



Title IX Sexual Harassment

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

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

About Us

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

*Data from October 2021

Who We Serve

560,907 Students

More than 200 languages spoken

75,807 Educators
Staff of Color

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

197 Districts

1,257 Schools

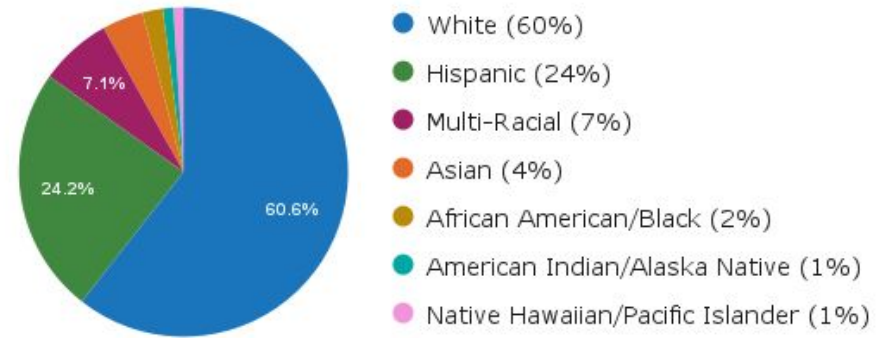
133 Charter Schools

19 Education Service Districts

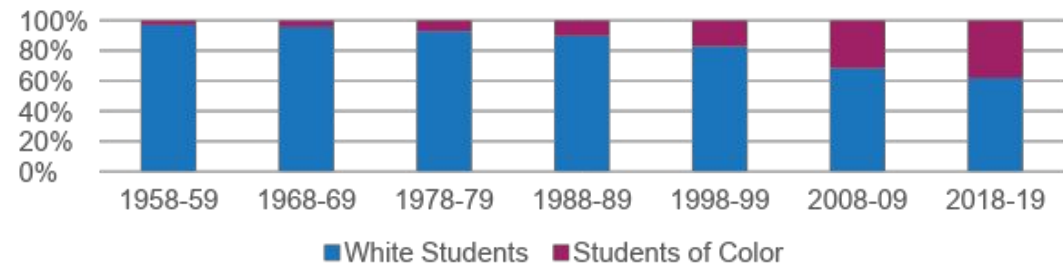
Oregon Department of Education, 2020-21 School Year

Student Diversity

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



Rapidly Diversifying Population



Agenda

- ★ Introduction to Title IX
- ★ Sexual Harassment Definitions & Dynamics
- ★ Intersecting Oregon Laws
- ★ Who's Who in Title IX Sexual Harassment
- ★ The 2020 Process: Response, Investigation, & Adjudication
- ★ Conflict of Interest & Bias in Investigations

Who's in the room?

What is your role at your school?

Chat Waterfall:

When you were a K12 student, what was your favorite thing about school?



The Groundwork: Introduction to Title IX



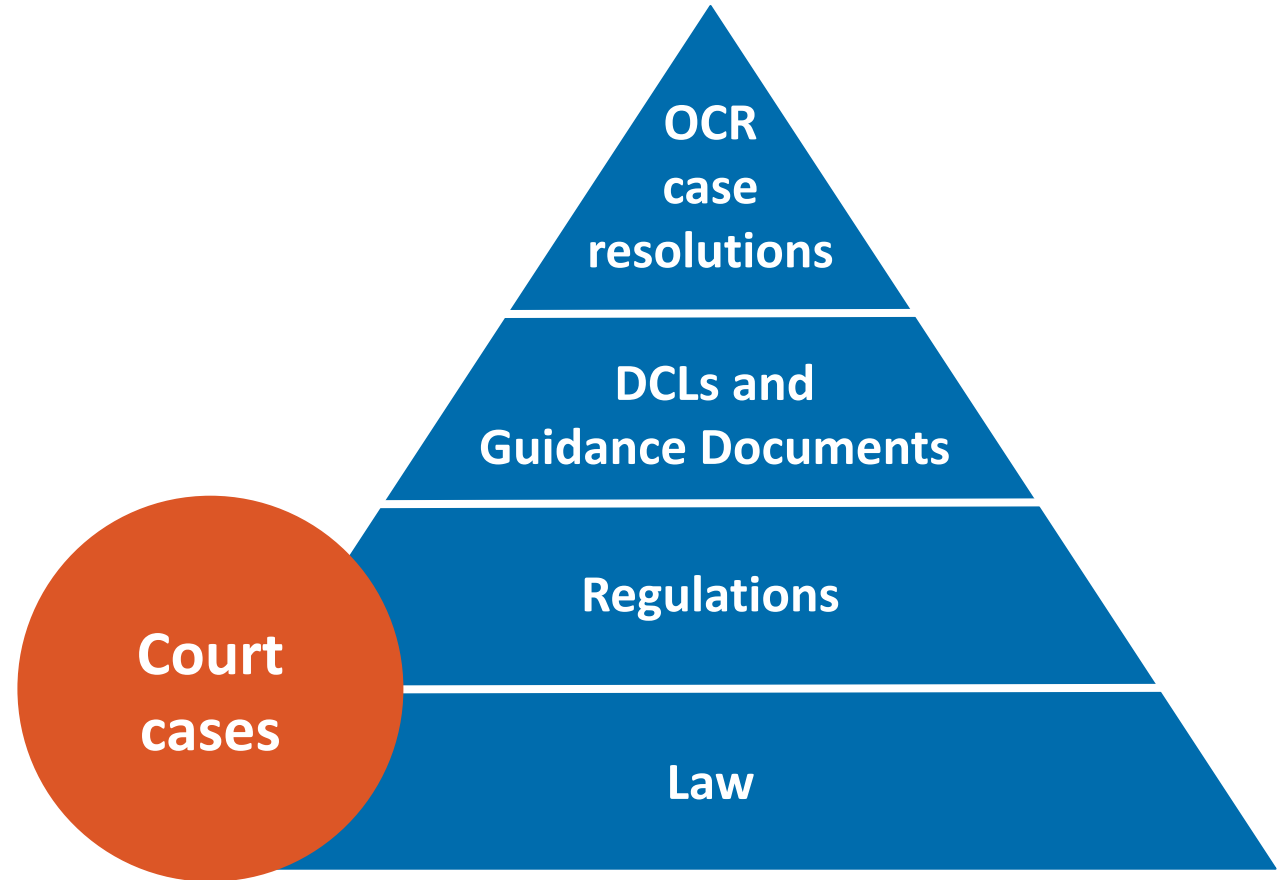
Title IX

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

Title IX is an evolving and living law!

Over the past 50 years, Title IX has changed.

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



Compliance

Schools and districts are responsible for complying with Title IX as a condition of their Federal funding.

All schools/districts must designate at least one employee to coordinate their compliance (Title IX Coordinator).



Key Areas of Title IX Compliance for K-12 Schools

- Title IX Coordinator(s)
- Your policies and procedures
 - Discrimination
 - Employment
 - Complaint processes
- Website
 - Nondiscrimination notice
 - Title IX contacts
- Recordkeeping
- Athletic equity
 - Policies
 - Funding
- Sexual harassment
 - Policies, procedures, and processes
 - Personnel
- Staff training
 - Reporting requirements

Title IX and sexual harassment

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

1980s

OCR releases a DCL and Q&A addressing sexual assault and the roles of schools

2011/2014

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

May 2020

1997/2001

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

2017

OCR revokes 2011 and 2014 guidance; announces intent to replace with regulations.



The 2020 Regulations: Highlights

What's new?

- Definition of sexual harassment
- Only applies to incidents that occur within the education programs/activities
- Multiple personnel; single investigator model no longer allowed
- Informal processes allowed (in some cases)
- Required notification documents
- Specific investigation process

What's the same?

- Students and employees entitled to an environment free of harassment
- When any K-12 employee becomes aware of sexual harassment, they must report it
- The school must respond to the harassment and, if substantiated, eliminate the hostile environment
- Supportive measures required

The 2020 Regulations: Key Terminology

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

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

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



Sexual Harassment: Definitions & Dynamics



Title IX Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

-34 CFR Part 106.30

Jurisdictional Requirements

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

Prong 1: quid pro quo



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

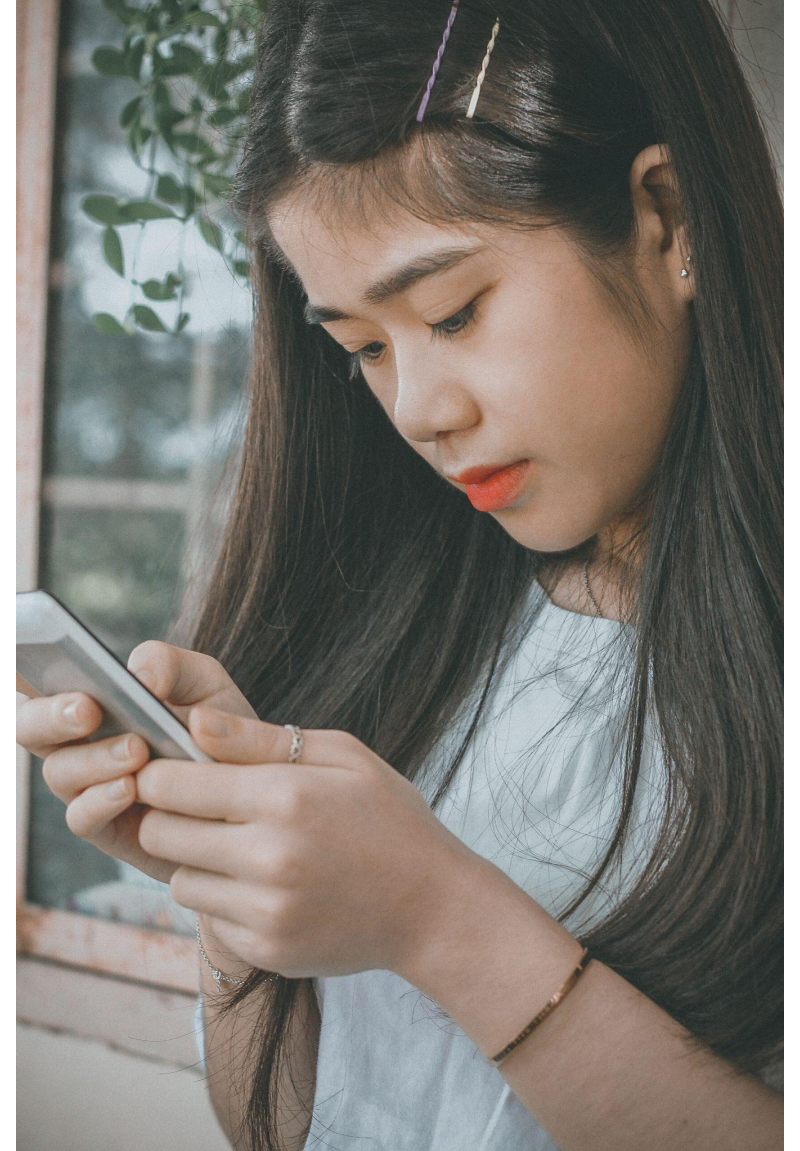
Prong 2: unwelcome conduct



- Conduct must be severe, pervasive, objectively offensive, **AND** must deny equal access to education
- Access denial can include: inability to focus/participate in class, avoiding professional development opportunities, quitting clubs or sports, skipping school, dropping out, etc.

Does this meet prong 2?

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



Prong 3: VAWA and Clery offenses



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



Domestic Violence

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

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



Dating Violence

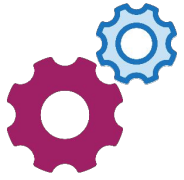
“The term “dating violence” means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of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

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

Partner Violence

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





Stalking

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

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

Stalking

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





Sexual Assault (selected definitions)

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

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

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

What is consent?

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

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

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

sexual assault includes when a person cannot consent because that person is:

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

Age of Consent in Oregon

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

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

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

Is there consent?

Abby missed a week of school when she had surgery for a broken leg, and is behind on studying for her finals. Jayden, her ex-boyfriend, offers to help her catch up. He says she can come to his house after school and he'll drive her home later. Jayden carries Abby downstairs to his basement rec room, since that's where they usually study. Jayden tries to flirt with Abby while they study, but she laughs and changes the subject.

