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# 2020 Title IX Training

**December 11, 2020, 9-11am**



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she/her

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## Before we get started...

This training is not intended as legal advice; we advise you to consult with your legal counsel before making policy or process changes.

ODE is available to support with individual technical assistance following this training.

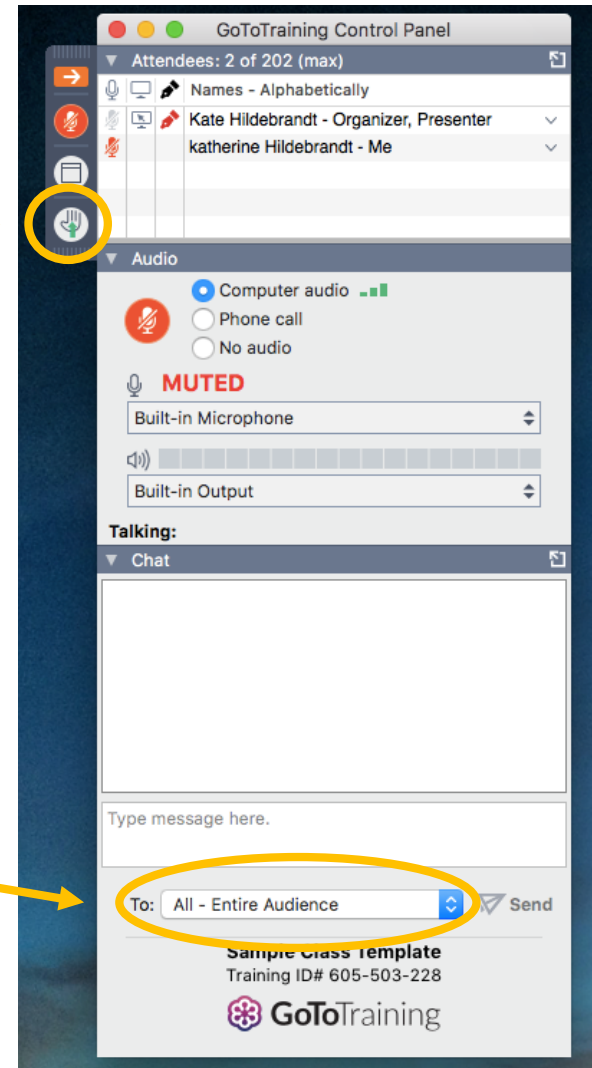
# Using GoToTraining

“raise your hand” to ask a question verbally – you will be unmuted



you can access the audio through either your computer or a phone

type a question to either the entire audience or to an individual



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# TODAY'S AGENDA



Recap



Sexual Harassment: The Title IX Process



Conflict of Interest & Bias





# RECAP

# What is covered by Title IX?

- Recruitment and admissions
- Financial assistance
- Curricular and co-curricular activities
- Athletics
- Sexual harassment and sex-based harassment
- Pregnant and parenting students
- Discipline
- Single-sex education
- Employment
- Retaliation

# Intersecting Oregon Laws

- OAR 581-021-0045 and 0046 - Discrimination  
*“Discrimination” means any act that unreasonably differentiates treatment, **intended or unintended**, or any act that is fair in form but discriminatory in operation, either of which is based on **age, disability, national origin, race, color, marital status, religion, sex or sexual orientation***
- ORS 342.704/OAR 581-021-0038 – Sexual Harassment Policy Requirements
- ORS 339.366 – Dating and Domestic Violence Policies
- Mandatory Reporting
- Sexual Conduct



# The 2020 Regulations: Major Changes for K-12 Schools

- New definition of sexual harassment
- Restriction to occurrences “within educational program or activity”
- Supportive measures required
- New and specific grievance process (and policy requirements!)
- Specific notification requirements
- Advisors of choice
- Specific training and personnel requirements
- Informal processes allowed

**Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

-34 CFR Part 106.30

	Title IX Coordinator	Investigator	Decision- Maker	Appeals Decision- Maker	Informal Process Facilitator
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Definition of sexual harassment

X

X

X

X

X

Scope of “educational program or activity”

X

X

X

X

X

How to conduct the applicable portions of the grievance process

X

X

X

X

X

Avoiding prejudice of facts, conflicts of interest, and bias

X

X

X

X

X

How to create a fair investigative report

X

Any technology used at hearings

X

X

Issues of relevance for questions and evidence

X

X





# SEXUAL HARASSMENT: THE TITLE IX PROCESS

# In this section...

- Who is involved in a Title IX investigation and adjudication?
- What are the steps once a school receives a Title IX report?
- How does decision-making work?



