OREGON
DEPARTMENT OF
EDUCATION

Title IX Investigations and Responses

High Desert ESD
August 21, 2024

Download today's materials

ODE Civil Rights Staff
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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.

Agenda

- Title IX 101
- Sex Discrimination
- Notice of Nondiscrimination and Staff Requirements
- Responding to Notice and Evaluation
- Grievance Procedures: Investigation, Determination, and Appeals
- Avoiding Conflict of Interest and Bias

This training is designed to fulfill the training requirements under 34 CFR § 106.8(d)(1) *All employees* and § 106.8(d)(2) *Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures*.

Norms and Expectations

Participants

Ask relevant questions as they arise

Remain engaged

Be open to learning

Break as needed

Presenter

Keep us on task and going at a peppy pace!

Answer questions as they arise

Provide a copy of the slides

Schedule technical assistance for individualized questions

Content Note:

This training discusses protected class discrimination. Explicit and discriminatory language is occasionally used. All examples are solely for educational purposes and are designed to contain elements of situations you may respond to in your school/district.

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Title IX 101

Title IX: Sex, Sexual Orientation, Gender Identity

1972 civil rights law that prohibits sex discrimination in federally funded education programs.

This includes discrimination based on **sex, sexual orientation,** and **gender identity**.

"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."

Specific Focus Areas of Title IX

Athletics

Schools have to provide equal opportunities for boys and girls teams, as well as equal benefits (facilities, equipment, travel, etc)

Pregnant and Parenting Students

Access to all programs, supportive accommodations, and medical leave

Sex-Based Harassment

Sex-based harassment, including sexual harassment, requires a school response

Sexual Orientation and Gender Identity Discrimination

SOGI discrimination is a form of sex discrimination covered by Title IX, and should be treated as such.

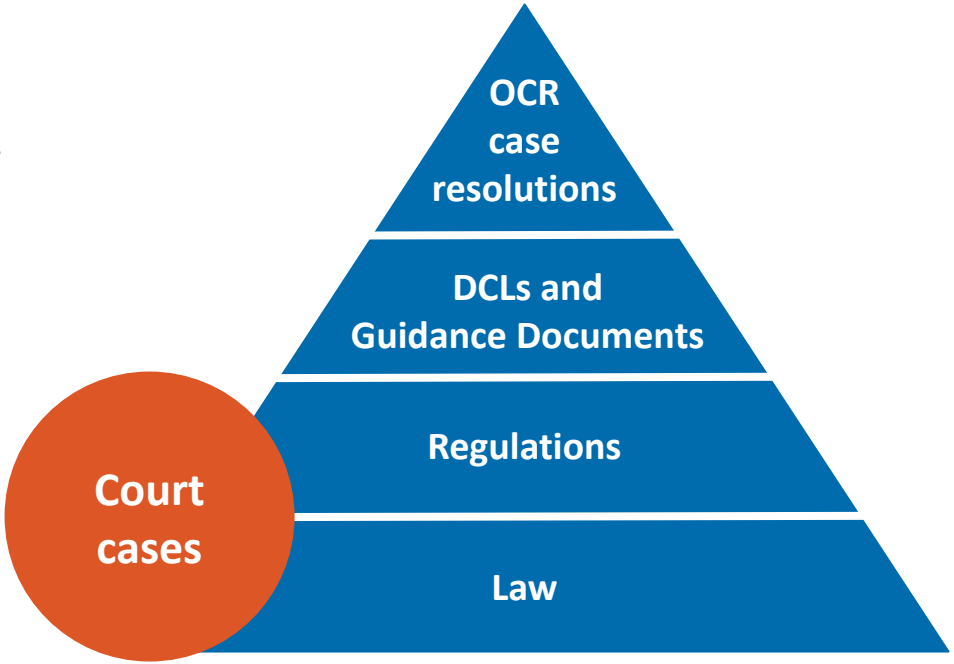
Single-Sex (or Sex-Segregated) Programs and Activities

Single-sex programs, or separate programs by sex/gender, are only allowed in specific, limited circumstances.

Title IX is an evolving and living law!

Over the past 50 years, Title IX has evolved and expanded.

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



Title IX Coordinator Designation

(1) **Title IX Coordinator.** Each recipient must designate and authorize at least one employee, referred to herein as a Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under Title IX and this part. If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient's consistent compliance with its responsibilities under Title IX and this part.

(2) **Delegation to designees.** As appropriate, a recipient may delegate, or permit a Title IX Coordinator to delegate, specific duties to one or more designees.

