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2020 Title IX Training: The New Title IX Regulations

September 2, 2020, 1:00pm-4:00pm



Kate Hildebrandt

she/her

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Oregon Department of Education

Equity and Excellence for Every Learner

- The Oregon Department of Education works in partnership with school districts, education service districts and community partners;
- Together, we serve over 580,000 K-12 students;
- We believe every student should have access to a 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.

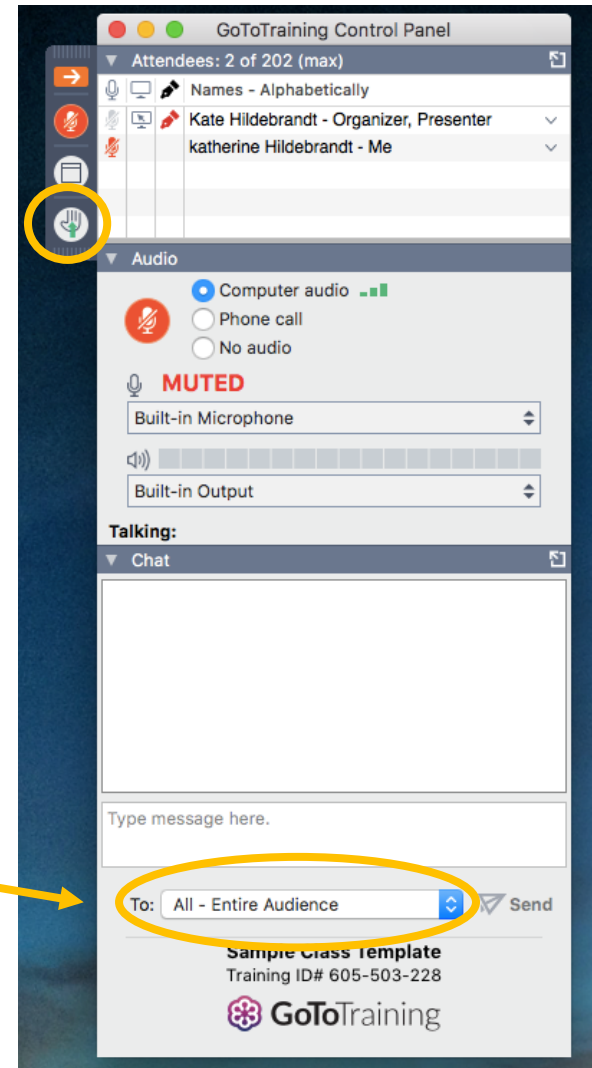
Using GoToTraining

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



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

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



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TODAY'S AGENDA



Background: Title IX and Oregon Law



Sexual Harassment: Definitions



Sexual Harassment: The Title IX Process



Conflict of Interest & Bias



BACKGROUND: TITLE IX & OREGON LAW

In this section...

- Introduction to Title IX
- Related Oregon laws, including
 - Discrimination and protected classes
 - Oregon's sexual harassment law
 - Mandatory reporting and SB155

"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."



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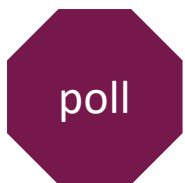
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What is covered by Title IX?

- 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

What CAN be separated by sex/gender?

- Athletics
- Sexuality education courses
- Physical education during contact sports
- Boy scouts, girl scouts, YMCA/YWCA
- Voluntary Youth Service Organizations



See also: 34 CFR Part 106

Single-Sex Classes and Cocurriculars

Nonvocational classes or cocurricular activities may be offered on a single-sex basis under ***very specific, limited*** circumstances, provided all of the following are met:

- the course or program is to achieve a specific educational-related goal or outcome or in response to a specifically identified educational issue;
- a substantially equal activity for the excluded sex is offered; and
- the school conducts periodic evaluations

See also: 34 CFR Part 106, and OCR's 2014 DCL *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*

Case Study: Girls-Only STEM Programs

Re: OCR Docket No. 15-19-2052

Dear Ms. Smith:

This letter is to notify you of the disposition of the above-referenced complaint filed on January 22, 2019, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Grand Valley State University (the University) alleging that the University discriminated against boys based on sex. Specifically, the complaint alleged that the University annually operates the Science Technology & Engineering Preview Summer (STEPS) Camp for Girls, a girls-only summer program that excludes boys from participation.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of federal financial assistance from the Department. As a recipient of federal financial assistance from the Department the University is subject to Title IX.

Based on the complaint allegation, OCR initiated an investigation of whether the University, on the basis of sex, excluded individuals from participation in, denied them the benefits of, or subjected them to discrimination with respect to any University program or activity, in violation of the Title IX implementation regulation at 34 C.F.R. § 106.31, and/or provided or otherwise carried out any of its educational programs or activities separately on the basis of sex, in violation of 34 C.F.R. § 106.34(a).