# Who's Involved?

**Title IX Coordinator**

Investigator

Decision-Maker

Appeals Decision-Maker

Informal Resolution Facilitator

may be the  
same person

only required  
if offered

poll



# Title IX Coordinator\*

- Oversees overall Title IX compliance
- For sexual harassment, must:
  - Respond to all actual notice
  - Coordinate supportive measures
  - Coordinate implementation of remedies and sanctions
  - Keep records
- For sexual harassment, may:
  - Investigate cases
  - Issue notices
  - Train other district personnel



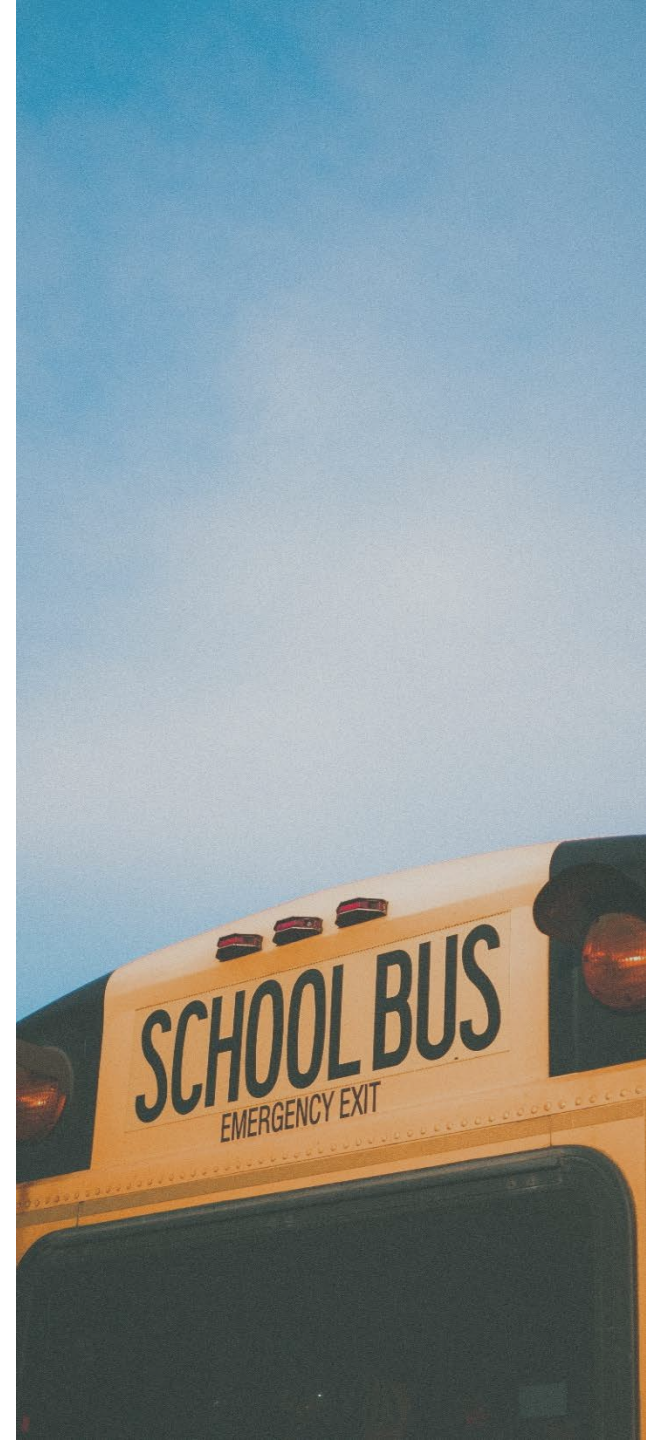
\*According to the new regulations, this person “must be referred to as the Title IX Coordinator”

