



Title IX Sexual Harassment

September 20, 2021 8:00 am-12:00 pm



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she/her

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Oregon Department of Education

Equity and Excellence for Every Learner

- The Oregon Department of Education works in partnership with school districts, education service districts and community partners;
- Together, we serve over 580,000 K-12 students;
- We believe every student should have access to a highquality, well-rounded learning experience;
- We work to achieve the Governor's vision that every student in Oregon graduates with a plan for their future.



Before we get started...

This training is not intended as legal advice and should not be taken as such; 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.



PC995

Using Zoom





click on "Reactions" to raise your hand

toggle the "To" button to send a question privately or publicly







TODAY'S AGENDA

The Groundwork: Introduction to Title IX

Sexual Harassment: Definitions & Dynamics

Intersecting Oregon Laws

Who's Who in Title IX

Response, Investigation, & Adjudication

Conflict of Interest & Bias



THE GROUNDWORK: INTRODUCTION TO K-12 TITLE IX



"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."



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



Key Components of Title IX in K-12 School/Districts

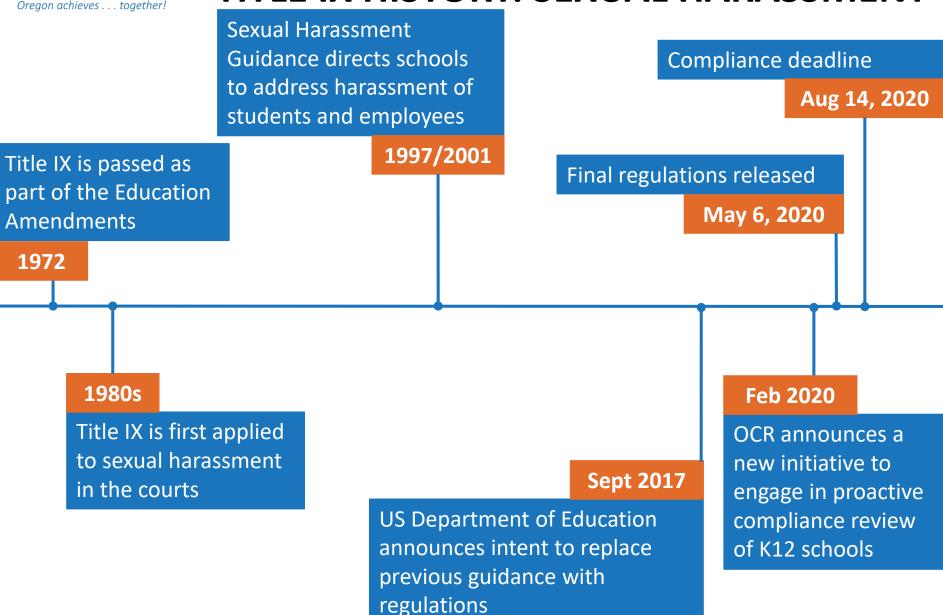
- Title IX Coordinator(s)
- Your policies and procedures
 - Discrimination
 - Sexual harassment
 - Employment/hiring
- Athletic equity
- Sexual harassment
- Website
- Staff training