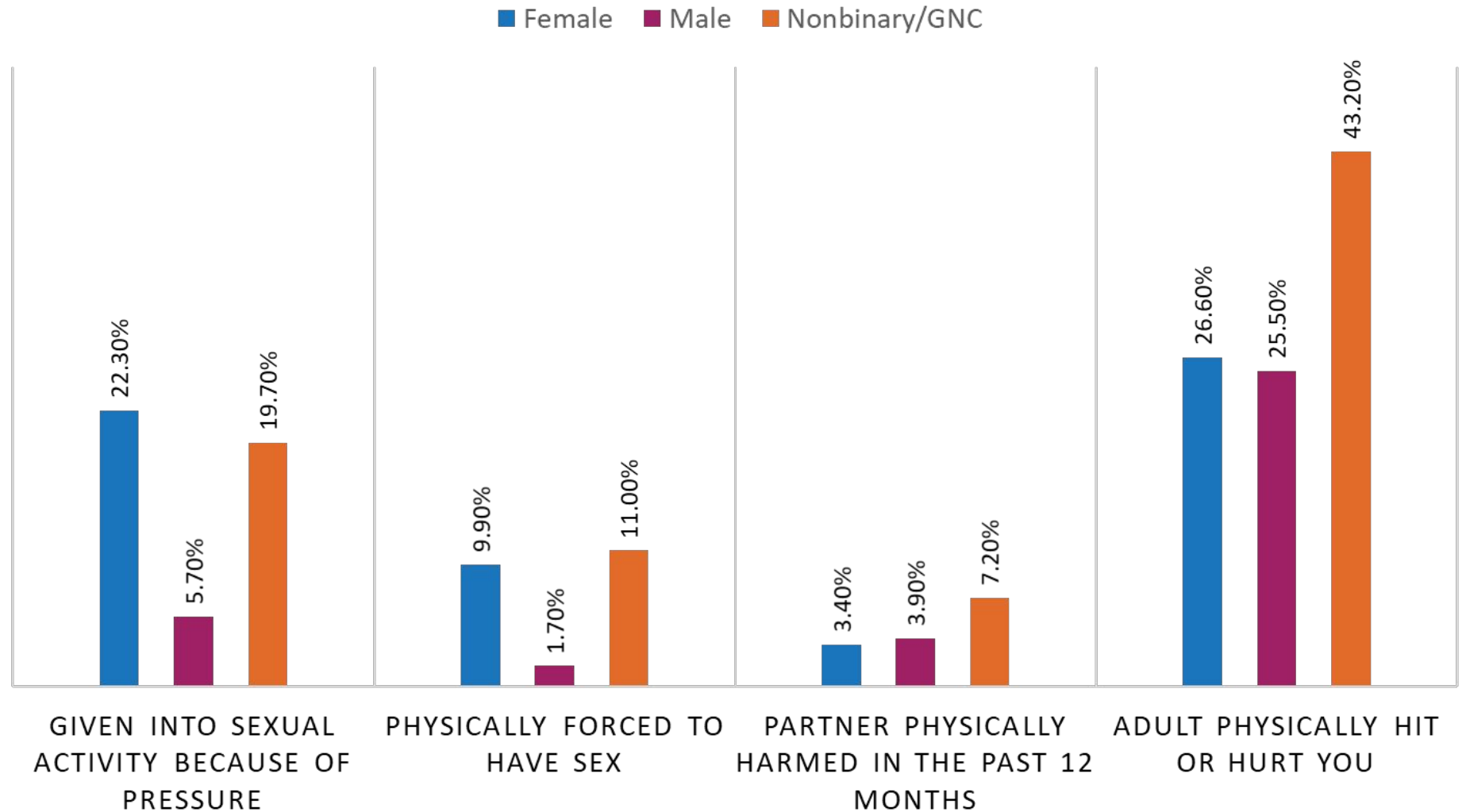
After a few hours, Abby says that she should probably get home. Jayden leans in to kiss her. Abby doesn't pull away, but stays very still and doesn't kiss him back. He tells her he misses her and wants her back. She says "I should really get home." He begs her to stay for just a bit longer, and starts kissing her again. Abby kisses him back this time, but still says "I REALLY need to go." Jayden asks if they can just hook up one last time. Abby says "umm... I think I shouldn't with my leg and all..." as Jayden pulls off his shirt and leans over onto Abby. Abby says "but I can go home right after this, right?"



In your breakout rooms, discuss...

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

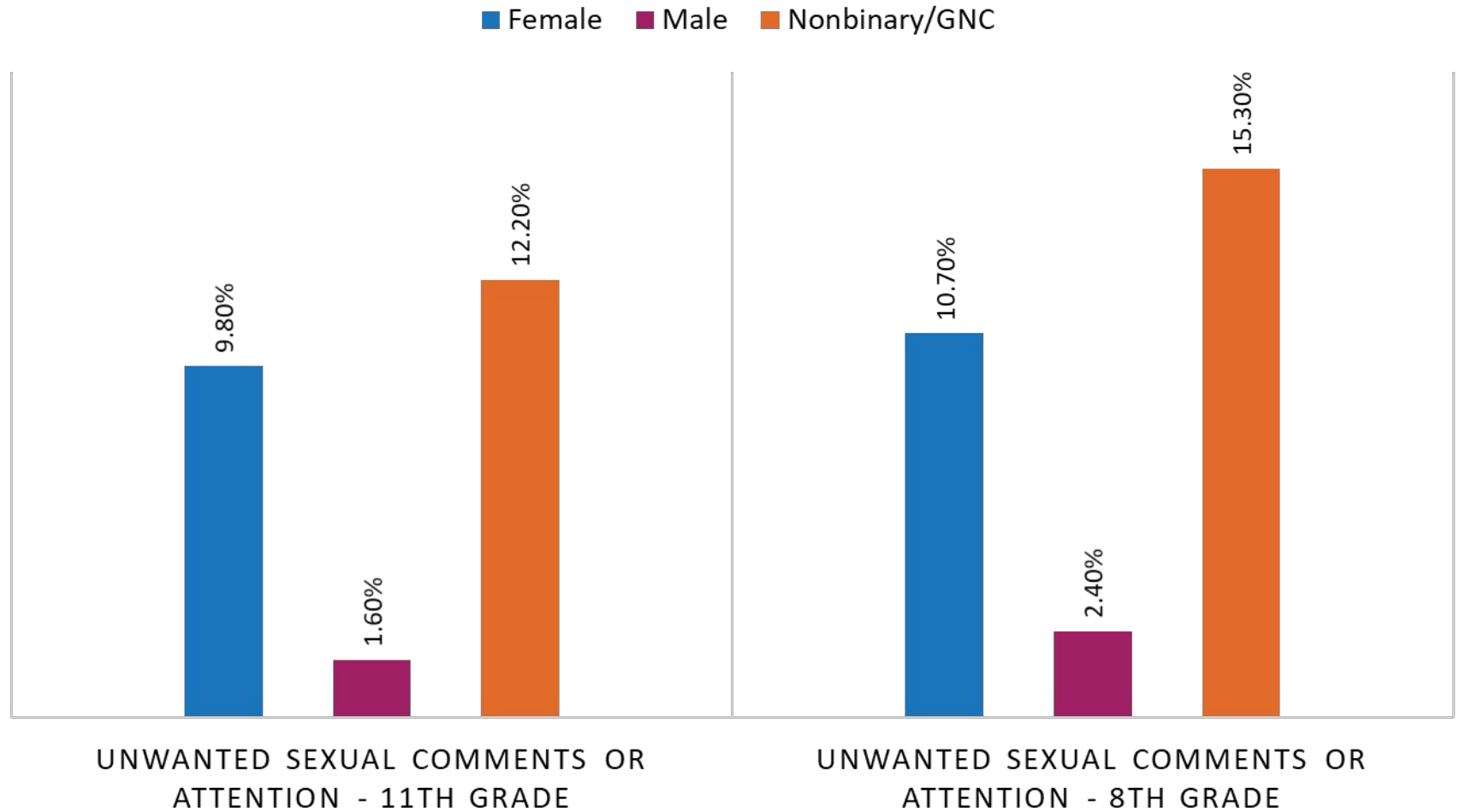
Oregon 11th graders report:



Oregon Healthy Teens Survey, 2019; 11th grade data, violence

<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/11th/Violence11.pdf>

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



Oregon Healthy Teens Survey, 2019; 11th grade data, bullying,

<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/11th/Bully11.pdf>

Oregon Healthy Teens Survey, 2019; 8^h grade data, bullying

<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2019/Gender/8th/Bully8.pdf>

Experiences and reporting

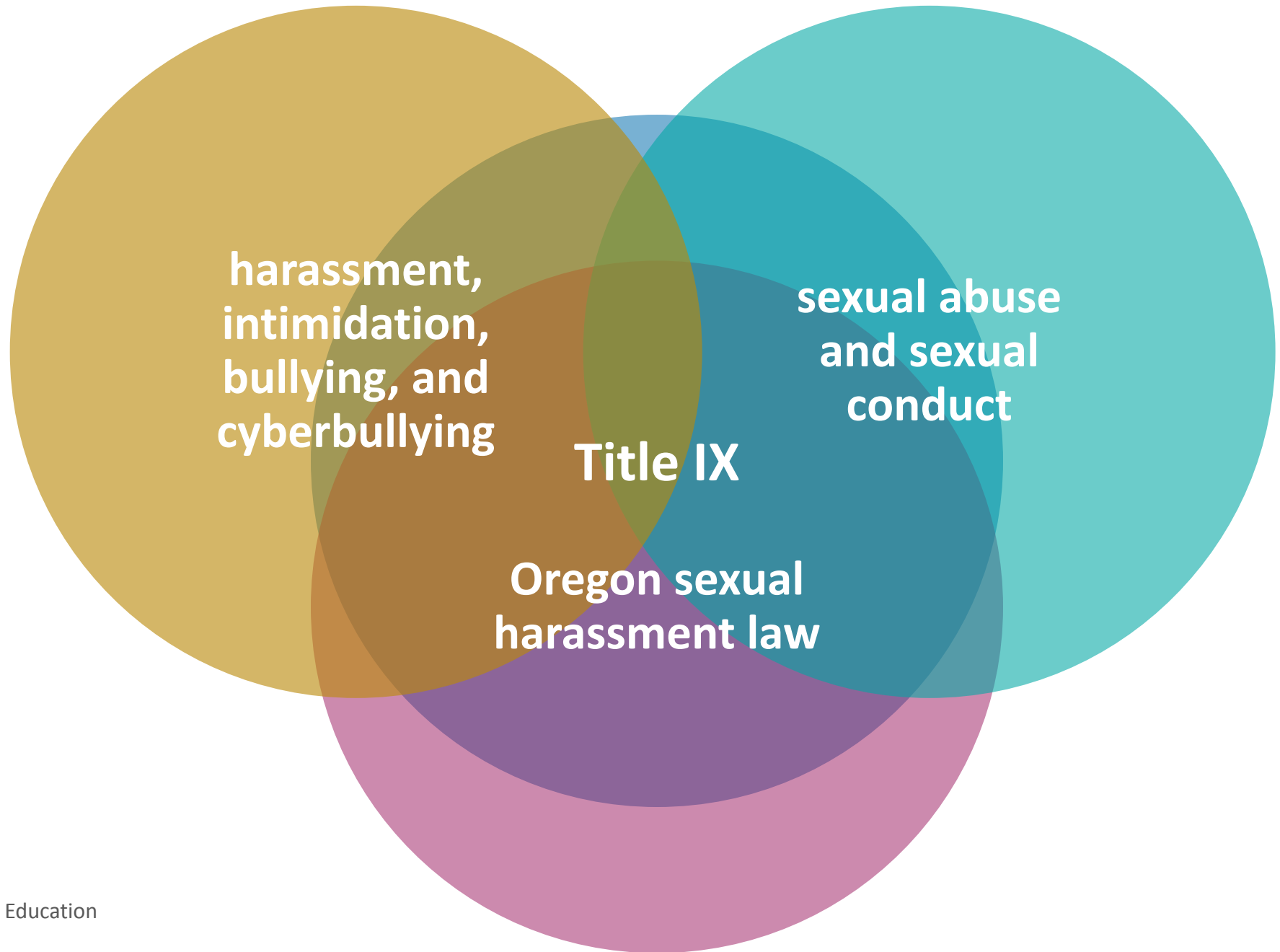
In 2017-2018, Oregon schools reported **1,653** instances of bullying and harassment based on sex and **14** instances of sexual assault in OCR's Civil Rights Data Collection.