# Investigator

- Conducts interviews
- Gathers and reviews evidence
- Writes the investigative report

# Informal Process Facilitator

- Coordinates informal process
- Must be separate from formal complaint and grievance process





# Decision-Maker(s)

- Conducts hearing, if applicable
- Facilitates “modified cross-examination” questioning for K-12
- Writes determination of responsibility

## Appeals Decision-Maker(s)

- Facilitates appeal process, including notification and written opportunity to respond
- Writes appeal decision

- 
- 1 Actual Knowledge
  - 2 Formal Complaint
  - 3 Investigation
  - 4 Decision-Making
  - 5 Appeal
  - 6 Sanctions and Remedies



	Title IX Coordinator	Investigator	Decision- Maker	Appeals Decision- Maker	Informal Process Facilitator
Actual Notice	X				
Supportive Measures	X				
Formal Complaint	X				
Investigation		X			
Decision			X		
Appeal				X	
Sanctions and Remedies	X		X	X	
Informal Process					X

# 1

# ACTUAL KNOWLEDGE

Actual knowledge to a K-12 school includes notice to ***any*** school or district employee.

Schools must respond in a manner that is not “**deliberately indifferent**,” which includes:

- Contacting the complainant
- Offering supportive measures
- Describing the process for filing a formal complaint
- *Potentially other steps*

## OREGON LAW INTERSECTION:

- Oregon sexual harassment policy rules
- mandatory reporting requirements (when implicated)
- SB155 reporting requirements (when implicated)

(a)



# Supportive Measures

- Mutual or uni-directional no-contact orders
- Changing class, work, or other schedules
- Academic accommodations, including extensions, academic rehabilitation, etc.
- Increased monitoring and safety measures
- Privacy measures and accommodations
- Transportation accommodations

Supportive measures may impact the other party, but must not ***unreasonably burden*** them such that it impacts their access to the educational program or activity.

Disciplinary measures may not be imposed on the respondent until the conclusion of grievance procedures.

# ORS 342.704/OAR 581-021-0038

## Notice of Rights and Options

- (a) Name and contact information for all persons designated by the district to receive complaints;
- (b) The rights of the person;
- (c) Information about the privacy rights of the person and legally recognized exceptions to those privacy rights for internal complaint processes and services available through the school or school district;
- (d) Information about the complaint process, including any applicable timelines;
- (e) Notice that civil and criminal remedies that are not provided by the school or district may be available to the person through the legal system, and that those remedies may be subject to statutes of limitation;
- (f) Information about services available to the person through the district, including any counseling services, nursing services, or peer advising;
- (g) Information about and contact information for support services available to the person;
- (h) Notice of the prohibitions of discipline as described in subsection (5)(h); and
- (i) Notice of prohibition of retaliation;



# 2

## FORMAL COMPLAINT

A formal complaint is a **document submitted by the complainant or signed by the Title IX Coordinator** requesting the initiation of grievance procedures.

Must dismiss under Title IX if:

- complainant is not “availing themselves, or attempting to avail themselves,” of the educational program
- the conduct in the formal complaint does not constitute sexual harassment
- the conduct did not happen in the educational program or activity of the school
- the conduct did not happen in the United States

**OREGON LAW INTERSECTION:** Oregon law will still require response to sexual harassment even if it must be dismissed under Title IX.

(3)





# “Educational program or activity”

“... ‘education program or activity’ includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs...”

-34 CFR Part 106.44(a)

This doesn't just include the school!

- Field trips
- Athletic games
- Buses and bus stops
- Fundraising events

Can third parties submit  
complaints?

## 2

# FORMAL COMPLAINT

A formal complaint is a **document submitted by the complainant or signed by the Title IX Coordinator** requesting the initiation of grievance procedures.