TITLE IX HISTORY: SEXUAL HARASSMENT





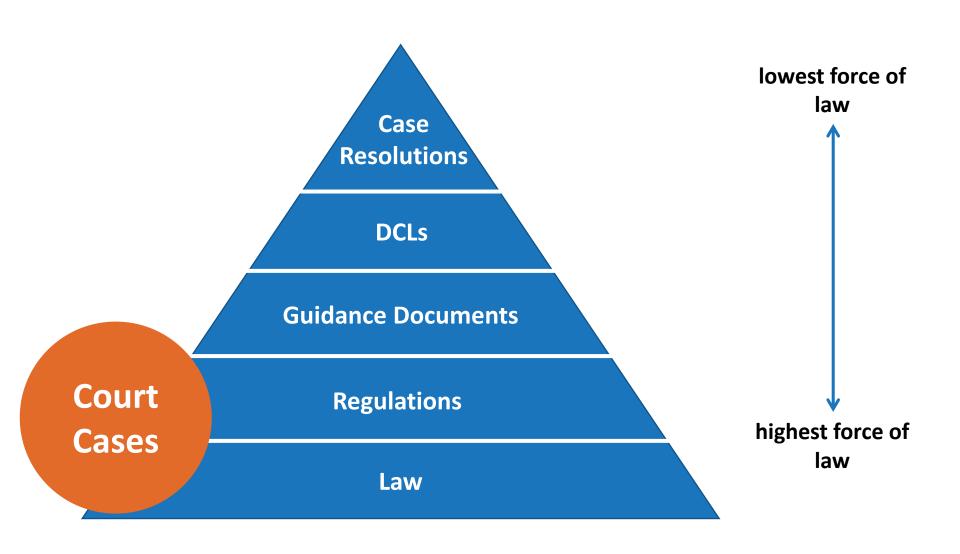
The 2020 Regulations: Major Changes for K-12 Schools

- 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





Understanding Title IX





Break for Questions



SEXUAL HARASSMENT: DEFINITIONS & DYNAMICS



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





Does this meet prong 2 (severe, pervasive, objectively offensive, denies equal access)?

Oliver is in the school's coding club that meets at lunch; everyone has been practicing making websites, and a group of students in the club use their website to rank everyone in the class by how "slutty" or "virginal" they are.

The website proclaims Oliver as the "top virgin," and includes a photoshopped picture of him made to look like he's naked, looking scared of a several nearby naked girls. Someone anonymously emailed it to everyone in the club during the last meeting, and Oliver has heard several classmates mutter "virgin" under their breath when he walks down the hall.



Sexual Assault

Rape: (Except Statutory Rape) The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault With An Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent.

-20 U.S.C. 1092(f)(6)(A)(v) and the FBI Uniform Crime Reporting System (NIBRS-version)





How do you define consent?

Question 6: Do schools need to adopt a particular definition of consent for determining whether conduct is "unwelcome" under the definition of sexual harassment in the 2020 amendments?

Answer 6: No. The preamble states that the Department will not require a school to adopt a particular definition of consent. The preamble explains that a school has the flexibility to choose a definition of consent that "best serves the unique needs, values, and environment of the [school's] own educational community."

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf



How will your school define consent?

"Consent is knowing, voluntary, and clear permission by word or action, to engage in mutually agreed upon sexual activity. To be effective, consent must be informed and reciprocal, freely and actively given, and mutually understandable."

-Oregon State University

Consent is not present for sexual activity when a person is:

- under the influence of drugs or alcohol;
- unconscious; or
- pressured through physical force, coercion or explicit or implied threats.

-ORS 342.704/OAR 581-012-0038



Is there consent?

Jax, an eighth grader, is talking to the school counselor and mentions that things haven't been going very well with their boyfriend, Sam. Specifically, Jax says that that things have been weird since they lost their virginity to Sam.

Jax says, "it wasn't what I expected. I met up with him at a baseball game, but he wouldn't let me come sit with him and his friends. He texted me to meet him by the bathrooms in the middle of the game, and then we went behind the bathrooms and did some stuff. I was nervous and I told him I wasn't ready to have sex, but he said that he loved me. I told him we could do other stuff, but he said that if I loved him I would have sex. He said he'd break up with me and tell everyone I was gay unless I proved my love to him. So we had sex, but I didn't like it at all."

In your breakout rooms...

- 1. What is your school/district's definition of consent?
- 2. Was the sexual encounter between Jax and Sam consensual?
 - Why or why not?
 - What additional information might you need to make a decision?





Having a clear definition of consent is important.

