

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Fall 2021 Title IX Overview Training

August 18, 2021
8:30-11:30 am

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Kate Hildebrandt

she/her

Civil Rights and Title IX Specialist

Oregon Department of Education

katherine.hildebrandt@ode.state.or.us

503-551-5713



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 high-quality, well-rounded learning experience;
- We work to achieve the Governor's vision that every student in Oregon graduates with a plan for their future.

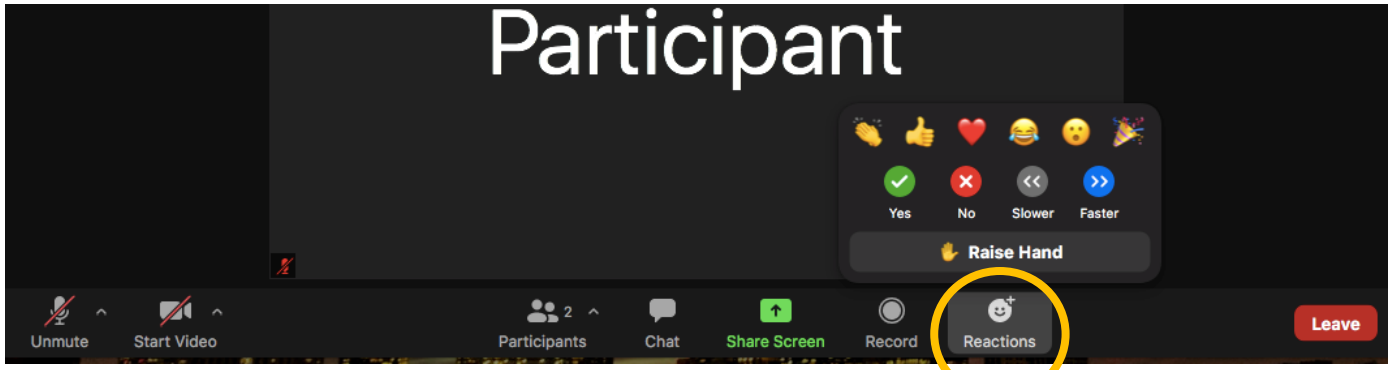


Before we get started…

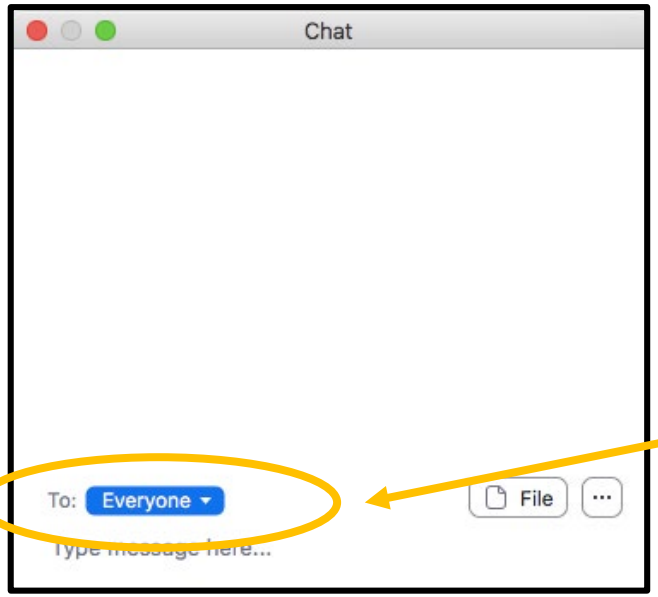
This training is not intended as legal advice; we advise you to consult with your legal counsel before making policy or process changes.

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

Using Zoom



click on “Reactions” to raise your hand



toggle the “To” button to send a question privately or publicly

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

POLL

Plan for the Day

- Speed Recap: The Fundamentals of Title IX
- Legislative and Legal Updates
  - Title IX
  - Oregon
- Recap: May 2020 Sexual Harassment Regs
- Discrimination based on Sexual Orientation and Gender Identity
- FAQs (based on your questions)







OREGON
DEPARTMENT OF
EDUCATION
Oregon achieves . . . together!



TITLE IX FUNDAMENTALS REVIEW

“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."

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

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

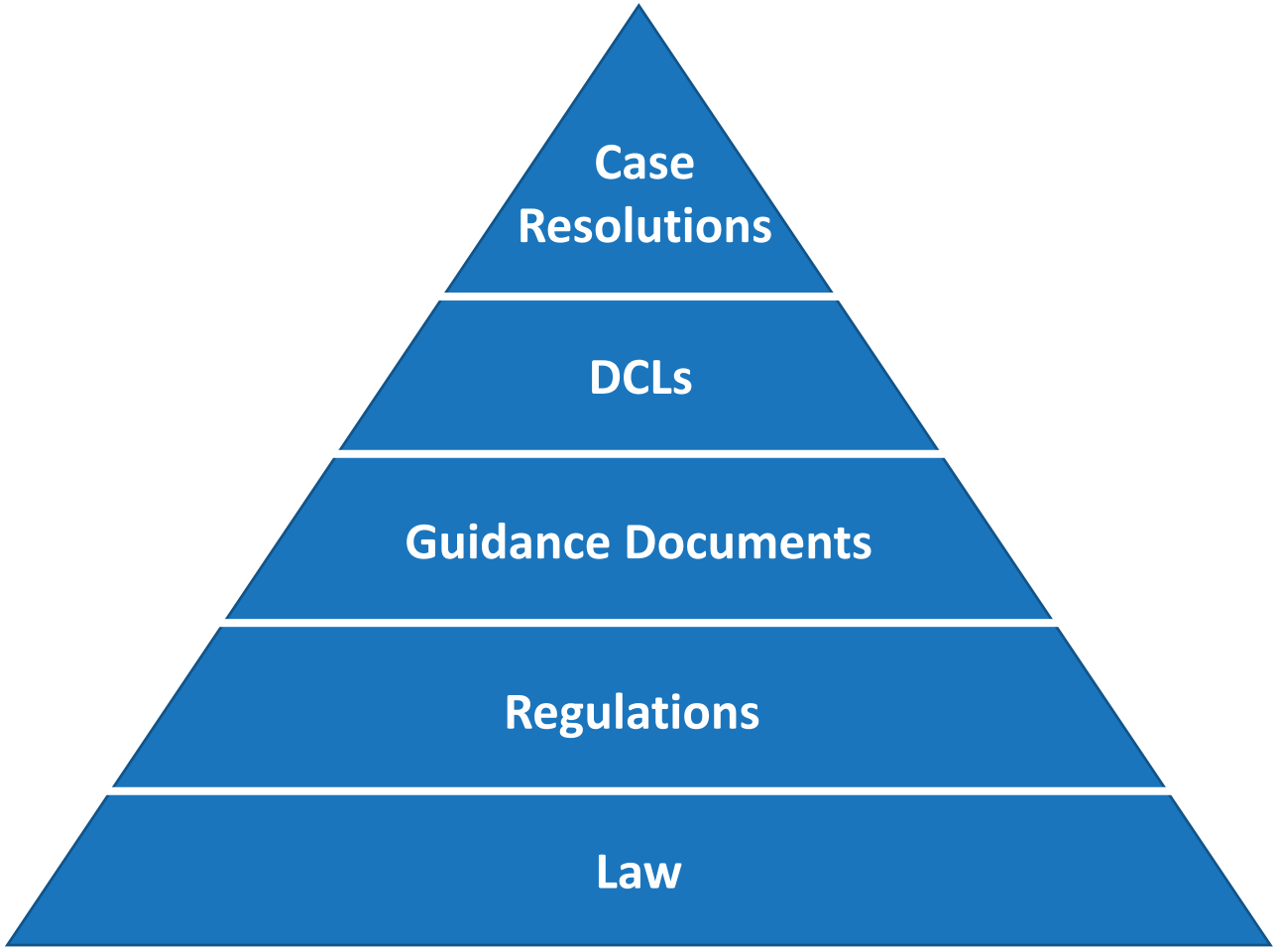
- Title IX Coordinator(s)
- Your policies and procedures
  - Discrimination
  - Sexual harassment
  - Employment/hiring
- Athletic equity
- Website
- Staff training



OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Understanding Title IX



Separating Education by Sex

- Certain allowable carveouts can always be single-sex
  - Athletics
  - Physical education during contact sports
  - Sexuality education during specific lessons
  - Boy scouts, girl scouts, and other voluntary youth service organizations
- Some programs can never be single sex
- Other programs can be offered on a single-sex basis in specific, limited circumstances:
  - Designed to achieve a specific purpose/response to a specific issue
  - Equal activity offered for the other sex
  - Periodic evaluations





OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!