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

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



Intersecting Oregon Laws



Oregon Sexual Harassment Law

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

These policies must include:

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

Title IX Sexual Harassment

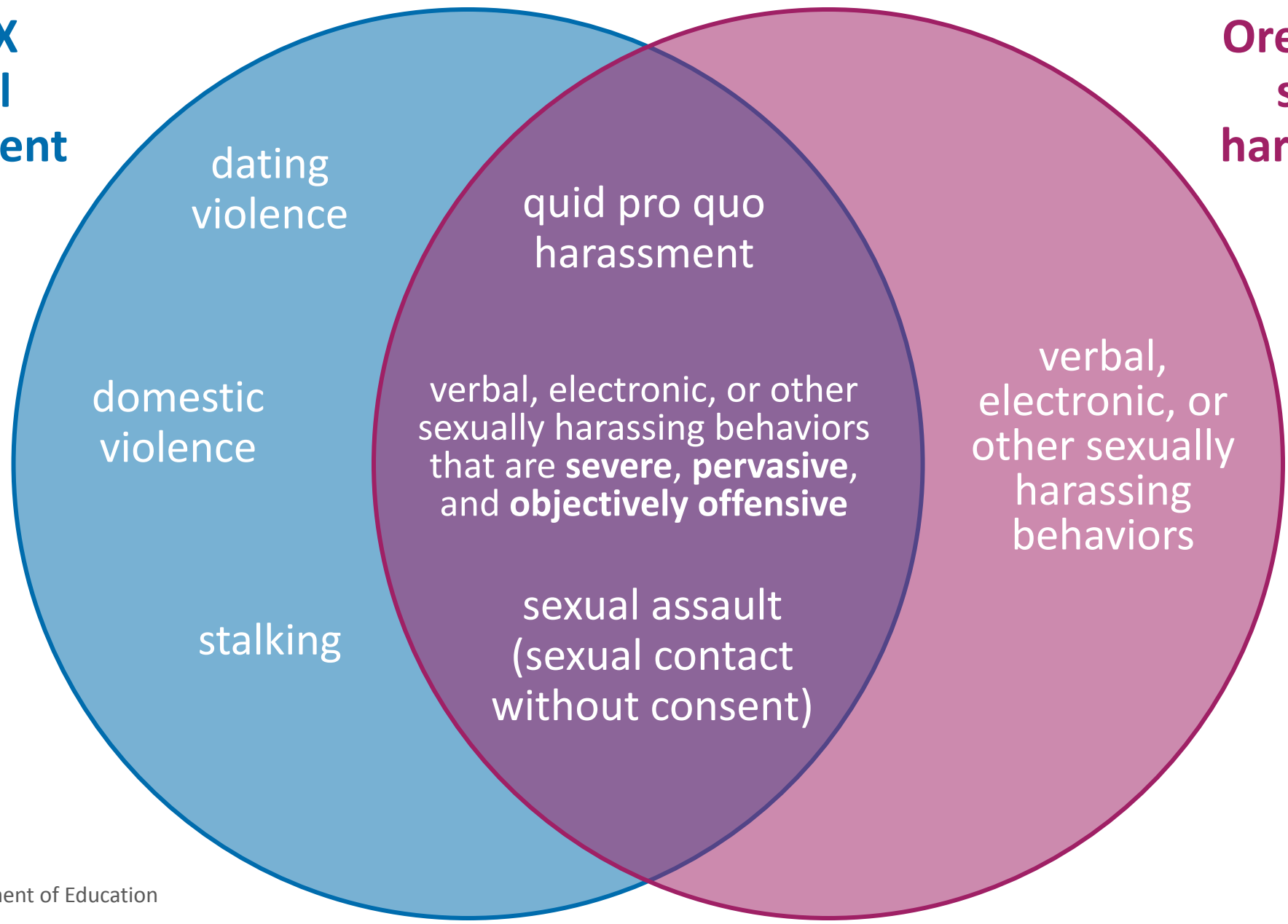
- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Oregon Sexual Harassment Law

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

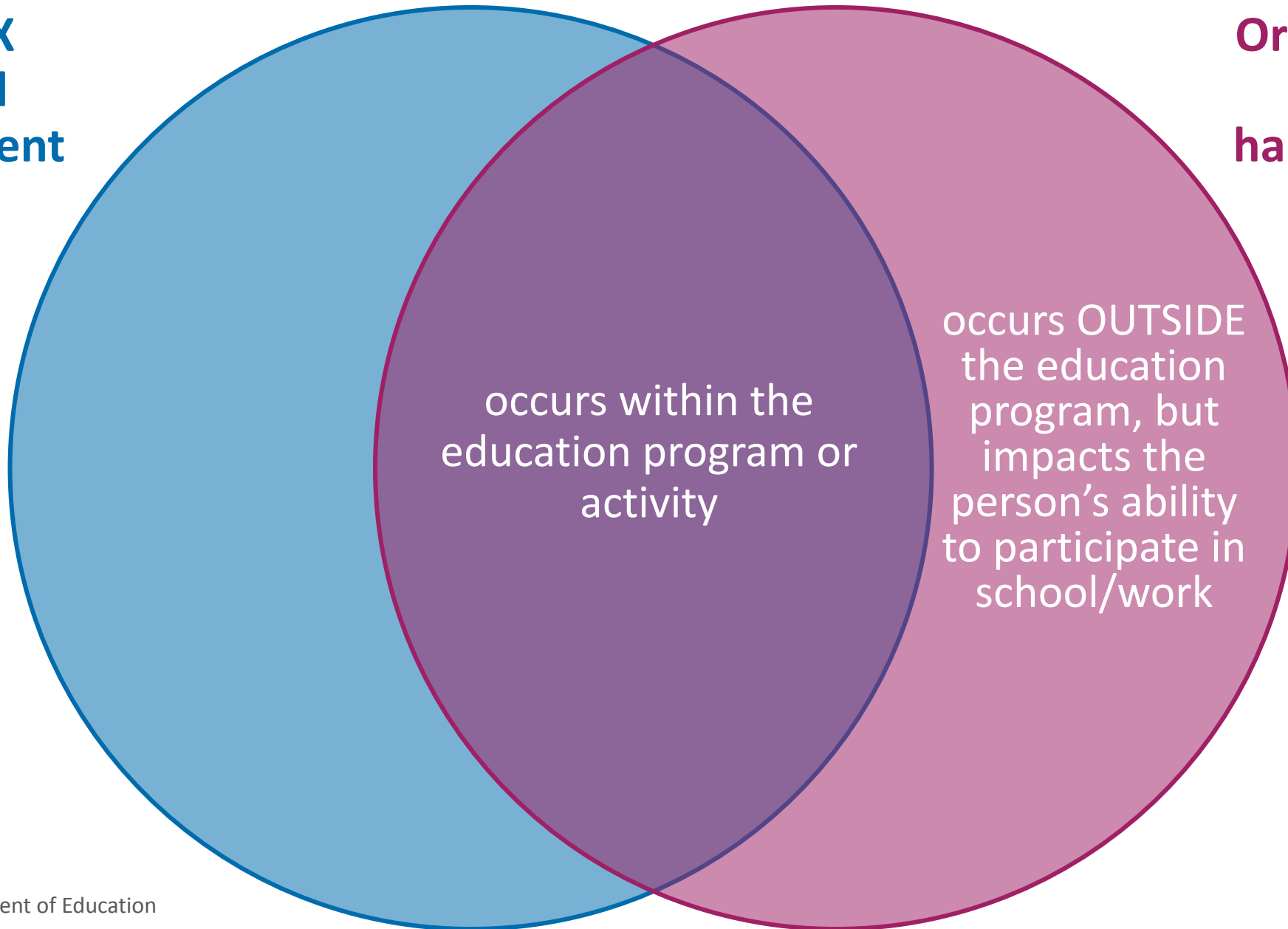
**Title IX
sexual
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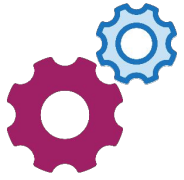
**Oregon law
sexual
harassment**



**Title IX
sexual
harassment**

**Oregon law
sexual
harassment**





Sexual Abuse

- Rape or sexual assault
- Sexual abuse, including sexual contact without a person's consent
- Sexual exploitation, including:
 - Filming, photographing, or exhibiting a child performing sexual contact or conduct
 - Sex trafficking, including permitting or encouraging a child to engage in a commercial sex act or purchasing sex with a minor

ORS 419B.005 and ORS 163.415-427; consent defined at ORS 163.315-345



Sexual Conduct

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

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

ORS 339.370

Sexual Conduct and Sexual Abuse



Oregon Department of Education

- Sexual abuse and sexual conduct must be reported to law enforcement, DHS, TSPC, and/or ODE (depending on conduct and licensure status).
- If the reported behavior is sexual conduct or abuse AND Title IX sexual harassment, the processes must be overlaid.

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



Harassment, Intimidation, and Bullying

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

“Harassment, intimidation, or bullying” means any act that:

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

ORS 339.351

Harassment, Intimidation, Bullying, and Cyberbullying

Schools are required to adopt policies that:

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

HB 2631: Parental Notification



- Requires parent/guardian notification if a student experiences or commits bullying, cyberbullying, harassment, or intimidation, with an opt-out option.
- Notification must occur:
 - Promptly for physical acts, or
 - Within a reasonable time period
- Prior to notification, the school must inform the student that they are notifying the parent/guardian.

HB 2631: Parental Notification



Oregon Department of Education

Notification is not required if:

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

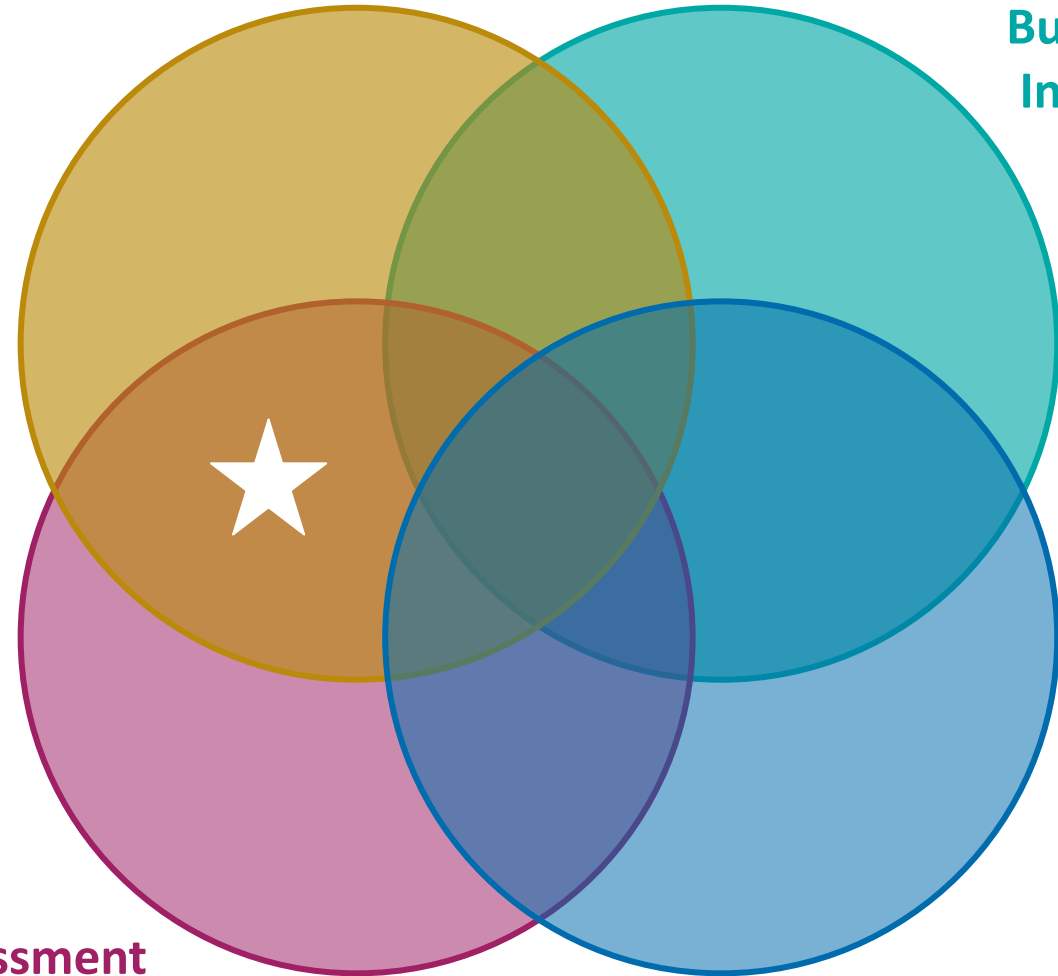
Schools must still notify students that their parents/guardians may become aware of the incident through accessing their educational records.

Which policies apply?