However, a third party could:

- Provide notice under Title IX and trigger associated responsibilities
- File a complaint under Oregon's sexual harassment guidelines



# Emergency Removal and Administrative Leave

Emergency removal of a student is allowed:

- following a risk analysis that determines there is risk to the physical health or safety of the school community
- respondent is provided notice and opportunity to challenge
- must comply with 504 and IDEA

Administrative leave of employees, paid or unpaid, is allowed while grievance process is pending

34 CFR § 106.44(c) and (d)



# Informal Process

Can, but not required to, offer informal resolution process for any case EXCEPT employee-on-student sexual harassment

- Formal complaint must be filed
- Notice must be given, which must include informal process information
- Both parties must submit written consent
- Identify and describe conditions under which parties can/cannot opt back into formal process

# Break for Questions

## 2

# FORMAL COMPLAINT

A notice of allegations must be issued simultaneously to complainant(s) and respondent(s), and must include:

- Information about the grievance process
- Allegations including: identity of parties, conduct, date, location,
- Presumption of non-responsibility for respondent
- Advisor of choice rights
- Any prohibitions on submitting false information

Ongoing/amended notice must be provided if additional allegations are added to the initial report.

### OREGON LAW INTERSECTION:

Oregon's laws on harassment, intimidation, bullying, and cyberbullying policies require a statement of consequences for false reports.

(2)



# 2

## FORMAL COMPLAINT

### OREGON LAW INTERSECTION:

*...students who initiate a complaint or otherwise report harassment covered by the policy or who participate in an investigation may not be disciplined for violations of the district's drug and alcohol policies that occurred in connection with the reported prohibited conduct and that were discovered because of the report or investigation, unless the student gave another person alcohol or drugs without the person's knowledge and with the intent of causing the person to become incapacitated and vulnerable to the prohibited conduct.*

OAR 581-021-0038(5)(h)





# Rights of Parents

*“The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.”*

*“Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a ‘complainant,’ ‘respondent,’ ‘party,’ or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.”*

34 CFR § 106.6



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# Best Practices: Safety Assessments and Safety Planning

“Typically in situations like this, we would directly notify your parent(s)/guardian(s) so they can support you throughout this process. How do you feel about us calling your parents today?”

Look for fears around:

- Physical harm

- Stability-related harm (loss of housing, withdrawal from school, etc)

- Emotional harm

- Identity-based harm\*

Make a safety plan with the student. Document the response and plan.

Is any follow-up needed to ensure safety at home?



# Advisors

Parties must be told of their right to bring an advisor to any interviews, hearings, or meetings. Schools may not set limits on who can serve as an advisor.

Minor students may bring both an advisor AND a parent.

Schools can set limits on how advisors participate, as long as those limitations apply equally to all advisors.

# 3

# INVESTIGATION

An investigation includes:

- Interviews with parties and witnesses (may be multiple)
  - Remember: right to bring advisor of choice
- Collection and reviews of evidence
  - Parties must also be allowed to examine all directly related submitted evidence
- Writing an investigative report

School districts must set investigation steps, processes, and timelines in their policies.

34 CFR § 106.45(b)(5)





# 3

# INVESTIGATION

## Possible Investigation Timeline\*

Day 1: Provide notice to the applicable party or witness, with **sufficient time** to prepare.

Day 3-6: Conduct interviews and collect evidence.

Day 7: Send evidence and draft report to parties and advisors; must allow **10 days** to review and submit written response.

Day 17: Receive responses and finalize investigative report.

Day 18: Submit to parties; allow at least **10 days** to respond before decision-making.

Day 28: Decision-making process starts.

Day 30: Determination of responsibility issued

\*with the exception of bolded minimum time frames required in the regulations, school districts will make their own timing decisions in their individual sexual harassment policies.



# Interview Skills

- Draft a list of questions ahead of time, but be flexible
- Open the interview by setting ground rules and sharing information
- When questioning...
  - Start broad, and work your way in
  - Use open-ended questions
  - Use the terminology and language of the person you're talking to
- Take breaks (for you and the interviewee)



# Helpful Questions

## Open-Ended

- “Can you help me understand...”
- “Tell me more...”
- “Describe...”