- Whether an act was consensual is a key component of many sexual harassment investigations.
- Not using a consistent definition can lead to biased investigations/decisions and inconsistent outcomes (which could be further discrimination!)
- Even though we are working with minors, it's not as simple as "18 is the age of consent." Young people of similar ages can engage in consensual sexual acts under Oregon law.*



^{*}see Oregon AG's letter on consensual minor-minor sexual interactions



Break for Questions

Domestic Violence

"[I]ncludes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, 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 or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, 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 jurisdiction."

-34 U.S.C. 12291(a)(8)



Dating Violence

"The term "dating violence" means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship."

-34 U.S.C. 12291(a)(10)



VIOLENCE

VIOLENCE

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Peer Pressure

 Threatening to expose someone's weakness or spread rumors • Telling malicious lies about an individual to peer group.

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Anger / **Emotional Abuse**

 Putting him/her down Making him/her feel badly about him or her . Name calling • Making him/her think he/she's crazy • Playing mind games • Humiliating him/her • Making him/her feel guilty.



Isolation/Exclusion

Controlling what another does, who he/she sees, and talks to, what he/she reads, where he/she goes • Limiting outside involvement • Using jealousy to justify actions.

Using Social Status

Treating her like a servant Making all the decisions Acting like the "master of the castle" • Being the one to define men's and women's roles.

Sexual Coercion

Manipulating or making threats to get sex • Getting her pregnant • Threatening to take the children away Getting someone drunk or drugged to have sex.

AND CONTROL WHEEL

TEEN POWER

Intimidation

Making someone afraid by using looks, actions, gestures. Smashing things Destroying property Abusing pets Displaying weapons.

Threats

Making and/or carrying out threats to do something to hurt another • Threatening to leave, to commit suicide, to report him/her to the police Making him/her drop charges • Making him/he

do illegal things.

Minimize/ Deny/ Blame

Making light of the abuse and not taking concerns about it seriously • Saying the abuse didn't happen • Shifting responsibility for abusive behavior • Saying he/she caused it.

VIOLENCE

Stalking

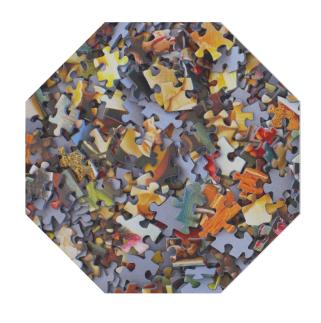
Stalking is "engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress."

-34 U.S.C. 12291(a)(30)





Stalking Dynamics



- Show up at your home, school or place of work unannounced or uninvited.
- Send you unwanted text messages, letters, emails and voicemails.
- Leave unwanted items, gifts or flowers.
- Constantly call you and hang up.
- Use social networking sites and technology to track you.
- Spread rumors about you.
- Wait at places you hang out.
- Use other people as resources to investigate your life. For example, looking at your facebook page through someone else's page or befriending your friends in order to get more information about you.
- Damage your home, car or other property.

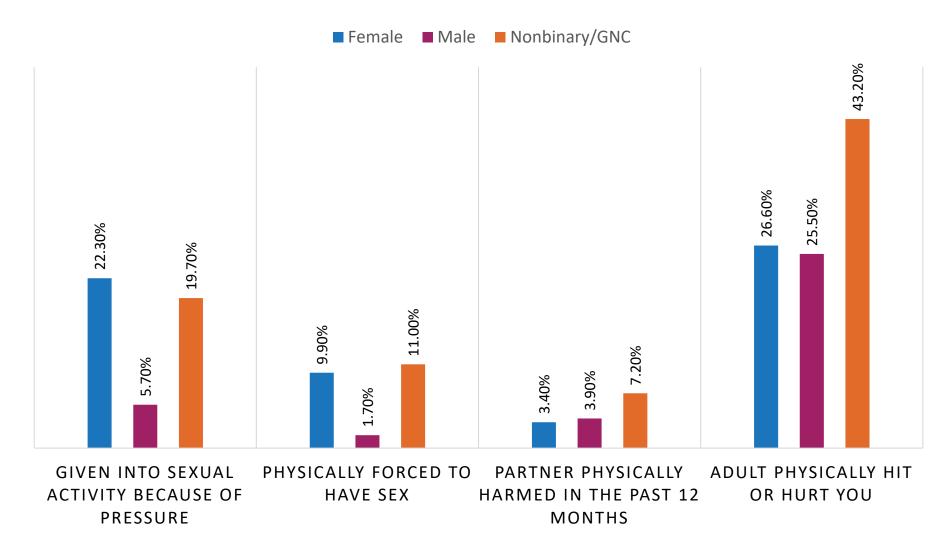
Source: LovelsRespect.org. https://www.loveisrespect.org/is-this-abuse/types-of-abuse/is-this-abusetypes-of-abusewhat-is-stalking/



