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MODEL SUPPLEMENTAL TITLE IX EMPLOYEE DISCIPLINARY HEARING PROCEDURE

I. Order of Precedence

This supplemental employee discipline procedure applies 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. § 106. Disciplinary proceedings against an employee respondent alleged to have engaged in sexual harassment in violation of Title IX shall be governed by the [College or University]'s administrative hearing practices and procedures, Chapter WAC ___-___-___,¹ and this supplemental hearing procedure. To the extent the supplemental hearing procedure conflicts with WAC ___-___-___, and/or provisions set forth in employment contracts, collective bargaining agreements,² employee handbooks, and other [College or University] employment policies and procedures, this supplemental hearing procedure will take precedence.

[Following section only applies to CTCs]³

Notwithstanding the foregoing, if Respondent is a tenured or probationary faculty member and the [employee disciplinary officer] determines that the allegations in the investigation, if true, would warrant Respondent's dismissal from the College, the [employee disciplinary officer] will refer the matter to the Tenure Dismissal Committee for a hearing pursuant to RCW 28B.50.863 and applicable procedures set forth in the faculty union Collective Bargaining Agreement (CBA). To the extent the Tenure Dismissal Committee procedures are inconsistent or conflict with Sections II through VII of this Supplement Procedure, those Supplement Procedure sections

¹ Most of the CTCs, regional universities, and TESC have adopted model administrative hearing procedures in their title of the Washington Administrative Code. See, e.g., WAC 132E-108 (Everett Community College) and WAC 495E-108 (Renton Technical College); WAC 174-108 (TESC). The following Colleges have *not* adopted these procedures: Olympic College, Pierce College, Yakima College, Tacoma Community College, and South Puget Sound Community College. State law does not require employment policies and procedures to be submitted to formal rulemaking. See RCW 34.05.010 (excluding "rules of institutions of higher education" governing "employment relationships" from the definition of "Rule" for purposes of Washington's Administrative Procedure Act (the APA). Therefore, institutions that have not adopted formal WACs may add language imposing the Model Administrative Hearing Procedures found at WAC 10-08 to this disciplinary procedure without undergoing formal rulemaking under the APA.

² Although this new disciplinary procedure is mandated by federal law, institutions will need to provide notice to their unions and an opportunity to bargain the impacts if the new procedure conflicts with CBA provisions.

³ This exception is written to ensure compliance with state law governing tenure dismissal proceedings at CTCs, which require that a Tenure Dismissal Committee conduct a hearing and make a recommendation to the appointing authority (usually the Board of Trustees) about whether dismissal is warranted. The regional universities and TESC are not subject to similar legislative restrictions on tenure dismissal.

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will prevail.⁴ At the end of the hearing, the Tenure Dismissal Committee will issue a Recommendation consistent with the provisions set forth in Section VIII. Complainant shall have the same right to appear and participate in the proceedings as the Respondent, including the right to present their position on the Recommendation to the *[appointing authority]* before final action is taken.

II. Prohibited Conduct Under Title IX

Pursuant to Title IX of the Education Act Amendments of 1972, 20 U.S.C. §1681, the *[College or University]* may impose disciplinary sanctions against an employee who commits, attempts to commit, or aids, abets, incites, encourages, or assists another person to commit, an act(s) of “sexual harassment.”

For purposes of this supplemental procedure, “Sexual Harassment” encompasses the following conduct:

- A. Quid pro quo harassment. A *[college or university]* employee conditioning the provision of an aid, benefit, or service of the *[College or University]* on an individual’s participation in unwelcome sexual conduct.
- B. Hostile environment. Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the *[College or University]’s* educational programs or activities, or employment.
- C. Sexual assault. Sexual assault includes the following conduct:
 - 1. 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.
 - 2. Nonconsensual sexual contact. 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.
 - 3. 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

⁴ See n.2.

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sister of either wholly or half related. Descendant includes stepchildren and adopted children under the age of eighteen (18).

4. Statutory rape. Consensual sexual intercourse between someone who is eighteen (18) years of age or older and someone who is under the age of sixteen (16).
- D. Domestic violence. Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking 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.
- E. Dating violence. Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person (i) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (ii) where the existence of such a relationship shall be determined based on a consideration of the following factors:
1. The length of the relationship;
 2. The type of relationship; and
 3. The frequency of interaction between the persons involved in the relationship.
- F. 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.

III. Title IX Jurisdiction

- A. This supplemental procedure applies only if the alleged misconduct:
1. Occurred in the United States;
 2. Occurred during a *[College or University]* educational program or activity; and
 3. Meets the definition of Sexual Harassment as that term is defined in this supplemental procedure.
- B. For purposes of this supplemental procedure, an “educational program or activity” is defined as locations, events, or circumstances over which the *[College or University]* exercised substantial control over both the Respondent and the context in which the alleged Sexual Harassment occurred. This definition includes any building owned or

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controlled by a student organization that is officially recognized by the [College or University].