**Sexual
Conduct**

**Harassment,
Bullying, and
Intimidation**

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



**Oregon
Sexual Harassment**

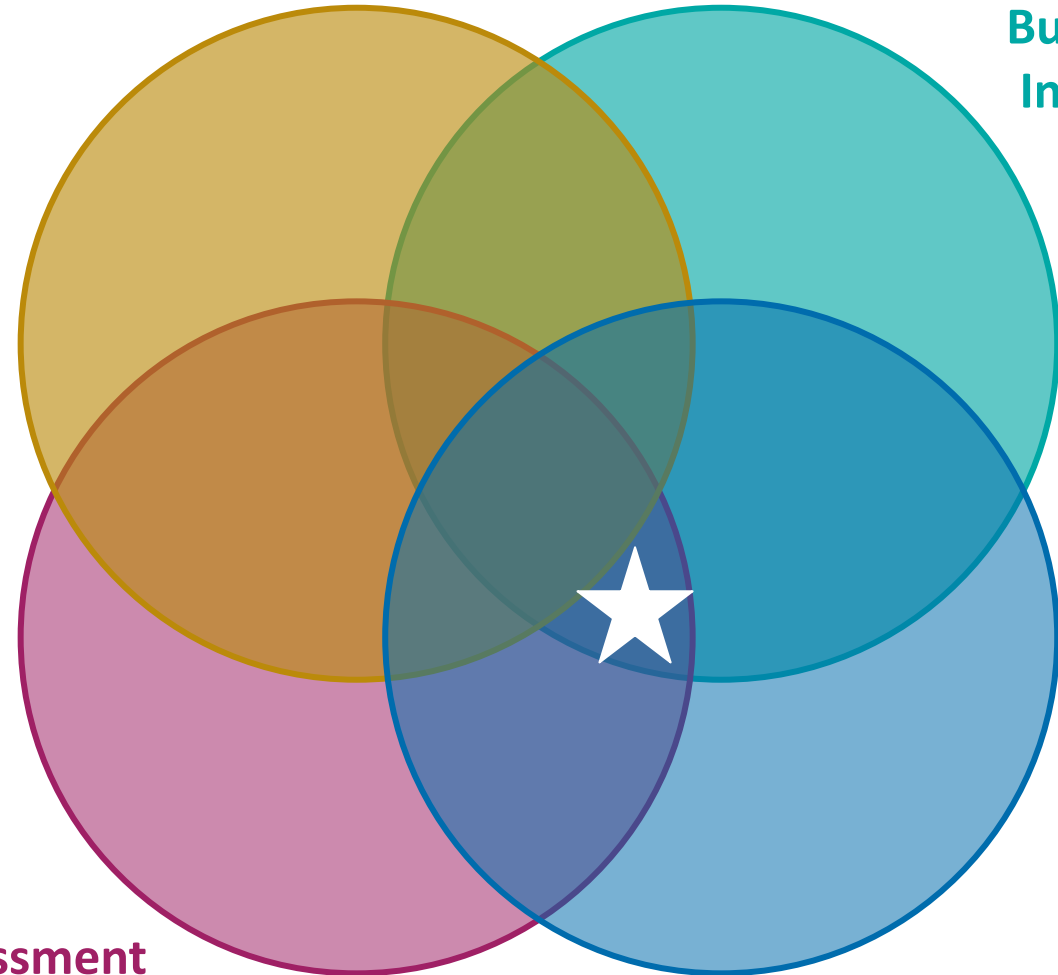
Title IX

Which policies apply?

For the past week, several students have been taking pictures of Student A while he walks down the hallway and posting them online with comments about his butt and physique. Student A has been late to class several times because he tries to avoid these students in the hallways between classes.

**Sexual
Conduct**

**Harassment,
Bullying, and
Intimidation**



**Oregon
Sexual Harassment**

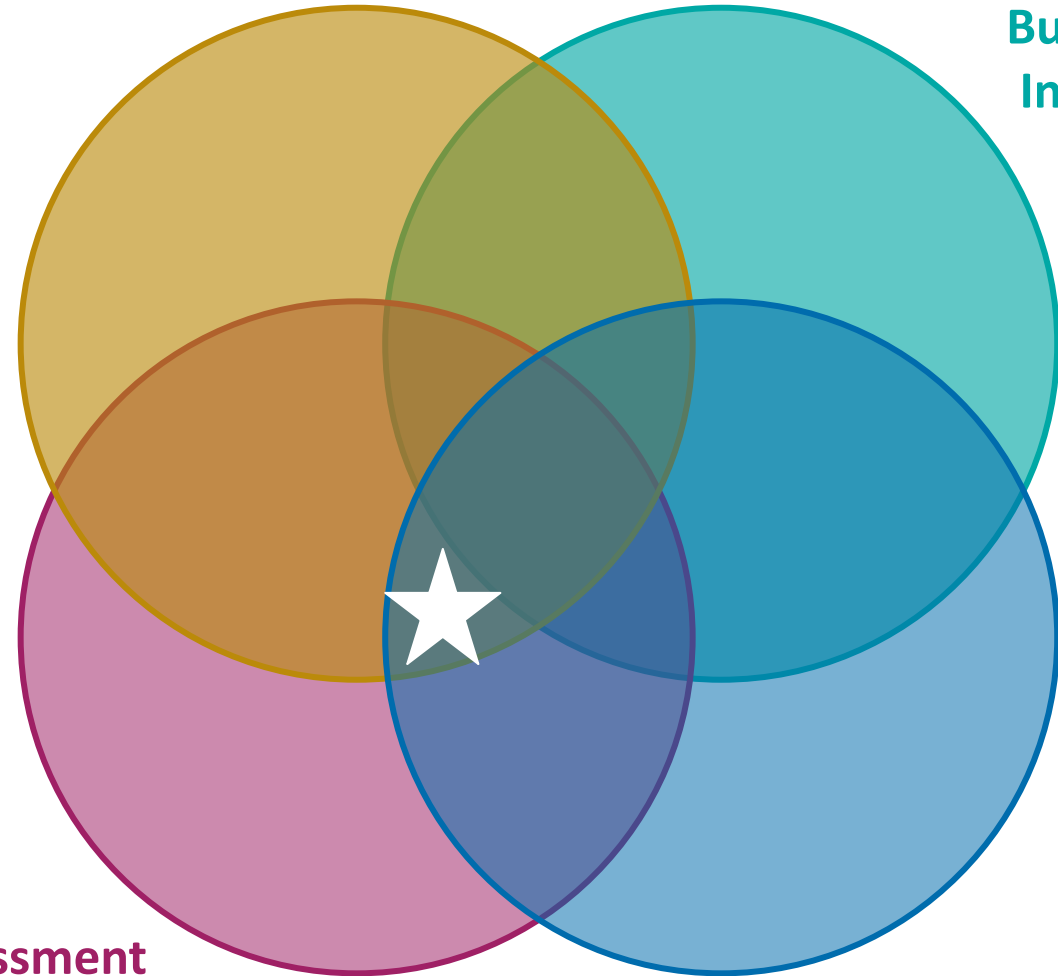
Title IX

Definitional Overlap

A coach suggests that Student A might be able to get off athletic probation if they volunteer after school to model for photographs of new swim uniforms.

**Sexual
Conduct**

**Harassment,
Bullying, and
Intimidation**



**Oregon
Sexual Harassment**

Title IX

Remember...

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



Who's Who in Title IX Sexual Harassment

Schools are required to designate, at minimum:

Title IX Coordinator

Investigator

Decision-Maker

Appeals Decision-Maker

The Title IX Coordinator may also serve as the Investigator.

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

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

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

Investigator



Investigates sexual harassment allegations

- Interviews complainants, respondents, and witnesses
- Collects and analyzes evidence

Writes investigative report

Keeps track of necessary records (given to Title IX Coordinator at the conclusion)

Schools may designate one investigator for each case, or multiple (dual-investigator model).

Decision-Maker



Conducts hearing process, if applicable
Facilitates “modified cross-examination”
process

Determines if each allegation can be
substantiated

Writes determination of responsibility

Schools may designate one decision-maker
for each case, or a panel of decision-makers.

The decision-maker cannot be the Title IX
Coordinator under any circumstances.

Appeals Decision-Maker



Facilitates appeals process

Based on a review of the documents, evidence, and any new documents/evidence that resulted in the appeal, may:

- Either alter or affirms the findings in the determination of responsibility
- Either alter or affirm the sanctions or remedies offered to the parties
-

Schools may designate one appeals decision-maker for each case, or a panel.

The appeals decision-maker cannot be the Title IX Coordinator under any circumstances.

Advisor



- Complainants and respondents must be allowed to bring an “advisor of choice” with them to all meetings, interviews, etc. as a support and advisor.
- Schools may not restrict who the advisor of choice can be.
- Schools “may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”

Who else?



Informal Process Facilitator

If a school offers an informal process, a trained facilitator must be designated to oversee that process.

Parents

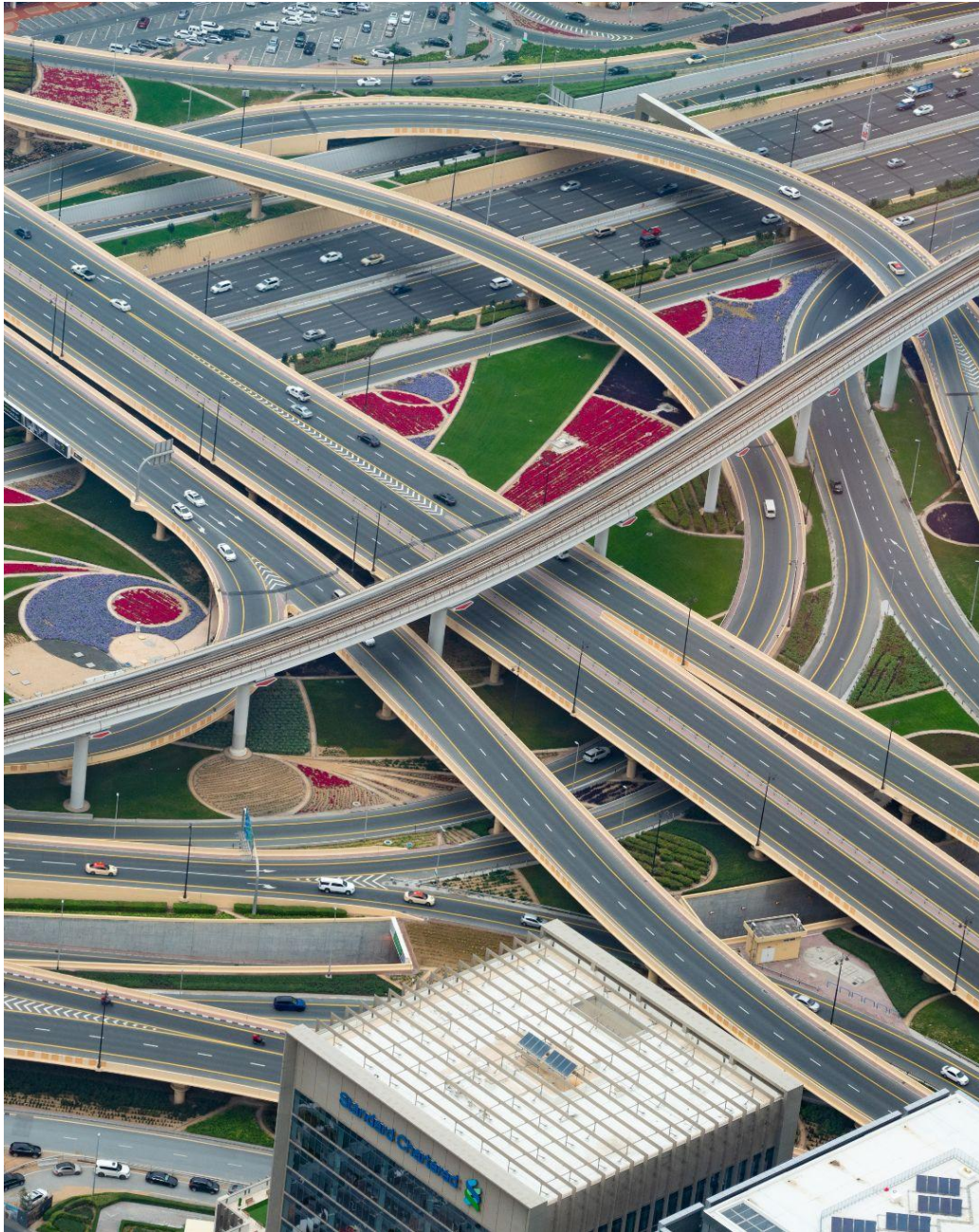
The 2020 regulations state that parents/guardians may act on behalf of their children for the purposes of Title IX if they otherwise have a legal right to do so.

Training Requirements

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



The 2020 Process: Response, Investigation, & Adjudication



1

Actual Notice and Supportive Measures

2

Formal Complaint

3

Investigation

4

Decision-Making

5

Appeals

6

Sanctions and Remedies

7

Wrap-up and Compliance

Who's Involved?

	Actual Notice and Supportive Measures	Formal Complaint	Investigation	Decision- Making	Appeals	Sanctions and Remedies
Title IX Coordinator	X	X				X
Investigator			X			
Decision-Maker				X		X
Appeals Decision-Maker					X	X



Actual Notice and Supportive Measures

Whenever any school employee has knowledge of possible sexual harassment, the school is “on notice” and must respond:

- outreach to complainant
- provision of supportive measures
- can engage in emergency removal

Who is involved?

