Title IX Sexual Harassment: Part 1

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Introduce yourself in the chat!

Name

School/District, Role

What is your role in Title IX?

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.

About Us

- The Oregon Department of Education works in partnership with school districts, education service districts and community partners to foster equity and excellence for every learner;
- Together, we serve over 560,907* K-12 students and support 75,807* school employees, including teachers, administrators and classified staff;
- We believe every student should have access to a high-quality, well-rounded learning experience; and
- We work to ensure every student in Oregon graduates with a plan for their future.

*Data from October 2021

Who We Serve

560,907 Students

More than 200 languages spoken

75,807 Educators

Staff of Color

- 11.4% of Teachers
- 12.3% of Administrators
- 16.4% of Counselors
- 21.1% of Educational Assistants

197 Districts

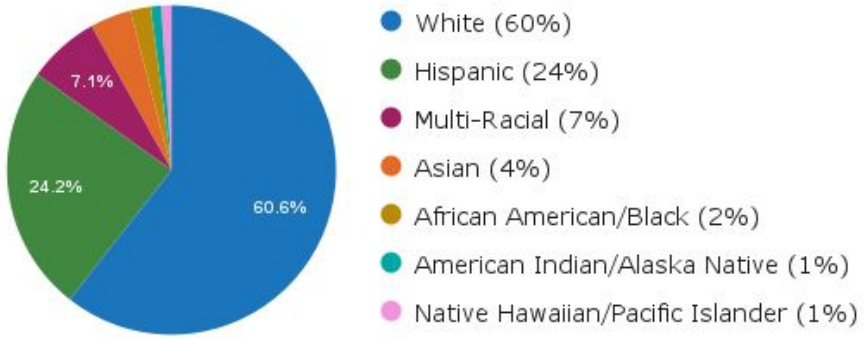
1,257 Schools

133 Charter Schools

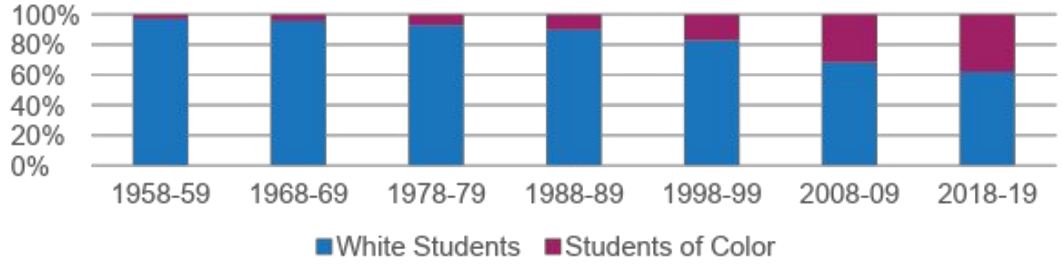
19 Education Service Districts

Student Diversity

- Economically Disadvantaged: 53%
- Ever English Learners: 18%
- Homeless: 3%
- Lesbian/Gay /Bisexual: 12.6%
- Mobile Students: 11%
- Students with Disabilities: 15%