Athletics

The "three-part test" for meeting Title IX athletic compliance:

(1) The number of male and female athletes is substantially proportionate to their respective enrollments; or

(2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or

(3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.

https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!





The “Laundry List”

(1) Provision and maintenance of equipment and supplies;

(2) Scheduling of games and practice times;

(3) Travel and per diem expenses;

(4) Opportunity to receive tutoring and assignment and compensation of tutors;

(5) Opportunity to receive coaching, and assignment and compensation of coaches;

(6) Provision of locker rooms, practice and competitive facilities

(7) Provision of medical and training services and facilities;

(8) Provision of housing and dining services and facilities;

(9) Publicity;

(10) Support services; and

(11) Recruiting.

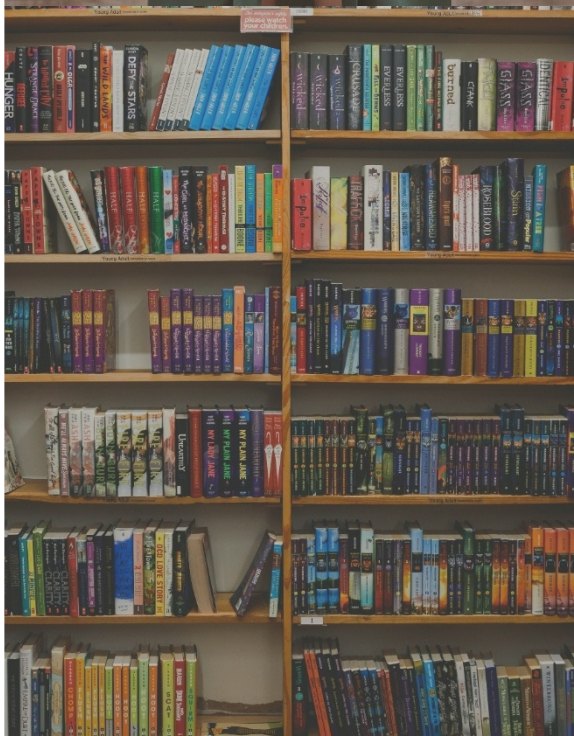
OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Pregnant and Parenting Students

- School cannot exclude pregnant or parents students from activities on the basis on their pregnancy/parenting status
- May only require medical permission if medical permission is required for all physical/emotional conditions
- Students are entitled to leave, either:
  - In alignment with the districts policies relating to temporary disabilities, or
  - In alignment with the recommendation of the student's physician





OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

34 CFR Part 106.40

OREGON
DEPARTMENT OF
EDUCATION
Oregon achieves . . . together!



LEGAL & LEGISLATIVE UPDATES

In this section…







- Title IX Updates
  - Sexual orientation and gender identity
  - New sexual harassment guidance document
- Oregon 2021 Legislative Session Updates
- Other items to watch – Supreme Court decision on free speech in schools

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Title IX: Sexual Orientation & Gender Identity Included



"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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Title IX: Q&A on Sexual Harassment

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

- 67 page document
- Does not change the 2020 sexual harassment regulations, but clarifies some common questions
- Provides sample policy language for specific required pieces



The 2021 Oregon Legislative Session

- No bills specifically impacted Oregon's requirements for sexual harassment policies in schools
- A number of bills overlap with Oregon's sexual harassment policies and Title IX, including:
  - Notification requirements for bullying, cyberbullying, and harassment
  - Gender identity added as a protected class
  - Slight modification to sexual conduct rules

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

HB 3041: Gender Identity as a Protected Class

Adds gender identity to the list of protected classes under a number of Oregon laws, including several education-specific requirements:

- ORS 338.135 - public charter school enrollment
- ORS 339.127-128 - nonresident student admission to school district
- ORS 339.329-364 - cyberbullying, harassment, intimidation
- ORS 658.850 - discrimination prohibited in education



School/district to-do list:

- Update your nondiscrimination policy (and website!)
- Check other policies where you list protected classes

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.

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

SB 242: Sexual Conduct

- Slightly modifies the definition of sexual conduct
  - Specifically, what sexual conduct is not
- Further explains confidentiality of investigations and reports



SB 566: Legal Consent Definition



- Removes the phrase “mentally defective” from the definition of consent under ORS 163.315.
- Replaces with “incapable of appraising the nature of the person’s conduct,” which is defined as:
  - The person is unable to understand the nature of the conduct;
  - The person is unable to understand the right to choose whether and how to engage in conduct, including the right to revoke a prior decision to engage in conduct; or
  - The person is unable to communicate a decision to engage in conduct.

Court Rulings of Note

- *Mohoney Area School District vs. B.L.,* Supreme Court
  - Free speech rights reiterated (*Tinker v. Des Moines*)
  - Schools have the right to regulate off campus speech only if it is particularly disruptive, as in the case of harassing, bullying, cheating, etc.
  - Schools do not have the right to regulate all off-campus speech in the same way they would regulate on-campus speech.

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Questions?

OREGON
DEPARTMENT OF
EDUCATION
Oregon achieves . . . together!



2020 SEXUAL HARRASSMENT REGULATIONS: RECAPS AND COMMON PITFALLS

In this section…







- 2020 Regulations Review
  - What were the major changes?
  - Definition of sexual harassment
  - Required roles and personnel
  - Required notices
- Common Pitfalls and Questions
  - Consent
  - Jurisdictional Authority
  - Overlap with Oregon law

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!



POLL

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

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

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;