34 CFR § 106.8(a)

Response Staff Training Requirements

ALL Employees

- School's obligation to address sex discrimination
- What is sex discrimination (scope of conduct, including sex-based harassment)
- Staff requirements when responding to notification of student pregnancy or notification of sex discrimination

Investigators, Decisionmakers, Individuals with Supportive Measure Modification Authority

- Training required of all employees AND
- Requirements upon receiving notice (§ 106.44)
- Grievance procedures (§ 106.45)
- Avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Meaning and application of relevant in relation to grievance process

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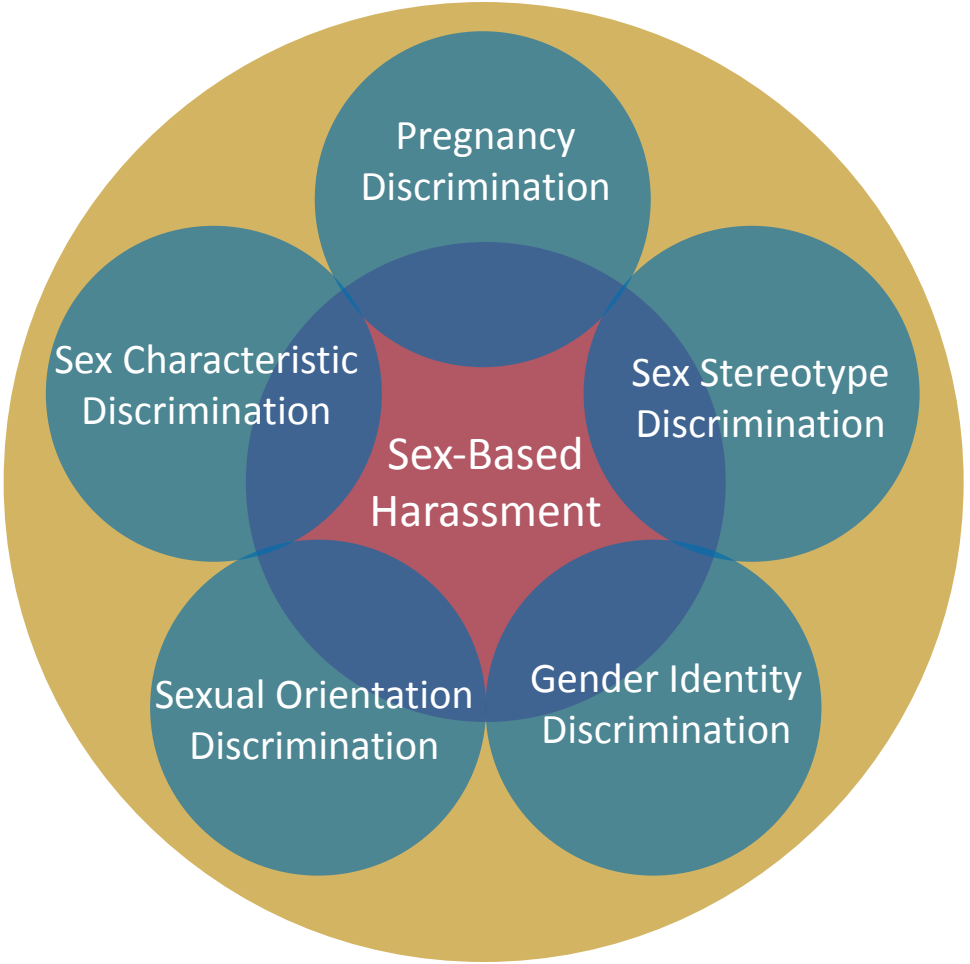
What is Sex Discrimination?

Sex Discrimination

…"conduct that could constitute sex discrimination" includes both a recipient's actions and its inaction in derogation of its Title IX obligations.

-Final Rule (unofficial copy), pg. 34



Athletic Equity: Benefits and Opportunities

The "Three-Part Test"

Schools have to provide equal **opportunities** for students to participate in athletics.

- Opportunities = spots on competitive athletic teams
- Schools are not required to have an equal number of spots; parts two and three offer options focusing on opportunities and support for the underrepresented sex

The "Laundry List"

Schools have to provide equal **benefits** for girls and boys sports teams.

- Benefits = facilities, equipment and supplies, coaching, travel, medical support, media support, etc.
- Benefits are compared overall (total program comparison), not sport-to-sport.
- ALL sources of benefits count!