Career and Technical Education (CTE)

CTE programs cannot discriminate by gender

- Recruitment and promotional materials
- Admissions and pre-reqs
- Counseling
- etc

CTE programs may never be offered on a single-sex basis.

The Methods of Administration Program (MOA) provides additional guidelines for schools that offer CTE programs.

See also: 34 CFR Part 106, and OCR's 2016 DCL *Guidance on Gender Equity in Career and Technical Education*

Is there potential discrimination?



ABC School has decided to add a cosmetology course co-taught with a local community college. The college sends this photo that ABC uses to advertise the class, and asks the school counselor to bring up the opportunity to enroll with any students she thinks might be interested.

Title IX and LGBTQ+ students

Does Title IX cover LGBTQ+ discrimination?

poll

ONE TO WATCH: TITLE IX & LGBTQ+ DISCRIMINATION?

US Dept of Education
releases guidance stating
discrimination based on
gender identity violates
Title IX

May 2016

US Dept of Ed revokes
May 2016 transgender
student guidance

Feb 2017

Bostock v. Clayton County: The
Supreme Court determines that Title
VII protects employees based on sexual
orientation and gender identity

Jun 2020

May 2016

Oregon Dept of
Education releases
Transgender Student
Guidance

Aug 2020

Citing Bostock, the 11th Circuit
hold that a Florida school has
violated Title IX by discriminating
against a transgender student
based on his gender identity

Title IX Sexual Harassment Terminology

Complainant “means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”

-34 CFR 106.30(a)

Respondent “means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

-34 CFR 106.30(a)

Recipient means the school or district who is receiving Federal funding, and therefore subject to Title IX.

TITLE IX HISTORY: SEXUAL HARASSMENT

Title IX is passed as part of the Education Amendments

1972

Sexual Harassment Guidance directs schools to address harassment of students and employees

1997/2001

1980s

Title IX is first applied to sexual harassment in the courts

2011

Dear Colleague Letter reiterates and expands protections for sexual assault; additional guidance and DCLs follow over the next several years

TITLE IX HISTORY: SEXUAL HARASSMENT

US Department of Education
revokes 2011 and 2014 Title IX
guidance; announces intent to
replace with regulations

Sept 2017

Compliance deadline*

Aug 14, 2020

Final regulations released

May 6, 2020

Nov 2018

Draft regulations are
released, previewing major
changes to sexual
harassment processes

Feb 2020

OCR announces a new
initiative to engage in
compliance reviews and data
collection related to K-12
sexual harassment of students
by employees

The 2020 Regulations: Major Changes for K-12 Schools

- New definition of sexual harassment
- Defining the scope of jurisdiction
- Supportive measures and notification of options required
- New and specific grievance process (and policy requirements!)
- More specific notification requirements
- Specific training and personnel requirements
- Informal processes allowed

WHAT'S THE SAME?

- Students are entitled to an education free from sexual harassment
- All K-12 school employees must still report sexual harassment
- Schools must have a designated Title IX Coordinator, and make information easily accessible
- Advisors of choice
- **Oregon laws still apply!**
 - Sexual harassment policy requirements
 - SB155 – sexual abuse and sexual conduct
 - Mandatory reporting



Intersection Oregon Laws

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

Training Requirements

Schools are responsible for ensuring all designated personnel receive appropriate training.

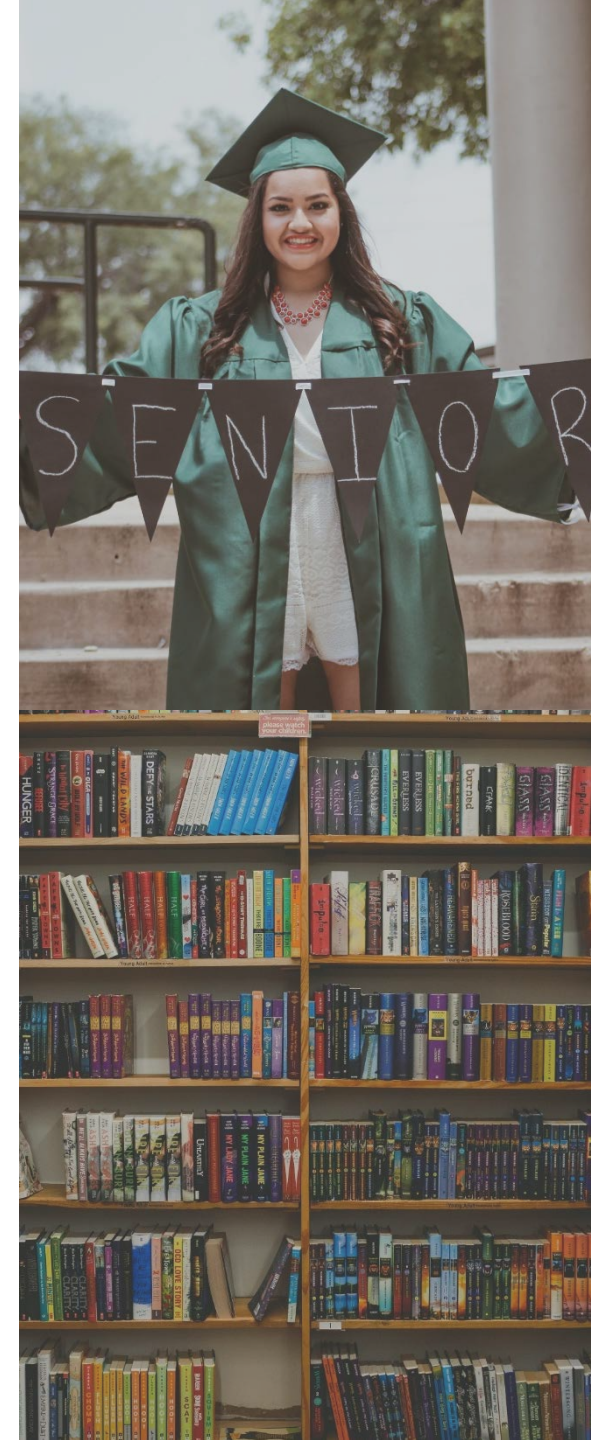
Personnel must:

“...not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent”

34 CFR § 106.45(b)(1)(iii)

Training materials must:

- Be free of bias and sex stereotypes
- Be posted to the school’s website



	Title IX Coordinator	Investigator	Decision- Maker	Appeals Decision- Maker	Informal Process Facilitator
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Definition of sexual harassment	X	X	X	X	X
Scope of “educational program or activity”	X	X	X	X	X
How to conduct the applicable portions of the grievance process	X	X	X	X	X
Avoiding prejudice of facts, conflicts of interest, and bias	X	X	X	X	X
How to create a fair investigative report		X			
Any technology used at hearings			X	X	
Issues of relevance for questions and evidence			X	X	



SEXUAL HARASSMENT: DEFINITIONS & DYNAMICS



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In this section...

- Definition of sexual harassment
- Comparison with Oregon's sexual harassment definition
- Consent
- Dynamics of dating violence, domestic violence, and stalking

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



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Does this meet prong 2?

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

The website proclaims Oliver as the “top virgin,” and includes a photoshopped picture of him made to look like he’s naked, looking scared of a several nearby naked girls. Someone anonymously emailed it to everyone in the club during the last meeting, and now an anonymous number keeps texting the picture to Oliver multiple times a day.

poll

Sexual Assault

Rape

“Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”

Fondling

“The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.”

Incest

Statutory Rape

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



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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.



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Type in the chat box:

How do you define
consent?

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 an agreement between people to engage in a sexual activity. Consent means freely choosing to say ‘yes’ to a sexual activity. It’s needed for any kind of sexual activity, from touching or kissing to intercourse. It’s always clearly communicated - there should be no mystery or doubt.”

-KidsHelpLine Australia

ORS 342.704/OAR 581-012-0038

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.

Is there consent?

poll

Lacey and her girlfriend Mira are at a party. Close to midnight, Mira says that she needs to get home before her curfew. They head out to the car, when Lacey asks if they can make out for bit before they go home. “I don’t really feel like it, I’m tired,” Mira says. Lacey pouts and says “come on, we never get to be alone together!” Mira responds that they won’t ever get to be alone together again if she gets grounded for missing her curfew. Lacey tells Mira, “this party was such a bust, I feel like nothing fun happened tonight! I’m so bored. If we’re not even gonna make out, I’m going back inside to have SOME fun before we leave. Who even cares if you’re grounded if you’re not gonna act like my girlfriend when we see each other anyways.” Lacey starts to open her car door. Mira looks at the clock and says “ok fine, as long as you promise we can leave in five minutes.”



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Break for Questions

Domestic Violence

“[I]ncludes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

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



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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)