## Experience-Based

- “How were you feeling...”
- “What did you notice...”
- “What was going through your mind...”

## Clarification

- “You mentioned X, can you tell me more about that?”

# Less Helpful Questions

## Forced-Choice

- “Were you scared, or did you feel ok?”

## Leading

- “You were drunk at the time, right?”

## Multiple/Compound

- “Tell me everything that happened after that, and what were you thinking or feeling at the time”

## Closed-Ended

- “Were you alone?”

## Opinion-Based

- “I believe you were afraid you’d get fired, is that true?”

## Why

- “Why did you leave class in the first place?”

# Think about:

1. what information do you need?
2. what questions will you ask?

A guy in my biology class has been harassing me all semester. I keep telling him that I have a boyfriend, but he keeps snapchatting me and texting me no matter what I do. Yesterday during class I found out that we have to work together on a group project. When we were all talking after class he kept finding ways to touch me, even though I was obviously uncomfortable. After school he followed me out to the parking lot and tried to kiss me, and I pushed him away, but I found out this morning that he told another girl in my group that we hooked up! I'm humiliated and now everyone thinks I'm a slut.



# Potential Interview Plan:

## Introductory Information

- Introduce self, set ground rules, confidentiality, questions

## Questions (start broad!)

- Start: “Tell me about what brought you in here today.”
- Context: “Can you tell me about your relationship and interactions with X before last week?”
- Clarifying: “You mentioned he’s been sending you snapchats and texts – tell me more about those.”
- Last Questions/Closing Loops: “When he followed you out to your car, do you remember where you were parked?”

## Concluding Information

- Witness list – e.g. “It’s often helpful to speak to witness who may have seen any interactions or who you talked to about the incident – is there anyone I should speak with?”
- What to expect next

# Evidence

What kinds of evidence might you collect as part of an investigation?

- Emails
- Text message
- IT data records
- Video surveillance
- Police reports
- Social media posts
- Attendance records
- Course assignments
- Journal entries
- ...all kinds of things!

Parties must be allowed to review any submitted evidence that directly relates to the allegations, even if the district does not intend to rely on it to make a determination of responsibility.

# Evidence

Privileged documents and communications may not be used in investigations without the express permission from the person who holds the privilege.

- Medical records
- Psychiatric records
- Advocacy records (*ORS 40.264 – SADV advocates*)
- Counseling records
- Legal records
- Any other privileged documents/communication

What if there's also a law enforcement investigation, or something else impacts the speed of an investigation?



# Temporary Delays

Temporary delays are allowed for good cause, which could include:

- Absence of a party
- Concurrent law enforcement activity
- Language translation needs
- Accommodations for students with disabilities

*...the final regulations only permit 'temporary' delays or 'limited' extensions of time frames even for good cause such as concurrent law enforcement activity, this provision does not result in protracted or open-ended investigations in situations where law enforcement's evidence collection (e.g., processing rape kits) occurs over a time period that extends more than briefly beyond the recipient's designated time frames.*

-p 30269, Federal Register, Vol. 85, No. 97

34 CFR § 106.44(b)(1)(v)

# 3 INVESTIGATION

The investigative report must “fairly summarize relevant evidence,” and must be sent to both parties and their advisors.

Best practice: create an investigative report template.

- Allegations and jurisdictional statement
- Timeline
- Summary of interviews
- Summary of supporting evidence
- Credibility assessment?
- Findings of fact

34 CFR § 106.45(b)(5)(vii)



# Report-Writing Skills

Reports should be:

- Neutral (e.g., “stated” versus “claimed”);
  - avoid use of unnecessary adjectives
  - avoid using the language of consensual sex to imply consent (caressed, performed)
- Accessible (avoid overly legalistic language)
- De-identified (use “Complainant, Respondent, Witness 1” instead of names)

Use quotes when possible

- Avoid sanitizing language from quotes

Define terms for readers



## What issues can you identify with this draft report?

Brian went back to his office, but he didn't leave Elisa alone and instead began to send her text messages about meeting up that evening. The barrage of texts made Elisa so uncomfortable that she emailed her boss to say she was feeling ill, and skipped the required team meeting that afternoon.