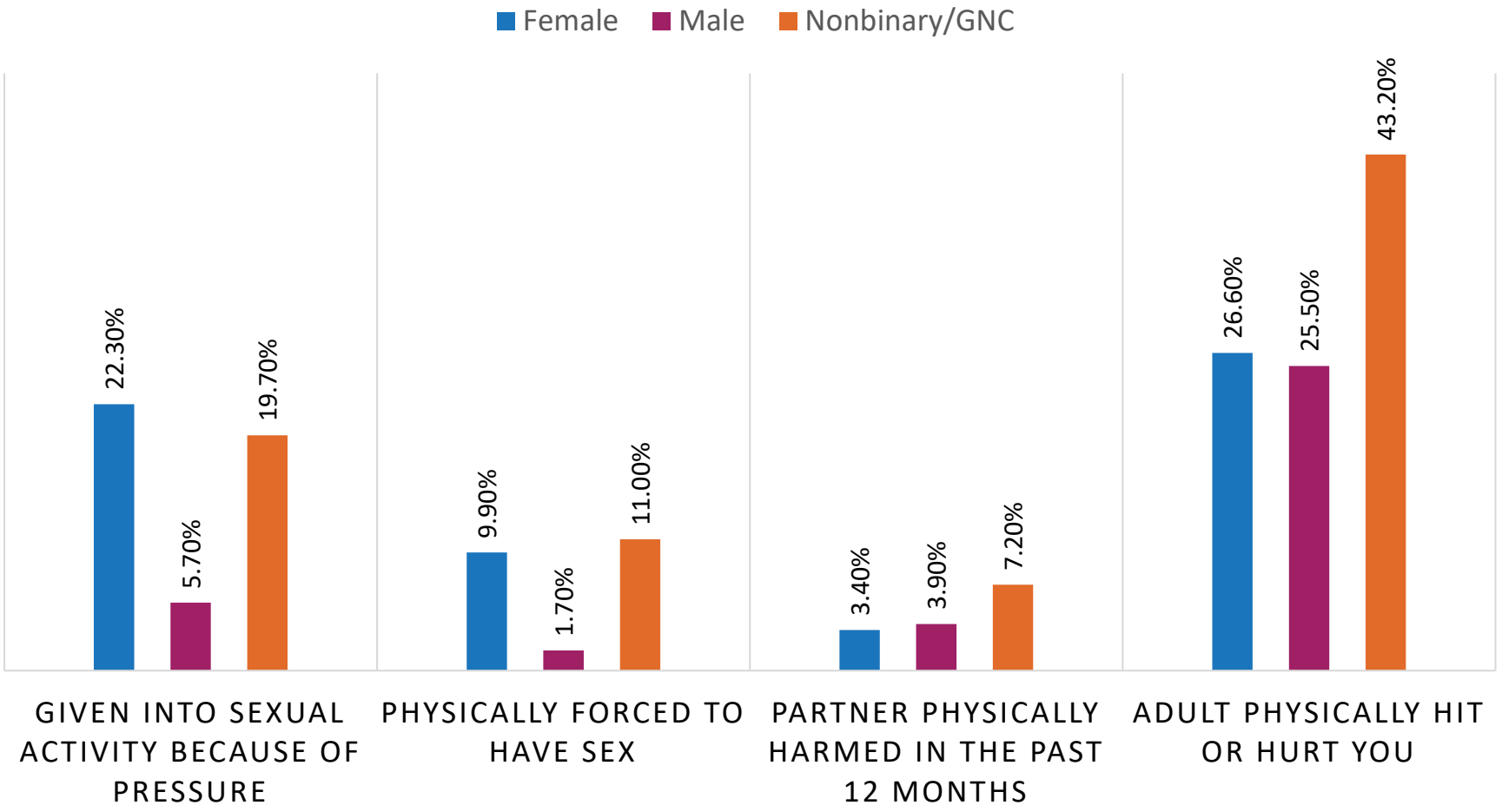
(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

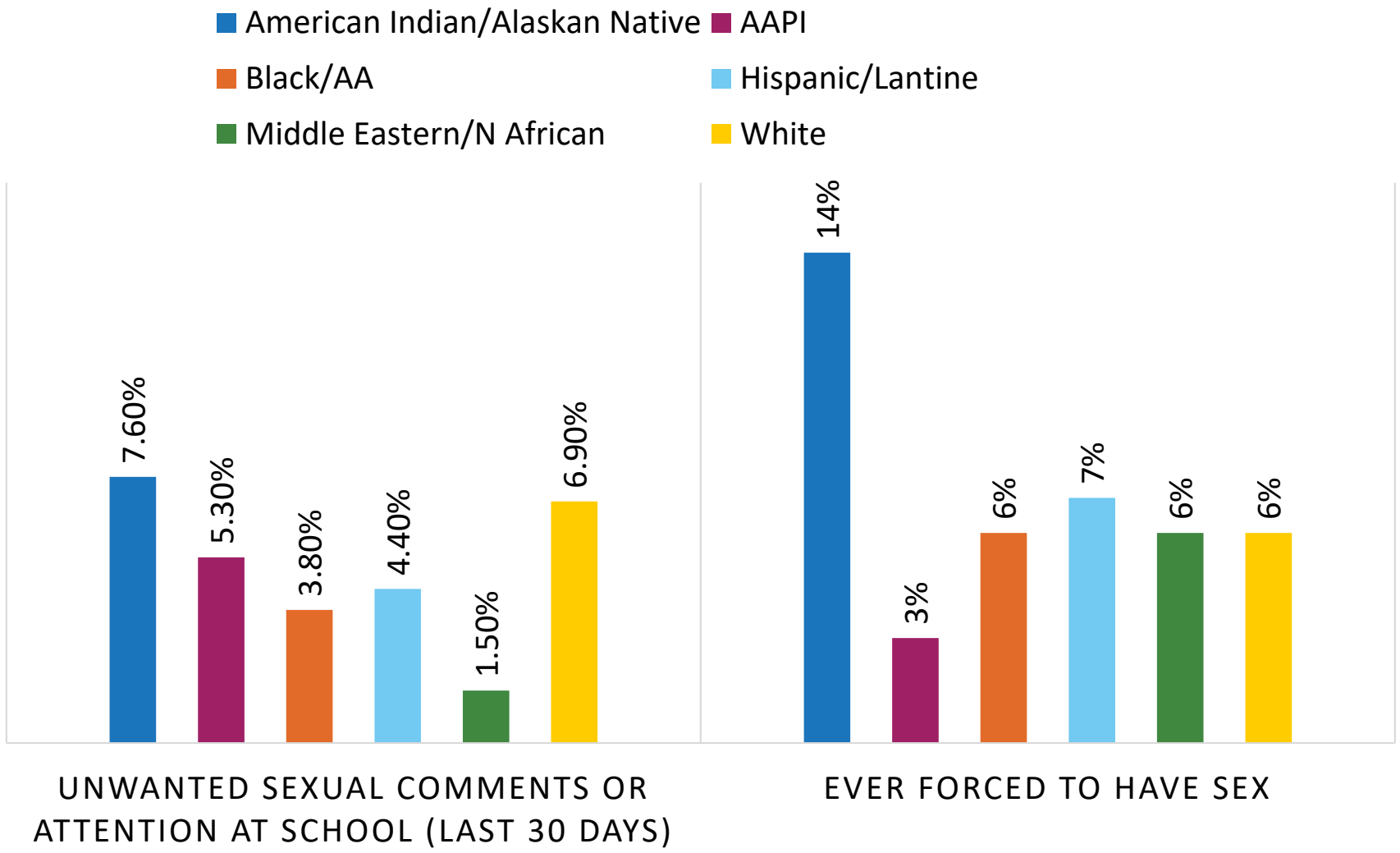
Violence and Abuse, 11th grade



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 DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

