

LEGAL UPDATE

WSSSC SPRING MEETING

MAY 19, 2023

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What we will cover

- Third Party Contracting*
- Title IX - 2.0*
- Barlow v. State of Washington Update*
- Student Conduct Academy Update*

Third Party Contracting

- Contracting by state agencies is governed by state procurement laws.
- With several notable exceptions, contracts must be awarded through competitive solicitation (bidding) under rules promulgated by Department of Enterprise Services. *See* RCW 39.26 and WAC 200-300.
- Public institutions of higher education (IHEs) also have independent procurement authority. *See* RCW 28B.10.029.
- IHEs may choose to act under DES's authority or their independent authority.
- Must comply with DES rules if operating under DES authority.



Exceptions to Competitive Solicitation

Exceptions to competitive solicitation requirement, include, but are not limited to:

- **Emergency contracts**;
- **Sole source contracts** that comply with the provisions of RCW 39.26.140;
- **Direct buy purchases**, as designated by DES (currently \$40,000 threshold for purchases from small businesses and veteran owned businesses, otherwise \$30,000);
- Purchases from **master contracts** established or authorized by DES;
- **Client services contracts**;
- **Intergovernmental agreements** awarded to any governmental entity, whether federal, state, or local and any department, division, or subdivision thereof;
- Contracts for **goods or services valued at less than \$10,000** under RCW 28B.10.029(1)(c)(iii); and
- Contracts for **goods or services valued at \$10,000 or more and less than \$100,000** are subject to relaxed solicitation requirements under RCW 28B.10.029(1)(c)(iii).

Contracting Process

- Purchasing office typically involved in procurement process and contract administration.
- College personnel usually responsible for negotiating contract with assistance from purchasing and AAG.
- AAG reviews contracts as to form to ensure compliance with Washington law.
- Employees executing contracts on behalf of an IHE must have authority to bind the College.
- Contract usually cannot be revised once it is executed by IHE.
- IHEs must follow DES Supplier Diversity Guidance when conducting procurement under RCW 39.26. Some IHEs are creating alternative diversity programs.

Select Contract Provisions

Protecting Confidential Information

- FERPA
- Public Records Act

Risk Shifting Provisions

- Indemnification clauses
- Insurance requirements
- Waiver of warranties
- Limitation of liability clauses

Venue and Choice of Law Clauses

Automatic Renewal (Evergreen) Clauses

QUESTIONS?

TITLE IX - 2.0

NOTICE OF PROPOSED RULEMAKING (NPRM)

Issued on June 23, 2022 – Fiftieth Anniversary of Title IX

Imposes procedural requirements for **all claims** of sex-based discrimination, including discrimination arising from:

- Sexual harassment;
- Sex stereotypes;
- Sex characteristics;
- Pregnancy and other related conditions;
- Sexual orientation; and
- Gender identify.

Sexual Harassment Definitions

Hostile Environment Harassment redefined as:

Unwelcome sex-based conduct that is sufficiently severe or pervasive that, **based on a totality of the circumstances and evaluated objectively and subjectively**, the conduct denies or limits a person's ability to participate in or benefit from the IHE's education program or activity.

Quid Pro Quo Harassment redefined as:

when an employee **or other person authorized by an IHE** to provide an aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person's participation in unwelcome sexual conduct.

Definitions for Sexual Assault, Domestic and Dating Violence, and Stalking largely unchanged

Expanded Jurisdiction

IHEs required to address all sexual discrimination in their education programs and activities, including:

- Discrimination that occurs overseas
- Discrimination that occurs in any building owned or controlled by a student organization that is officially recognized by the IHE
- Conduct that occurs off campus when the respondent is:
 - A representative of the IHE; or
 - Otherwise subject to the IHE's disciplinary authority
- Complainants not required to be actively engaged or seeking to engage with IHE's program or activity.