- Title IX Coordinator, Complainant

Overlap your Oregon-specific processes:

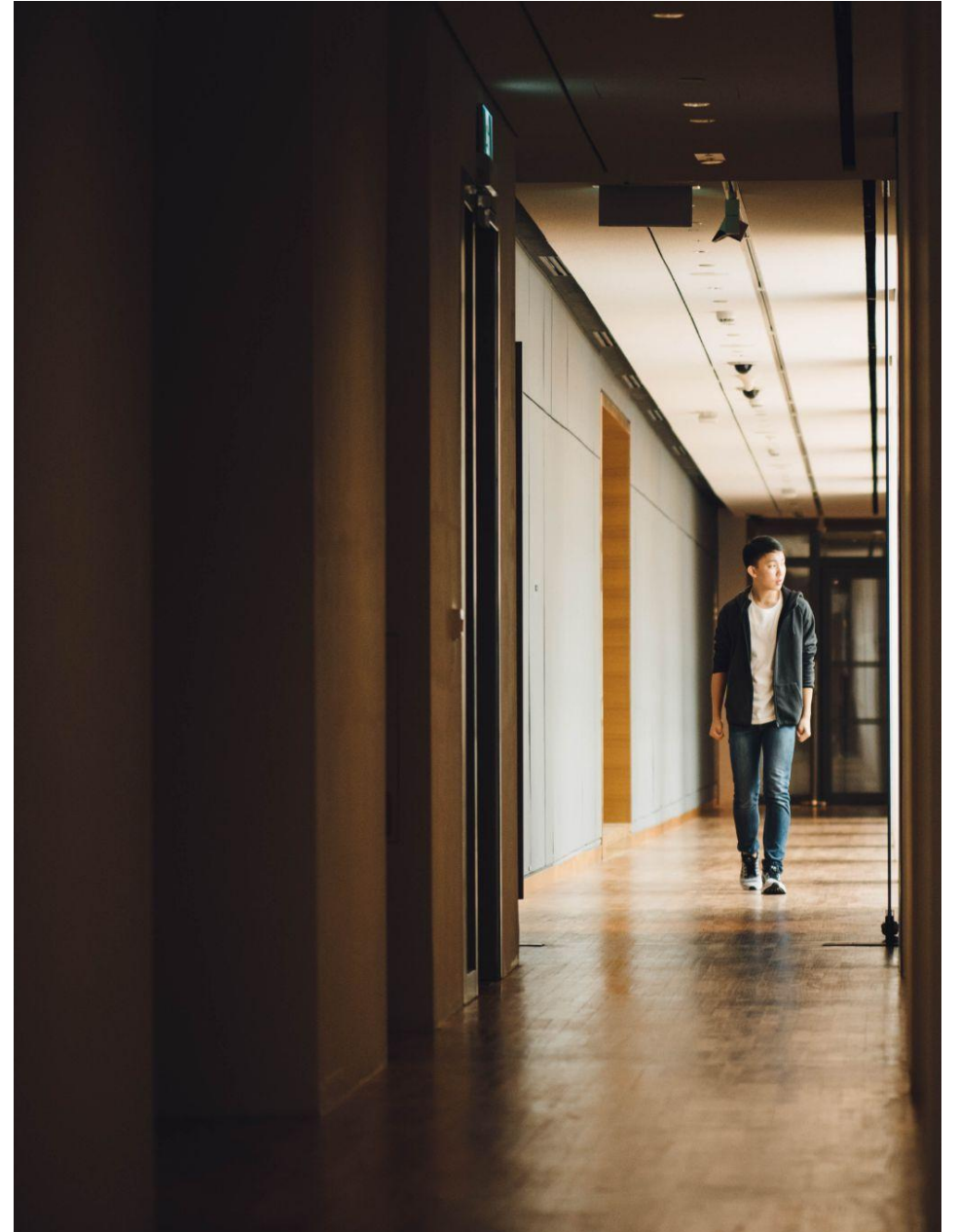
- mandatory reporting
- Oregon sexual harassment law “notification of rights and options”
- bullying and harassment parental notification

Actual knowledge to a K-12 school includes notice of possible sexual harassment 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

34 CFR § 106.30(a)



Harassment, Intimidation, Bullying, and Cyberbullying Parental Notification

- Parental notification is required “promptly” for physical acts and “within a reasonable period of time” for other acts.
- Must notify the parents of the student who was bullied and the student accused of engaging in bullying.
- Prior to notification, the school must inform the student that they are notifying the parent/guardian
- Notification is NOT required if:
 - The staff member believes notification would endanger the student, or
 - The student requests no notification AND the staff member believes notification is not in the best interest of the student AND the staff member informs the student about FERPA (and other) parental information rights.



Best Practices: Safety Planning

“Typically in situations like this, we call 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 (e.g., LGBTQ+ students)

Make a safety plan with the student. Refer them to a supportive adult.
Document the response and plan.



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

Supportive measures means non-disciplinary, non-punitive *individualized services offered as appropriate, as reasonably available, and without fee or charge* to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Such measures are designed to *restore or preserve equal access* to the recipient's education program or activity *without unreasonably burdening the other party*, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

34 CFR § 106.30(a)



Examples of supportive measures

- No-contact directives
- Changing class, work, or other schedules
- Academic accommodations, including extensions, academic rehabilitation, etc.
- Policy/procedural accommodations, such as waiving or modifying specific requirements (school transfers, absence policies, etc)
- Increased monitoring and safety measures
- Privacy measures (keeping additional information confidential)
- Transportation accommodations



Emergency Removal (Student)

Emergency removal of a student is allowed if:

- an individualized risk analysis determines there is risk to the ***physical health or safety*** of an individual or the school community
- the respondent is provided with immediate notice and opportunity to challenge the removal
- the school continues to comply with IDEA, Section 504, and the ADA with respect to the student being removed and (and all other obligations)

34 CFR § 106.44(c)



Formal Complaint

Once a formal complaint has been filed, the Title IX grievance process begins.

- Schools must issue a **Notice of Allegations**
- Participants now have the option to opt into an informal process
- Schools may put employees on administrative leave

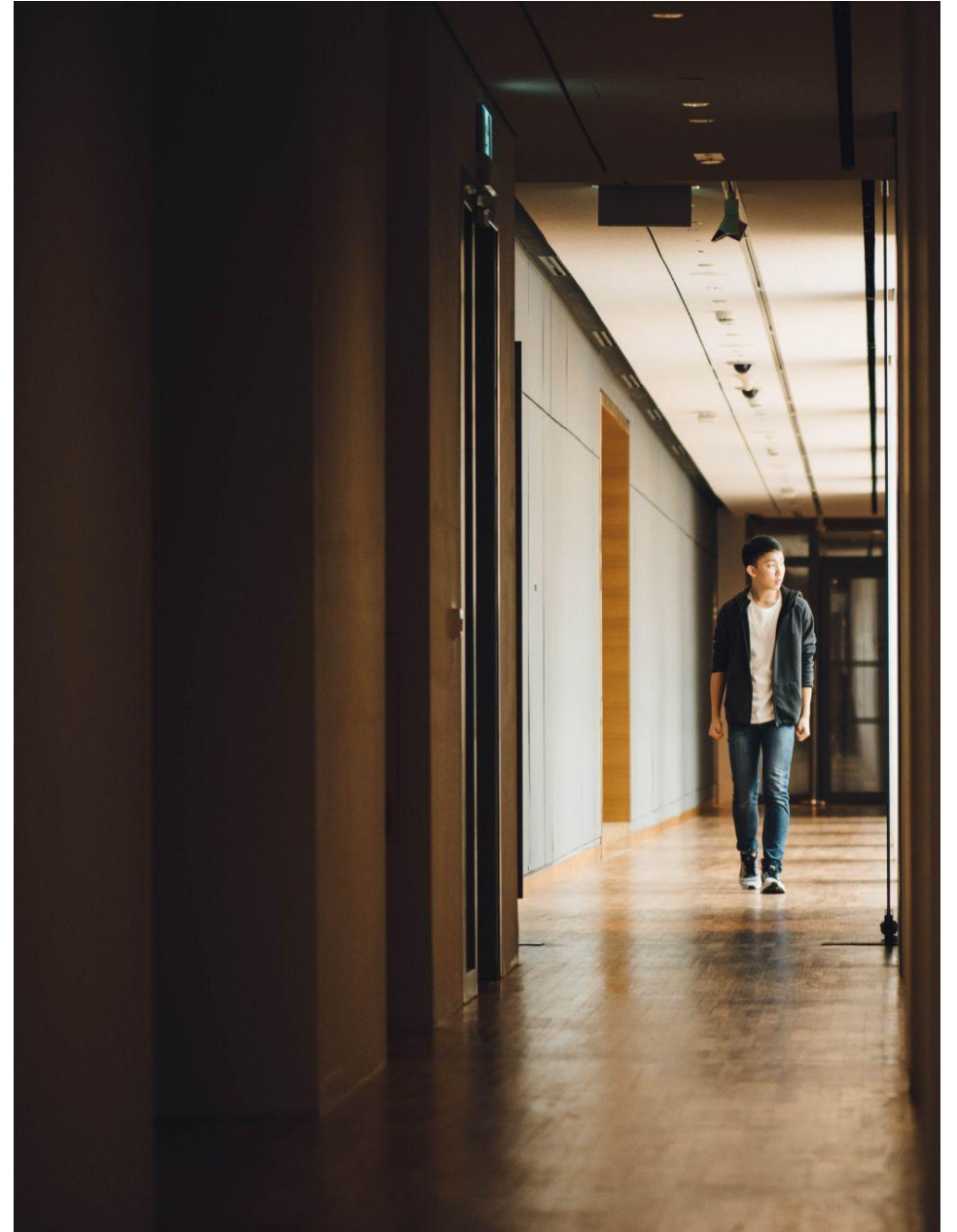
Who is involved?

- Title IX Coordinator, Complainant, Respondent, Advisors

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

At the time of filing a formal complaint, a complainant must be ***participating in or attempting to participate in*** the education program or activity of the recipient with which the formal complaint is filed.

34 CFR § 106.30(a)



“Education 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



2021 Questions & Answers, OCR

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.”

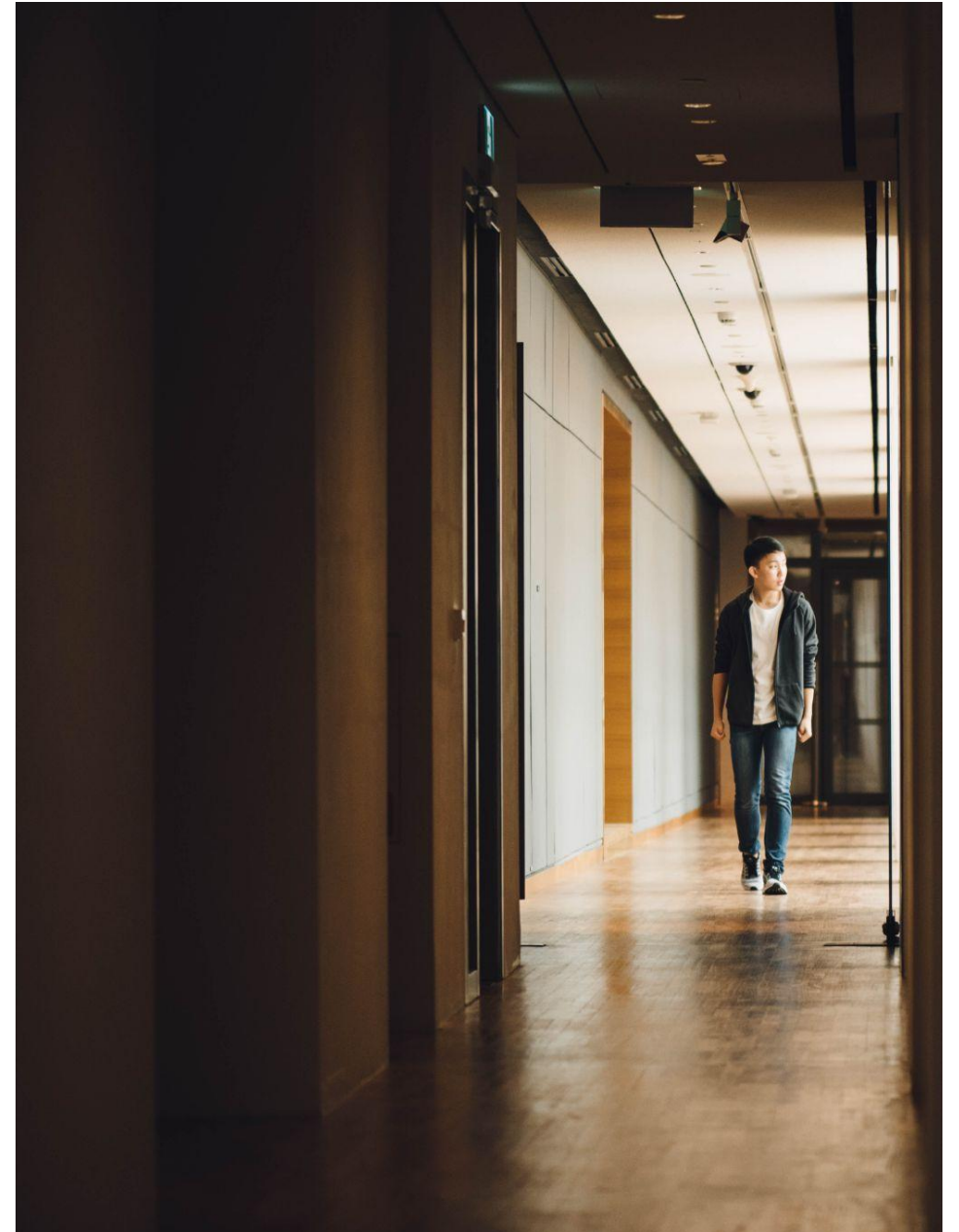
MUST dismiss under Title IX if:

- 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

MAY dismiss under Title IX if:

- complainant asks to withdraw the complaint
- the respondent is no longer enrolled or employed by the recipient
- “specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein

34 CFR § 106.45(b)(3)





Notice of Allegations

- Information about the grievance process, including any informal resolution processes if available
- Allegations including: identity of parties, conduct, date, location,
- Presumption of non-responsibility for respondent and that determination is made at the conclusion of the process
- Right to an advisor
- That they may inspect any submitted evidence that relates to the allegations
- Any prohibitions on submitting false information within the school's student code of conduct

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

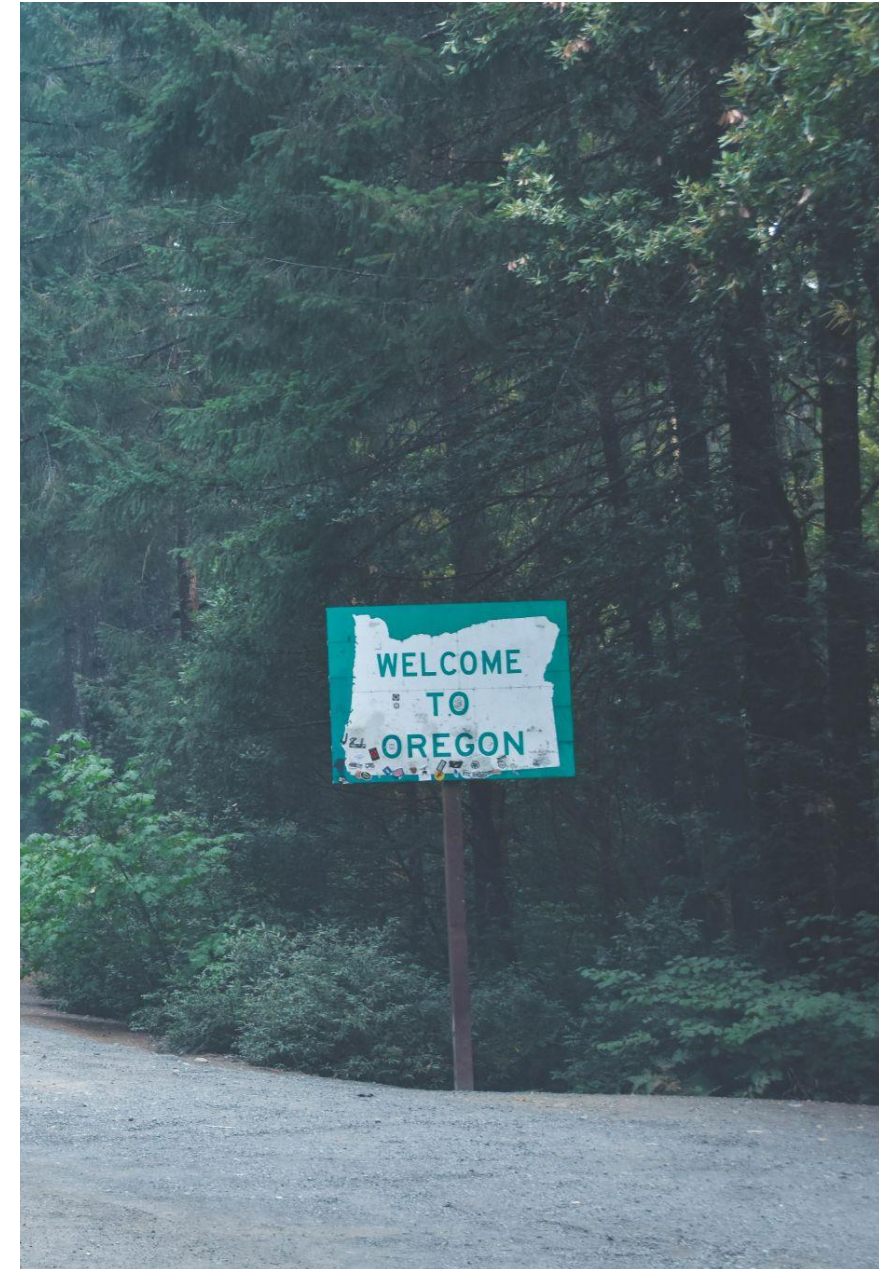
34 CFR Part 106.45(b)(2)

ORS 339.356 (2)(m) - Bullying/Harassment

A statement of the *consequences and appropriate remedial action for a person found to have falsely accused another* of having committed an act of harassment, intimidation or bullying or an act of cyberbullying as a means of reprisal or retaliation, as a means of harassment, intimidation or bullying or as a means of cyberbullying.

OAR 581-021-0038(5)(h) - Oregon Sexual Harassment

...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.



Informal Resolution

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

- Formal complaint must be filed
- Notice of Allegations must be issued, which must include informal process information
- Both parties must submit written consent
- Identify and describe conditions under which parties can/cannot opt back into formal process, and must allow them to opt back into the formal grievance process prior to the parties agreeing upon a resolution.

34 CFR § 106.45(b)(9)

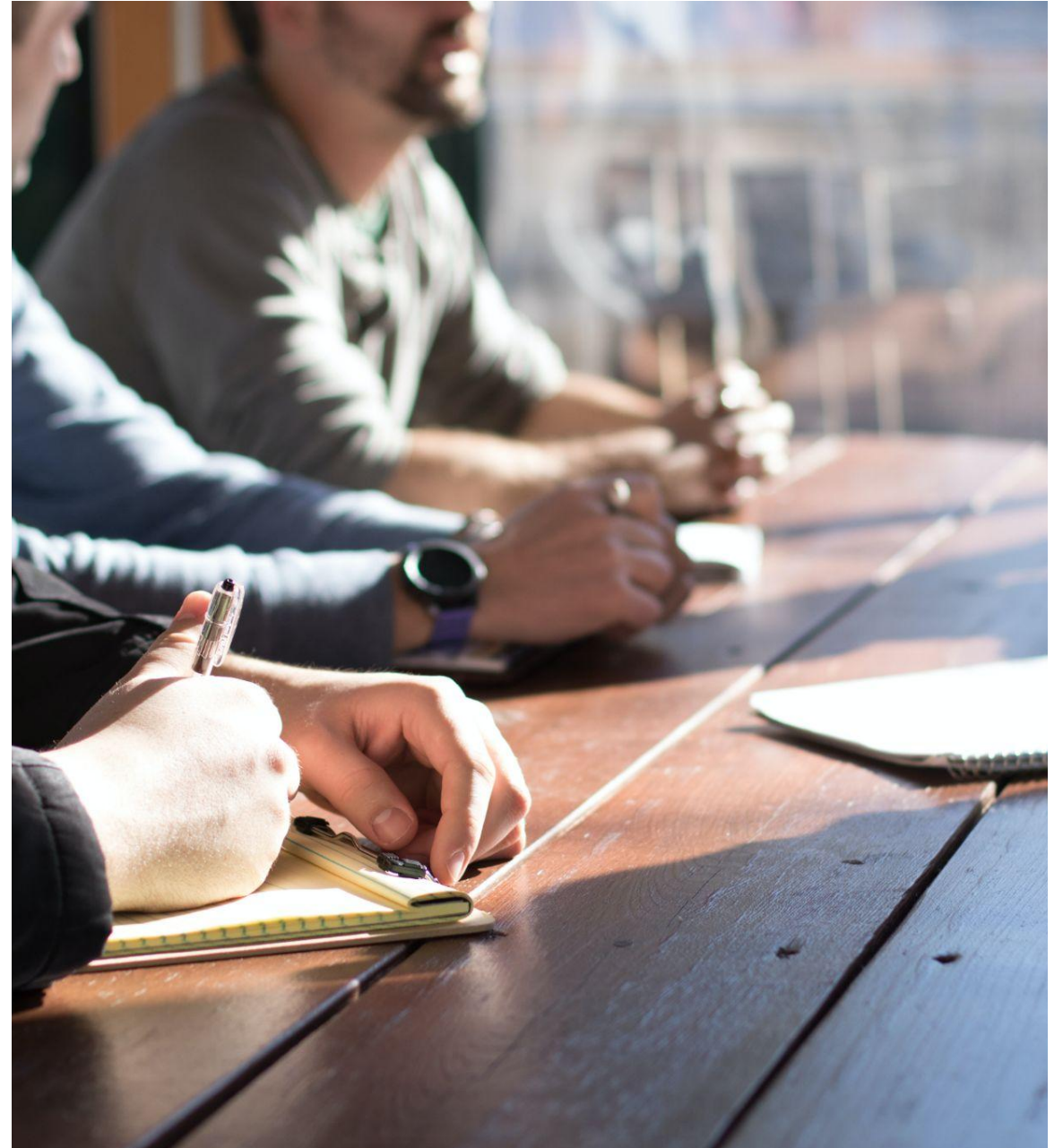
Advisors

Parties have a right to bring an advisor to any interviews, hearings, or meetings. Schools may not set limits on **who** can serve as an advisor.

Minor students may bring both an advisor AND a parent.

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

34 CFR § 106.45(b)(2)(1)(B) and 106.45(b)(5)



Emergency Leave (Staff)

Schools may place a staff member on paid or unpaid leave if:

- the Title IX grievance process is being conducted and is pending
- the school continues to comply with Section 504 and the ADA with respect to the staff member being put on leave and (and all other obligations)

34 CFR § 106.44(d)



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

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

Does this meet the definition of sexual harassment under Title IX? What are your next steps?

3

Investigation

Investigating the allegations of sexual harassment under Title IX involves:

- Interviewing parties
- Gathering and reviewing evidence
- Writing and Issuing the **Investigation Report**

Who is involved?

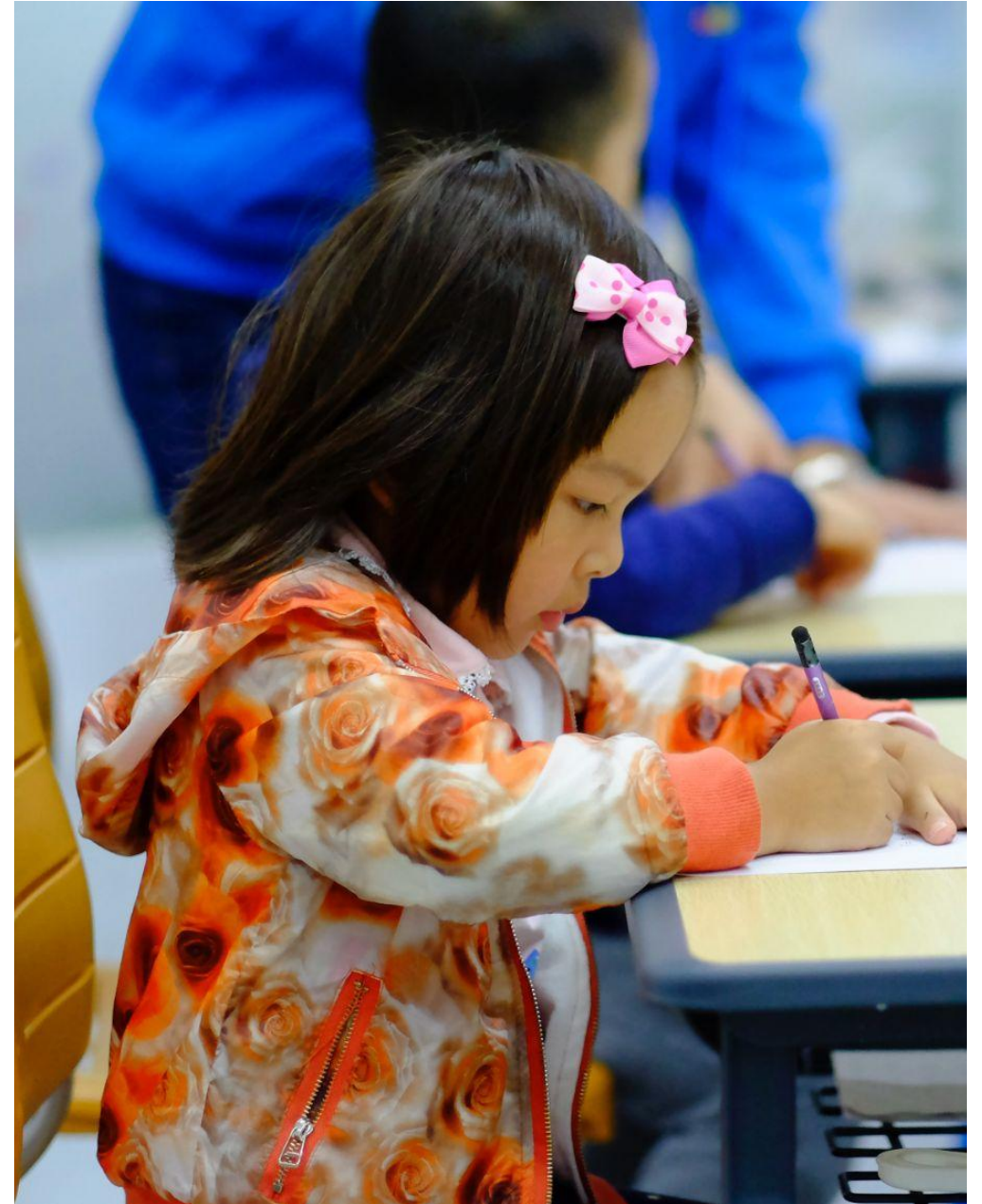
- Investigator, Complainant, Respondent, Advisors, Witnesses, possibly the Title IX Coordinator

The burden of conducting the investigation must be on the school, not the complainant or respondent.