Rapidly Diversifying Population



Oregon Department of Education, 2020-21 School Year

Agenda



The Groundwork: Introduction to Title IX



Sexual Harassment: Definitions & Dynamics



Intersecting Oregon Laws



Conflict of Interest & Bias in Investigations



The Groundwork: Introduction to Title IX

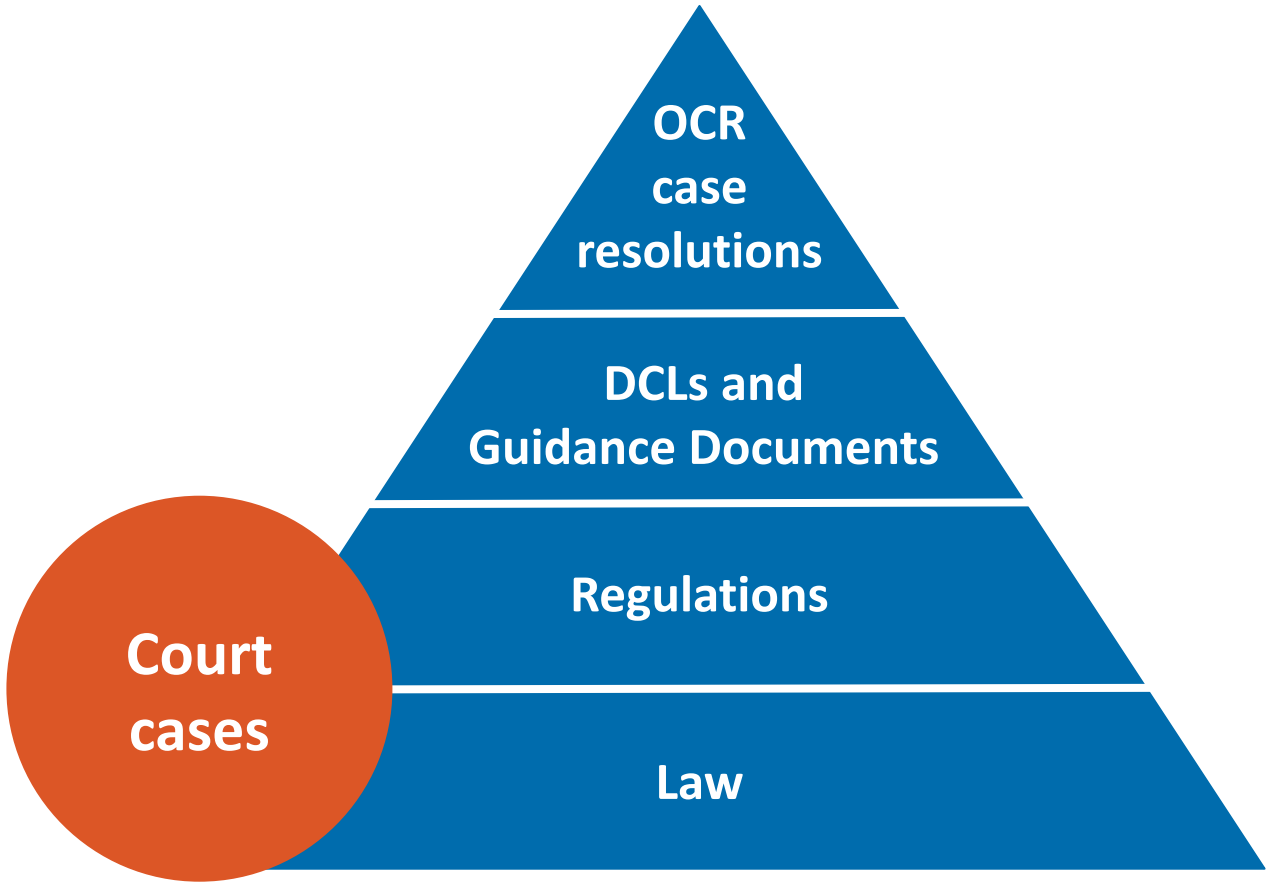
Title IX

“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."

Title IX is an evolving and living law!

Over the past 50 years, Title IX has changed.

The Office of Civil Rights, Congress, and the Courts have all impacted how Title IX is implemented and enforced through:



Sex Discrimination includes Sexual Orientation and Gender Identity

"Consistent with the Supreme Court's ruling and analysis in Bostock, the Department interprets Title IX's prohibition on discrimination "on the basis of sex" to encompass discrimination on the basis of sexual orientation and gender identity."

-OCR Notice of Interpretation, June 16, 2021

academics and activities





sexual harassment, sexual assault, dating violence, stalking

pregnant and parenting students





athletics

admissions, hiring, and access





sexual orientation and gender identity discrimination

Title IX and sexual harassment

1980s

A series of supreme court cases interpret Title IX to include sexual harassment

1997/2001

OCR releases Sexual Harassment Guidance, advising schools on their responsibilities and expectations

2017

OCR revokes some previous sexual harassment; announces intent to replace with regulations.

May 2020

OCR releases sexual harassment regulations; compliance deadline August 14, 2020

2022

OCR releases draft regulations that would replace and update the 2022 regulations.

The Summer 2022 NPRM: What does it mean?

Draft regulations (Notice of Proposed Rulemaking) were released on June 23, 2022. If adopted, these regulations would replace many of the current regulations, including the 2020 regulations that outlined strict sexual harassment procedures.

- If adopted, these regulations would affect nearly every piece of Title IX compliance.
- Subsequent athletics-specific regulations were proposed in May 2023.

OCR has recently stated that these new regulations should be expected in **March 2024.**

The 2020 Regulations: Key Terminology

Recipient: the school or district who receives federal funds, and is therefore liable to comply with Title IX.

Complainant: the person who is reported to have experienced sexual harassment.

Respondent: the person who is reported to have committed sexual harassment.

The 2020 Regulations: Personnel Requirements

Title IX Coordinator

Investigator

Decision-Maker

Appeals Decision-Maker

The Title IX Coordinator may also serve as the Investigator.

In each case the Investigator, Decision-Maker, and Appeals Decision-Maker must be different people.

The Decision-Maker and Appeals Decision-Maker CANNOT be the Title IX Coordinator.

Personnel Training Requirements

	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	



Sexual Harassment: Definitions & Dynamics



Title IX Sexual Harassment

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

Jurisdictional Requirements

- The conduct must occur within the educational programs or activities offered by the school/district.
  - On school grounds
  - Off school grounds, including: field trips, athletic games, transportation, school fundraising events, etc.
- The conduct must occur within the United States.
- The school/district must exercise reasonable control over the respondent.

Prong 1: quid pro quo



- Quid pro quo harassment can **only be committed by employees**
- Can be perpetrated against students or other employees
- Quid pro quo harassment can be overt or covert

Prong 2: unwelcome conduct



- Conduct must be severe, pervasive, objectively offensive, **AND** must deny equal access to education

- Access denial can include: inability to focus/participate in class, avoiding professional development opportunities, quitting clubs or sports, skipping school, dropping out, etc.

Does this meet prong 2?

Sam is walking down the hallway between classes when she gets a notification to accept an airdrop. The photo is a picture of Sam that she sent to her ex-boyfriend months ago, wearing a bikini and with the phrase “i’ll steal your boyfriend” written on it. Sam looks around and is sure that other people are staring at her and got the photo too. Later that day, Sam’s friend tells her to look at a classmate’s snapchat story. One of the posts has the same photo and says “this slut will do anything to get attention.”



Prong 3: VAWA and Clery offenses



- Sexual assault, domestic violence, dating violence, and stalking are **included** in the definition of sexual harassment
- Sexual assault includes rape, sodomy, sexual assault with an object, fondling, incest, and statutory rape
- These definitions come from the Clery Act (1990) and the VAWA Amendments to Clery (2014), which apply primarily to colleges

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)

Partner Violence

- Can include physical violence, threats of violence, sexual abuse and coercion, stalking, or emotional abuse

- Perpetrators of partner violence often use a variety of tactics leading up to physical or sexual abuse, such as those in the Teen Power and Control Wheel (SafeStart)





Stalking

"[E]ngaging 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

- Shows up at home, school or place of work unannounced or uninvited.
- Unwanted text messages, emails and voicemails.
- Leave unwanted items, gifts or flowers.
- Use social networking sites and technology to track.
- Spread rumors.
- Uses other people as resources to investigate the victim's life. For example, looking at their instagram through someone else's account, or befriending their friends in order to get more information about them.
- Damages home, car or other property.





Sexual Assault (selected definitions)

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.

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.

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

What is consent?

Schools are not required to adopt a particular definition of consent for Title IX.

