OSPA VIRTUAL WINTER RETREAT FEBRUARY 2021

Defensible, Trauma-Informed Sexual Abuse and Molestation Investigations in Schools

Presented by Jackie Gharapour Wernz
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1

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Agenda

Part 1

- Sexual Harassment Law Basics
- Introduction to Trauma in Sexual Harassment
- Intersectional Considerations

Questions & Break

Part 2

- Impact of Trauma on Investigations
- Practical Tips for Defensible, Trauma-Informed Investigations

Questions

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Before We Begin

What This Is

- Informational
- Title IX Training (post to web)

What This Is Not

- Legal Advice
- Exhaustive
- Comprehensive Title IX Training

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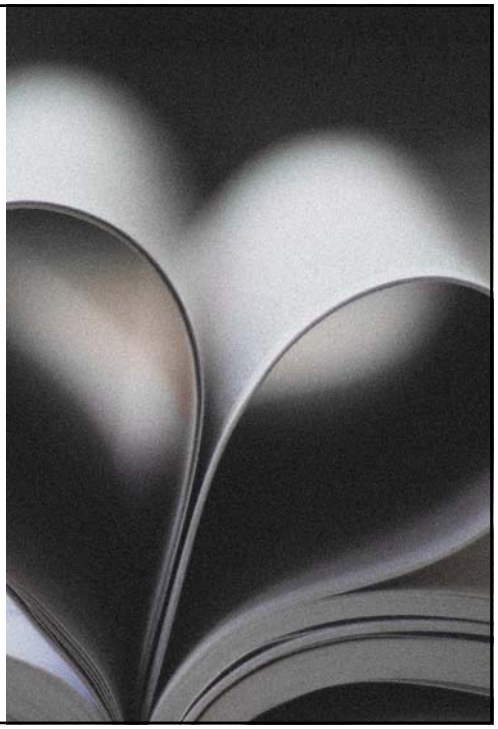
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PART ONE

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Sexual Harassment Law Basics



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Sexual Harassment

Employment

- Oregon Law (e.g., ORS 659A.030
- Title VII of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972

Students

- Oregon Law (e.g., SB155; ORS 419B.005)
- Title IX

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THE HILL

New Title IX regulations give expanded rights to those accused of sexual assault on campus |...



Inside Higher Ed

New Title IX regulation sets location-based boundaries for sexual harassment...



FOX NEWS

Department of Education releases new Title IX regulations

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New Rule

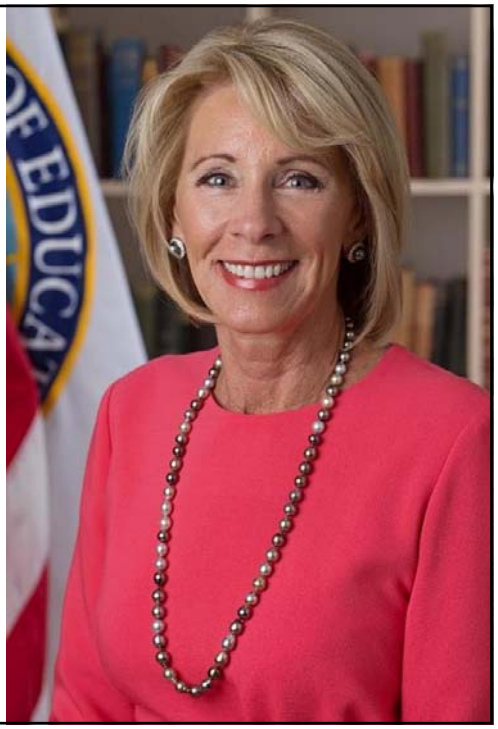
Formal notice and rulemaking process (stronger force of law)

Initially proposed November 2018

~ 125,000 comments

Over 2,000 pages of commentary, rules issued May 2020

Final rule effective August 14, 2020



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Big Changes Under New Rules

- Narrower Definition of "Sexual Harassment"
- Only applies to conduct "in a program or activity" or "in the U.S."
- Clear Application to Employment
- Extensive requirements + procedures

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Impact on Student Reports

- Sexual harassment definition between laws is quite broad
- Most sexual abuse and molestation will be covered by Title IX if in a program or activity and in the United States
- If not, will likely be covered by Oregon law

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EducationWeek®

FEDERAL

Schools Could See U-Turn on Civil Rights Under Biden



By Christina A. Samuels — December 02, 2020 8 min read

Civil rights activists expect the next education secretary will restore guidance to schools that she rescinded on transgender students' rights, sexual assault, and school integration efforts.

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Trauma Pendulum Swing

- Obama-era guidance supported a trauma-informed, victim-centric approach
- Trump-era rules did not prohibit trauma-informed training/processes but noted that misuse can violate rules
  - ➢ At least some courts have agreed with this approach
- Biden-era – will we see a swing back toward a victim-centric approach?