Single-Sex Programs

There are only two ways a school can offer a single-sex or sex-separated educational program (which includes classes, clubs, field trips, etc.):

- If it is specifically allowable in regulation (contact sports, instruction on human sexuality, choruses, etc.); or
- If it meets specific requirements outlined in 34 CFR 106.34(b):
  - based on an important educational objective that is implemented evenhandedly
  - enrollment is voluntary
  - excluded students are provided a substantially equal coeducational opportunity
  - it is evaluated regularly

Educational programs or activities run by external partners are also subject to these requirements. See: Dear Colleague Letter on Voluntary Youth Service Organizations

Gender Identity: De Minimis Harm

In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

§ 106.31(a)(2)

Gender Identity and De Minimis Harm

The Department has determined, based on a careful reading of Title IX and each of its statutory provisions, that sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination. However, when such separation imposes more than de minimis injury on a protected individual, see Bostock, 590 U.S. at 681, such as when it denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity, this would violate Title IX's general nondiscrimination mandate, 20 U.S.C. 1681

-p. 1268, unofficial copy of the Preamble

Oregon law prohibits discrimination based on gender identity. Oregon law and supporting court cases allow students to access the restrooms and locker rooms that align with their gender identity. See ODE's Gender Expansive Students Guidance for more information.

Pregnancy and Related Conditions

A recipient must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.

§ 106.40(a)

Pregnancy or related conditions means:

(1) Pregnancy, childbirth, termination of pregnancy, or lactation;

(2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or

(3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

§ 106.2

Pregnancy and Related Conditions

Many requirements stay the same:

- Must provide reasonable modifications (example modifications are listed)
- Access to separate/modified educational settings on voluntary basis only
- Must allow leave of absence
- Medical certification allowed in limited comparable circumstances

Some NEW requirements:

- All employees must provide Title IX contact info to pregnant students
- Once Title IX Coordinator is notified, obligation to provide notice of recipient's obligations to pregnant students
- May only require documentation in limited circumstances
- Provision of lactation space

Sex-Based Harassment

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:

(1) **Quid pro quo harassment.** An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

(2) **Hostile environment harassment.** Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

(3) **Specific offenses.**

(i) Sexual assault
(ii) Dating violence
(iii) Domestic violence
(iv) Stalking

34 CFR § 106.2

Quid Pro Quo SBH

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

34 CFR § 106.2

If any SBH involves a student complainant and employee respondent:

In addition to **mandatory reporting**, whenever an employee, agent, contractor or volunteer engages in **sexual conduct** involving a student, it must be reported to DHS, law enforcement, TSPC, or ODE (depending on conduct and licensure).

Hostile Environment SBH

(OLD) 2020 Definition

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.

2024 Definition

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).

Hostile Environment SBH

5 requirements to meet:

- ❑ Unwelcome
- ❑ Sex-based
- ❑ Subjectively and objectively offensive
- ❑ Severe or pervasive
- ❑ Limits or denies access to an educational program or activity

5 factors to consider:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

(iv) The location of the conduct and the context in which the conduct occurred; and

(v) Other sex-based harassment in the recipient's education program or activity;

§ 106.2

Is there a hostile environment?

- ❑ Unwelcome
- ❑ Sex-based
- ❑ Subjectively and objectively offensive
- ❑ Severe or pervasive
- ❑ Limits or denies access to an educational program or activity

Serena, a sixth grade girl, was outed as transgender two months ago. Serena reports to the counselor that she feels like one of her teachers, Mr. Jackson, has been treating her differently since the outing. Serena says he hasn't called on her once to answer a question in class during the past two months, and he doesn't smile at her or give her high-fives anymore like he does with other students. Serena's grades have dropped since she was outed, and when she asked for more time to complete her homework, Mr. Jackson denied her request - even though Serena knows other students have gotten extensions. Serena also noticed that Mr. Jackson will go out of his way to avoid using any pronouns or gender-based descriptors for her; instead he'll say, for example, "boys and girls and Serena, please focus."

Use the 5 requirements and 5 factors to determine whether a hostile environment has been created.

Specific Offenses: Sexual Assault

Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

- **Rape:** Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instances in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.
- **Fondling:** The touching of the private body parts of another person for the purposes of sexual gratification, without the consent of the victim, including instances where the victim is unable to give consent because of their age or because of their temporary or permanent mental or physical incapacity.
- **Also includes:** incest, statutory rape

34 CFR § 106.2; 2023 NIBRS Reporting Manual

SBH and Consent

The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.

Oregon's School-Based Consent Definition

"Without consent" means an act performed: Without the knowing, voluntary and clear agreement by all parties to participate in the specific act; or

(A) When a person who is a party to the act is:

(i) Incapacitated by drugs or alcohol;

(ii) Unconscious; or

(iii) Pressured through physical force, coercion or explicit or implied threats to participate in the act.