### Reworded:

Between approximately 11:00 and 11:45 am, while in his office, Respondent sent 24 text messages to Complainant, stating he “couldn’t wait to get her alone” and “I can’t stop thinking about you, it’s driving me insane knowing you’re sitting out there.” (see Appendix 3)

At 11:27 am, Complainant emailed her supervisor stating she would be leaving for the day because she was not feeling well. Complainant reported that she knew she was at risk of getting in trouble for missing a meeting that afternoon, but that she was too uncomfortable and didn’t want to see Respondent there.



# Break for Questions

# 4

## DECISION-MAKING

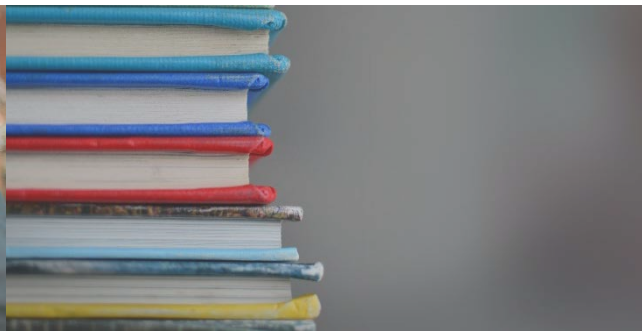
The decision-making process must include:

- Independent review of the investigative report and all directly related evidence, as well as party responses, by a person who did NOT serve as the investigator.
- A “modified cross-examination” process of allowing parties to submit written questions, read written responses, and submit limited follow-up questions.\*

K-12 schools are not required to hold live hearings.

34 CFR § 106.45(b)(6)

\*these questions must be directly related to the allegations, and must not be relating to the complainant’s sexual predisposition or unrelated sexual behavior, except in limited circumstances; the decision-maker may exclude irrelevant questions



# “Modified Cross-Examination”

Parties may submit written questions that are asked of the other party or witnesses. The written answers are submitted to that party, with limited follow up.

- Can be conducted during the 10-day review time
- What if a party or witness refuses to answer the question?

Exclude questions that:

- Are not related to the allegations
- Seek privileged information
- Are related to the complainant’s sexual predisposition or unrelated sexual behavior, unless it goes to prove consent or to “prove that someone other than the respondent committed the behavior”

# 4

# DECISION-MAKING

## Possible Decision-Making Timeline\*:

Day 1: Final investigative report sent to parties and advisors. Parties are informed of their right to submit written questions; questions are due on Day 4.

Day 4: Decision-Maker screens the questions. Appropriate questions are forwarded; responses are due by Day 6.

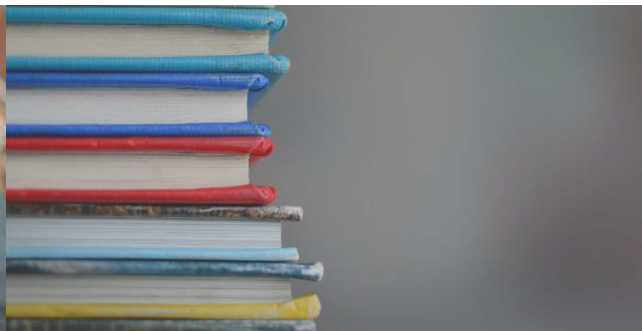
Day 6: Answers are received by decision-maker, and shared with parties. Parties are informed of their right to ask follow-up questions (only those that pertain to clarifying or further elaborating on answers given); those questions are due on Day 8.

Day 8: Decision-maker screens follow-up questions. Appropriate questions are forwarded; responses are due by Day 10.

Day 10: Answers received, and shared with parties.

Day 12: Determination of responsibility issued.

