

WSR 24-15-083
EMERGENCY RULES
WASHINGTON STATE
SCHOOL FOR THE BLIND

[Filed July 18, 2024, 3:04 p.m., effective August 1, 2024]

Effective Date of Rule: August 1, 2024.

Purpose: To bring the Washington State School for the Blind's student conduct code (the code) into compliance with a new final rule governing sex discrimination grievance procedures recently adopted by the United States Department of Education and to update the code to ensure its prohibited conduct and procedures adequately protect the interests of the college community and the constitutional and procedural rights of individual students.

Citation of Rules Affected by this Order: New WAC 72-120-400, 72-120-405, 72-120-410, 72-120-415, 72-120-420, 72-120-425, 72-120-430, and 72-120-435.

Statutory Authority for Adoption: RCW 72.40.022.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; and that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this Finding: On April 19, 2024, the United States Department of Education released its final rule under Title IX. This rule requires recipients of federal financial assistance, which operate an education program or activity, to adopt student disciplinary procedures addressing sex discrimination, including sex-based harassment. The deadline for implementing this new rule is August 1, 2024.

Number of Sections Adopted in Order to Comply with Federal Statute: New 8, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: July 18, 2024

Scott McCallum
Superintendent

OTS-5631.1

SUPPLEMENTAL STUDENT CONDUCT PROCEDURES FOR CASES INVOLVING ALLEGATIONS OF VIOLATION OF TITLE IX

NEW SECTION

WAC 72-120-400 Order of precedence. These supplemental procedures apply to allegations of sexual harassment subject to Title IX jurisdiction pursuant to regulations promulgated by the United States Department of Education. See 34 C.F.R. Part 106. To the extent these supplemental procedures conflict with the Washington state school for the blind's standard disciplinary procedures, WAC 72-120-001 through 72-120-315, or any provisions set forth in student handbooks, and other school or agency policies and procedures, these supplemental procedures will take precedence.

NEW SECTION

WAC 72-120-405 Prohibited conduct under Title IX. (1) Pursuant to chapter 392-400 WAC and Title IX of the Education Amendments Act of 1972, 20 U.S.C. Sec. 1681, the Washington state school for the blind may impose disciplinary sanctions up to and including expulsion against a student who has been found responsible for committing, attempting to commit, aiding, abetting, inciting, encouraging or assisting another person to commit or engage in acts of sex discrimination, which include sex-based harassment.

(2) For the purposes of this supplemental procedure, the following conduct is prohibited:

- (a) Sex discrimination;
- (b) Sex-based harassment;
- (c) Sexual violence;
- (d) Stalking; and
- (e) Retaliation.

NEW SECTION

WAC 72-120-410 Definitions. For the purposes of this supplemental procedure, the following definitions apply:

- (1) "Agency" means the Washington state school for the blind.
- (2) "Complaint" means a written or oral request that can be objectively understood as a request for the agency to investigate and make a determination about alleged sex discrimination.
- (3) "Complainant" means the following individuals who have been subjected to alleged conduct that would constitute sex discrimination:
 - (a) A student or employee; or
 - (b) A person other than a student or employee who was participating or attempting to participate in the agency's education program or activity at the time of the alleged discrimination.

(4) "Consent" means knowing, voluntary, and clear permission by word or action, to engage in mutually agreed upon sexual activity. Each party has the responsibility to make certain that the other has consented before engaging in the activity. For consent to be valid, there must be at the time of the act of sexual intercourse or sexual contact actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. A person cannot consent if they are unable to understand what is happening or are disoriented, helpless, asleep, or unconscious for any reason, including due to alcohol or other drugs. An individual who engages in sexual activity when they know, or reasonably should know, that the other person is physically or mentally incapacitated has engaged in nonconsensual conduct. Intoxication is not a defense against allegations that an individual has engaged in nonconsensual sexual conduct.

(5) "Decision maker" means the school's associate director of campus programs, superintendent, or designee.

(6) "Disciplinary sanction" means consequences imposed on a respondent following a determination that the respondent violated the agency's policy prohibiting sex discrimination or the school's conduct code.

(7) "Impermissible evidence" means privileged communications, unless the privilege has been effectively waived by the holder, and irrelevant evidence about a complainant's prior sexual behavior.

