

# Title IX – Yes, This is Really Happening Right Now. Key Considerations in Anticipation of the August 14 Effective Date.

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With the Title IX implementation date of August 14 fast approaching, your education institution must quickly assess policies and procedures in four major ways:

1. Review and update sexual misconduct policies and procedures;
2. Train staff on the updated policies and procedures and prepare key employees for new roles within the Title IX complaint process;
3. Evaluate employment considerations including the intersection with an employer's Title VII obligations and with collective bargaining agreements ("CBAs"); and
4. Communicate these updates to stakeholders, including students, staff, and parents.

Yes, **by August 14**. This checklist should help you to address the main areas for compliance.

## SEXUAL MISCONDUCT POLICIES

Update existing policies in the following key areas:

- **Start with definitions. (This may not be as simple as it sounds.)**
  - » **Sexual harassment:** Because Title IX and Oregon law require different definitions of sexual harassment, policies must address both. Educational institutions will need to differentiate "sexual harassment" for the purposes of Title IX and "sexual harassment" for the purposes of Oregon law, hopefully without creating too much confusion for your communities.
  - » **Other important definitions to add or revise:**
    - Complainant and Respondent
    - Formal complaint versus informal complaint
  - » **Mandatory reporters:** Higher education institutions will need to determine which employees are mandatory reporters and which are not. For K-12 schools, all employees are mandatory reporters, which is consistent with Oregon law.
  - » **Oregon law – definitions:** Oregon law also requires higher education institutions to develop definitions for the following terms in consultation with their respective student governments:
    - "Anti-oppression"
    - "Culturally-responsive"
    - "Gender-responsive"
    - "Trauma-informed"

If institutions have already worked with their student governments to define these terms, they should review those new definitions to ensure they do not conflict with Title IX regulations.

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- **Update or add key procedural and substantive requirements.**

Include or update the following requirements to comply with Title IX regulations:

- » Supportive measures.
- » Notice to parties.
- » Formal and informal resolution processes. Title IX regulations include very specific requirements for a formal complaint and informal complaint resolution, including written consent.
- » Requirement to dismiss complaints that do not meet the Title IX definition of harassment. Under the Title IX regulations, institutions are required to dismiss a complaint, for the purposes of Title IX, which does not meet the Title IX definition of harassment. Institutions may proceed under a separate section of the code of conduct, and, under Oregon law, must proceed if the conduct meets the Oregon definition of sexual harassment.
- » Standard of proof: The standard of proof for Title IX complaints may be either clear and convincing evidence or a preponderance of the evidence. Whichever standard a school or institution chooses, the same standard must be applied in all Title IX complaints—including complaints by or against employees, by or against students, and by or against third parties. This may have significant consequences for collective bargaining (more about that below).
- » Investigation and determination of complaints, deciding and delivering sanctions, and providing appeals (more about some of these requirements below).

- **Review and decide about grievance procedures under Title IX and under state law.**

- » Because Title IX requires specific, resource-intensive procedures for addressing conduct that meets the Title IX definition of sexual harassment, institutions should decide whether to apply (a) the same (Title IX) procedures to all sexual harassment complaints, (b) Title IX procedures until and unless the institution determines that Title IX does not cover the conduct, potentially skipping the live hearing (more about that below) if a complaint must be dismissed for Title IX purposes; or (c) some other blend.

- **Prepare for live hearings.**

- » The new regulations require live hearings for all Title IX formal complaints to higher education institutions; live hearings are optional for K-12 schools.
- » Among many other requirements, an institution's hearing procedures must:
  - Allow parties to be represented by an advisor of their choice and assign an advisor if a party does not have one;
  - Allow each party's advisor to cross-examine all witnesses; and
  - Not consider statements from parties or witnesses who do not consent to live cross-examination.

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- » In developing hearing procedures, institutions should:
  - Consider developing rules of decorum;
  - Account for situations in which a party refuses to testify;
  - Define roles and responsibilities of the advisor; and
  - Establish rules of evidence.

## TRAINING

- Train faculty, staff, and students on the new sexual harassment policies and procedures before the new academic year begins.
- Provide specific training to employees who are responsible for reporting, investigating, deciding, and hearing appeals.
- Here are just a few of the key personnel and the issues that training must cover:
  - » **Investigators** must understand conflicts of interest, timelines, relevance, bias, and how to develop an investigative report.
  - » **Decisionmakers** must understand and enforce the institution's rules for live hearings, including the role of advisors, investigators, and parties; impartial decisionmaking; and appropriate use of technology. For live hearings, decisionmakers must know how to make relevancy calls about evidence in real time. They must also know how to issue written decisions in accordance with the Title IX requirements.
  - » **Appeals officers** must know when a party may appeal a decision, must understand the timelines, and must know how to issue a written decision.

## LABOR AND EMPLOYMENT CONSIDERATIONS

Title IX regulations expressly apply to allegations of sexual harassment involving employees, including at-will and represented employees.

- **Employees are entitled to protections and procedures under both Title VII and Title IX.**
  - » Title IX and Title VII have different definitions of sexual harassment, as well as other key differences. Employers must comply with both laws in complaints involving employees. This will likely require institutions to review and update employment policies and procedures.
- **Collective bargaining agreements must comply with Title IX.**
  - » This includes having the same standard of proof for both student and employee complaints and providing a live hearing as required. Institutions may need to engage in interim bargaining in order to meet labor law requirements and be in compliance with Title IX by August 14.

## COMMUNICATION

We know you are already communicating with your communities about an unprecedented number of significant changes. Add Title IX to the list, and be ready to answer questions and concerns from staff, students, and parents. A few notes about communication:

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- You must give notice of Title IX-related policies to a wide range of individuals, including applicants for admission and/or employment, students, parents or legal guardians of K-12 students, employees, as well as to all unions or professional organizations that hold collective bargaining or professional agreements.
- You must make publically available on the institution's or school district's website all materials used to train Title IX coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process.
- Many groups are concerned that the Title IX regulations will discourage individuals from reporting sexual harassment and will make it harder for institutions to respond to such reports. Be prepared to consider how to encourage reporting and how to address these concerns.

Our education law team will continue to provide support to education institutions as they work to implement these regulations. We are prepared to help your institution review its policies, discuss compliance, and consult with you about the difficult choices ahead.

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**Jollee Patterson** works with a wide range of education and public institutions, including public and private universities, community colleges, school districts, private schools, special districts, and other public entities. She supports clients in a wide variety of areas including employment, Title IX and other civil rights, constitutional issues, governance, public meetings and records, compliance audits, and policies and procedures.

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