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Until We Hear Differently

- Must continue to apply the Title IX Rules
- Should ensure all Title IX team members are trained
- Should continue to focus on fairness of processes, including with respect to trauma

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Introduction to Trauma in Sexual Harassment



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Trauma, Defined

The New York Times

Is Trauma Being Trivialized?

By Felicia R. Lee

Sept. 6, 2003

Flashbacks. Nightmares. Feeling disconnected from your body. Whether it is the anniversary of Sept. 11, the continuing threat of terrorism, sexual abuse by the clergy, school shootings or any one of many other causes of angst, Americans have been inundated with the language of trauma and information about how to

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What is Trauma?
An emotional response to a terrible event

Complex Trauma?
Repetitive and Continuous in nature

Trauma has real and lasting effects on the brain, if we understand this, we can collect better evidence while also providing a safe environment to parties

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What is Trauma?

The 3 **Es**

1. An emotionally painful or distressing event
2. The experience of the event induces an abnormally intense and prolonged stress response
3. The event and experience of the event result in lasting physical & mental effects

TYPES OF TRAUMA

Extreme Acute Event
Examples: car accident, assault, natural disaster

Chronic Stressful Events
Examples: abuse, violence, poverty, historical, systemic

Childhood Traumatic Grief
Typical grieving process is complicated if the death was traumatic

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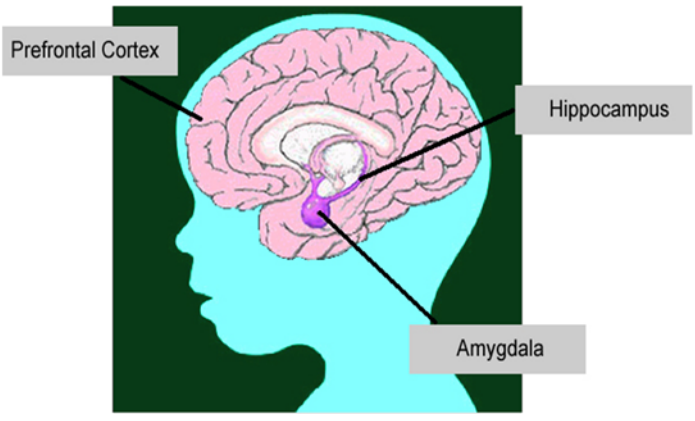
Bruce D Perry © 2004-2015

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The brain's response to trauma

The amygdala detects whether a stimulus (person or event) is threatening and the hippocampus, the center of short-term memory, links the fear response to the context in which the threatening stimulus or event occurred. These two brain structures also play an important role in the release of stress hormones such as cortisol and adrenaline influencing the capacity of the prefrontal cortex for regulating thought, emotions, and actions, as well as keeping information readily accessible during active learning.

Georgetown University Center for Child and Human Development



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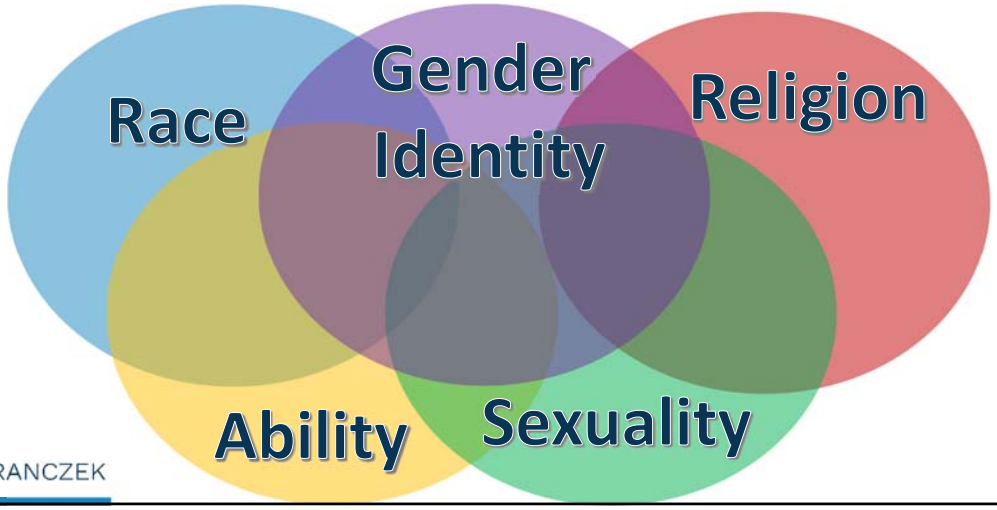
Intersectional Considerations



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Intersectionality



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Intersectional Concern

- If your investigative approach assumes all sexual violence matters have a common denominator or follow a universal narrative, you may improperly prioritize those who fit that narrative and, even inadvertently, further marginalize those who are already vulnerable.