However…

It is crucial to have a clear, consistent understanding of consent in order to have fair investigations and due process for all students.

Oregon's Definition of Consent

Oregon has an "implied definition" in ORS 342.704/OAR 581-012-0038

"Without consent" means an act performed:

(A) Without the knowing, voluntary and clear agreement by all parties to participate in the specific act; or

(B) When a person who is a party to the act is:

(i) Incapacitated by drugs or alcohol;

(ii) Unconscious; or

(iii) Pressured through physical force, coercion or explicit or implied threats to participate in the act.

Age of Consent in Oregon

The age at which a person can consent to sexual activity in Oregon is 18 (ORS 163.315).

It is also a defense against criminal charges if lack of consent is due ONLY to age, and the age difference is less than 3 years (ORS 163.345).

The Oregon Attorney General has stated that minor-minor sexual activity does not need to be reported as abuse if it is otherwise consensual and falls within this age-gap clause (letter, Sept 11, 2018).

Is there consent?

Asia, a 12th grader, has been flirting with Jackson, an 11th grader, for several weeks. She sends him snapchat messages and pictures of her implying that he should break up with his girlfriend and date her instead. One day Asia messages him at the beginning of the school day and says she has third period free, and that he should meet her. Jackson leaves class and Asia sneaks Jackson into an empty bathroom, where she pulls him to her and kisses him. Jackson kisses her back for a minute, and then abruptly pulls away, saying “I shouldn’t have done that, I have a girlfriend.” Asia laughs and ask him why he’s been letting her send him pictures if he actually cared about his girlfriend? Jackson says “I think this was a mistake,” and begs her not to tell anyone. Asia kisses him again and strokes his arm and says “as long as we’re secretly hooking up, I won’t tell anyone.” Jackson pulls away from her again and says “I don’t want to be a cheater.” Asia says “you’re already a cheater, but no one has to know.” She leans in and starts kissing his neck and unbuttoning his shirt. Jackson seems stiff and doesn’t kiss her back, but stops trying to pull away.



In your breakout rooms, discuss...

Was the sexual encounter between Jackson and Asia consensual?

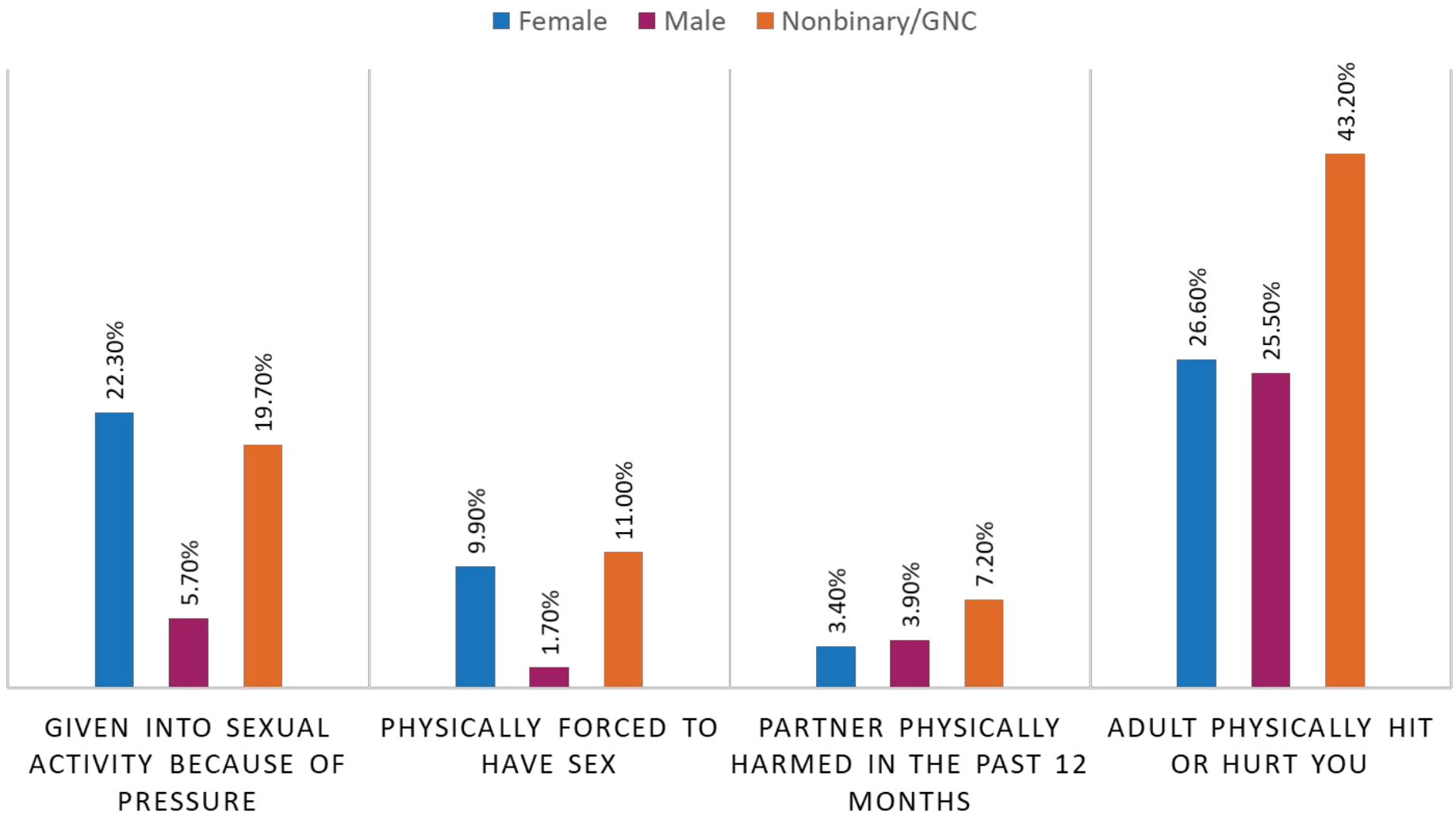
- Why or why not?
- What factors influence your decision?
- What additional information might you need to make a decision?