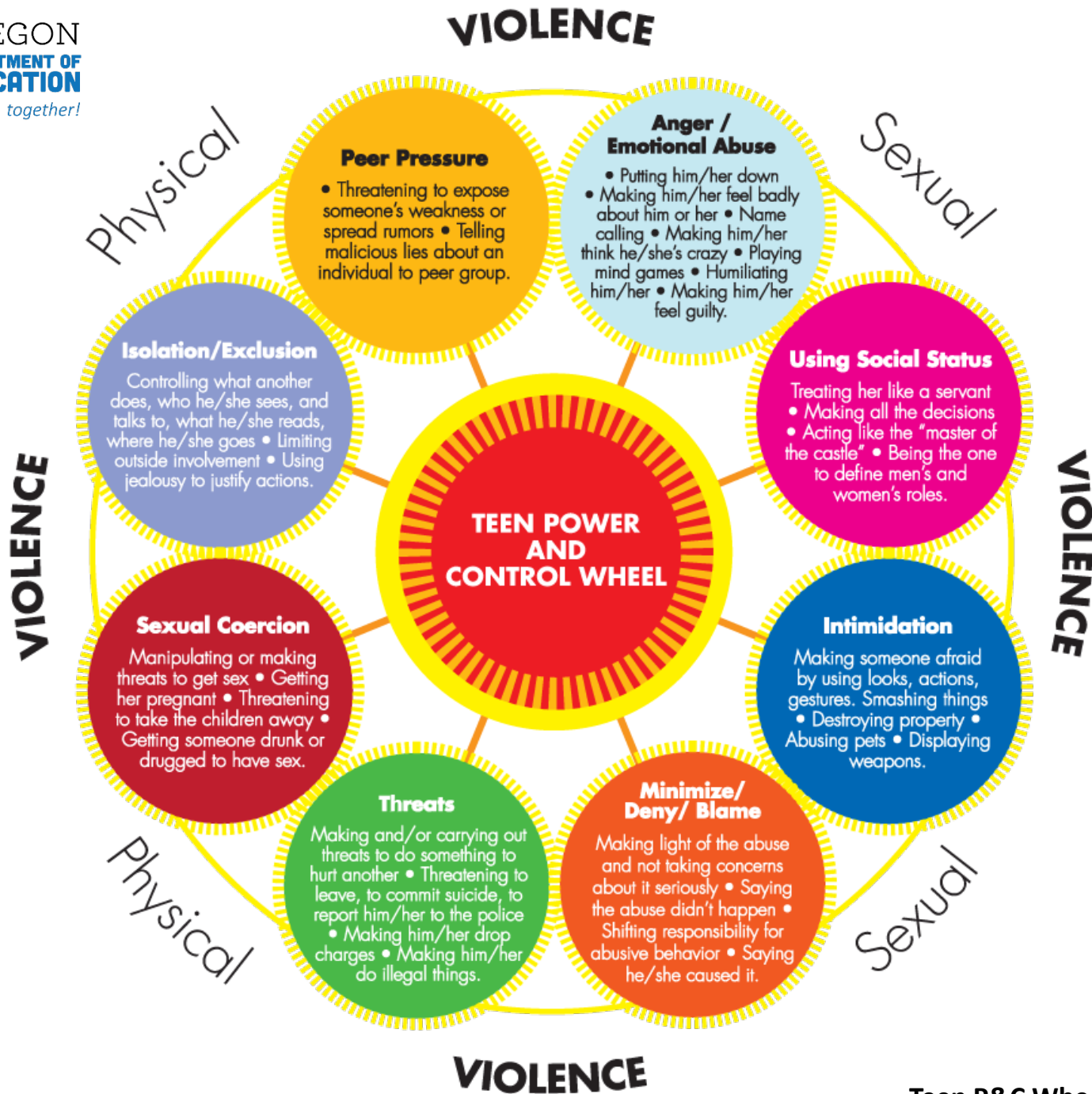


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Type in the chat box:

What behaviors might occur in a relationship of teen dating violence?



#ThatsNotLove

▶ ⏮ 🔊 1:09 / 1:12



[#ThatsNotLove](#) campaign | Because I Love You - Delete | One Love Foundation

2,399,739 views • Oct 13, 2015

👍 6.8K 🗨️ 194 ➦ SHARE ≡+ SAVE ⋮

Common dynamics of partner violence you might run into during investigations

A survivor might...

- Have missed a lot of school/work
- Have been coerced into breaking school/employment rules
- Defend the person they initially reported against
- Recant their report



Stalking

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

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



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Type in the chat box:

What does stalking look like?

Stalking Dynamics



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

Break for Questions



SEXUAL HARASSMENT: THE TITLE IX PROCESS

In this section...

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

Investigations will be covered in detail in the afternoon training

Who's Involved?