Specific Offenses: Domestic Violence

Domestic violence meaning felony or misdemeanor crimes committed by a person who:

(A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;

(B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;

(C) Shares a child in common with the victim; or

(D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction;

In Oregon, crimes of domestic violence include crimes of abuse:

- Physical violence
- Threats of physical violence
- Sexual violence or abuse

ORS 135.230

34 CFR § 106.2

Specific Offenses: Dating Violence

Dating violence meaning 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:

(1) The length of the relationship;

(2) The type of relationship; and

(3) The frequency of interaction between the persons involved in the relationship;

Does NOT include acts that fall under the definition of domestic violence.

Includes but is not limited to:

- Physical violence
- Sexual violence
- Threats of physical or sexual violence

34 CFR § 106.2; Clery Act

Specific Offenses: Stalking

Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(A) Fear for the person's safety or the safety of others; or

(B) Suffer substantial emotional distress.

34 CFR § 106.2

Photo by Y-n-Y-n on Unsplash

Retaliation

Retaliation means intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other actions taken by a recipient under § 106.44(f)(1). Nothing in this definition or this part precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.

Peer retaliation means retaliation by a student against another student.

§ 106.2

Retaliation

Photo by Element 5 Digital on Unsplash

When a recipient has information about conduct that reasonably may constitute retaliation under Title IX or this part, the recipient is obligated to comply with § 106.44. Upon receiving a complaint alleging retaliation, a recipient must initiate its grievance procedures under § 106.45, or, as appropriate, an informal resolution process under § 106.44(k).

§ 106.71

Jurisdiction and Location of Discrimination

§ 106.11 Application.

Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

SBH Location and Jurisdiction, cont.

…student online speech in the school context would be subject to school discipline. The Court observed that it had previously "stressed" that when elementary schools and secondary schools act in loco parentis, they have a greater interest in regulating student speech.

-p. 146, unofficial copy of the Preamble

The Department accordingly concludes that elementary schools and secondary schools have sufficient authority to address conduct that creates a hostile environment even when that conduct occurs online and outside of a specific school activity.

-p. 148, unofficial copy of the Preamble

Poll:
Is it sex discrimination?

Daniella, a 10th grade student, is pregnant; after discussing her options with the school, her family decides she should finish the year at the alternative school for more flexibility in the curriculum. Daniella asks if she can keep a water bottle and snacks at her desk, but is told that the alternative school has a strict policy against this and that they never make any exceptions; she is expected to follow the rules like any other student.

Liv and Nicole have organized a school silent protest relating to sexual assault awareness month; students will wear t-shirts depicting statistics about sexual assault and will remain silent for the entire day. The school has a strict dress code which does not allow clothing with logos or graphics; Liv and Nicole are told they can still hold the protest and students can remain silent, but they cannot wear the shirts.

Miguel and his boyfriend Aaron post a tiktok of their prom outfits, which several students comment on with homophobic comments and slurs. While Miguel and Aaron are dancing at prom, a group of students giggle and back away from them, saying they're "gross" and "pussies."

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Notice of Nondiscrimination & Staff Requirements

Notice of Nondiscrimination

Overlap with Oregon law notice and other Federal civil rights!

Must contain specific items:

- A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates
- A statement that inquiries about the application of Title IX and this part to the recipient may be referred to the recipient's Title IX Coordinator, the Office for Civil Rights, or both
- The name or title, office address, email address, and telephone number of the Title IX Coordinator
- How to locate the recipient's nondiscrimination policy and grievance procedures
- How to report information about conduct that may constitute sex discrimination and how to make a complaint of sex discrimination

Must be posted on "website and in each handbook, catalog, announcement, bulletin, and application form."

34 CFR § 106.8(c)

May provide a shortened version of the notice in some locations, with a link to the full notice online.

All Staff: Sex Discrimination Notification

Any employee of an elementary or secondary school who is not confidential must notify the Title IX Coordinator when they have conduct that reasonably may constitute sex discrimination.

- Not applicable if the employee has been personally subject to the discriminatory conduct

§ 106.44(c)(1)

- Does not need to have proof of the discrimination
- Applies to all employees - how will you ensure they are aware of this?

Recognizing Notice

A school can be put “on notice” of a possible Title IX concern/violation without the filing of a formal Title IX complaint. Examples:

Parents meeting with an elementary Principal mention that their child’s teacher regularly divides the students into boys and girls groups when he needs to split the students up for play/learning time.

A group of senior girls document inequitable facilities between boys and girls sports and present it to their class for their senior project.