\*school districts will make their own timing decisions in their individual sexual harassment policies





# Standards of Evidence

## ***Preponderance of Evidence***

“[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, ‘simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’”

## ***Clear and Convincing***

“[c]lear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce ‘in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [sic] highly probable.’”



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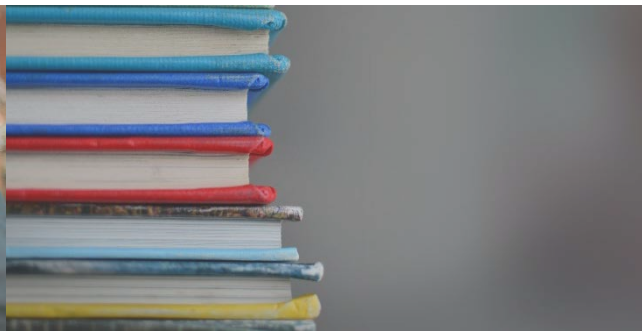
# 4

## DECISION-MAKING

The written determination of responsibility should be sent simultaneously to both parties, and should include:

- The allegations
- Procedural steps from formal complaint through determination
- Findings of fact
- Conclusions of fact
- Results of each allegation and rationale (responsible or not responsible)
- Sanctions and if remedies provided
- Appeal bases and procedures

34 CFR § 106.45(b)(7)



Parties must be allowed to appeal on at least three grounds:

- Procedural irregularity
- Newly discovered or available evidence
- Bias or conflict of interest

Schools may designate other grounds and set time limits on appeals. Appeals are **one level**.

## OREGON LAW INTERSECTION:

In Oregon, individuals may appeal the final result of a discrimination complaint process (including sex-based discrimination such as sexual harassment) to ODE.

(8)





# 6

## SANCTIONS AND REMEDIES

If there is a finding of responsibility, sanctions and remedies must be implemented.

- **Sanctions** are disciplinary measures imposed on the respondent.
- **Remedies** are designed to restore educational access for the complainant.

Regardless of finding, supportive measures may stay in place or be further implemented for the complainant and respondent.

34 CFR § 106.45(b)(7)





# Examples of Sanctions and Remedies

## Sanctions

- Detention
- Suspension
- Expulsion
- Community service
- Counseling
- Evaluation and treatment
- Removal from activities, classes, sports, etc.

## Individual Remedies

- Academic remediation
- Counseling
- Waiver/adjustment of academic, cocurricular requirements
- Additional supportive measures

## Community Remedies

- Educational programs
- Policy reviews
- Staff training



# Break for Questions



# CONFLICTS OF INTEREST & BIAS

# Bias

“A tendency, inclination, or prejudice toward or against something or someone.”

-Psychology Today

## Implicit Bias

“The attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”

-The Kirwin Institute for the Study of Race and Ethnicity





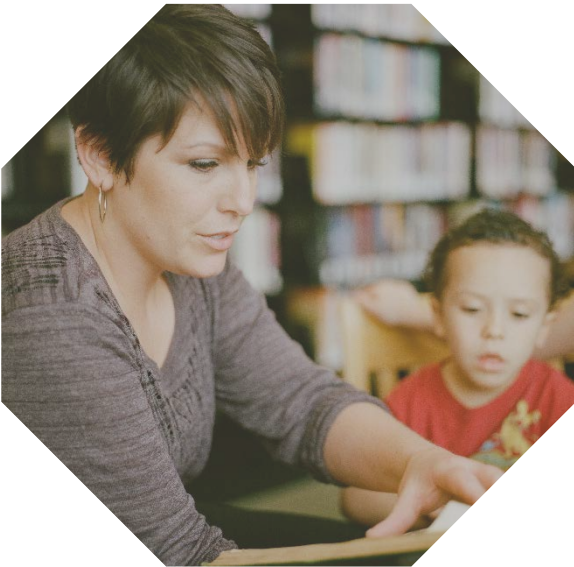
# Confirmation Bias

“The tendency to bolster a hypothesis by seeking consistent evidence while disregarding inconsistent evidence.”