Why is it important to address sexual harassment within our schools?

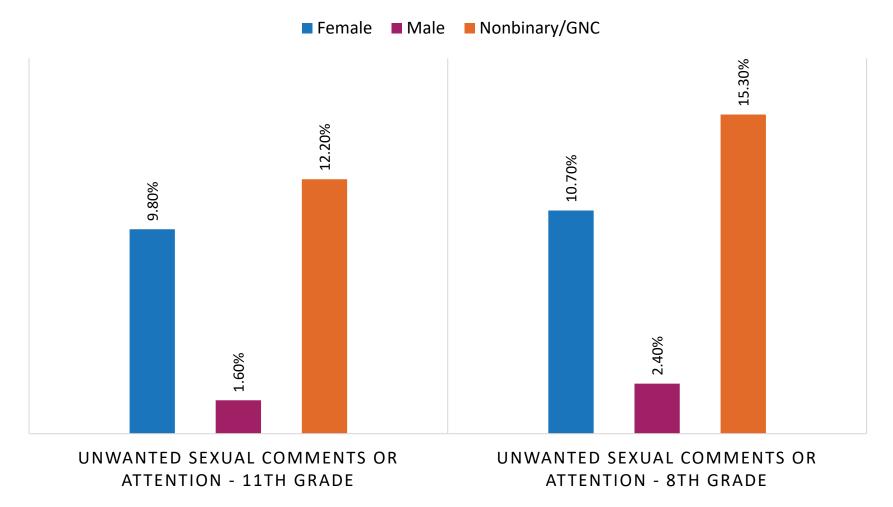


Violence and Abuse, 11th grade





Bullying, Past 30 Days



Oregon Healthy Teens Survey, 2019; 11th grade data, bullying https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/8th/Bully8.pdf
https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/8th/Bully8.pdf

Impacts of sexual harassment in the school environment

- Lower grades
- Dropping out of sports and cocurriculars
- Missing school
- Leaving school

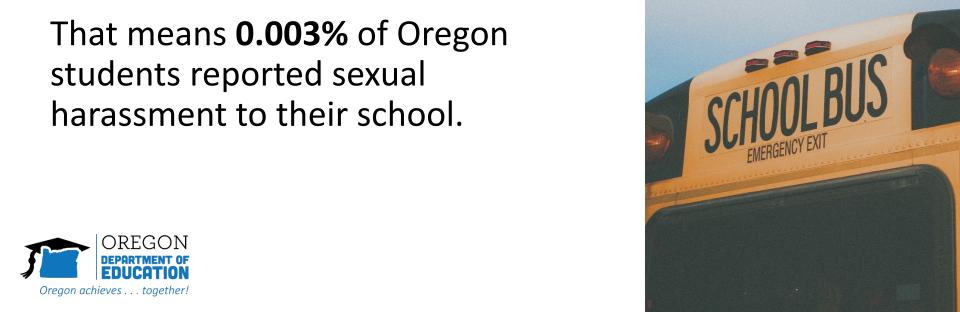
The toll of sexual harassment can extend to friends of the student who was harassed.