Assessing Consent

The following questions can help you determine whether consent was present:

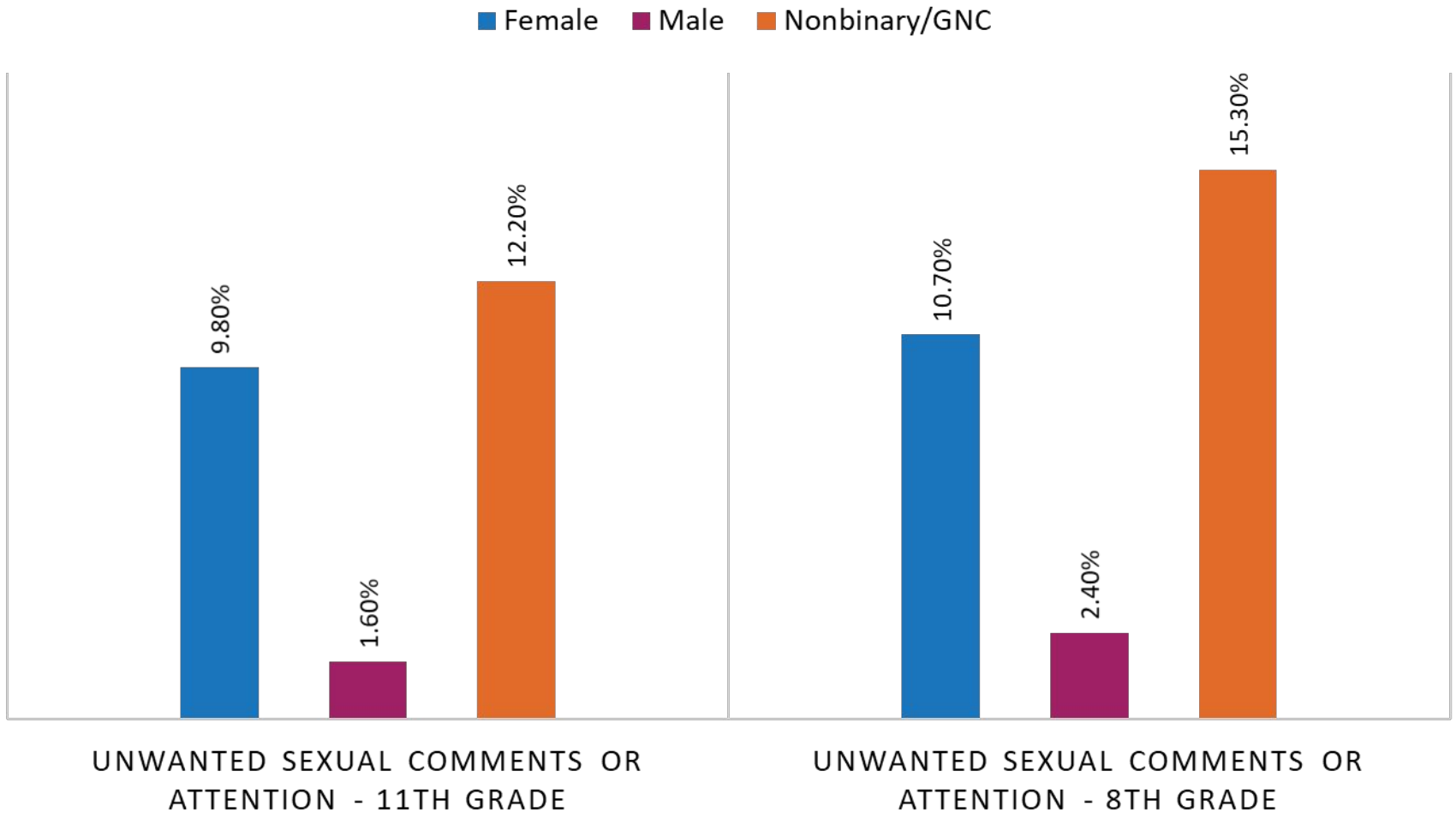
- What was said? What tone was used?
- What was implied? How was the interaction perceived?
- What body language was used?
- Where was the interaction? What environmental factors impacted the parties agency in the moment?
- What capacity and knowledge did parties have during the interaction?
- What previous relationship dynamics exist between the parties - previous threats/harassment, etc.?
- What power dynamics exist in the situation?

Oregon 11th graders report:



Oregon Healthy Teens Survey, 2019; 11th grade data, violence
https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/11th/Violence11.pdf

Oregon 8th and 11th graders report in the past 30 days:



Oregon Healthy Teens Survey, 2019; 11th grade data, bullying, https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/11th/Bully11.pdf
Oregon Healthy Teens Survey, 2019; 8h grade data, bullying
https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/8th/Bully8.pdf