Title IX Coordinator

Investigator

Decision-Maker

Appeals Decision-Maker

only required
if offered

Informal Resolution Facilitator

may be the
same person

poll



Title IX Coordinator*

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



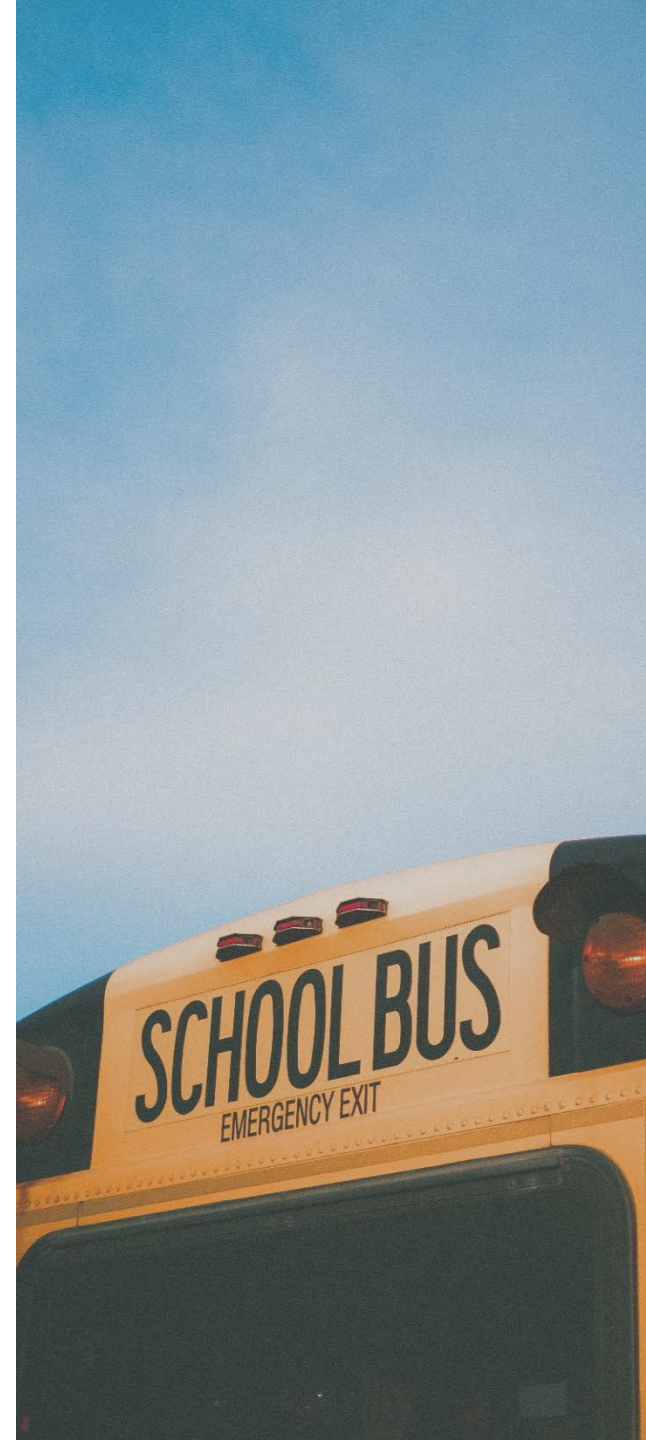
*According to the new regulations, this person “must be referred to as the Title IX Coordinator”

Investigator

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

Informal Process Facilitator

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





Decision-Maker(s)

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

Appeals Decision-Maker(s)

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

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

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

1

ACTUAL KNOWLEDGE

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

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

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

OREGON LAW INTERSECTION:

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

(a)



Supportive Measures

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

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

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

ORS 342.704/OAR 581-021-0038

Notice of Rights and Options

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

2

FORMAL COMPLAINT

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

The complainant must be availing themselves, or attempting to avail themselves, of the educational program when filing the complaint.

Must dismiss under Title IX if:

- the conduct in the formal complaint does not constitute sexual harassment
- the conduct did not happen in the educational program or activity of the school
- the conduct did not happen in the United States

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

(3)



“Educational program or activity”

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

-34 CFR Part 106.44(a)

This doesn't just include the school!

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

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).