Parties must be provided an equal opportunity to present witnesses and evidence.

The complainant and respondent cannot be restricted from discussing the investigation, or from gathering and presenting witnesses and evidence.

34 CFR § 106.45(b)(5)



Conducting Interviews

Parties must be given written notice of the date, time, location, participants, and purpose of any interviews with sufficient time to prepare.

34 CFR § 106.45(b)(5)

Suggested tips:

- Prepare a standardized list of introductory (and closing) information/ground rules to go over at the beginning of every interview.
- Prepare for who will be in the room (advisors, parents, etc.)
- Gather any preliminary information you have access to
- Prepare a list of interview questions ahead of time (but be prepared to be flexible!)
- Take breaks as needed

Conducting Interviews

Using empathetic listening skills and trauma-informed practices can help create a positive, structured interview environment for every participant.

Tips for good questioning:

- Start broad, and work your way in (open-ended questions)
- Avoid closed-ended and blaming questions, or questions that try to “trap” a participant
- Provide context to your questions as necessary
- Use age-appropriate language and questioning - avoid overly legalistic language

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.

34 CFR § 106.45(b)(5)

Evidence

Privileged documents and communications may not be used in investigations without the express permission from the person who holds the privilege.

- Medical records
- Psychiatric records
- Advocacy records (ORS 40.264 – SADV advocates)
- Counseling records
- Legal records
- Any other privileged documents/communication

34 CFR § 106.45(b)(1)(x)



Tomorrow you are interviewing Matt. In his initial report, which he emailed in to the Title IX Coordinator, he said:

“This girl in my biology class won’t leave me alone. She texts and dms me all the time, even though I never respond and I’ve told her I have a girlfriend. We were put in the same group for a project, and last week we were all standing around after school in the parking lot dividing up the work. She said she was confused and asked me to stay and explain it to her again, so I did. Then she kissed me, and I had to push her off to get her to stop. I found out she told everyone we hooked up and she’s spreading all these lies saying we’re together.”

Draft a list of questions to prepare for this interview. What else would you do to prepare?

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 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 and advisors; allow at least **10 days** to respond before 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.



2020 *Preamble*, OCR

...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

Temporary Delays

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

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

What else could cause a process delay?



Investigation Report

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

34 CFR Part 106.45(b)(5)

Best practice: create an investigative report template.

- Allegations and jurisdictional statement
- Timeline
- Summary of interviews
- Summary of supporting evidence
- Credibility assessment?
- Findings of fact



Decision-Making

Investigating the allegations of sexual harassment under Title IX involves:

- Conducting the “modified cross-examination” process
- Independently reviewing the investigation report and evidence
- Determining responsibility and sanctions
- Writing and issuing the **Determination of Responsibility**

Who is involved?

- Decision-Maker(s), Complainant, Respondent, possibly Witnesses,

“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.

- Can be conducted during the 10-day review time

Exclude questions that:

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

34 CFR § 106.45(b)(6)



Exclude or allow?

Xavier has been accused of sexually assaulting Elliot on an overnight trip for an athletic away game. Xavier submits the following questions:

- Do you remember that three weeks before the trip, didn't you tell me you were gay and would be willing to hook up with anyone on the team?
- When we hooked up the night before the tournament, didn't you tell me you would bring a condom on the trip and leave it on the bathroom counter if you felt like hooking up?
- Didn't you tell your counselor that you were excited we had hooked up on the trip?

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.’”

-Footnote 1441, p 30381, Federal Register, Vol. 85, No. 97

Specific Cross-Disciplinary Prohibitions

Drug and Alcohol Policies

...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.

Covid-19 Policies

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....

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

Sample Decision-Making Timeline

Day 1: Final investigative report sent to parties and advisors.* Parties are informed of their right to submit written questions; questions are due on Day 4.

Day 4: Decision-Maker screens the questions. Appropriate questions are forwarded; responses are due by Day 6.

Day 6: Answers are received by decision-maker, and shared with parties. Parties are informed of their right to ask follow-up questions (only those that pertain to clarifying or further elaborating on answers given); those questions are due on Day 8.

Day 8: Decision-maker screens follow-up questions. Appropriate questions are forwarded; responses are due by Day 10.

Day 10: Answers received, and shared with parties. Responses to investigative report received.*

Day 12: Determination of responsibility issued.

*The regulations require that parties and advisors have 10 days to view the investigative report and submit a response.



Determination of Responsibility

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

- The allegations
- Procedural steps from formal complaint through determination (including notifications, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held)
- Findings of fact
- Conclusions applying the findings to school/district policies
- Results of each allegation and rationale (responsible or not responsible)
- Sanctions provided and if remedies provided, as applicable
- Appeal bases and procedures

34 CFR § 106.45(b)(7)

Report-Writing Skills

- Reports should be neutral (e.g., “stated” versus “claimed”)
 - avoid use of unnecessary adjectives
 - avoid using the language of consensual sex to imply consent (caressed, performed)
- Make your language accessible
 - avoid overly legalistic language
- De-identify (use “Complainant, Respondent, Witness 1” instead of names)
- Use quotes when possible
 - Avoid sanitizing language from quotes
- Define terms for readers



Appeals

Investigating the allegations of sexual harassment under Title IX involves:

- Facilitating the appeals and response process.
- Independently reviewing the investigation, determination, and any newly submitted statement and evidence
- Writing and issuing the **Appeal Determination**

Who is involved?

- Appeals Decision-Maker(s), Complainant, Respondent, possibly Witnesses

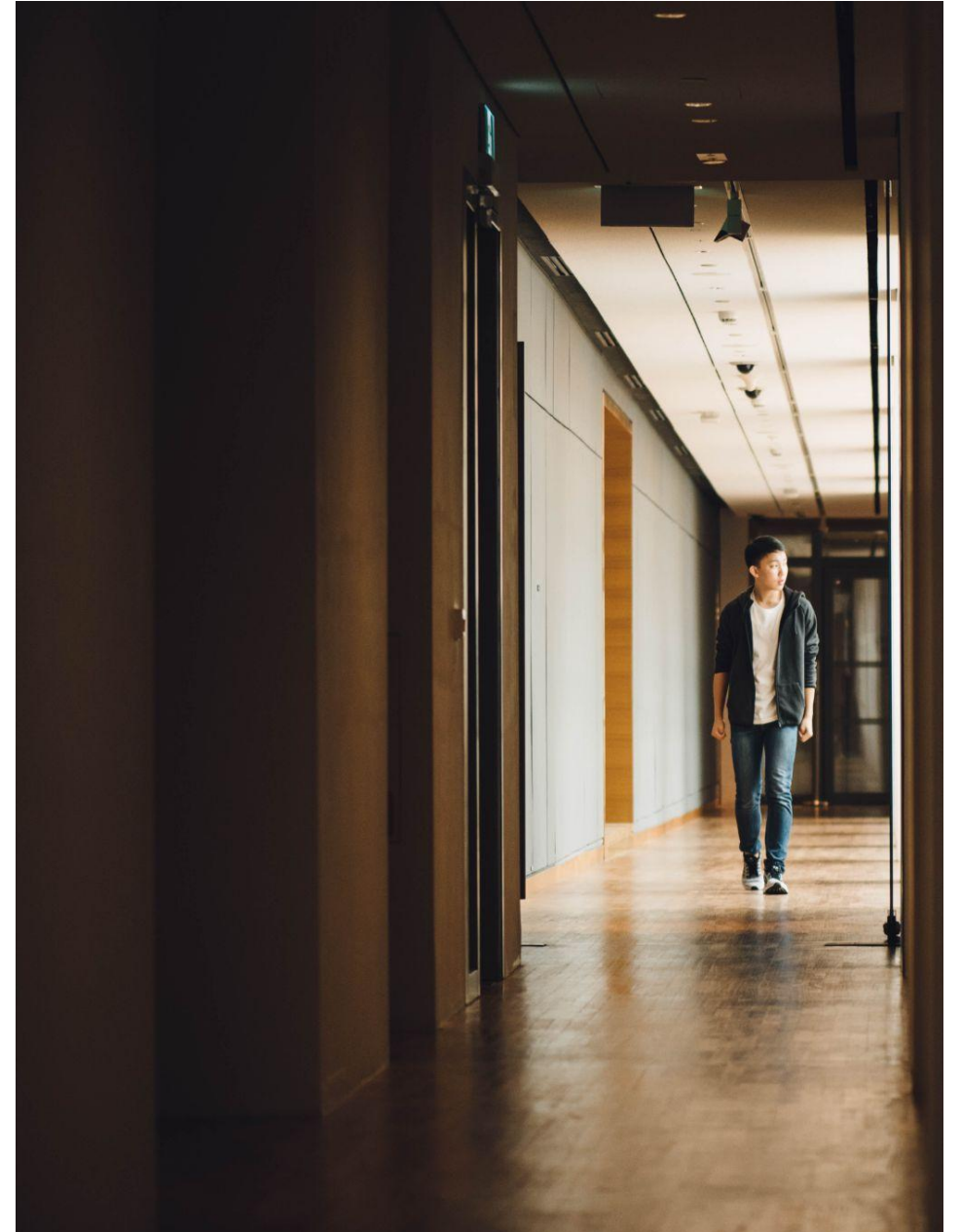
Parties must be allowed to appeal on **at least three grounds**:

- Procedural irregularity
- Newly discovered or newly available evidence
- Bias or conflict of interest from Title IX Coordinator, investigator, or decision-maker

Schools may designate other grounds and set time limits on appeals in their policies.

Appeals are **one level**.

34 CFR § 106.45(b)(8)



Appeal Process

Parties should be notified in writing when an appeal is submitted.

Parties should be given a reasonable, equal opportunity to provide a written response to any appeal.

The appeals decision-maker must be a different person from the investigator and the decision-maker.

34 CFR § 106.45(b)(8)



Appeal Determination

Must issue a written determination that describes:

- the results of the appeal
- the rationale of the appeal

The written determination must be issues simultaneously to both parties.

34 CFR § 106.45(b)(7)



Sanctions and Remedies

Once the results of the grievance process are finalized, the school must implement sanctions and remedies.