Experiences and reporting

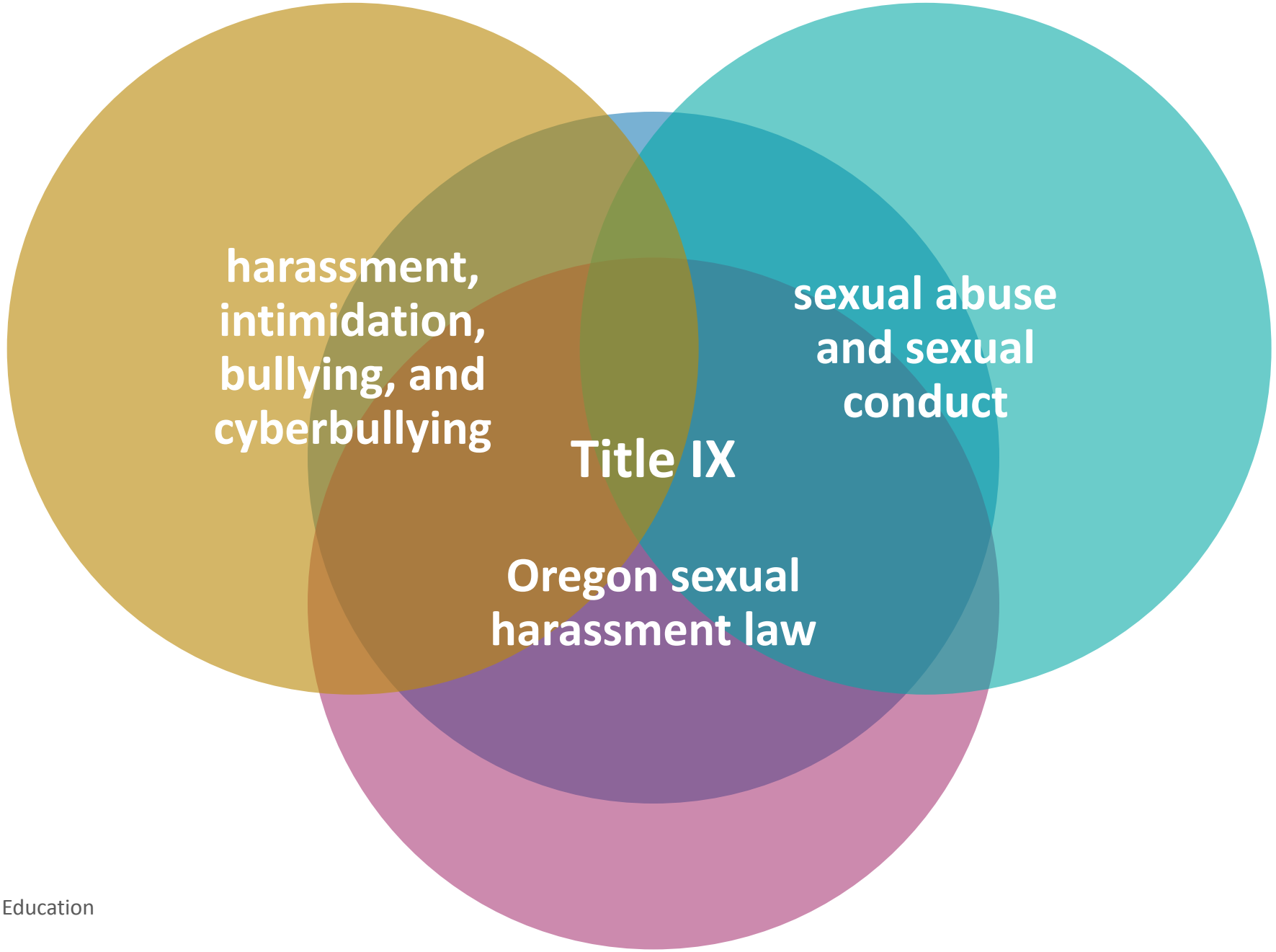
In 2017-2018, Oregon schools reported **1,653** instances of bullying and harassment based on sex and **14** instances of sexual assault in OCR's Civil Rights Data Collection.

That means **~0.003%** of Oregon students reported sexual harassment to their school that year.

Why are these numbers so different from the data on previous slides?



Intersecting Oregon Laws


harassment, intimidation, bullying, and cyberbullying
sexual abuse and sexual conduct
Title IX
Oregon sexual harassment law

Oregon Sexual Harassment Law

Oregon law (ORS 342.700-708 and OAR 581-021-0038) requires schools to adopt policies that prohibit sexual harassment for students, employees, and third parties.

These policies must include:

- specific definitions of sexual harassment
- a requirement for employees to report sexual harassment
- the supportive measures are available to reporting parties
- that all reports will be investigated
- that reporting and responding parties will be notified when an investigation begins and it's outcome
- that all reporting parties receive written notice of their rights and options under the policy

Title IX Sexual Harassment

(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).

Oregon Sexual Harassment Law

(i) A demand or a request for sexual favors in exchange for benefits.