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- (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
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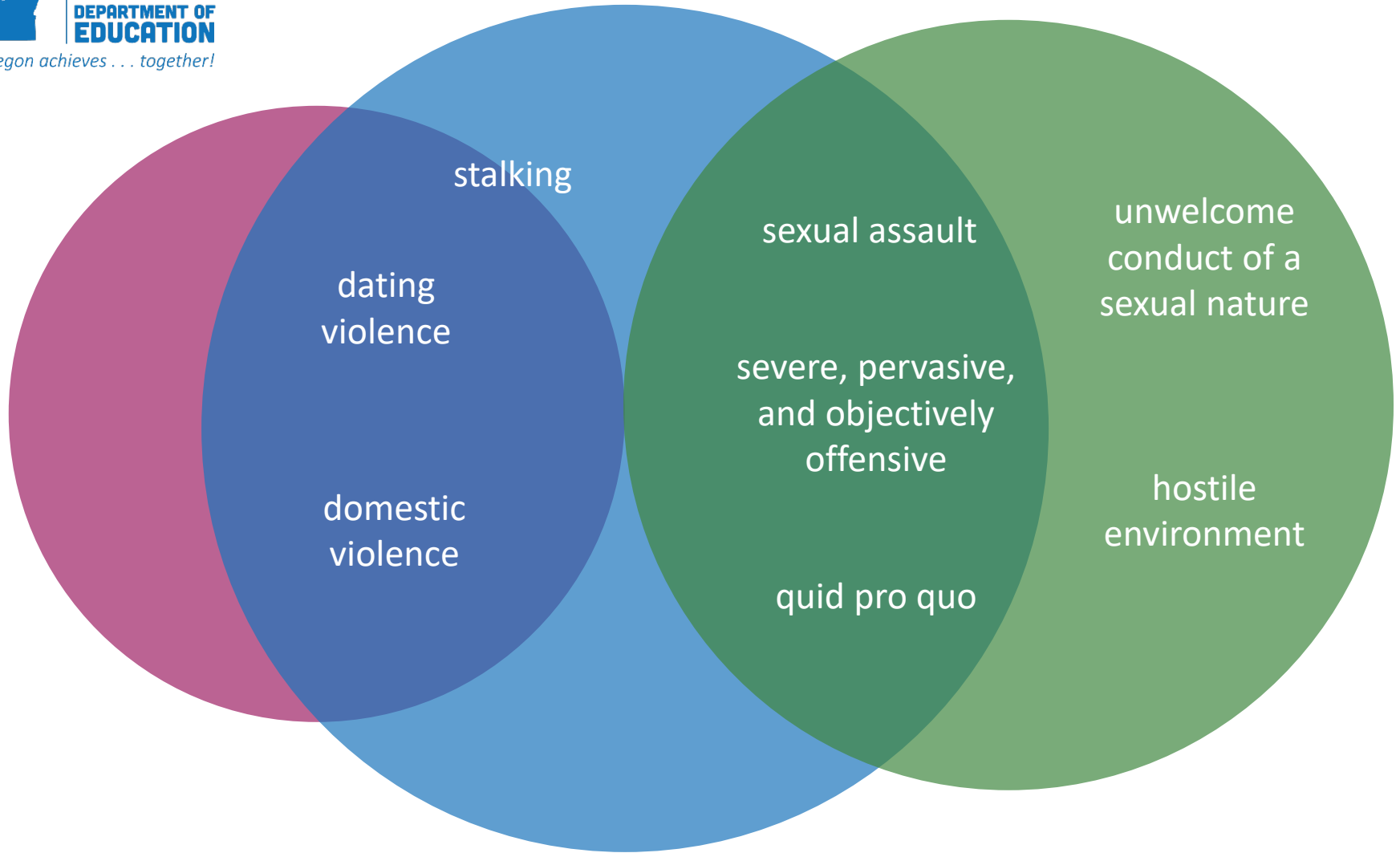
(iii) Assault, when sexual contact occurs without a person's consent because the person is:

- (I) Under the influence of drugs or alcohol;
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- (III) Pressured through physical force, coercion or explicit or implied threats.



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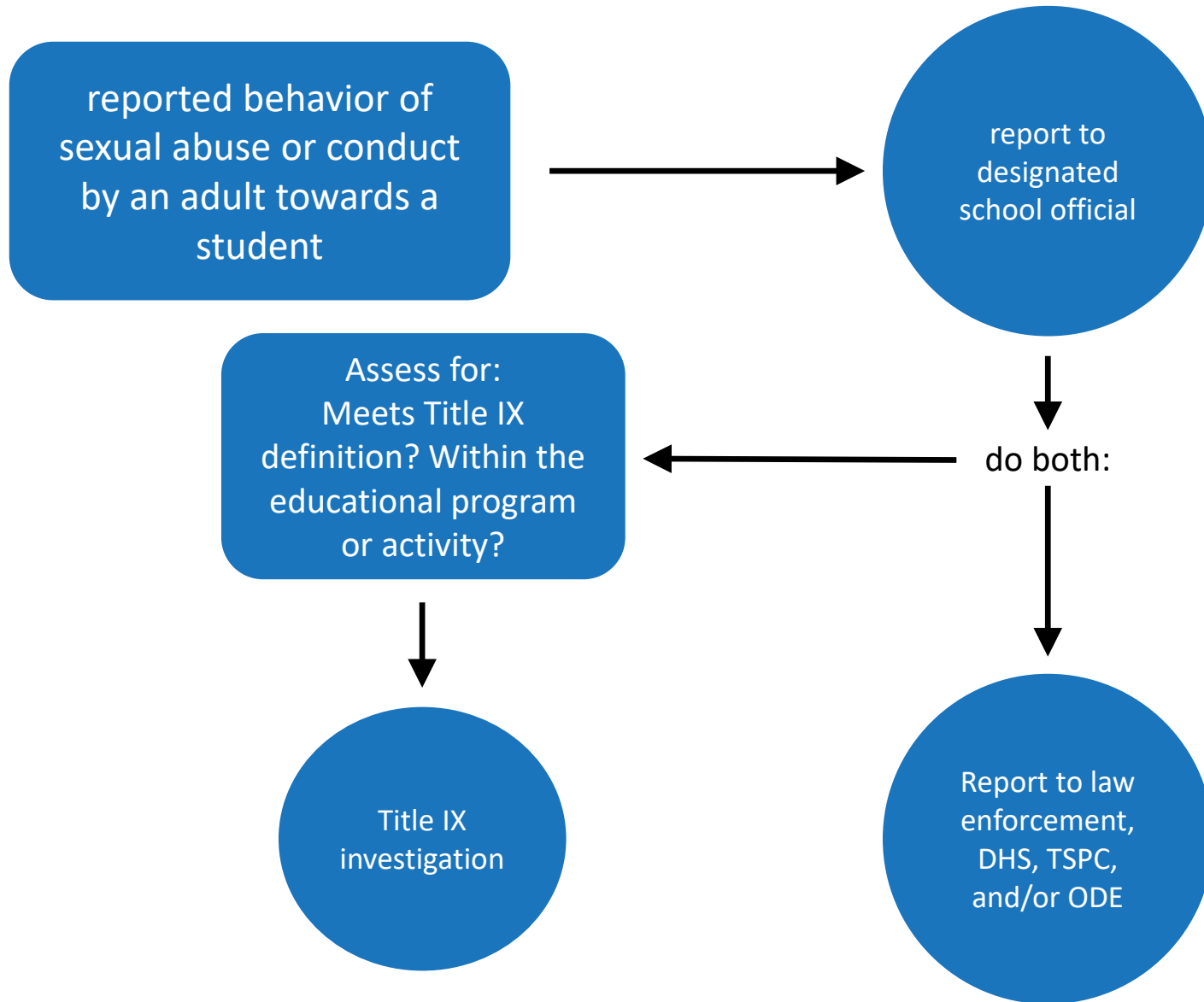
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Oregon's teen dating violence
and domestic violence policies
(ORS 339.366)