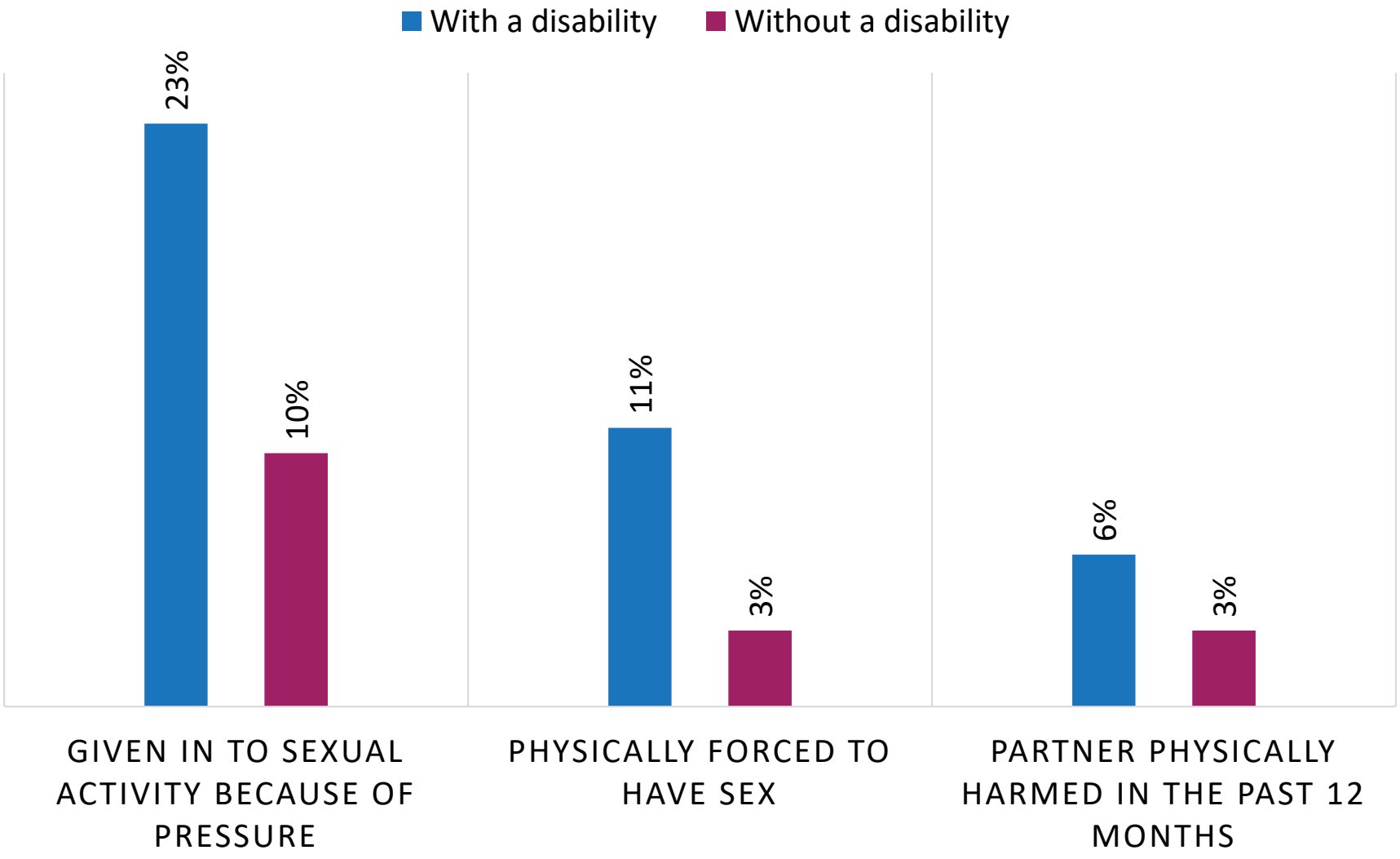
Sexual Harassment by Race



Oregon Healthy Teens Survey, 2019; OHA data

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Sexual Harassment by Disability Status



Oregon Healthy Teens Survey, 2019; OHA data

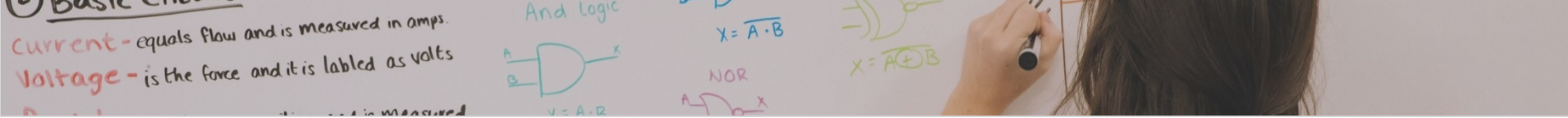
Reporting vs. Experiences

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.

That means approximately **0.003%** of Oregon students reported sexual harassment to their school.



OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!



Required Notifications

- Students/families are required to receive written notice that the school does not discriminate, and who the Title IX Coordinator is.
- The Title IX Coordinator's contact information must be prominently posted on the website and in any printed handbooks/catalogs distributed by the school.

What other means of communication has your school/district used?

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Defined Roles in 2020 Regulations

Title IX Coordinator

Investigator

may be the same person

Decision-Maker

Appeals Decision-Maker

Informal Resolution Facilitator

only required if offered





Title IX Coordinator*

- Oversees total 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"

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

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 record-keeping system and coordination process to ensure compliance and oversight
  - Bias/conflicts at the school level possible

Investigator

POLL

- 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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!



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

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Required Notices



Parental Notification Requirements

"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

Answer 40: …The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent. Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent "would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians." If a parent or guardian has a legal 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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

So… where does this leave us?

Best practice: notification is usually a positive and supportive option, **AND** make exceptions for safety and autonomy

- Involve the student in your decision-making; discuss notification openly
- Pay attention to the student's fears around safety, identity, harm, or support
- Make a support plan with the student if you're not notifying

This overlaps with bullying/harassment/intimidation notification rights!





OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Timeline

- Schools/districts are free to set their own timelines:
  - Must define “reasonably prompt” time frames for the conclusion of the process and for appeals
- There are two required timelines:
  - In the **Investigation** stage, the complainant and respondent must be allowed 10 days to review any evidence submitted by the other party and to submit a written response.
  - Between the **Investigation** and **Decision-Making** stages, the parties (and their advisors) must be allowed 10 days to review the investigation report and submit a written response.

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

In your breakout rooms…

1. **How successful has your school/district been in implementing the new regulations? What questions/concerns do you still have?**

2. **Have you/your district processed any Title IX cases under the new regulations yet?**
   - **If yes – what were your takeaways from the process? What lessons can you share with your colleagues?**
   - **If no – what questions or concerns do you have about the process?**

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Questions?

Common Pitfalls:
Consent under Title IX

OREGON
DEPARTMENT OF
EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

How does your school/district define consent?

POLL

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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!



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.

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

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Common Pitfalls: Jurisdictional Authority

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

When must/can schools respond?

Conduct must:

- Have occurred within the educational program or activity
- Have occurred within the United States
- Constitute sexual harassment (if substantiated)

Complainant must:

- Be "availing themselves, or attempting to avail themselves," of the educational program

May dismiss if the respondent is no longer enrolled or employed.



34 CFR § 106.30(a) and 106.45(b)(3)

Answer 8: …Schools should also note that, under the 2020 amendments, a school may still offer "supportive measures to a complainant who reports sexual harassment that occurred outside the [school's] education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it related to, or happens subsequent to, sexual harassment that occurred outside the education program or activity."

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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Elsa tells the school counselor that she's been unable to focus on school lately because her ex-boyfriend has been harassing her. He's been showing up at her house late at night trying to get her to take him back, and texting her nonstop. She also says he's been using the fact that he's Student Council president to get out of class early and wait for her by her car.

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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

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.

The student also says she knows at least two other former students the teacher would call and engage in similar conversations with.

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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Common Pitfalls: Title IX and Oregon Law Intersections

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!



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.



OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

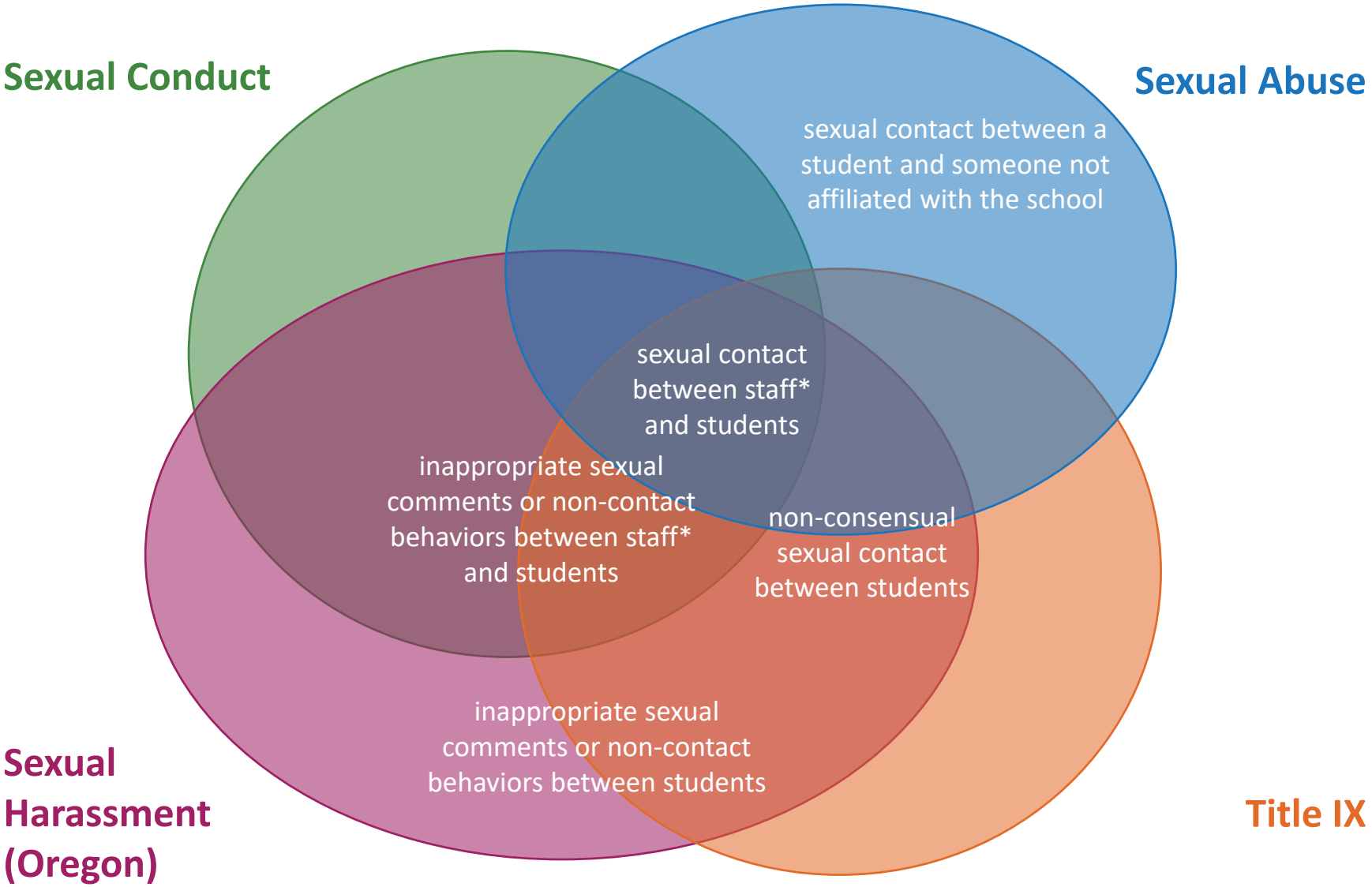
OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

"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.

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Definitional Overlaps



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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Jax, an eighth grader, is talking to the school counselor and mentions that things haven't been going very well with their boyfriend lately. Jax says that their boyfriend goes to the local high school, and Jax really likes him but he's been threatening to break up with Jax if Jax tells anyone about the relationship.

Jax also says that things have been weird since they lost their virginity to their boyfriend. 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 told 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 didn't feel good about it, because he wasn't very nice about it, but he says that this is what love is like."

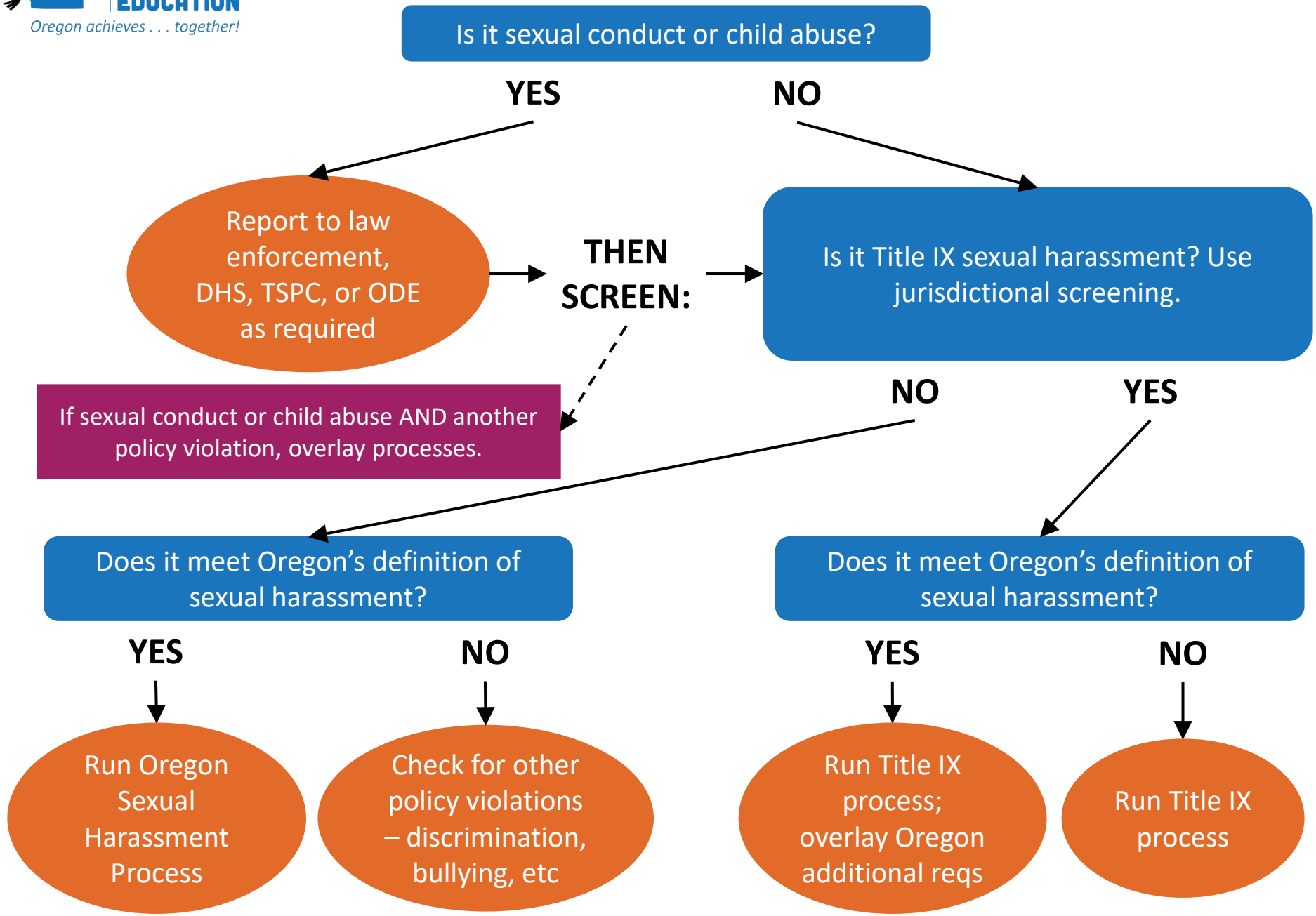
Based on your understanding, this scenario is:

- Sexual conduct
- Sexual abuse
- Title IX sexual harassment
- Oregon sexual harassment



OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

REPORT:



What if there is a law enforcement, DHS, TSPC, or ODE investigation, but I'm also required to investigate under Title IX?

- Title IX allows for temporary process delays for reasonable cause, including law enforcement.
- Title IX **does not** allow protracted delays, such as waiting for the conclusion of the entire legal process.
- A law enforcement for DHS investigation **does not** replace the district's own Title IX investigation – different definitions, different standards, different remedies.

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

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 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

HB 2631: Bullying, Cyberbullying, and Harassment Notification



For the most part, notification of parents/guardians is now required. However, the law allows some leeway for student safety and autonomy.