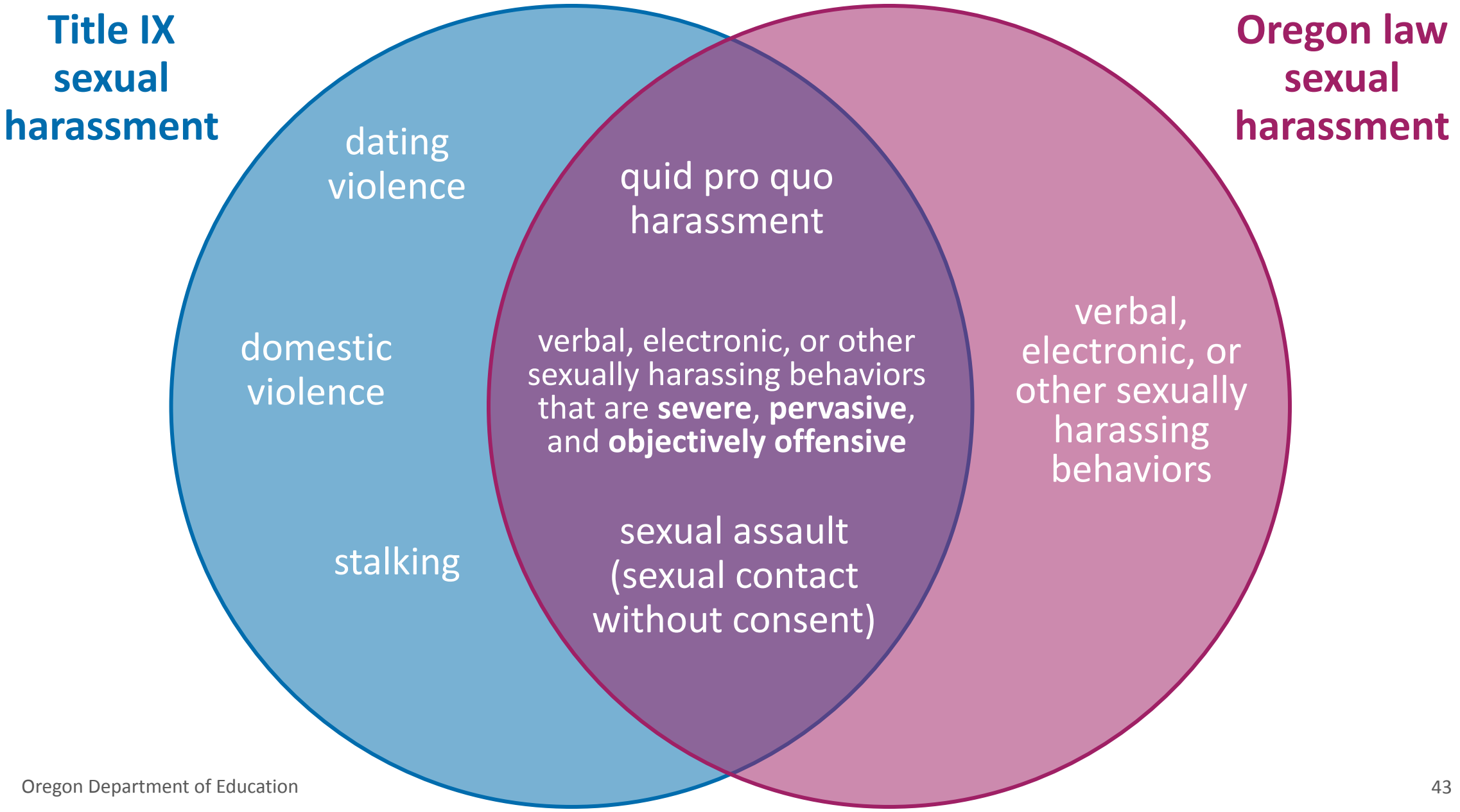
(ii) Unwelcome conduct of a sexual nature that is physical, verbal, or nonverbal and that:

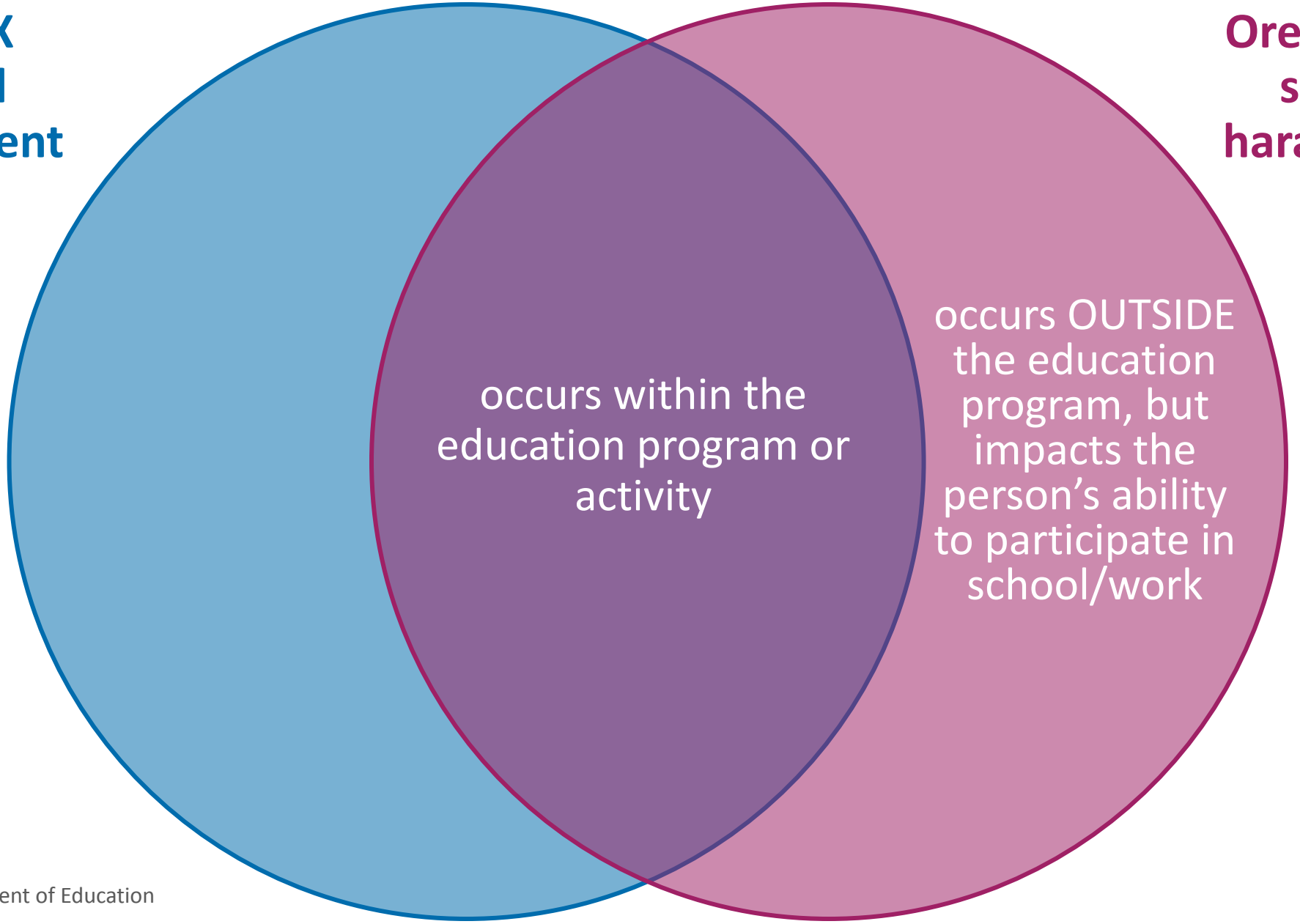
(I) Interferes with a student's educational activity or program;

(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 consent


Title IX sexual harassment
dating violence
domestic violence
stalking
quid pro quo harassment
verbal, electronic, or other sexually harassing behaviors that are **severe**, **pervasive**, and **objectively offensive**
sexual assault (sexual contact without consent)
Oregon law sexual harassment
verbal, electronic, or other sexually harassing behaviors


Title IX sexual harassment
Oregon law sexual harassment
occurs within the education program or activity
occurs OUTSIDE the education program, but impacts the person's ability to participate in school/work

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 or hostile educational environment.

