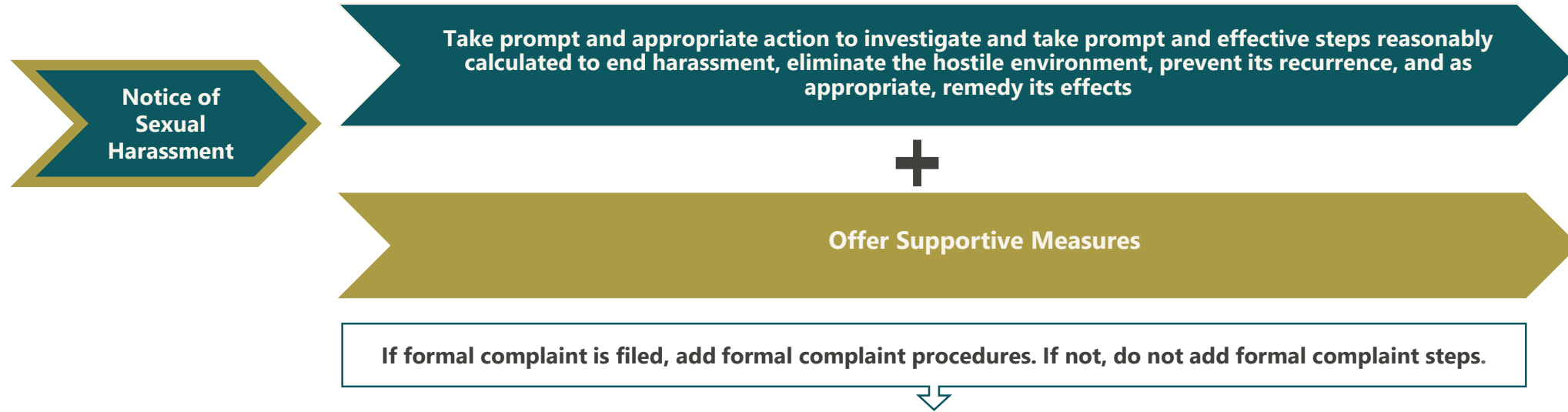


# Impact of Title IX Rules on Existing Washington Complaint Procedures

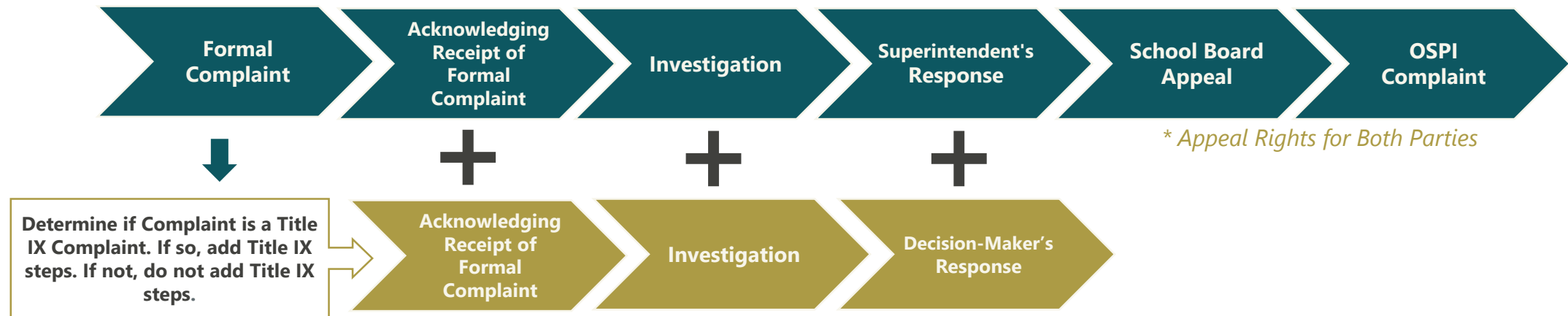
- 5. Corrective Action Timeline.** Any corrective measures must be instituted as expeditiously as possible but no later than 30 days after the school district's written response, unless otherwise agreed to by the complainant.
- 6. Appeals.** District should not limit the bases to appeal to those outlined in the new Title IX rules. All appeal options available to complainants must also be available to the respondent.
- 7. Title IX Complaint Requirements Unmet.** If a Title IX formal complaint is dismissed, a school may be required to continue the investigation under the state complaint process.



# Responding to Notice of Sexual harassment



## Formal Complaint Process



# Student Discipline and the New Title IX Rules

The new rules limit imposing discipline until the conclusion of the investigation but have an exception for emergency removals.

State discipline rules still apply.



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# Limits on Disciplinary Actions

- The Title IX rules prohibit a school from imposing disciplinary sanctions, or other actions that are not supportive measures, against a student until the district has followed the Title IX complaint process and determined the student was responsible for sexual harassment.
- If a complainant does not file a formal complaint but the district believes disciplinary action is necessary, the Title IX Coordinator will need to file a complaint initiate the Title IX complaint process.
- School districts must still comply with Washington's student discipline rules, chapter 392-400 WAC, when administering discipline to a student who has engaged in sexual harassment.



# Emergency Removals

- The Title IX rules do not preclude a school district from removing a student from school 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.
- Apply Washington's student discipline rules for emergency expulsions, at WAC 392-400-510 through 392-400-530



# Actions Required to Implement the New Title IX Rules

- Revise sexual harassment procedure
- Re-designate Title IX Coordinator (if currently superintendent)
- Implement training for Title IX staff



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# Revise Sexual Harassment Procedure

- The Title IX rules include several specific requirements for sexual harassment complaint procedures.
- Update your sexual harassment procedures.
- WSSDA's revised model sexual harassment policy and procedure for students (3205) will be available soon.
- **Action Item:** Consult your legal counsel or WSSDA for changes to your sexual harassment complaint procedure.

# Re-Designate Title IX Coordinator

## *If Currently Superintendent*

- Under the new Title IX Rules, the Title IX Coordinator may not be the same person as the decision maker in a Title IX sexual harassment formal complaint.
- State rules designate the superintendent (or their designee) as the decision maker in a discrimination or sexual harassment complaint.
- **Action Item:** Washington school districts that currently have the superintendent designated as the Title IX Coordinator will need to re-designate this role to a different employee, 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

- New Title IX training requirements (detailed on next slide) apply to:
  - Title IX Coordinators,
  - Investigators,
  - Decision-makers, and
  - Any person who facilitates an “informal resolution process.”
- **Action Item:** Identify these staff members. Plan for budget and training hours to complete this training. Once the training is received, post the training materials on the district website.



# Implement Training for Title IX Staff

## All Title IX Staff

- 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.



## Decision-Maker

Relevance of evidence and written questions (including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant) and any technology to be used at a live hearing.

## Investigators

Issues relating to relevance of evidence and creating an investigative report that fairly summarizes evidence.



# Title IX Resources

## *From the U.S. Department of Education*

- 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](#)



# Questions?

## Contact OSPI for Technical Assistance

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**Email:** [equity@k12.wa.us](mailto:equity@k12.wa.us)

**Call:** 360-725-6162 (TTY: 360-664-3631)

**Visit our website:**

[www.k12.wa.us/policy-funding/equity-and-civil-rights](http://www.k12.wa.us/policy-funding/equity-and-civil-rights)



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