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.

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Questions?

OREGON
DEPARTMENT OF
EDUCATION
Oregon achieves . . . together!



TITLE IX: GENDER IDENTITY AND SEXUAL ORIENTATION

In this section…



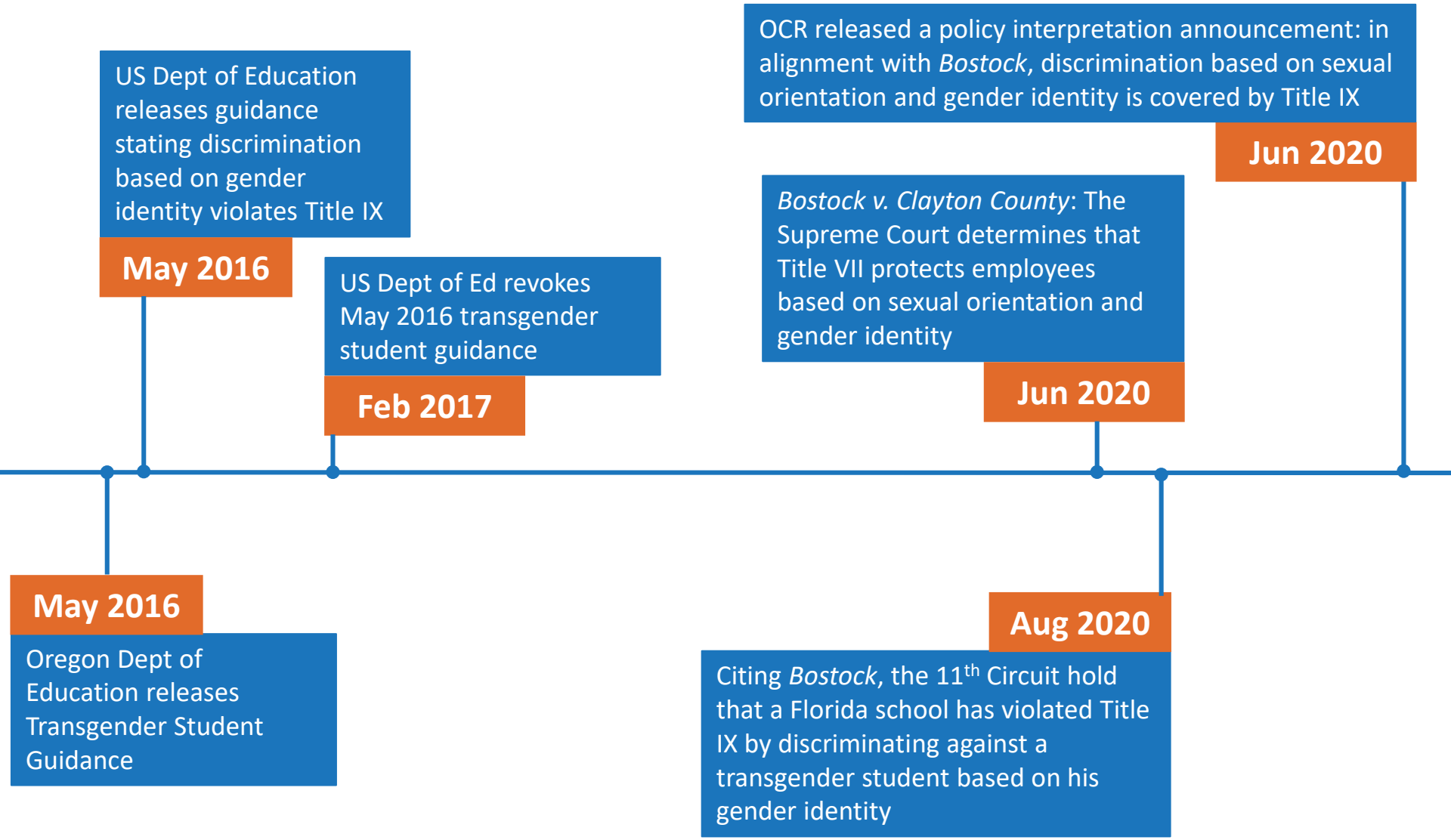




- How Title IX came to include discrimination based on sexual orientation and gender identity
- Overlap with Oregon law
- Review of ODE's *Guidance on Supporting Transgender Students*

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

TITLE IX & LGBTQ+ DISCRIMINATION



Discrimination: Oregon

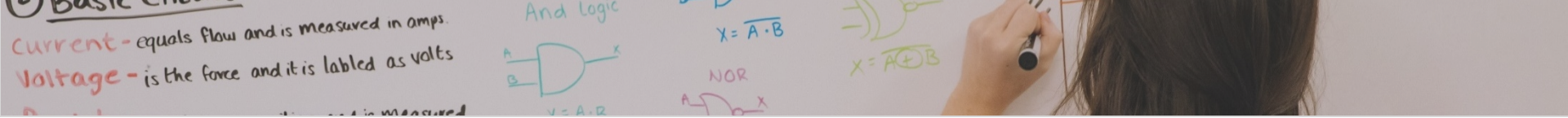
"Discrimination" means any act that unreasonably differentiates treatment, ***intended or unintended****, or any act that is fair in form but discriminatory in operation, either of which is based on* ***age, disability, national origin, race, color, marital status, religion, sex or sexual orientation****;*





OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

OAR 581-021-0045 and 0046: Discrimination Prohibited in Schools; ORS 326 & 659 provide authority to implement ORS 326.051 &659.850



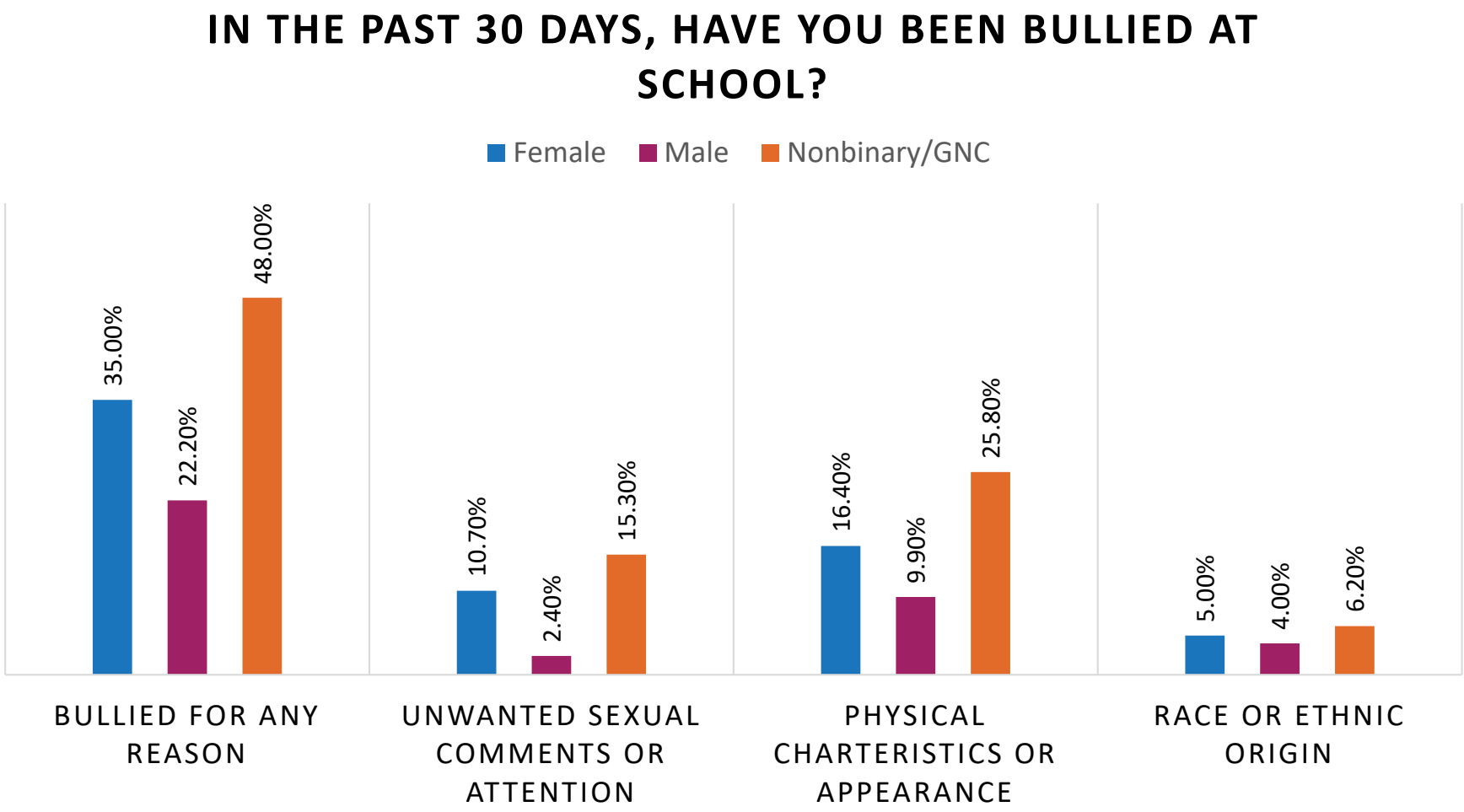
Examples from OCR of possible discrimination:

A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is “not appropriate for school.” Teachers suggest that the student attend alone or bring a boy as a date.

C U.S. Department of Justice Civil Rights Division U.S. Department of Education Office for Civil Rights Confronting Anti-LGBTQI+ Harassment in Schools A Resource for Students and Families (DOE and DOJ joint resource) https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf

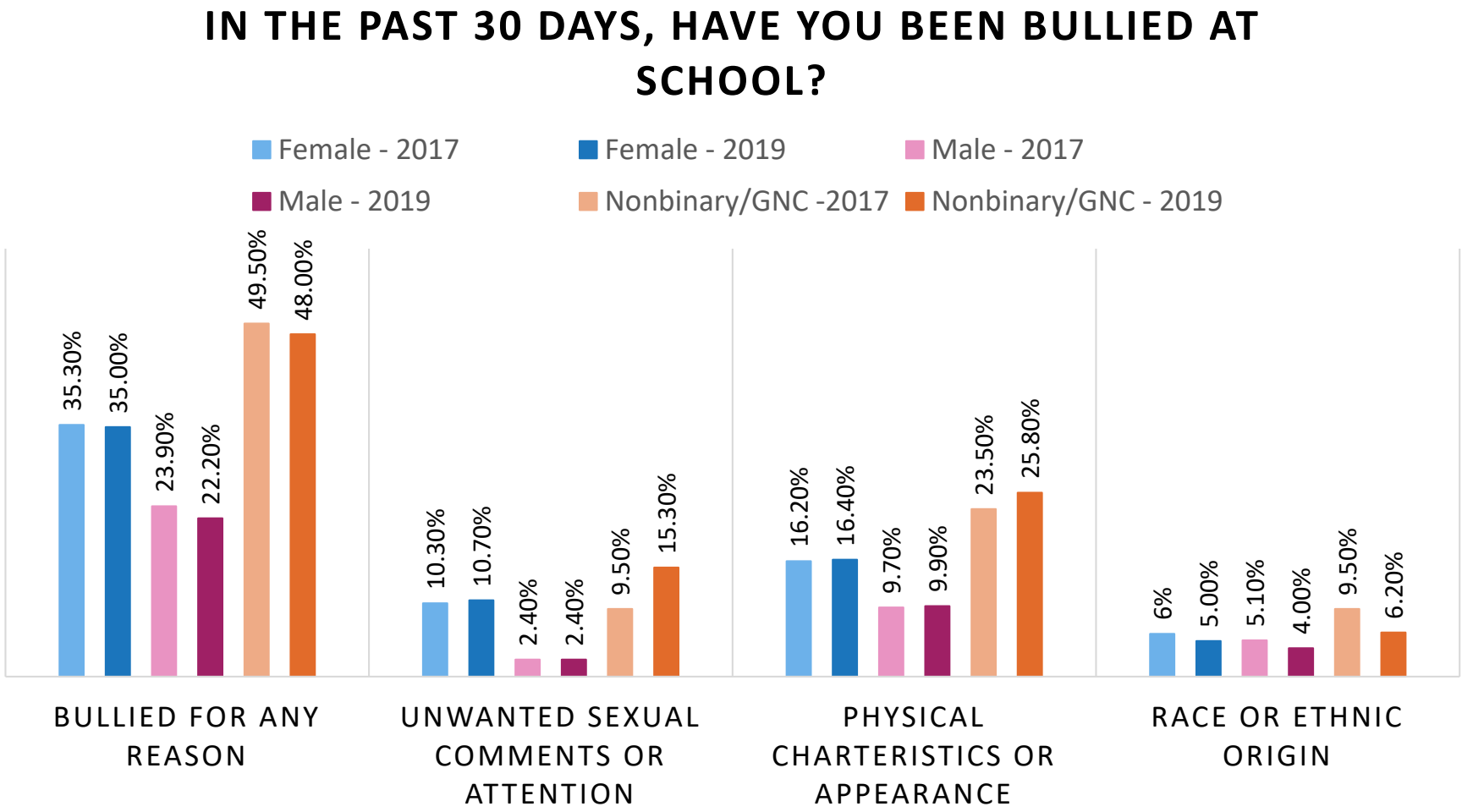
OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Bullying, 8th grade



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

Bullying, 8th grade (2017 v. 2019)



Oregon Healthy Teens Survey, 2017; 8th grade data, bullying
https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2017/Gender/8th/Bully8.pdf



59.1% of LBGTQ+ students felt unsafe at school because of their sexual orientation; **42.5%** felt unsafe because of their gender expression.

32.7% of LGBTQ+ students missed at least one entire day of school in the past month because they felt unsafe or uncomfortable; **8.6%** missed four or more days in the past month.

GLSEN 2019 school climate survey; https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Executive-Summary-English_1.pdf

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!



ODE's Transgender Student Guidance

- Terminology
- Student Identity
- Free and Appropriate Public Education
- Names and Pronouns
- School Documents and Records
- Name Change Options + Process
- Transcripts and Diplomas
- Student Health Records
- Instruction + Comprehensive Sexuality Education
- Gender-Based Activities, Rules, Policies
- Restroom and Locker Usage
- Sports
- Student Safety

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Student Identity



The person best situated to determine a student's gender identity is the individual student.

- When a student or the student's parent or guardian notifies the school that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity.
- There is no medical diagnosis or treatment requirement. Requiring students to produce such identification documents can be considered a violation of Oregon law if it limits or denies a student access to an educational program or activity.

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Restrooms and Locker Rooms

- Students should be allowed to use the restrooms, locker rooms, and showers that align with their gender identity

- Schools may offer a single-stall restroom or alternative accommodations, but may not require the student to use them.



OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Parents for Privacy v. Dallas School District (Parents for Privacy v. Barr)

- 2017 - a group of parents sued the Dallas School District regarding a trans student's use of restroom, locker, and shower facilities that aligned with their gender identity
- 2018 - District Court dismissed the case, citing that the school's policies/practices do not violate the rights of cisgender students
- Feb 2020 - Ninth Circuit Court of Appeals affirms the dismissal
- Dec 2020 - Supreme Court denies appeal petition



OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Sports



OSAA's Gender Identity Participation Policy

"…once a transgender student has notified the student's school of their gender identity, the student shall be consistently treated as that gender for purposes of eligibility for athletics and activities…"

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Sports: OSAA Policy



Q: What if a nonbinary or intersex student experiences gender fluidity during a season that is documented at school by pronoun change or is of a transitional nature?
A: As a student transitions, communication should be documented within school registration information consistent with other school procedures. If the activity in which the student is trying out for is gender-segregated or gender-specific, then the student shall commit to the team with which they register for the entirety of that season, subject to section B(3).