Reporting vs. Experiences

In 2017-2018, Oregon schools reported **1,653** instances of bullying and harassment based on sex and **14** instances of sexual assault in OCR's Civil Rights Data Collection.





Institutional Betrayal

When there is an expectation of school safety, not following or clearly communicating policy can perpetrate institutional betrayal, which exacerbates trauma.

Clear, consistent, caring responses help mitigate the impacts of trauma.

We can help make the difference between protracted trauma and positive healing!



Break for Questions



INTERSECTING OREGON LAWS





Sexual Harassment Policies

Oregon school districts are required to adopt policies that prohibit sexual harassment, and that:

- Require employees to report harassment
- Require schools to implement supportive measures to reporting or impacted parties
- Require investigation of reported harassment
- Require specific types of notification to students who report or are reported to commit harassment

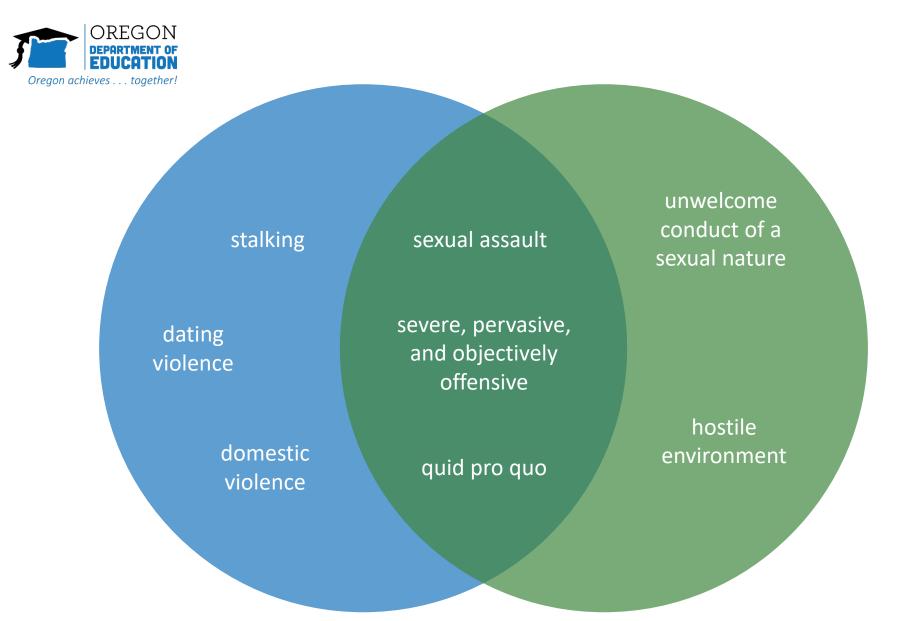


Sexual Harassment: Title IX compared to Oregon law

- (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).

- (i) A demand or a request for sexual favors in exchange for benefits.
- (ii) Unwelcome conduct of a sexual nature that is physical, verbal, or nonverbal and that:
 - (I) Interferes with a student's educational activity or program;
 - (II) Interferes with a school or district staff member's ability to perform their job; or
 - (III) Creates an intimidating, offensive, or hostile environment.
- (iii) Assault, when sexual contact occurs without a person's consent because the person is:
 - (I) Under the influence of drugs or alcohol;
 - (II) Unconscious; or
 - (III) Pressured through physical force, coercion or explicit or implied threats.