Title IX sexual
harassment
policies

Oregon's K-12 sexual
harassment policies
(OAR 581-021-0038)



Can third parties submit
complaints?

2

FORMAL COMPLAINT

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

However, a third party could:

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



Emergency Removal and Administrative Leave

Emergency removal of a student is allowed:

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

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

34 CFR § 106.44(c) and (d)

Informal Process

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

- Formal complaint must be filed
- Notice must be given, which must include informal process information
- Both parties must submit written consent

34 CFR § 106.45(b)(9)

Break for Questions

2

FORMAL COMPLAINT

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

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

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

34 CFR Part 106.45(b)(2)



2

FORMAL COMPLAINT

OREGON LAW INTERSECTION:

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

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



Rights of Parents

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

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

34 CFR § 106.6



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Best Practices: Safety Assessments and Safety Planning

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

Look for fears around:

- Physical harm

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

- Emotional harm

- Identity-based harm*

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

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

Advisors

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

Minor students may bring both an advisor AND a parent.

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

2

FORMAL COMPLAINT

Title IX allows for the consolidation of cases

“A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.”

34 CFR Part 106.45(b)(4)



An investigation includes:

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

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

34 CFR § 106.45(b)(5)



Interview Skills

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

Helpful Questions

Open-Ended

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

Experience-Based

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

Clarification

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

Less Helpful Questions

Forced-Choice

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

Leading

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

Multiple/Compound

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

Closed-Ended

- “Were you alone?”

Opinion-Based

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

Why

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

Think about:

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

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

Evidence

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

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

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

3 INVESTIGATION

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

Best practice: create an investigative report template.

- Allegations
- Timeline
- Summary of interviews
- Summary of supporting evidence
- Credibility assessments
- Findings of fact

34 CFR § 106.45(b)(5)(vii)



Report-Writing

Reports should be:

- Neutral (e.g., “stated” versus “claimed”)
- Accessible
- De-identified (use “Complainant, Respondent, Witness 1” instead of names)

Consider including:

- Timeline
- Summaries of interviews (use quotes where possible)
- Evidentiary assessments

3

INVESTIGATION

Possible Investigation Timeline*

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

Day 3-6: Conduct interviews and collect evidence.

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

Day 17: Receive responses and finalize investigative report.

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

Day 28: Decision-making process starts.

Day 30: Determination of responsibility issued

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



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

Temporary Delays

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

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

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

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

34 CFR § 106.44(b)(1)(v)

Break for Questions

4

DECISION-MAKING

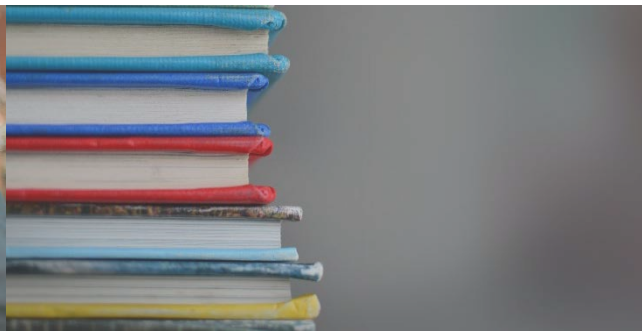
The decision-making process must include:

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

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

34 CFR § 106.45(b)(6)

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



“Modified Cross-Examination”

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

- What if a party or witness refuses to answer the question?

