Fall 2021 Title IX Training

October 5, 2021
09:00 am - 12:00 pm
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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...

The information provided within this presentation does not, and is not intended to, constitute legal advice; instead all content provided is for information purposes only.

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

- Click on “Reactions” to raise your hand.
- Toggle the “To” button to send a question privately or publicly.

Oregon Department of Education
Oregon achieves... together!
Plan for the Day

• The Fundamentals of Title IX
• Recap: May 2020 Sexual Harassment Regs
• Intersections: Title IX and Oregon Law
• Discrimination based on Sexual Orientation and Gender Identity
• FAQs (based on your questions)
TITLE IX FUNDAMENTALS
“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.”
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
Understanding Title IX

- Law
- Regulations
- Guidance Documents
- DCLs
- Case Resolutions
- Court Cases

The pyramid shows the hierarchical force of law, with Court Cases at the top and Law at the bottom, indicating the lowest force of law.
Key Components of Title IX in K-12 School/Districts

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

• Students/families are required to receive written notice that the school does not discriminate, and who the Title IX Coordinator is.

• The Title IX Coordinator’s contact information must be prominently posted on the website and in any printed handbooks/catalogs distributed by the school.

What other means of communication has your school/district used?
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
Separating Education by Sex

• Certain allowable carveouts can always be offered as single-sex
  • Athletics
  • Physical education during contact sports
  • Sexuality education during specific lessons
  • Boy scouts, girl scouts, and other voluntary youth service organizations

• Some programs can never be single sex

• Other programs can be offered on a single-sex basis in specific, limited circumstances:
  • Designed to achieve a specific purpose/response to a specific issue
  • Equal activity offered for the other sex
  • Periodic evaluations
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).
Athletics

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

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

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

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

https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html
The “Laundry List”

(1) Provision and maintenance of equipment and supplies;
(2) Scheduling of games and practice times;
(3) Travel and per diem expenses;
(4) Opportunity to receive tutoring and assignment and compensation of tutors;
(5) Opportunity to receive coaching, and assignment and compensation of coaches;
(6) Provision of locker rooms, practice and competitive facilities;
(7) Provision of medical and training services and facilities;
(8) Provision of housing and dining services and facilities;
(9) Publicity;
(10) Support services; and
(11) Recruiting.
Focus on: Facilities

• Common facilities pitfalls
  • Baseball and softball
  • Locker rooms
  • Facilities managed by other entities

• Remember...
  • Program compliance is assessed OVERALL between opportunities/support for girls and boys
  • If your district is seeking bonds/improvements, plan ahead
Covid-19 Restrictions and Athletic Opportunities

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

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

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

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

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

34 CFR Part 106.40
TITLE IX SEXUAL HARASSMENT
In this section...

• 2020 Regulations Review
  • What were the major changes?
  • Definition of sexual harassment
  • Required roles and personnel
  • Required notices

• Common Pitfalls and Questions
  • Consent
  • Jurisdictional Authority
  • Overlap with Oregon law
The 2020 Regulations: Major Changes for K-12 Schools

• New definition of sexual harassment
• Restriction to occurrences “within educational program or activity”
• Supportive measures required
• New and specific grievance process (and policy requirements!)
• Specific notification requirements
• Advisors of choice
• Specific training and personnel requirements
• Informal processes allowed
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


-34 CFR Part 106.30
### Oregon Healthy Teens Survey, 2019; 11th grade data, violence


<table>
<thead>
<tr>
<th>Category</th>
<th>Female</th>
<th>Male</th>
<th>Nonbinary/GNC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Given into sexual activity because of pressure</td>
<td>22.30%</td>
<td>5.70%</td>
<td>19.70%</td>
</tr>
<tr>
<td>Physically forced to have sex</td>
<td>9.90%</td>
<td>1.70%</td>
<td>11.00%</td>
</tr>
<tr>
<td>Partner physically harmed in the past 12 months</td>
<td>3.40%</td>
<td>3.90%</td>
<td>7.20%</td>
</tr>
<tr>
<td>Adult physically hit or hurt you</td>
<td>26.60%</td>
<td>25.50%</td>
<td>43.20%</td>
</tr>
</tbody>
</table>
Bullying, Past 30 Days

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

Oregon Healthy Teens Survey, 2019; 8th grade data, bullying
Reporting vs. Experiences

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

That means approximately 0.003% of Oregon students reported sexual harassment to their school.
Title IX: Q&A on Sexual Harassment

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

• 67 page document
• Does not change the 2020 sexual harassment regulations, but clarifies some common questions
• Provides sample policy language for specific required pieces
INTERSECTIONS:
TITLE IX & OREGON LAW
bullying and harassment, dating violence, etc

abuse

Title IX

sexual conduct

Oregon sexual harassment policy
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


(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.
“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.
Definitional Overlaps

Sexual Conduct

Sexual Abuse

Sexual Harassment (Oregon)

*for the purposes of defining sexual conduct, staff includes employees, volunteers, agents, and contractors
Jax, an eighth grader, is talking to the school counselor and mentions that things haven’t been going very well with their boyfriend lately. Jax says that their boyfriend goes to the local high school, and Jax really likes him but he’s been threatening to break up with Jax if Jax tells anyone about the relationship.