Title IX

Oregon Law

Sexual Conduct

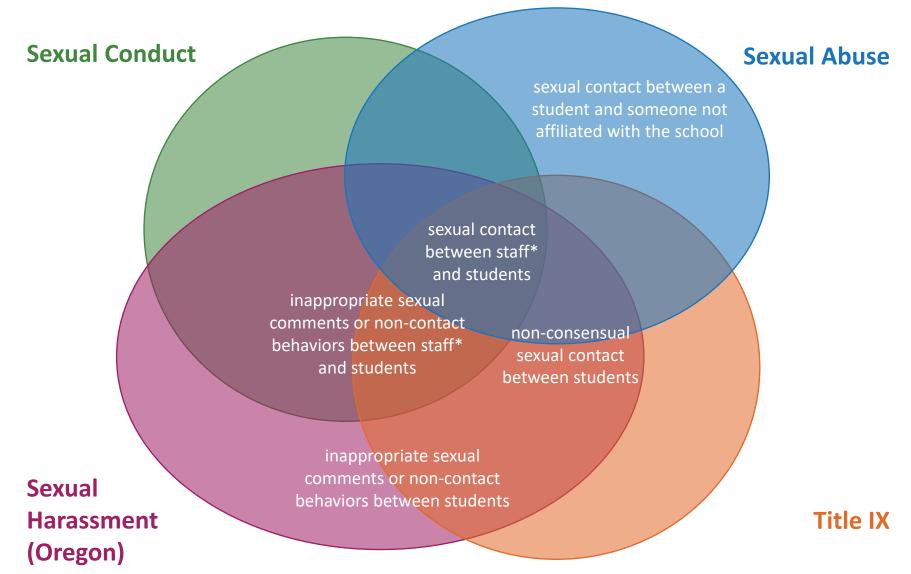
"Sexual conduct" means verbal or physical conduct or verbal, written or electronic communications by a **school employee**, a **contractor**, an agent or a volunteer that involve a student and that are:

- (A) Sexual advances or requests for sexual favors directed toward the student; or
- (B) Of a sexual nature that are directed toward the student or that have the effect of unreasonably interfering with the student's educational performance, or of creating an intimidating, hostile or offensive educational environment.





Definitional Overlaps

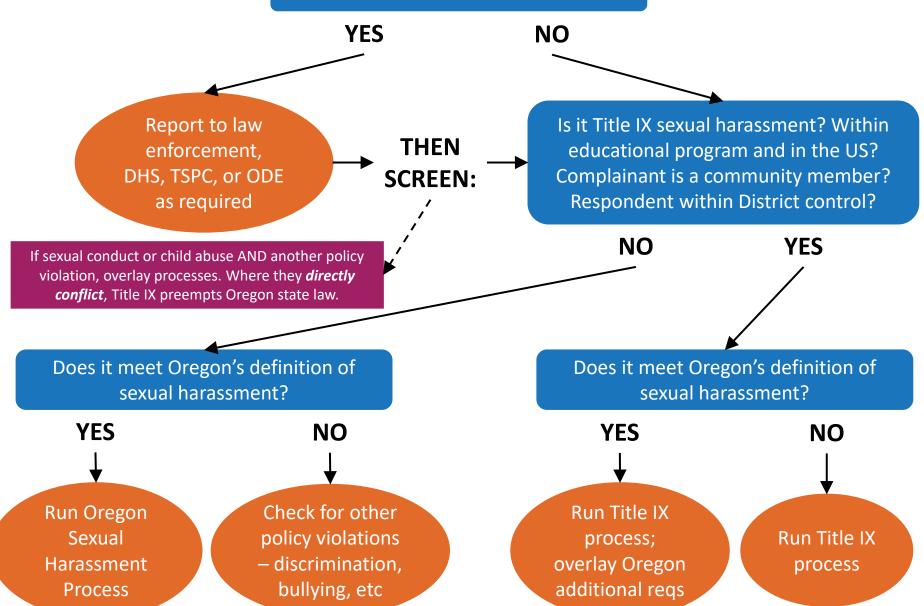


^{*}for the purposes of defining sexual conduct, staff includes employees, volunteers, agents, and contractors



REPORT:

Is it sexual conduct or child abuse?