(a) Privileged communications include:

(i) Spousal/domestic partner privilege;

(ii) Attorney-client and attorney work product privileges;

(iii) Privileges applicable to members of the clergy and priests;

(iv) Privileges applicable to medical providers, mental health therapists, and counselors;

(v) Privileges applicable to sexual assault and domestic violence advocates; or

(vi) Other legal privileges identified in RCW 5.60.060.

(b) Prior sexual behavior. Questions or evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant and must be excluded, unless such question or evidence:

(i) Is asked or offered to prove someone other than the respondent committed the alleged misconduct; or

(ii) Concerns specific incidents of prior sexual behavior between the complainant and the respondent, which are asked or offered on the issue of consent.

(8) "Investigation procedure" is the process the school uses to initiate, informally resolve, and/or investigate allegations that a student has violated school policies prohibiting sex discrimination or sex-based harassment.

(9) "Peer retaliation" means retaliation by a student against another student.

(10) "Pregnancy or related conditions" means:

(a) Pregnancy, childbirth, termination of pregnancy, or lactation;

(b) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or

(c) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

(11) "Program" or "programs and activities" means all operations of the school.

(12) "Relevant" means related to the allegations of sex discrimination under investigation. Questions are relevant when they seek evi-

dence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decision maker in determining whether the alleged sex discrimination occurred.

(13) "Remedies" means measures provided to a complainant or other person whose equal access to the school's educational programs or activities has been limited or denied by sex discrimination. These measures are intended to restore or preserve that person's access to educational programs and activities after a determination that sex discrimination has occurred.

(14) "Respondent" means an individual who has been alleged to have violated the school's policy prohibiting sex discrimination.

(15) "Retaliation" means intimidation, threats, coercion, or discrimination against any person by the school, a student, or an employee or other person authorized by the school to provide aid, benefit, or service under the school's education program or activity, for the purpose of interfering with any right or privilege secured by school policies and procedures prohibiting sex discrimination, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process, in these investigation procedures, and any disciplinary proceeding for sex discrimination. Nothing in this definition precludes the school from requiring an employee to provide aid, benefit, or service under the school's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing.

(16) "School" means the Washington state school for the blind.

(17) "Sex discrimination" occurs when a respondent causes a complainant more than de minimis (insignificant) harm by treating the complainant differently from other similarly situated individual(s) based on:

- (a) Sex stereotypes;
- (b) Sex characteristics;
- (c) Pregnancy or related conditions;
- (d) Sexual orientation; or
- (e) Gender identity.

Preventing a person from participating in an education program or activity consistent with their gender identity constitutes more than de minimis harm and is prohibited.

(18) "Sex-based harassment." For purposes of this supplemental procedure, sex-based harassment is a type of sex discrimination that occurs when a respondent engages in the following discriminatory conduct on the basis of sex:

(a) Quid pro quo harassment. An employee, agent, or other person authorized by the agency to provide an aid, benefit, or service under the agency's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

(b) Hostile environment. Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the agency's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

(iv) The location of the conduct and the context in which the conduct occurred; and

(v) Other sex-based harassment in the recipient's education program or activity.

(c) Sexual violence. Sexual violence includes the following conduct:

(i) Nonconsensual sexual intercourse. Any actual or attempted sexual intercourse (anal, oral, or vaginal), however slight, with any object or body part, by a person upon another person, that is without consent and/or by force. Sexual intercourse includes anal or vaginal penetration by a penis, tongue, finger, or object, or oral copulation by mouth to genital contact or genital to mouth contact.

(ii) Nonconsensual sexual contact (fondling). Any actual or attempted sexual touching, however slight, with any body part or object, by a person upon another person that is without consent and/or by force. Sexual touching includes any bodily contact with the breasts, groin, mouth, or other bodily orifice of another individual, or any other bodily contact in a sexual manner.

(iii) Incest. Sexual intercourse or sexual contact with a person known to be related to them, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either wholly or half related. Descendant includes stepchildren and adopted children under the age of 18.

(iv) Statutory rape (rape of a child). Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(v) Domestic violence. Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, coercive control, damage or destruction of personal property, stalking, or any other conduct prohibited under RCW 10.99.020, committed by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state of Washington, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state of Washington, RCW 26.50.010.