Jax also says that things have been weird since they lost their virginity to their boyfriend. Jax says, “it wasn’t what I expected. I met up with him at a baseball game, but he wouldn’t let me come sit with him and his friends. He told me to meet him by the bathrooms in the middle of the game, and then we went behind the bathrooms and did some stuff. I didn’t feel good about it, because he wasn’t very nice about it, but he says that this is what love is like.”

Based on your understanding, this scenario is:

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

Is it sexual conduct or child abuse?

YES

Report to law enforcement, DHS, TSPC, or ODE as required

THEN SCREEN:

NO

Is it Title IX sexual harassment? Use jurisdictional screening.

NO

Does it meet Oregon’s definition of sexual harassment?

YES

Run Oregon Sexual Harassment Process

NO

Check for other policy violations – discrimination, bullying, etc

YES

Run Title IX process; overlay Oregon additional reqs

NO

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

• Title IX allows for temporary process delays for reasonable cause, including law enforcement.
• Title IX **does not** allow protracted delays, such as waiting for the conclusion of the entire legal process.
• A law enforcement for DHS investigation **does not** replace the district’s own Title IX investigation – different definitions, different standards, different remedies.
ORS 339.351: Harassment, intimidation, or bullying and cyberbullying

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

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

• Substantially interferes with a student’s educational benefits, opportunities, or performance;
• Takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop;
• Has the effect of:
  • Physically harming a student or damaging a student’s property
  • Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property; or
  • Creating a hostile environment, including interfering with the psychological well-being of a student; and
• May be based on, but not limited to, the protected class status of a person
HB 2631: Bullying, Cyberbullying, and Harassment Notification

• Requires parent/guardian notification if a student experiences or commits bullying, cyberbullying, harassment, or intimidation under specific circumstances*

• Notification must occur:
  • Promptly for physical acts, or
  • Within a reasonable time period

• Prior to notification, the school must inform the student that they are notifying the parent/guardian
HB 2631: Bullying, Cyberbullying, and Harassment Notification

(i) Notification is **not required** under this subparagraph if the school official reasonably believes notification could endanger the student who was subjected to an act of harassment, intimidation or bullying or an act of cyberbullying or if all of the following occur:

(I) The student who was subjected to an act of harassment, intimidation or bullying or an act of cyberbullying requests that notification not be provided to the student’s parents or guardians;

(II) The school official determines that notification is not in the best interest of the student who was subjected to an act of harassment, intimidation or bullying or an act of cyberbullying; and

(III) The school official informs the student that federal law may require the student’s parents or guardians to have access to the student’s education record, including any requests made as provided by this sub-subparagraph.
TITLE IX SEXUAL HARASSMENT
Defined Roles in 2020 Regulations

Title IX Coordinator

Investigator

Decision-Maker

Appeals Decision-Maker

Informal Resolution Facilitator

may be the same person

only required if offered
Title IX Coordinator*

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

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

• Schools may assign more than one Title IX Coordinator

• Pros
  • Spread around the work
  • More direct contact (school-wide coordinator)

• Cons
  • Need to ensure a tight record-keeping system and coordination process to ensure compliance and oversight
  • Bias/conflicts at the school level possible
Investigator

• 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
Parental notification for Bullying, Harassment, Intimidation, and Cyberbullying – HB 2631
Notice of rights and options – ORS 342.704/OAR 581-021-0038

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

34 CFR § 106.30(a)
A formal complaint is a document submitted by the complainant or signed by the Title IX Coordinator requesting the initiation of grievance procedures.

Must dismiss under Title IX if:

- complainant is not “availing themselves, or attempting to avail themselves,” of the educational program
- 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.
Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school’s education program or activity, may the school’s Title IX Coordinator file a formal complaint?

Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.

In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so. For example, the preamble explains that if a school “has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority,” OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school’s Title IX Coordinator does not sign a formal complaint, “even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process.”

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf
Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school?

Answer 27: No. Although a school may dismiss a formal complaint if, at any time during the grievance process, the respondent is “no longer enrolled or employed” by the school, dismissal is not required...

A school may consider, for example, “whether a respondent poses an ongoing risk to the [school’s] community,”... Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf
Answer 40: ...The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent. Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent “would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians.” If a parent or guardian has a legal right to act on a complainant or respondent’s behalf, this authority applies throughout all aspects of the Title IX matter, including throughout the grievance process.
So... where does this leave us?

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

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

This overlaps with bullying/harassment/intimidation notification rights!
Do you have jurisdictional authority to investigate under Title IX?

A student who graduated last year emails the school Vice Principal to report on “weird behavior” from the school’s AP History teacher. She says that during her junior year she developed a close relationship with him during class, and that he gave out his cell phone number to several students to “answer any study questions.” Over the course of the next two years, they started texting about life outside of school.