ORS 339.351: Harassment, intimidation, or bullying and cyberbullying

"Cyberbullying" means the use of any electronic communication device to harass, intimidate, or bully

"Harassment, intimidation, or bullying" means any act that:

- Substantially interferes with a student's educational benefits, opportunities, or performance;
- Takes place on or immediately adjacent to school grounds, at any schoolsponsored activity, on school-provided transportation or at any official school bus stop;
- Has the effect of:
 - Physically harming a student or damaging a student's property
 - Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student's property; or
 - Creating a hostile environment, including interfering with the psychological well-being of a student; and
- May be based on, but not limited to, the protected class status of a person





HB 2631: Bullying, Cyberbullying, and Harassment Notification



- Requires parent/guardian notification if a student experiences or commits bullying, cyberbullying, harassment, or intimidation under specific circumstances*
- Notification must occur:
 - Promptly for physical acts, or
 - Within a reasonable time period
- Prior to notification, the school must inform the student that they are notifying the parent/guardian



HB 2631: Bullying, Cyberbullying, and Harassment Notification



- (i) Notification is **not required** under this subparagraph if the school official reasonably believes notification could endanger the student who was subjected to an act of harassment, intimidation or bullying or an act of cyberbullying or if all of the following occur:
- (I) The student who was subjected to an act of harassment, intimidation or bullying or an act of cyberbullying requests that notification not be provided to the student's parents or guardians;
- (II) The school official determines that notification is not in the best interest of the student who was subjected to an act of harassment, intimidation or bullying or an act of cyberbullying; and
- (III) The school official informs the student that federal law may require the student's parents or guardians to have access to the student's education record, including any requests made as provided by this sub-subparagraph.



Break for Questions



WHO'S WHO IN TITLE IX





Who's Involved?



Decision-Maker

Appeals Decision-Maker





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"

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Deputy Title IX Coordinators?



- Schools may assign more than one Title IX Coordinator
- Pros
 - Spread around the work
 - More direct contact (school-wide coordinator)
- Cons
 - Need to ensure a tight recordkeeping system and coordination process to ensure compliance and oversight
 - Bias/conflicts at the school level possible

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 crossexamination" 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





Required Training

	Title IX Coordinator	Investigator	Decision- Maker	Appeals Decision- Maker	Informal Process Facilitator
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 prejudgment 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	



RESPONSE, INVESTIGATION, & ADJUDICATION





- 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



bullying and harassment, dating violence, etc

sexual abuse

Title IX

Oregon sexual harassment policy

sexual conduct



Required Notices



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)

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;



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Bullying/Harassment Notification

Requires parent/guardian notification if a student experiences or commits bullying, cyberbullying, harassment, or intimidation under specific circumstances.*

- Notification must occur:
 - Promptly for physical acts, or
 - Within a reasonable time period
- Prior to notification, the school must inform the student that they are notifying the parent/guardian
- Notification is **NOT** required if:
 - · The staff member believes notification would endanger the student, or
 - The student requests no notification AND the staff member believes notification is not in the best interest of the student AND the staff member informs the student about FERPA (and other) parental information rights.



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.

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Answer 34...In light of the COVID-19 pandemic, "the facts and circumstances" of a given situation may require a school to provide remote counseling, or similar teletherapy option, as a supportive measure to students who are unable to access on-campus counseling services. Similarly, in a remote learning environment, supportive measures may include ensuring that parties to a complaint do not share the same online classes.

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf

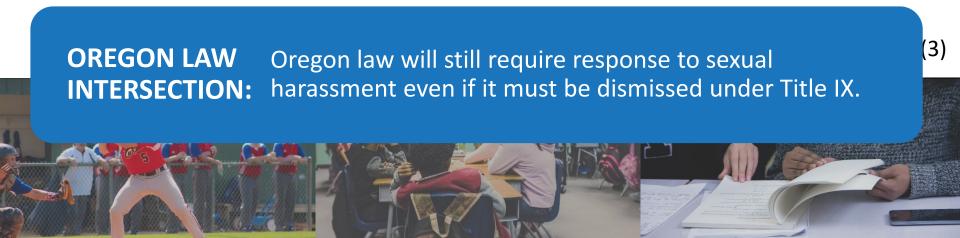




A formal complaint is a document submitted by the complainant or signed by the Title IX Coordinator requesting the initiation of grievance procedures.