- C. Proceedings under this supplemental procedure must be dismissed if the [decision maker]⁵ determines that one or all of the requirements of Section A(1)-(3) have not been met. Dismissal under this supplemental procedure does not prohibit the [College or University] from pursuing disciplinary action against a Respondent based on allegations that the Respondent engaged in other misconduct prohibited by federal or state law, employment contracts or handbooks, or other [College or University] policies.
- D. If the [employee disciplinary officer]⁶ determines the facts in the investigation report are not sufficient to support Title IX jurisdiction and/or pursuit of a Title IX violation, the [employee disciplinary officer] will issue a notice of dismissal in whole or part to both parties explaining why some or all of the Title IX claims have been dismissed.

IV. Initiation of Discipline

- A. Upon receiving the Title IX investigation report from the Title IX Coordinator, the [employee disciplinary officer] will independently review the report to determine whether there are sufficient grounds to pursue a disciplinary action against the Respondent for engaging in prohibited conduct under Title IX.
- B. If the [employee disciplinary officer] determines that there are sufficient grounds to proceed under these supplemental procedures, the [employee disciplinary officer] will initiate a Title IX disciplinary proceeding by filing a written disciplinary notice with the [decision maker] and by serving the notice on the Respondent and the Complainant, and their respective advisors. The notice must:
 - 1. Set forth the basis for Title IX jurisdiction;
 - 2. Identify the alleged Title IX violation(s);

⁵ Institutions will need to make a decision about who is responsible for hearing these cases and issuing the disciplinary decision. It could be an outside hearing officer hired by the institution or loaned from another institution, a single employee or panel of employees, or a combination of these individuals. If the institution decides to go with an employee or panel of employees, it should consider designating the Chair for the Student Conduct Committee to participate, as the Title IX training they receive as Chair of the Student Conduct Committee will be applicable here as well.

⁶ The “employee disciplinary officer” in employee disciplinary proceedings serves the same role as the student conduct officer in student disciplinary proceedings. The employee disciplinary officer is responsible for reviewing the investigation report to determine whether it contains sufficient factual findings, which, if proven to be true, would be sufficient to find that the Respondent engaged in sexual harassment that is prohibited under this supplemental Title IX rule. They are also responsible for presenting the Institution’s case at the hearing.

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3. Set forth the facts underlying the allegation(s);
 4. Identify the range of possible sanctions that may be imposed if the Respondent is found responsible for the alleged violation(s);
 5. Explain that each Party is entitled to be accompanied by an Advisor of their own choosing during the hearing and that:
 - a. Advisors will be responsible for questioning all witnesses on the Party's behalf;
 - b. An Advisor may be an attorney and/or, if the Party is a represented employee, a union representative;
 - c. A represented employee who chooses an Advisor who is not a union representative must submit a signed waiver of union representation that includes consent from the union;⁷ and
 - d. The [College or University] will appoint the Party an Advisor of the [College or University]'s choosing at no cost to the Party, if the Party fails to choose an Advisor;
 6. Explain that if a Party fails to appear at the hearing, a decision of responsibility may be made in the Party's absence.
- C. Service of the disciplinary notice or any other document required to be served under this supplemental procedure may be done personally or by first class, registered, or certified mail, or by electronic mail to the Party's [college or university] email address.⁸

V. Pre-Hearing Procedure

- A. Upon receiving the disciplinary notice, the [decision maker] will send a hearing notice to all parties in compliance with WAC 10-08-040.⁹ Pursuant to _____,¹⁰ the hearing

⁷ Represented employees have a right to mandatory union representation during disciplinary meetings and proceedings.

⁸ This provision is necessary because, otherwise, WAC 10-08-110(2)(c) prohibits the use of email to serve documents on a party, unless the receiving party has expressly assented to receiving service by this method.

⁹ This is a citation to the Office of Administrative Hearings' [Model Rules](#). **Institutions will want to carefully review OAH's model rules to understand the procedural requirements they impose in addition to those set forth in this supplemental procedure.**

¹⁰ Insert citation to the Model Title IX Grievance Procedure requiring that Parties receive 10 days to review the Final Investigation Report before a hearing can be set.

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date may not be scheduled less than ten (10) days after the Title IX Coordinator provided the Final Investigation Report to the Parties.

- B. A Party is entitled to be accompanied by an Advisor of their choice during the disciplinary process at the party's own expense. The Advisor may be an attorney and/or, if the Party is a represented employee, a union representative.
 - 1. If the Advisor is an attorney, the Advisor must file a notice of appearance with the *[decision maker]* with copies to all parties and the *[employee disciplinary officer]* at least five (5) days before the hearing. If a notice of appearance is not filed within this timeframe, the Party will be deemed to have waived their right to have an attorney as an Advisor.
 - 2. If a Party is a represented employee who chooses not to use a union-provided Advisor, the Party must provide the *[decision maker]* with a signed waiver of union representation, including written consent from the union.
- C. In preparation for the hearing, the Parties will have equal access to all evidence gathered by the investigator during the investigation, regardless of whether the *[College or University]* intends to offer the evidence at the hearing.