Q: Can a nonbinary student access more than one sport or activity during the same season?
A: Yes, provided that a student may not participate in gender-segregated and/or gender-specific sports/activities at the same time but is otherwise eligible to participate in all sports/activities that are not gender-segregated or gender-specific.



Examples from OCR of possible discrimination:

On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as "male." Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her "those are the district's policies."

C U.S. Department of Justice Civil Rights Division U.S. Department of Education Office for Civil Rights Confronting Anti-LGBTQI+ Harassment in Schools A Resource for Students and Families (DOE and DOJ joint resource) https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Records and Transcripts

- Confidentiality and FERPA
- Name Change Options and Process: schools have different options, including depending on whether a student has legally changed their name or is not yet ready/able to.
- SSID: gender can be changed upon request from the student
- Data collection: gender fields must include “X” option.



OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Single-Sex Classes or Activities



- Title IX prohibits most single-sex or sex-segregated classes and activities; there are a few exceptions, like sports and some lessons during sexuality education.
- For single-sex or sex-segregated classes or activities, trans students should be allowed to participate consistent with their gender identity.
- Avoid separating or singling out students by sex or gender unless absolutely necessary.

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Student Safety

- Once a school is on notice of possible discriminatory harassment, **it must take *immediate* and *appropriate* steps to investigate or determine what occurred.**

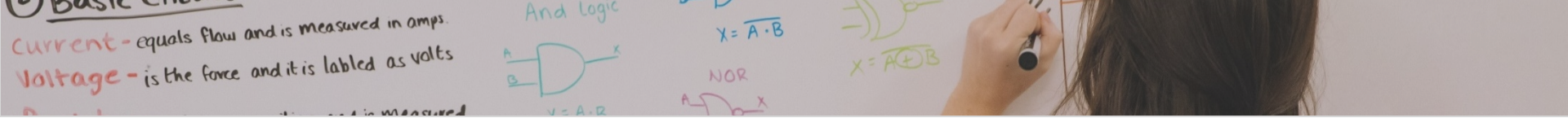
- To craft effective steps to end the harassment, a school must first ensure it has a full **understanding of the scope of the harassment and the scope of the impact on the students involved**.



Examples from OCR of possible discrimination:

When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates "out" him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school's administrators, they dismiss it, saying: "you can't expect everyone to agree with your choices."

C U.S. Department of Justice Civil Rights Division U.S. Department of Education Office for Civil Rights Confronting Anti-LGBTQI+ Harassment in Schools A Resource for Students and Families (DOE and DOJ joint resource) https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf



Examples from OCR of possible discrimination:

An elementary school student with intersex traits dresses in a gender neutral way, identifies as nonbinary, and uses they/them pronouns. The student's teacher laughs when other students ask if they are "a boy or a girl" and comments that there is "only one way to find out." The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks "you have to be able to laugh at yourself sometimes."

C U.S. Department of Justice Civil Rights Division U.S. Department of Education Office for Civil Rights Confronting Anti-LGBTQI+ Harassment in Schools A Resource for Students and Families (DOE and DOJ joint resource) https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf



GSAs

- Schools must allow GSAs (or similar clubs) to form by the same rules for any other club.
- Schools cannot create separate rules.

LGBTQ+ students with GSAs in their schools…

- Felt less unsafe
- Missed less school
- Experienced less bullying and violence based on gender expression
- Perceived that staff were more supportive of LGBTQ+ student rights

GLSEN 2019 National School Climate Survey;
https://www.glsen.org/sites/default/files/2020-11/NSCS19-111820.pdf

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!



Aligning Practices

- Provisions apply to students and staff
- Title IX Coordinators
  - Loop in coordinators on discrimination based on sexual orientation and gender identity
  - Record and track all reported discrimination just as you would other Title IX sex discrimination
- Remember – sexual harassment procedures are JUST for sexual harassment; other sex discrimination (including gender identity and sexual orientation) is covered by general provisions of 34 CFR Part 106

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Questions?

OREGON
DEPARTMENT OF
EDUCATION
Oregon achieves . . . together!



FAQs

In this section…







- Title IX and Covid-19
- Athletics
- Title IX Sexual Harassment and Younger Children

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Title IX and Covid-19

OREGON
DEPARTMENT OF
EDUCATION
Oregon achieves . . . together!



Sexual Harassment Procedures and Covid-19

- The pandemic did not alter school's responsibilities under the new regulations.
- Consider:
  - Online programs – how far does the educational program extend?
  - How are students getting information about how to report?
  - Do covid-19 restrictions count as a "reasonable delay" to extend the time frames?

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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

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

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!





Covid-19 Restrictions and Athletic Opportunities

Some sports may continue to be shifted, eliminated, or modified as the covid-19 pandemic evolves.

- **OCR has not released any communication stating that schools are exempt from the three-part test or laundry list requirements during the covid-19 pandemic.**
- **But…** there could be understanding and leniency, and as long as you're showing thoughtful decisions about equity

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!





Athletics

Potential strategies to keep equity in place while modifying/eliminating sports during covid-19:

- Keep good documentation of the health requirements, government orders, etc. that require modification/elimination
- Increase opportunities in safe/allowable sports
- Monitor for laundry-list equity issues (facilities, practice time, etc); share burdens equally around teams as much as possible
- Consider balance both **within** and **between** laundry-list components

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Athletics, cont.

Facilities

- Common facilities pitfalls
  - Baseball and softball
  - Locker rooms
  - Facilities managed by other entities
- Remember…
  - Program compliance is assessed OVERALL between opportunities/ support for girls and boys
  - If your district is seeking bonds/improvements, plan ahead





OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Publicity and Social Media



- Social media support is a component of publicity
- Which teams/events are advertised on social media?
- Which students are highlighted?

Upcoming OSAA-ODE Title IX Webinar

Overview: Title IX and Athletic Equity

September 28, 1-2:30 pm

Save the date, and look for registration to open approximately one month prior.

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!





Athletics Resources

OCR Athletics Resources

https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html

OSAA Title IX Resources

http://www.osaa.org/equity

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Sexual Harassment Between Younger Children

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

OREGON DEPARTMENT OF EDUCATION
Oregon achieves . . . together!

Key Reminders



- The definition of Title IX sexual harassment does not change based on age.
- Developmental behavior can make it more challenging to recognize behavior, especially for untrained individuals.
- Teachers, especially in the K-5 environment, need to be able to recognize behaviors as sexual harassment.

Ellie, a second grader, has been struggling with behavioral issues since the beginning of the year. She has been running around the classroom during class and screaming 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 appears calm but concerned, and tells the teacher that Ellie also tried to reach under her (Louise's) dress last week.

Age/Development in Investigation, Determination, and Sanctions

- Any act that could be sexual harassment under Title IX must be treated as such, regardless of age
  - Where does intent lie in the **definition**?
  - Consider the impact on the complainant
- Age and development can provide **context**
  - Were the behaviors appropriate, consensual developmental exploration? Consult experts!
- Age and development may affect sanctioning
  - Ex: developmentally appropriate behavioral counseling

OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Questions?



OREGON DEPARTMENT OF EDUCATION

Oregon achieves . . . together!

Kate Hildebrandt

Civil Rights and Title IX Specialist

katherine.hildebrandt@state.or.us

503-551-5713

www.oregon.gov/ode