Exclude questions that:

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



Is this question relevant? Why or why not?

Oliver is in the school's coding club that meets at lunch; everyone has been practicing making websites, and a group of students in the club use their website to rank everyone in the class by how "slutty" or "virginal" they are. The website proclaims Oliver as the "top virgin," and includes a photoshopped picture of him made to look like he's naked, looking scared of a several nearby naked girls. Someone anonymously emailed it to everyone in the club during the last meeting, and now an anonymous number keeps texting the picture to Oliver multiple times a day.

During the hearing, one respondent submits this question for Oliver:

- "Isn't it true were telling people that you were scared of girls and having sex?"

Standards of Evidence

Preponderance of Evidence

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

Clear and Convincing

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



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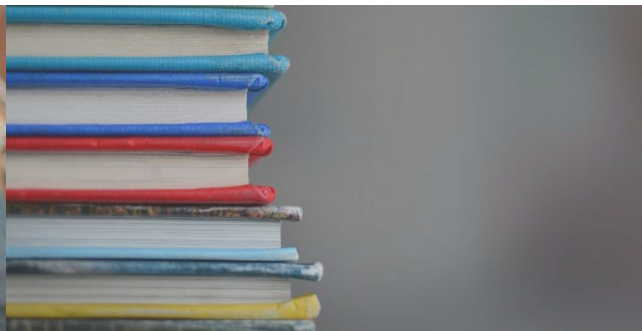
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DECISION-MAKING

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

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

34 CFR § 106.45(b)(7)



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

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

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

OREGON LAW INTERSECTION:

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

(8)



6

SANCTIONS AND REMEDIES

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

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

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

34 CFR § 106.45(b)(7)



Break for Questions



CONFLICTS OF INTEREST & BIAS

In this section...

- What is bias?
- Bias and sexual harassment/assault
- Addressing and preventing bias
- Identifying conflict of interest

What pops into your mind?

Peanut Butter

Macaroni

Cookies

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

Implicit Bias

0:06 / 2:26



Implicit Bias: Peanut Butter, Jelly and Racism

53,126 views • Apr 12, 2019

👍 214 💬 29 ➦ SHARE ≡+ SAVE ⋮



Confirmation Bias

the tendency to search for, interpret, favor, and recall information that confirms or supports one's prior beliefs or values

THE IMPACT OF HUMAN FACTORS ON CRIMINAL INVESTIGATIONS

Confirmation Bias

0:03 / 4:31



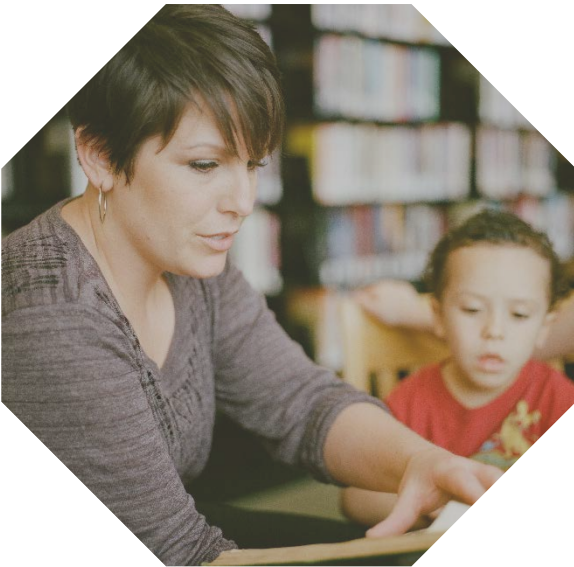
Confirmation Bias, Dr. Sherry Nakhaeizadeh

5,985 views • Nov 19, 2018

134 0 SHARE SAVE ...

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

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



The Impact of Bias: An Example

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



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

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



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



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

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

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

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

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

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

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



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



Break for Questions

How do I avoid bias in my
Title IX work?

Implicit bias affects us most when we have...

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



Type in the chat box:

What strategies might help mitigate bias and implicit bias in Title IX processes?

Strategies to Address Bias



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

Break for Questions

Conflict of Interest

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

-The People's Law Dictionary

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

-McCombs School of Business at University of Texas

Does this present a conflict of interest?

Your Title IX Coordinator also serves as gymnastics coach at the city gym. A student who the coordinator has coached for the past three years files a formal complaint of sexual harassment.

Does this present a conflict of interest?

One of your school board members, who serves as your decision-making panel, used to teach in the district and taught both the complainant and respondent several years ago in elementary school.

Does this present a conflict of interest?

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

Strategies to Address Conflict of Interest



- Develop a district-specific conflict of interest protocol (*consider integrating it into your Title IX policy*)
- Cross-train multiple individuals to account for potential conflict of interest
- Develop partnerships with nearby districts to share investigators and decision-makers when necessary
- ***What else?***

Break for Questions



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