VI. Rights of Parties

- A. The provisions of this supplemental procedure shall apply equally to both parties.
- B. The *[College or University]* bears the burden of offering and presenting sufficient testimony and evidence to establish that the Respondent is responsible for a Title IX violation by a preponderance of the evidence.
- C. The Respondent will be presumed not responsible until such time as the disciplinary process has been finally resolved.
- D. During the hearing, each Party shall be represented by an Advisor. The Parties are entitled to an Advisor of their own choosing and the Advisor may be an attorney or, if the Respondent holds a represented position, a union representative. If a party does not choose an Advisor, then the Title IX Coordinator¹¹ will appoint an Advisor of the *[College or University]*'s choosing on the Party's behalf at no expense to the Party.

¹¹ This responsibility could also be assigned to the *[decision maker]* or some other neutral institution administrator. The institution will want to make sure that whomever is selecting the advisor is free from actual or perceived bias or conflict of interest.

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VII. Evidence

The introduction and consideration of evidence during the hearing is subject to the following procedures and restrictions:

- A. Relevance: The Committee Chair shall review all questions for relevance and shall explain on the record their reasons for excluding any question based on lack of relevance.
- B. Relevance means that information elicited by the question makes a fact is dispute more or less likely to be true.
- C. 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:
 - 1. Is asked or offered to prove someone other than the Respondent committed the alleged misconduct; or
 - 2. Concerns specific incidents of prior sexual behavior between the Complainant and the Respondent, which are asked or offered on the issue of consent.
- D. Cross-examination required: If a Party or witness does not submit to cross-examination during the live hearing, the *[decision maker]* must not rely on any statement by that Party or witness in reaching a determination of responsibility.
- E. No negative inference: The *[decision maker]* may not make an inference regarding responsibility solely on a witness’s or party’s absence from the hearing or refusal to answer questions.
- F. Privileged evidence: The *[decision maker]* shall not consider legally privileged information unless the holder has effectively waived the privilege. Privileged information includes, but is not limited to, information protected by the following:
 - 1. Spousal/domestic partner privilege;
 - 2. Attorney-Client and attorney work product privileges;
 - 3. Privileges applicable to members of the clergy and priests;
 - 4. Privileges applicable to medical providers, mental health therapists, and counsellors;
 - 5. Privileges applicable to sexual assault and domestic violence advocates; and
 - 6. Other legal privileges identified in RCW 5.60.060.

VIII. Initial Order

- A. The *[decision maker]* will be responsible for drafting an Initial Order that:
 - 1. Identifies the allegations of sexual harassment;

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2. Describes the grievance and disciplinary procedures, starting with filing of the formal complaint through the determination of responsibility, including notices to parties, interviews with witnesses and parties, site visits, methods used to gather evidence, and hearings held;
 3. Makes findings of fact supporting the determination of responsibility;
 4. Reaches conclusions as to whether the facts establish whether the Respondent is responsible for engaging in Sexual Harassment in violation of Title IX;
 5. Contains a statement of, and rationale for, the Committee’s determination of responsibility for each allegation;
 6. Describes any disciplinary sanction or conditions imposed against the Respondent, if any;
 7. Describes to what extent, if any, Complainant is entitled to remedies designed to restore or preserve Complainant’s equal access to the *[College or University]’s* education programs or activities; and
 8. Describes the process for appealing the Initial Order to the *[College or University]* President.
- B. The *[decision maker]* will serve the Initial Order on the Parties simultaneously.

IX. Appeals

- A. The Parties have the right to appeal from the determination of responsibility and/or from a Title IX dismissal, in whole or part, of a formal complaint, as set forth in the Initial Order. To the extent they are consistent with the provisions of this Procedure, the right to appeal is subject to the same procedures and timeframes set forth in WAC ___-___-___.¹²
- B. The President or the President’s delegate will determine whether the grounds for appeal have merit, provide the rationale for this conclusion, and state whether the disciplinary sanctions and conditions imposed in the Initial Order are affirmed, vacated, or amended, and, if amended, set forth the new disciplinary sanctions and conditions.
- C. The President’s Office shall serve the Final Decision on the parties simultaneously.

¹² Citation to the procedure for appealing an Initial Order to the President under the institution’s student conduct procedure.

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- D. All decisions reached through this process are final. No decisions or recommendations arising from this disciplinary procedure will be subject to grievance pursuant to any Collective Bargaining Agreement.¹³

¹³ This provision will need to be bargained with the applicable unions.