ORS 339.370

Sexual Conduct and Sexual Abuse



- Sexual abuse and sexual conduct must be reported to law enforcement, DHS, TSPC, and/or ODE (depending on conduct and licensure status).

- If the reported behavior is sexual conduct or abuse AND Title IX sexual harassment, the processes must be overlayed.

Reporting to law enforcement, DHS, ODE, and/or TSPC does NOT absolve the school of their Title IX responsibilities.

Harassment, Intimidation, and Bullying

"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 school-sponsored 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

ORS 339.351

Harassment, Intimidation, Bullying, and Cyberbullying

Schools are required to adopt policies that:

- cover behavior that happens at school-sponsored activities and locations
- require employees to report harassment, intimidation, bullying, or cyberbullying to a designated official
- provide a process for investigating and responding to harassment, intimidation, bullying, and cyberbullying
- state potential consequences for committing harassment, intimidation, bullying, or cyberbullying
- provide consequences for false accusations
- prohibit retaliation

ORS 338.351 Parental Notification



- Requires parent/guardian notification if a student experiences or commits bullying, cyberbullying, harassment, or intimidation, with an opt-out option.
- 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.

ORS 338.351 Parental Notification



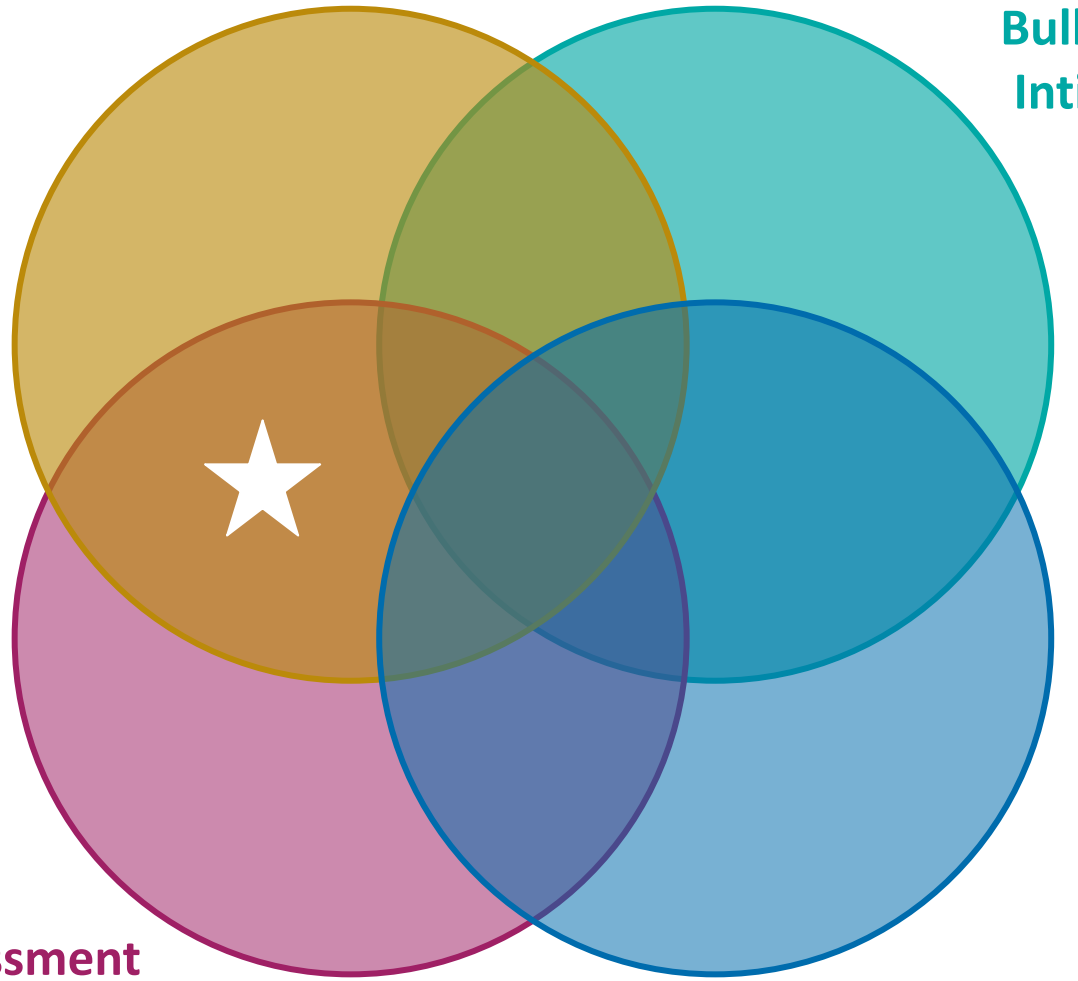
Notification is not required if:

- a school official reasonably believes notification could endanger the student, **OR**
- the student requests that the school not notify their parents, a school official believes that notification is not in the best interest of the student

Schools must still notify students that their parents/guardians may became aware of the incident through accessing their educational records.

