

**From:** Sarah Albertson  
**Sent:** Fri, 11 Jun 2021 20:27:10 +0000  
**To:** T9PublicHearing  
**Subject:** Written Comment: Title IX Public Hearing (Washington SEA)  
**Attachments:** Written Comment\_Title IX Public Hearing (Washington SEA).pdf

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The Office of Superintendent of Public Instruction (OSPI) is the state education agency (SEA) that oversees K–12 public schools in Washington. OSPI’s statutory duty is to promulgate rules and guidelines to eliminate discrimination in public schools, including discrimination on the basis of sex. RCW 28A.640.020. Since the 1970s, OSPI has regulated school districts in Washington to ensure their compliance with Title IX and state sex discrimination laws. In 2012, OSPI released [guidelines](#) to districts that spell out the steps districts must take under state and federal law to prevent sexual harassment in schools. The OSPI guidelines largely align with the U.S. Department of Education’s [Revised Sexual Harassment Guidance](#) issued in 2001 (2001 Guidance).

OSPI appreciates the opportunity to provide input to the Department on its Title IX sexual harassment regulations and guidance because OSPI has serious concerns with the Title IX regulations that went into effect in August 2020. OSPI opposes these regulations because they significantly reduce protections for students experiencing sexual harassment while also imposing a prescriptive complaint procedure that was designed for institutions of higher education rather than K–12 school systems. As a result, because Washington is committed to eliminating discrimination and protecting students from sexual harassment, OSPI has had to rely on Washington’s more comprehensive and protective sexual harassment legislation and administrative framework to fill the gaps left by the 2020 Title IX regulations. However, because the federal requirements include prescriptive complaint procedures, Washington school districts are left to implement multiple sexual harassment procedures to comply with both federal and state law.

To ensure that schools provide students with educational environments free from discrimination in the form of sexual harassment and provide for fair, prompt, and equitable resolution of reports of sexual harassment, OSPI urges the Department to (1) redraft its regulations and guidance to return to previous, long-standing guidance on responding to sexual harassment; (2) tailor guidance to K–12 students and schools; and (3) develop training materials and technical assistance resources for school districts.

Also, OSPI encourages the Department to provide guidance on eliminating discrimination on the basis of sexual orientation, gender expression, and gender identity.

#### **Return to previous, long-standing guidance on responding to sexual harassment**

To ensure schools provide students with educational environments free from sexual harassment, OSPI requests the Department revise its Title IX regulations and guidance to return to the previous standards for responding to hostile environment sexual harassment outlined in the 2001 Guidance and as articulated in the Department's 2014 guidance:

A school violates a student’s rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or

deny a student's ability to participate in or benefit from the school's educational program, i.e. creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

OSPI believes the above standards requiring a school's response are clearer and more effective in eliminating discrimination than those established in the 2020 Title IX regulations.

OSPI also requests the Department revise the Title IX regulations to remove the private litigation "deliberate indifference" standard from administrative regulations and guidance. The administrative standard exists separate from the litigation standard for a reason—the two contexts have different purposes and different outcomes. The U.S. Supreme Court was explicit in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998), that the "deliberate indifference" liability standard under Title IX is limited to private actions for monetary damages. The Court acknowledged the power of the Department to promulgate and enforce requirements that effectuate Title IX's nondiscrimination mandate, even in circumstances that would *not* give rise to a claim for money damages. As the 2001 Guidance makes clear, the purpose of administrative enforcement is to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.

Further, OSPI's requested change would bring the Department's sexual harassment guidance back into alignment with its other discriminatory harassment guidance, which also applies the same standard for addressing race- or disability-harassment hostile environments.

### **Develop guidance that is tailored to children's needs and K–12 systems**

OSPI also urges the Department to revise the Title IX regulations and guidance to be more tailored to the experiences specific to K–12 students, including young children, and K–12 school systems. Previous and current Title IX regulations and guidance appear to be written for the context of institutions of higher education—but the differences between higher education and K–12 are immense. OSPI believes the prescriptive complaint process required in the 2020 Title IX regulations is not feasible or appropriate for many elementary and secondary schools—especially without additional guidance from the Department.

For example, the complaint process outlined in the 2020 Title IX regulations requires several time-intensive administrative steps and multiple trained staff to implement. This process is not feasible for K–12 school districts because, unlike in most institutes of higher education, many of Washington's 295 school districts have only one or a few administrators. Also, many of these school districts already had difficulty securing adequate resources to conduct investigations. The administrative burden the Title IX complaint process demands on small school districts with few administrators is overwhelming.

Similarly, the cross-examination questioning required in the Title IX complaint process is not appropriate for K–12 students and families. In many instances, posing and responding to questions will fall on young children and their parents. Also, requiring schools to allow the party to directly question another party or witness prolongs the investigation, creates a high-conflict and potentially counterproductive adversarial process, may subject victims of sexual harassment to further trauma, and serves as a deterrent for victims of sexual harassment and assault to file a complaint. As this sort of cross-examination is highly adversarial, OSPI believes any questioning in an investigation should be assigned to the investigator in the K–12 setting.

For these reasons, OSPI urges the Department to revise the Title IX complaint process to be less prescriptive and adversarial, and instead set broader standards for fair, prompt, and equitable resolution to sexual harassment reports that can be more appropriately applied in K–12 school districts.

However, if the Department decides to keep the 2020 Title IX regulations and its current complaint process intact, OSPI urges the Department to provide clear guidance to K–12 school districts on how to implement the complaint process, including on the following topics:

- Who should serve as the Title IX Coordinator, Investigator, and Decision Maker in a school district with only one administrator (the Superintendent)
- Whether a child must read or respond to questions posed to them in cross-examination
- The type of questions that can (and cannot) be asked to a child in cross-examination
- The protection and redaction of student personal information in cross-examination questions and responses
- The provision of accommodations for students and families with disabilities, as well as language-assistance services for students and families with limited-English proficiency, to participate in the complaint process

#### **Provide training resources to assist school districts, and Title IX coordinators, in preventing and responding to sexual harassment**

OSPI strongly urges the Department to provide training resources to assist school districts in meeting their obligations to prevent and respond to sexual harassment, and if left intact, the specific training requirements outlined in the 2020 Title IX regulations.

The 2020 Title IX regulations include robust training requirements, which OSPI supports, yet the Department has provided no support for school districts to meet these requirements. Since the 2020 Title IX regulations were enacted last summer, OSPI has received numerous training requests from school districts that are distressed about how to find support and resources in meeting the new requirements. OSPI believes the Department is best positioned to create these materials because only the Department, as the regulator of Title IX, can assure the training materials are adequate. Moreover, with 295 school districts in Washington, it is incredibly inefficient to have each school district expending resources to develop or purchase the same training resources.

#### **Gender-inclusive schools and nondiscrimination based on sexual orientation**

The Department has also requested input on the steps it can take to address discrimination based on sexual orientation and gender identity in educational environments.

Washington has protected public school students from discrimination based on sexual orientation, gender expression, and gender identity since 2010. OSPI supports further guidance from the Department on eliminating discrimination against students based on their sexual orientation, gender expression, and gender identity.

Please feel welcome to contact me if you have any questions on OSPI's recommendations.

Sincerely,



**Sarah Albertson** *she/her*

Managing Attorney, Equity and Civil Rights  
Office of Superintendent of Public Instruction (OSPI)

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

k12.wa.us

June 11, 2021

Sent by email only: T9PublicHearing@ed.gov

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Sarah Albertson  
Managing Attorney, Equity and Civil Rights