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



"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



Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?

Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.

In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so. For example, the preamble explains that if a school "has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority," OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school's Title IX Coordinator does not sign a formal complaint, "even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process."

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf



Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school?

Answer 27: No. Although a school may dismiss a formal complaint if, at any time during the grievance process, the respondent is "no longer enrolled or employed" by the school, dismissal is not required...

A school may consider, for example, "whether a respondent poses an ongoing risk to the [school's] community,"... Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf



Do you have jurisdictional authority to investigate under Title IX?

A student who graduated last year emails the school Vice Principal to report on "weird behavior" from the school's AP History teacher. She says that during her junior year she developed a close relationship with him during class, and that he gave out his cell phone number to several students to "answer any study questions." Over the course of the next two years, they started texting about life outside of school.

By the end of her senior year, they were talking on the phone at least once a week; the teacher would sometimes call her in the evenings on his way home from "bad dates," and describe the dates to her and ask her for relationship advice. He would ask her if she found him attractive, and how to make himself more attractive to girls.

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Break for Questions



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)



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)



Question 61: May a school discipline a complainant, respondent, or witness for violating the school's COVID-19 or other policy during a reported incident of sexual harassment?

Answer 61: No, unless the school has a policy that always imposes the same punishment for violating the COVID-19 or other policy regardless of the circumstances....The preamble explains that if a school punishes an individual for violations of other school policies, it will be considered retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX.

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf



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.



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



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."





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?



Answer 40: ...<u>If a parent or guardian has a legal</u> right to act on a complainant or respondent's behalf, this authority applies throughout all aspects of the Title IX matter, including throughout the grievance process.

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf



Advisors

Parties must be told if they have a 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.



While elementary and secondary schools may choose to permit parties to have an advisor, the 2020 amendments only require an advisor at the postsecondary school level due to the cross-examination requirement.

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf





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)





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

Less 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?"

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?"

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





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





Break for Questions

In your breakout rooms...

Ellie, a fourth grader, has been struggling with behavioral issues since the beginning of the year. She has been running around the classroom during class, and sometimes screams at her classmates when they try to talk to her or approach her on the playground.

Today, Ellie's teacher saw her scream at her classmate Louise and try to pull down Louise's pants and underwear. The teacher separates the two students, and sends Ellie to talk to the school behavioral specialist. Louise tells the teacher that Ellie has tried to reach under Louise's dress and underwear several times before.



In your breakout rooms...

1. Does this meet the definition of sexual harassment under Title IX?

- 2. What are your first steps? Consider...
 - Notification
 - Student safety and supportive measures
 - Party rights and protections
 - Required timelines





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 followup 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



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"





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."





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**.





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)



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

Research shows that teachers view Black students as "less innocent," "more sexual," and "older for their age" than their White peers.¹





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

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.¹





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

- 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



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



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



Because Anita Hill was perceived as stoic and unemotional while testifying, many discredited her statements.

Terry Crews stated that many people did not believe him when he talked about being sexually harassed because of his gender and physical appearance.







How do I avoid bias in my Title IX work?



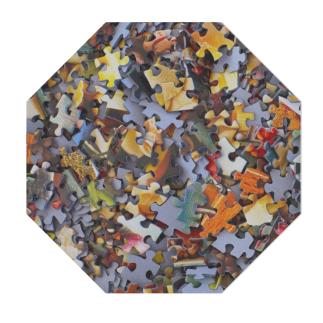
Implicit bias affects us most when we have...

- 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 bias/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 bias/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 investigators* and decision-makers when necessary
- What else?



Final Questions