(vi) Dating violence. Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship shall be determined based on a consideration of the following factors:

(A) The length of the relationship;

(B) The type of relationship; and

(C) The frequency of interaction between the persons involved in the relationship.

(d) Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

(19) "Title IX coordinator" is responsible for processing Title IX complaints and conducting or overseeing formal investigations and any informal resolution processes under this procedure.

NEW SECTION

WAC 72-120-415 Rights of parties. The provisions of these supplemental procedures shall apply equally to the respondent and the complainant.

The school bears the burden of offering and presenting sufficient evidence to establish that the respondent is responsible for engaging in sex discrimination, sex-based harassment, or retaliation related to or arising from such allegations by a preponderance of the evidence.

The respondent will be presumed not responsible until such time as the disciplinary process has been finally resolved.

NEW SECTION

WAC 72-120-420 Determination. (1) Following an investigation and evaluation of all relevant and not otherwise impermissible evidence, the decision maker:

(a) May question parties and witnesses to adequately assess a party's or witness's creditability to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination. This process involves:

(i) The decision maker will request the party or witness to attend an interview;

(ii) During the interview, the decision maker may ask questions that do not seek irrelevant or impermissible evidence;

(b) Will use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred. The standard of proof requires the decision maker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness. If the decision maker is not persuaded under this standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decision maker will not determine that sex discrimination occurred;

(c) Will notify the parties in writing of the determination whether sex discrimination occurred under Title IX including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal;

(d) Will not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the grievance procedures that the respondent engaged in prohibited sex discrimination;

(e) Will comply with the grievance procedures before the imposition of any disciplinary sanctions against a respondent; and

(f) Will not discipline a party, witness, or others participating in the grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the determination whether sex discrimination occurred.

(2) If there is a determination that sex discrimination occurred, the Title IX coordinator will, as appropriate:

(a) Coordinate the provision and implementation of remedies to a complainant and other people the agency identifies as having had equal access to the agency's education program or activity limited or denied by sex discrimination;

(b) Coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions; and

(c) Take other appropriate prompt and effective steps to ensure that sex discrimination does not recur within the agency's education program or activity.

NEW SECTION

WAC 72-120-425 Disciplinary process for sex-based harassment.

(1) Following a determination that sex-based harassment occurred, the associate director of campus programs or designee will make a disciplinary decision and may impose disciplinary sanctions, which may include detention, behavior contracts, restrictions of privileges, reprimand, restitution, suspensions, or expulsion.

(2) Any discipline imposed under the section is subject to the requirements in WAC 72-120-201 and 392-172A-05140 through 392-172A-05175.

(3) Following a determination that sex-based harassment occurred, the Title IX coordinator or designee may provide remedies, which may include alternative class schedules, counseling, or residential assignment.

NEW SECTION

WAC 72-120-430 Appeals. (1) If the complainant or respondent disagrees with the decision maker's determination, the disagreeing party may appeal the determination by filing a written notice of appeal with the school's superintendent or designee within 21 calendar days following the date upon which the complainant received the determination.

(2) The school will implement appeal procedures equally for both parties and provide written notice to the other party when an appeal is filed.

(3) The school will ensure that the decision maker for the appeal is not the same decision maker who reached the determination regarding responsibility or dismissal, the investigator, or the Title IX coordinator.

(4) The hearing will commence by the 20th calendar day following the filing of the written notice of appeal, unless otherwise agreed to by the complainant and the superintendent for good cause.

(5) Both parties will be allowed a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome of the initial determination.

(6) Unless otherwise agreed to by the parties, the decision maker on appeal will render a written decision within 20 calendar days following the filing of the notice of appeal and provide the parties with a copy of the decision.

(7) The written decision will describe the result of the appeal and the rationale for the result.

NEW SECTION

WAC 72-120-435 Extension of time frames. The time frames in these supplemental procedures may be extended on a case-by-case basis for good cause and with notice to the parties that includes the reason for the delay.

(1) The Title IX coordinator, decision maker, or superintendent, may send written notice to the parties stating the extension of the time frame for a major stage and the reason for the extension; or

(2) A party may submit a written request to the Title IX coordinator asking for an extension of the time frame for a major stage and the reason for requesting the extension.