Grace Kyungwon Hong, AAUP, Intersectional and Anticarceral Approaches to Sexual Violence in the Academy

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Questions & Break



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PART TWO

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Impact of Trauma on Investigations



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Impact on Effective Response

- We all have explicit and implicit biases, including stereotypes about gender roles, sexual assault, and domestic violence
- Such bias can undermine the effectiveness of a response to reports

Department of Justice,
Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence

Impacts of Trauma

Trauma – Understanding impact

Disorganized recall/processing
Difficulty making decisions; may change mind about wanting to make a complaint or go to police

Trauma – Counter-intuitive "victim" behavior

Demeanor (crying, rage, calm, unresponsive)
Limited effort to resist during event
Questioning self ("why didn't I," "maybe my fault")
Delayed reporting . . . recantation

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Impacts of Trauma

Trauma – Stages of recovery

- Initial shock
- Reactivation
- Denial
- Anger (Responding Party, self, others)
- Integration

Trauma – Your own personal bias?

- Deciding who/what to believe
- False reports (exceedingly rare)
- Over-identify with Reporting Party/Responding Party

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Examples of Impacts

- A complainant did not call out for help despite there being people within earshot who could help ("tonic immobility")
- A complainant cannot recall details of the investigation that are essential to the investigator
- A complainant recalls some, but not all details, or describes events out of order

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Examples of Impacts

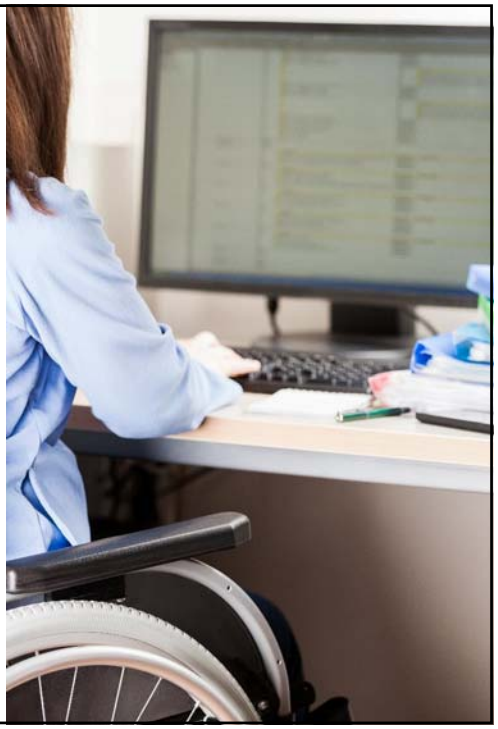
- Memory improves over time
- Impacts on affect—smiling, laughing, stoic

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Practical Tips for Defensible, Trauma-Informed Investigations



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Trauma in Practice

- Trauma should be considered during an investigation
  - Putting a party at ease is important
  - More likely to obtain sufficient information
  - It's the right thing to do

2019 ATIXA Position Statement:
Trauma-Informed Training and the Neurbiology of Trauma

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Trauma in Practice

Acknowledge pain/difficult situation

- "It's ok if you can't remember every detail in order."
- Focus on what the party can remember, prompt on senses – explain reasoning
- Find out when the fear began
- Offer breaks ("I can tell this is hard")

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Trauma in Practice

Do not start at the beginning and demand that the witness provide every detail; instead, ask open ended questions such as:

- "What are you able to tell me about what happened?"
- "Tell me more about. . .?"
- "Help me understand your thoughts when. . .?"
- "What are you able to remember about [5 senses]?"
- "What was your reaction?"
- "What was the most difficult part of your experience?"
- "What, if anything, can't you forget about this experience?"

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AVOID BLAMING QUESTIONS

- *Why didn't you tell them directly to stop commenting on your body?*
- *Why didn't you report sooner?*
- *Why didn't you go to the hospital right away?*
- *If you don't remember everything, we can't know what happened?*



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INSTEAD….

- *Did you say anything in response?*
- *What prompted you to come forward now?*
- *Did you do anything else?*
- *Questions about going to hospital or police – relevant to the investigation?*



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Trauma in Practice

- Effects of trauma should not be used against a party – to diminish credibility
- Avoid using trauma information as a substitute for evidence or to bolster credibility

2019 ATIXA Position Statement:
Trauma-Informed Training and the Neurbiology of Trauma

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Be Fair

- Avoid biases against respondents, too
- Use similar questioning techniques
- Remember that respondents may also experience stress and trauma

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Remember

- Investigators are not required to have neurobiology or science background
- Investigators must be careful not to cross the line between appropriate and inappropriate use of trauma-informed practices
- Improper reliance on trauma-informed processes can create a due process violation

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Questions



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