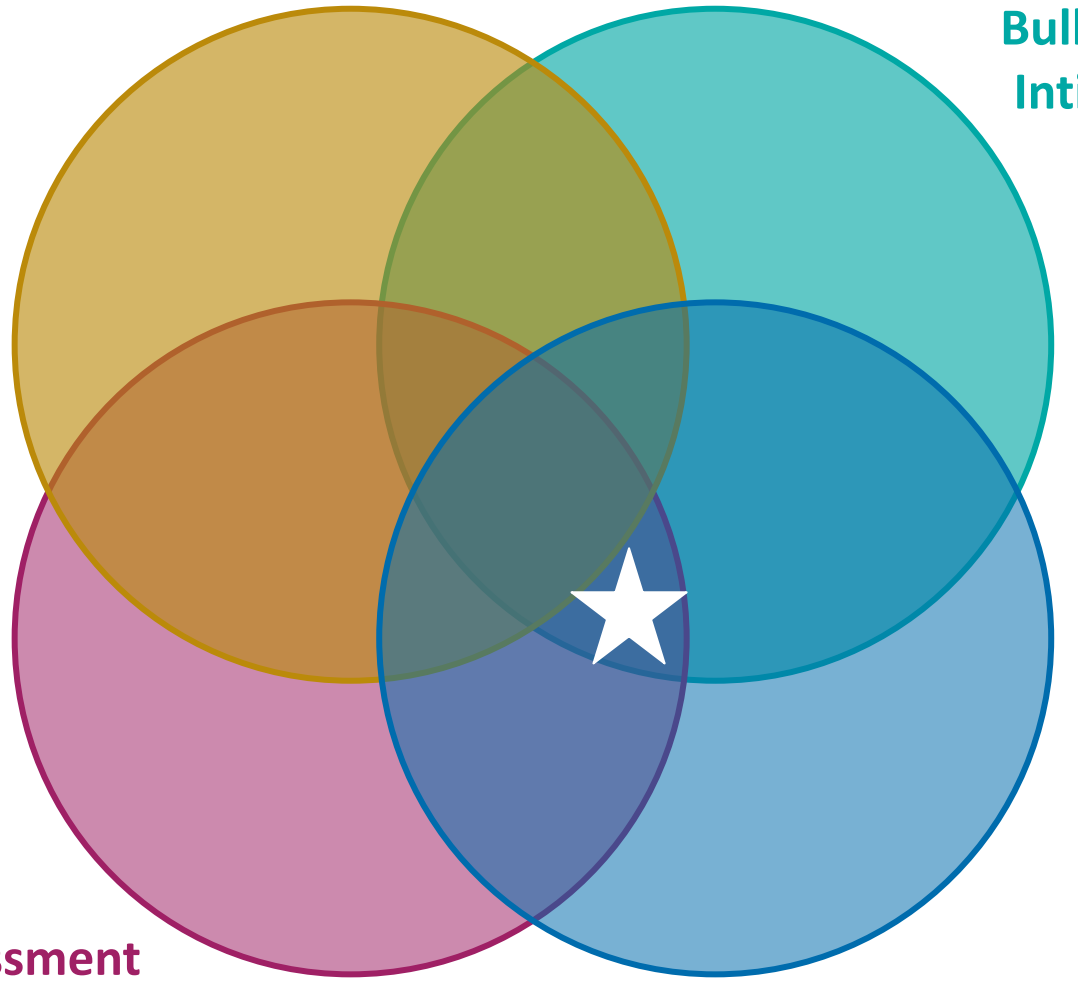
Which policies apply?

A school employee is accused of having sex with a 17-year-old high school senior while they are attending a church retreat together.



Which policies apply?

An anonymous instagram account posts pictures of a ninth grade girl taken in the hallways and classrooms at school. The account calls her a “tr*nnie” and dissects whether she is “really a boy” by discussing what they can tell about her body parts, including breasts and genitals, from the photos.



Remember...

- **Most Title IX sexual harassment will ALSO constitute sexual harassment under Oregon law.**
- **If an employee sexually harasses a student, it is almost always also child abuse or sexual conduct.**
- **Most Title IX sexual harassment is also bullying, harassment, intimidation, or cyberbullying.**



Conflict of Interest & Bias in Investigations



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

Bias

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

In these processes, we may bring implicit or explicit bias in the the room with us…

...which helps us form a “hunch” or “gut feeling” about a case...

...which then makes us vulnerable to confirmation bias.



Consider: What stereotypes and expectations does society hold about victims (people who experience sexual assault and harassment) and perpetrators (people who commit sexual assault and harassment)?

Victims: stereotypes and expectations

A study found that law enforcement and criminal justice officials 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

What other stereotypes or expectations does society hold about victims?

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

Perpetrators: stereotypes and expectations

evil

angry

hostile

unwilling to submit to authority

unapologetic

pattern of previously documented bad behavior

outbursts

uncontrolled

These biases and stereotypes overlap with others we hold...



race

family status

ability status

social class

sexual orientation

age

national origin

gender identity

appearance

social tradition

religion

If we hold these biases, if can bias us for/against complainants or respondents.



Because Anita Hill was perceived as stoic and unemotional while testifying, her statements were widely discredited in the media.

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



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

The Kirwin Institute, The Ohio State University

Strategies to decrease bias in investigations

- 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?



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

What could a conflict of interest look like in K-12 Title IX?

Financial conflicts, such as yourself or a family member employing a student or a student's family member

Structural/job conflicts, such as directly supervising a student or staff member or having another role that would benefit/be harmed by an outcome

Personal conflicts, such as favoritism, bonds, or close relationships

Imbalance conflicts, where your different relationships with parties or different levels of interaction bias you

Perceived conflicts, where it appears from the outside that a conflict exists, whether it actually does or not

Does this present bias or conflicts of interest?



Your school board serves as your appeals panel. One of your school board members 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 or conflicts of interest?



The respondent tells you that they have a witness, Connor, 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 Connor last semester, which resulted in two suspensions and several tense meetings with the Connor's parents.

Strategies to mitigate conflicts 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?

*ORS 703.401-411 provides information on qualification of investigators

OREGON
DEPARTMENT OF
EDUCATION

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