Title IX does not preempt obligation to comply with state or local laws, or other requirements that provide greater protection against sex discrimination

Title IX Coordinator Response to Sex Discrimination

- ❖ At least one employee must be designated as a Title IX Coordinator
- ❖ Coordinator responsibilities may be assigned to others, but Coordinator must retain “ultimate oversight”
- ❖ Coordinator authorized to consult with disability services if complainant or respondent is a student with a disability
- ❖ Must monitor for barriers to reporting sexually discriminatory conduct and take steps to reasonably calculated to address those barriers
- ❖ Coordinator can serve as decisionmaker and/or investigator

Reporting/Notification Requirements

- Confidential employees with information about suspected sexual discrimination must refer impacted party to Title IX Coordinator
- Employees who have authority to institute corrective measures must report suspected discriminatory conduct to Title IX Coordinator
- Administrative leaders, teachers, or advisors with information about suspected discriminatory conduct against a **student** must notify the Title IX Coordinator
- Administrative leaders, teachers, or advisors with information about suspected discriminatory conduct against an **employee** must either notify the Title IX Coordinator or refer impacted employee to Title IX Coordinator
- All other employees must either report suspected discrimination to Title IX Coordinator or refer impacted party to Title IX Coordinator
- IHEs have discretion re: requirements for students who are also employees

Maintaining Activities & Programs Free from Sex Discrimination (cont.)

Confidential Employees

- IHEs should identify Confidential Employees to all participants
- Confidential employees must explain their status when they informed about possible sexual discrimination and provide person with referral to Title IX Coordinator

Disclosures of sexual harassment during in-person or on-line public awareness event

- IHE not required to act unless there is an immediate and serious threat to the health or safety of college community members
- IHE must use this information to inform its efforts to prevent sex-based harassment and to address alleged sex-based harassment within particular programs or locations

Grievance Procedures Applicable to All Sex Discrimination Complaints

Sex discrimination grievance procedure only applies to allegations against an individual – “When a sex discrimination complaint that an [IHE] policy of practice discriminates on the basis of sex, the [IHE] is not the respondent”

The Decisionmaker may be the same person as the Title IX Coordinator or investigator (will allow Title IX procedures to align with standard student conduct procedures)

Respondent is presumed not responsible until completion of the discipline process

Case may be dismissed at any time if

- IHE is unable to identify respondent after taking reasonable steps to do so
- Respondent is no longer a student or employed by the IHE
- Complainant withdraws the allegations and IHE lack sufficient corroborating evidence to proceed.
- IHE determines that conduct alleged in complaint, even if proven, does not constitute sex discrimination

IHE must provide all parties notice of dismissal and information necessary for appeal

Grievance Procedure for Sex-Based Harassment Complaints Involving Students

- Parties have the right to an advisor of their choosing during the investigation and disciplinary procedures
- Live hearing not required
- IHE may “reasonably delay” issuing notice of allegations to address safety concerns appropriately. Safety concerns must be based on individualized assessment
- IHEs may take reasonable steps to ensure against the unauthorized disclosure of materials obtained exclusively through grievance process by parties and their advisors
- IHE must provide advisor if party does not have one
- Advisor must conduct questioning during live hearings
- Decisionmaker cannot rely on testimony of party who refuses to answer question relating to credibility

Pregnancy and Related Conditions

Discrimination based on student's current, potential, or past pregnancy or related conditions is prohibited

Student may voluntarily participate in "separate portion" of educational program or activity provided the separate portion is equivalent to what is offered to non-pregnant students

When an employee is informed about a student's pregnancy, the employee must promptly inform student about how they to contact the Title IX Coordinator for assistance

Upon learning that a student is pregnant, the Title IX Coordinator must promptly inform the student about:

- The prohibitions against sexual discrimination
- Offer reasonable modifications to IHE policies, practices, or procedures
- Allow access, on a voluntary basis, to any separate and comparable portion of the IHE's programs or activities
- Allow voluntary leave of absence
- Ensure availability of lactation space
- Grievance procedures for sexual discrimination

QUESTIONS?

Barlow v. State - Update

- WSU student is disciplined for sexual misconduct, but is subsequently allowed to transfer to different campus where he sexually assaults another student in an off-campus apartment
- Second victim sues WSU for negligence, among other things
- Ninth Circuit refers the following questions to the Washington State Supreme Court:
 - (1) Does Washington law recognize a special relationship between a university and its students giving rise to a duty to use reasonable care to protect students from foreseeable injury at the hands of other students?
 - (2) If the answer to question 1 is yes, what is the measure and scope of that duty?
- Oral argument on February 23, 2023 – Decision pending

Student Conduct Academy - Update

- Two full-day sessions in September
- Wenatchee Community College will be hosting on the Eastside
- Still looking for Westside host
- Training will be for Student Conduct Officers, but may be beneficial for others to attend
- Additional focus on summary suspension procedures

The end