By the end of her senior year, they were talking on the phone at least once a week; the teacher would sometimes call her in the evenings on his way home from “bad dates,” and describe the dates to her and ask her for relationship advice. He would ask her if she found him attractive, and how to make himself more attractive to girls.
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.

OREGON LAW INTERSECTION: Oregon’s laws on harassment, intimidation, bullying, and cyberbullying policies require a statement of consequences for false reports.
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)
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.
Break for Questions
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
Possible 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.

Day 12: Determination of responsibility issued.

*School districts will make their own timing decisions in their individual sexual harassment policies.
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.
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)
Questions?
Common Pitfalls and FAQs
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)
How does your school/district define consent?
Question 6: Do schools need to adopt a particular definition of consent for determining whether conduct is “unwelcome” under the definition of sexual harassment in the 2020 amendments?

Answer 6: No. The preamble states that the Department will not require a school to adopt a particular definition of consent. The preamble explains that a school has the flexibility to choose a definition of consent that “best serves the unique needs, values, and environment of the [school’s] own educational community.”

OCR; Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf
Having a clear definition of consent is important.

- Whether an act was consensual is a key component of many sexual harassment investigations.
- Not using a consistent definition can lead to biased investigations/decisions and inconsistent outcomes *(which could be further discrimination!)*
- Even though we are working with minors, it’s not as simple as “18 is the age of consent.” Young people of similar ages can engage in consensual sexual acts under Oregon law.*

*see Oregon AG’s letter on consensual minor-minor sexual interactions*
How will your school 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 not present for sexual activity when a person is:

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

- ORS 342.704/OAR 581-012-0038
Questions?
TITLE IX: GENDER IDENTITY AND SEXUAL ORIENTATION
In this section...

• How Title IX came to include discrimination based on sexual orientation and gender identity

• Overlap with Oregon law

• Review of ODE’s 2016 *Guidance on Supporting Transgender Students*
Title IX: Sexual Orientation & Gender Identity Included

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

-OCR Notice of Interpretation, June 16, 2021
US Dept of Education releases guidance stating discrimination based on gender identity violates Title IX

US Dept of Ed revokes May 2016 transgender student guidance

OCR released a policy interpretation announcement: in alignment with Bostock, discrimination based on sexual orientation and gender identity is covered by Title IX

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

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

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

OAR 581-021-0045 and 0046: Discrimination Prohibited in Schools; ORS 326 & 659 provide authority to implement ORS 326.051 & 659.850
HB 3041: Gender Identity as a Protected Class

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

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

School/district to-do list:
• Update your nondiscrimination policy (and website!)
• Check other policies where you list protected classes
Examples from OCR of possible discrimination:

A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is “not appropriate for school.” Teachers suggest that the student attend alone or bring a boy as a date.
59.1% of LBGTQ+ students felt unsafe at school because of their sexual orientation; 42.5% felt unsafe because of their gender expression.

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

ODE’s Transgender Student Guidance

- Terminology
- Student Identity
- Free and Appropriate Public Education
- Names and Pronouns
- School Documents and Records
- Name Change Options + Process
- Transcripts and Diplomas

- Student Health Records
- Instruction + Comprehensive Sexuality Education
- Gender-Based Activities, Rules, Policies
- Restroom and Locker Usage
- Sports
- Student Safety
Student Identity

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

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

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

- Students should be allowed to use the restrooms, locker rooms, and showers that align with their gender identity
  
- Schools may offer a single-stall restroom or alternative accommodations, but may not require the student to use them.
Parents for Privacy v. Dallas School District (Parents for Privacy v. Barr)

• 2017 - a group of parents sued the Dallas School District regarding a trans student’s use of restroom, locker, and shower facilities that aligned with their gender identity

• 2018 - District Court dismissed the case, citing that the school’s policies/practices do not violate the rights of cisgender students

• Feb 2020 - Ninth Circuit Court of Appeals affirms the dismissal

• Dec 2020 - Supreme Court denies appeal petition
OSAA’s Gender Identity Participation Policy

“...once a transgender student has notified the student's school of their gender identity, the student shall be consistently treated as that gender for purposes of eligibility for athletics and activities...”
Sports: OSAA Policy

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

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

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

• Title IX prohibits most single-sex or sex-segregated classes and activities; there are a few exceptions, like sports and some lessons during sexuality education.

• For single-sex or sex-segregated classes or activities, trans students should be allowed to participate consistent with their gender identity.

• Avoid separating or singling out students by sex or gender unless absolutely necessary.
When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates “out” him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school’s administrators, they dismiss it, saying: “you can’t expect everyone to agree with your choices.”
Examples from OCR of possible discrimination:

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

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

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

• Schools must allow GSAs (or similar clubs) to form by the same rules for any other club.

• Schools cannot create separate rules.

LGBTQ+ students with GSAs in their schools...

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

GLSEN 2019 National School Climate Survey;
Aligning Practices

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