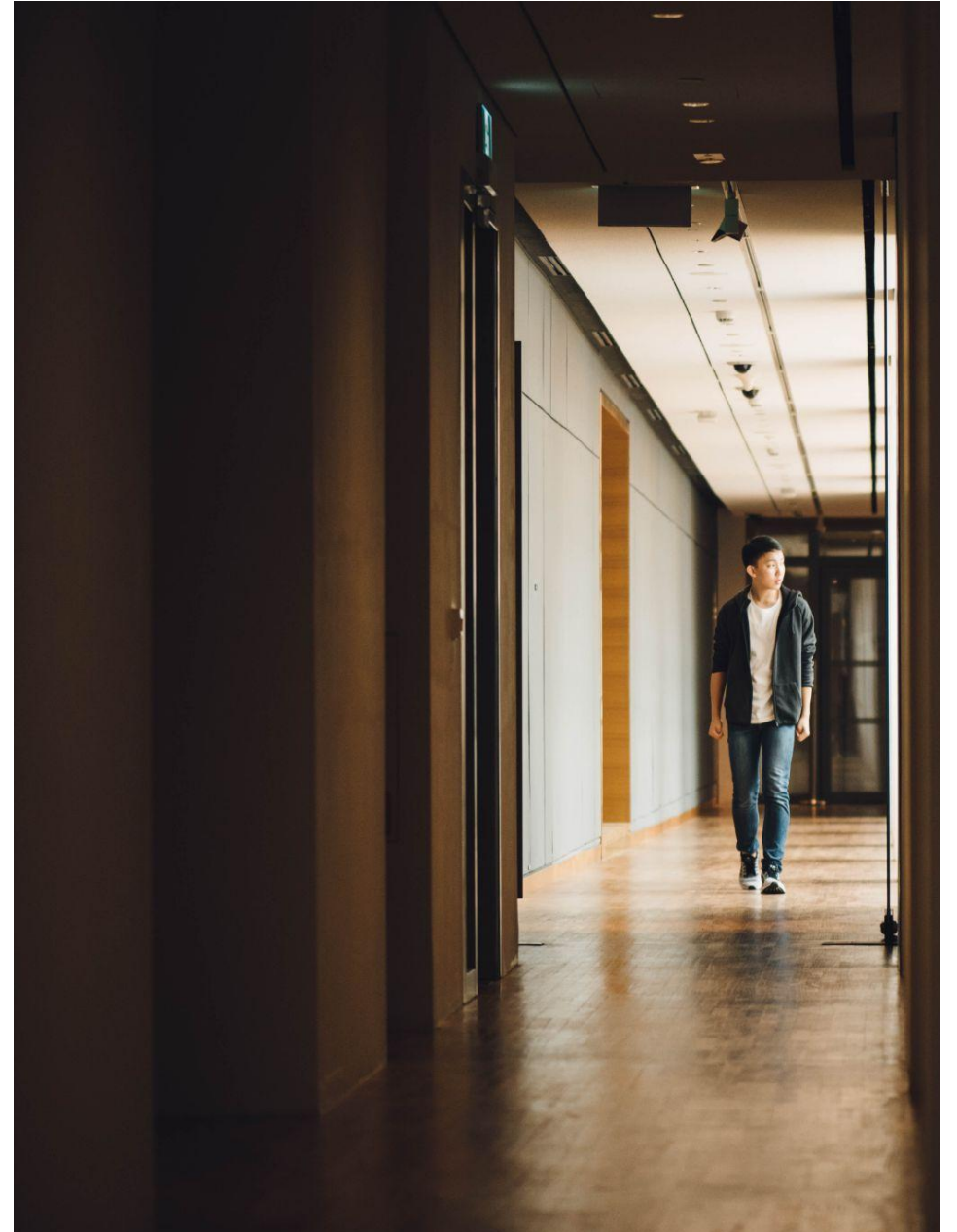
- **Sanctions** are disciplinary or other measures imposed on a respondent found responsible.
- **Remedies** are measures designed to restore educational access for the complainant and remedy any harm caused.

Who is involved?

- Title IX Coordinator, Complainant, Respondent, others

Examples of Sanctions

- Detention
- Suspension
- Expulsion
- Community service
- Required courses or seminars
- Counseling
- Evaluation and treatment
- Removal from specific classes, sports, etc.
- Co-enrollment prohibition





Examples of Remedies

Individual Remedies

- Academic remediation
- Counseling
- Waiver/adjustment of academic, athletic, or cocurricular requirements
- Additional supportive measures

Community Remedies

- Educational programs
- Safety measures (hallway monitoring, etc)
- Policy reviews
- Staff training

Follow-Up

Title IX Coordinator should ensure that all sanctions, remedies, and supportive measures are implemented appropriately as required.

- Who needs to be involved to successfully each sanction/remedy?
- Who needs to be informed to successfully prevent retaliation or further harm?

Periodic check-ins with parties may be needed:

- Are sanctions/remedies having their intended effects?
- Have any additional issues arisen? Are additional supportive measures needed?



Wrap-up and Compliance

The final steps of the process ensure the everything is finalized and the school has met the standards of compliance, including:

- Ensuring confidentiality
- Recordkeeping
- Debriefing and review

Who is involved?

- Title IX Coordinator, Investigator, Decision-Maker, Appeals Decision-Maker

Recordkeeping

Records must be kept of:

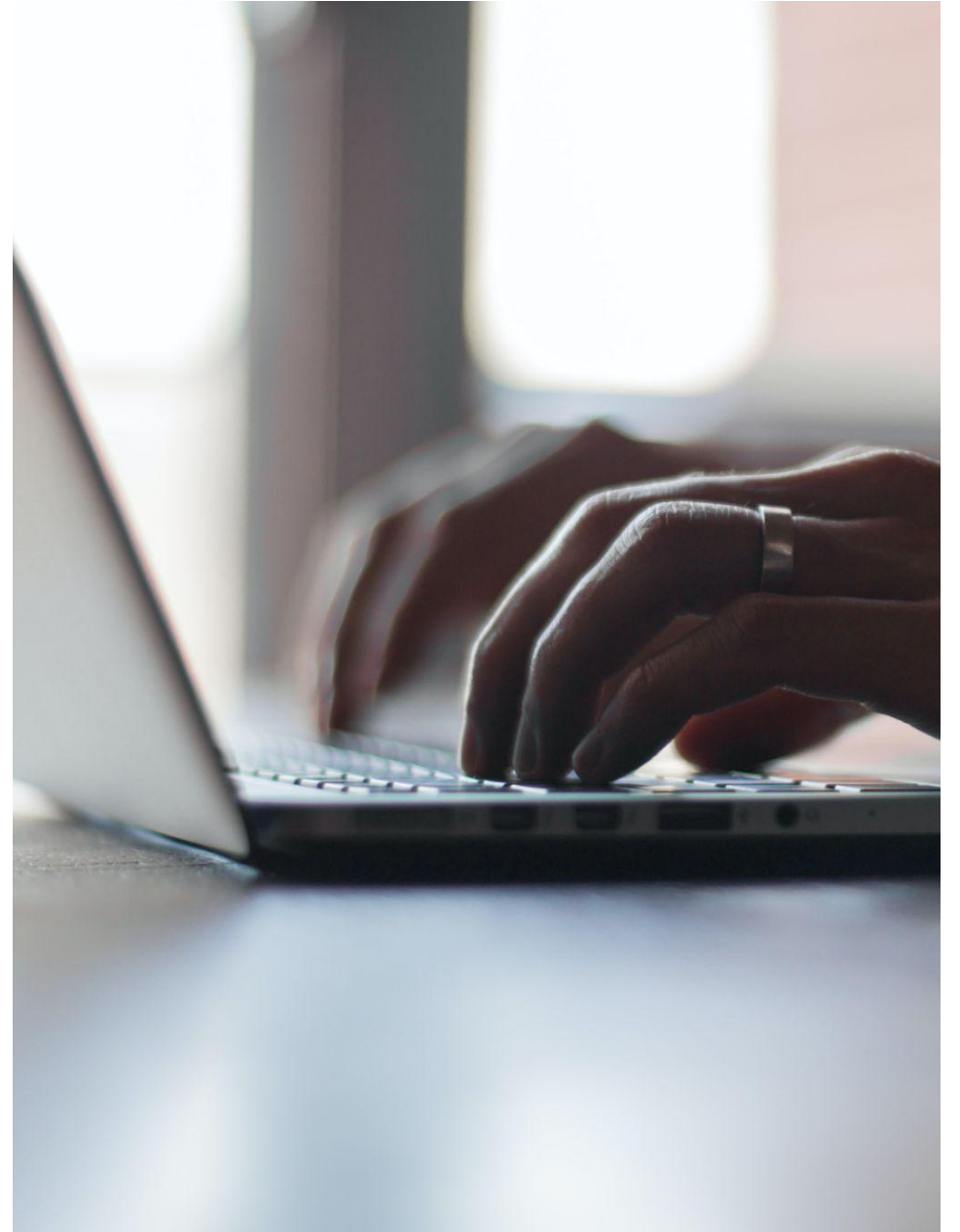
- each record of actual notice and response (including supportive measures), and why that response was not deliberately indifferent
- each investigation, including the results and any sanctions or appeals
- each appeal
- each informal resolution
- all materials used to train Title IX personnel

Records must be maintained for a minimum of seven years.

34 CFR § 106.45(b)(10)

Wrapping Up

- Safely store or destroy lose information related to the case (ex - information from lose notes should be transferred to records, then destroyed)
- Ensure secure storage of all records.
- Debrief with team:
 - What went well? What didn't go well?
 - What was unexpected?
 - What do we need to know for next time?





Conflict of Interest & Bias in Investigations



Bias

Bias

“A tendency, inclination, or prejudice toward or against something or someone.”

-Psychology Today

Implicit Bias

“The attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”

-The Kirwin Institute for the Study of Race and Ethnicity



Bias

Confirmation Bias

“The tendency to bolster a hypothesis by seeking consistent evidence while disregarding inconsistent evidence.”

-O'Brien & Ellsworth, 2006, Confirmation Bias in Criminal Investigations

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

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

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



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

Victims: stereotypes and expectations

A study found that law enforcement and criminal justice officials are more likely to believe someone experienced sexual assault if...

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

What other stereotypes or expectations does society hold about victims?

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

Perpetrators: stereotypes and expectations

evil

angry

hostile

unwilling to submit to authority

unapologetic

pattern of previously
documented bad behavior

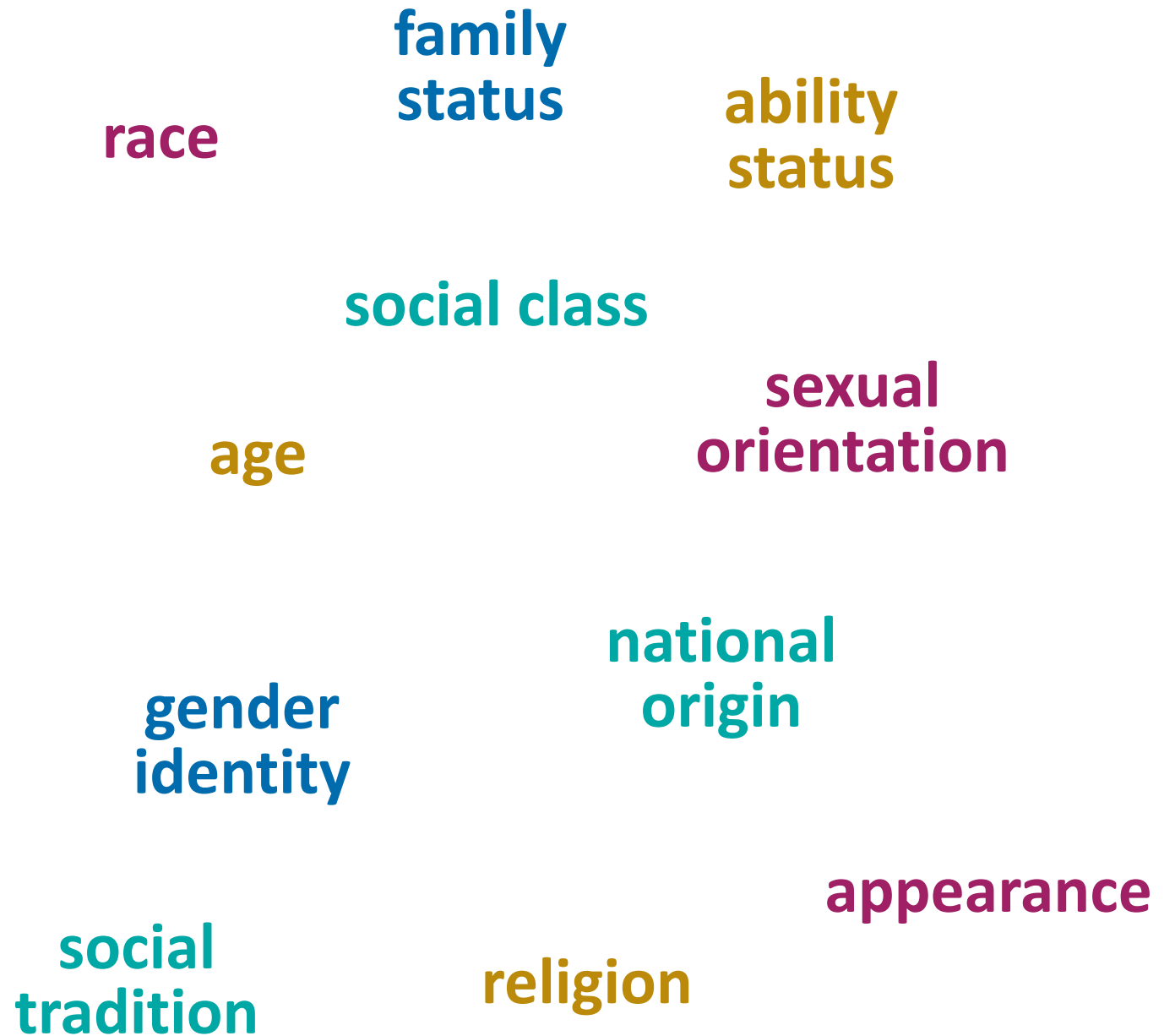
outbursts

uncontrolled

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



Oregon Department of Education



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



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

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



Bias affects us most when we have...



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

Strategies to decrease bias in investigations

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

What else?



Conflict of Interest

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

-The People’s Law Dictionary

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

-McCombs School of Business at University of Texas

Does this present bias or conflicts of interest?



Your school board serves as your appeals panel. One of your school board members used to teach in one of the district's elementary schools. She taught both the complainant and respondent approximately five years ago, when they were in second grade.

Does this present bias or conflicts of interest?



The respondent tells you that they have a witness 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 mitigate conflicts of interest

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

What else?

*ORS 703.401-411 provides information on qualification of investigators



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