-O'Brien & Ellsworth, 2006, Confirmation Bias in Criminal Investigations

We bring **implicit bias** into the room with us....

...and then we're vulnerable to **confirmation bias** in order to prove our "hunch" was correct.





# The Impact of Bias: An Example

Teachers view Black students as “less innocent,” “more sexual,” and “older for their age” than their White peers.<sup>1</sup>



Black girls make up 8% of enrollment in K-12 schools, but 13% of students suspended.<sup>2</sup>

Black girls are 2-3x as likely as their White peers to be disciplined for subjective infractions like class disruption and dress code violations; compared to White boys, Black boys are 1.5x as likely.<sup>1</sup>



Black girls are 2.7x as likely to be referred to the juvenile justice system than their White peers.<sup>1</sup>



1. Epstein, R., Blake, J.J., & Gonzalez, T. (2017). Girlhood interrupted: The erasure of Black girls' childhood. Center on Poverty and Inequality, Georgetown Law. <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>
2. Office for Civil Rights, US Dept of Ed, Civil Rights Data Collection. (2016). First look: Key data highlights on equity & opportunity gaps in our nation's public schools.



What biases does society hold about victims and perpetrators of sexual harassment and assault?

# A study found that we are more likely to believe someone experienced sexual assault if...

- They are female
- They are emotionally distressed
- They display more stereotypically gendered behaviors in terms of clothing, mannerisms, way of speaking, and social interactions

Schuller, McKimmie, Masser, & Klippenstine, 2010. Judgements of Sexual Assault. *New Criminal Law Review*, 13(4)

# Conversely, what phrases, personality traits, or dispositions are commonly associated with perpetrators of sexual assault?

- evil
- angry
- hostile
- unwilling to submit to authority
- unapologetic
- pattern of previously documented bad behavior
- outbursts
- uncontrolled



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# When complainants and respondents conform to OR defy our expectations, it can bias us.





How do I avoid bias in my  
Title IX work?

# Implicit bias affects us most when we have...

- Ambiguous or incomplete information
- Compromised cognitive loads (stress, too much multi-tasking)
- Time constraints
- Overconfidence in our objectivity



# Strategies to Address Bias



- Increase your knowledge and research multiple perspectives about: sexual harassment, identities you don't share, investigation methods, etc.
- Slow down!
- Reduce subjectivity where possible – checklists? Templates?
- Question the subjective and objective
- Use peer-collaboration models
- Get an external evaluation
- Use hard data to check your processes – case reviews, statistics, etc
- ***What else?***

# Break for Questions



# Conflict of Interest

“A situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially adverse interests of both parties.”

-The People's Law Dictionary

“A conflict of interest arises when what is in a person's best interest is not in the best interest of another person or organization to which that individual owes loyalty... A conflict of interest can also exist when a person must answer to two different individuals or groups whose needs are at odds with each other.”

-McCombs School of Business at University of Texas

# Does this present a conflict of interest?

One of your school board members, who serves as your decision-making panel, used to teach in one of the district's elementary schools. She taught both the complainant and respondent approximately five years ago, when they were in second grade.

# Does this present a conflict of interest?

The respondent tells you that they have a witness who saw what really happened, and who can definitely refute the allegations. The Title IX investigator, who is also the Assistant Principal, was involved in disciplining this witness last semester, which resulted in two suspensions and several tense meetings with the witness's parents.

# Strategies to Address Conflict of Interest



- Develop a district-specific conflict of interest protocol (*consider integrating it into your Title IX policy*)
- Cross-train multiple individuals to account for potential conflict of interest
- Develop partnerships or external contracts to share personnel\* when necessary
- ***What else?***

\*ORS 703.401-411 provides information on qualification of investigators – make sure to cross-check!



# Break for Questions



# What's next?

- Update your policies
  - Draft notification documents
- Update website
  - Title IX Coordinator contact info
  - Nondiscrimination notice
- Train all Title IX personnel
  - Seek additional, role-specific training where applicable; best practice is to go above and beyond compliance!
- Train all employees on new definition of sexual harassment



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