An anonymous instagram account is getting media attention for posting stories of students experiencing sexual harassment at the local middle school.

A parent submits a public complaint form stating LGBT middle school students are being regularly bullied, and that staff have been notified and done nothing about the problem.

All Staff: Pregnancy Notification

When any employee is notified of a student's pregnancy or related conditions, must:

- Provide Title IX Coordinator Title IX contact information
- informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity

§ 106.40(b)(2)

NOTE: It is NOT required that the employee notify the Title IX Coordinator directly to protect student/family privacy and autonomy

Confidential Employees

Who can be a confidential employee?

- Person whose communications are privileged under state or federal law
- Person who is designated as confidential by the school district

Confidential designation applies only for the purposes of Title IX; Title IX confidential employees are not alleviated of other reporting responsibilities.

Obligations

Schools must: notify participants who the confidential employees are.

Confidential employees must: inform people who disclose to them of:

- their confidential status
- how to contact the Title IX Coordinator and make a complaint
- the availability of supportive measures and informal resolution options

§ 106.2 and 106.44

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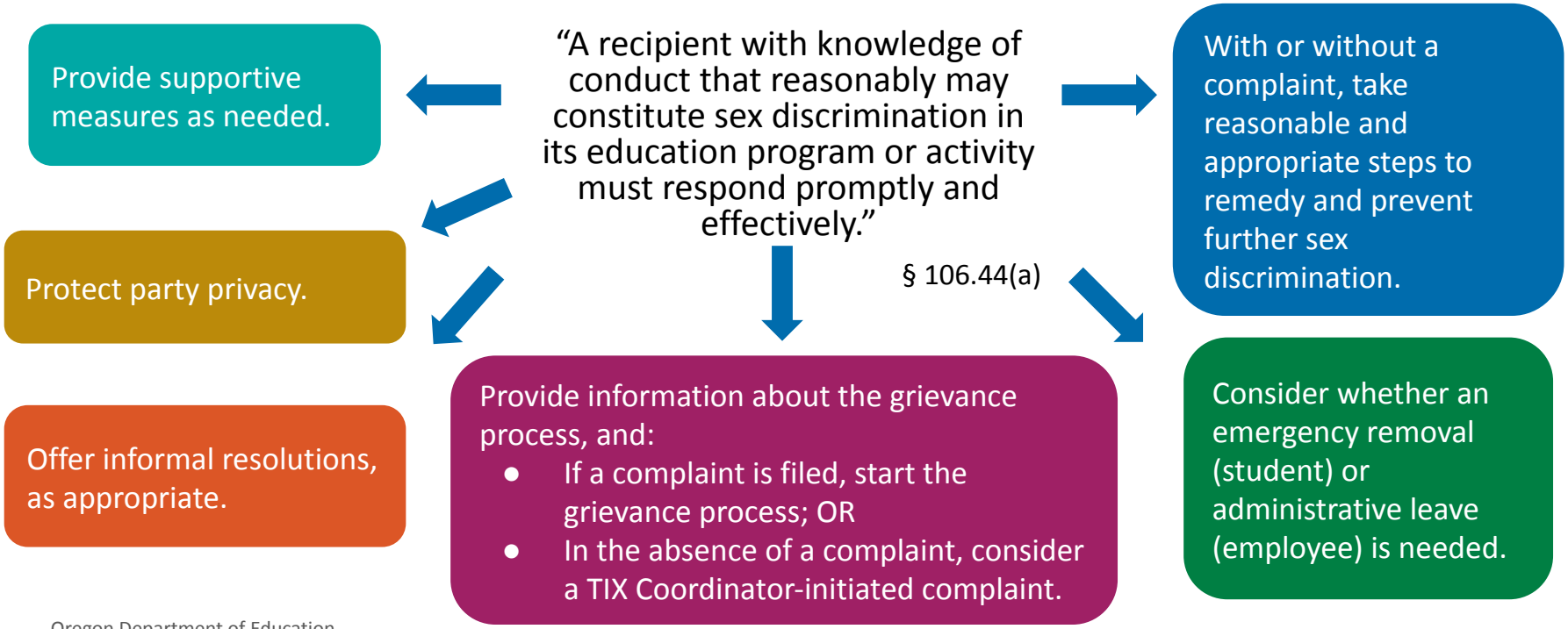
Responding to Notice & Evaluation

Response to Sex Discrimination



Privacy Requirements

(j) **Prohibited disclosures of personally identifiable information.** A recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in the following circumstances:

(1) When the recipient has obtained prior written consent from a person with the legal right to consent to the disclosure;

(2) When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;

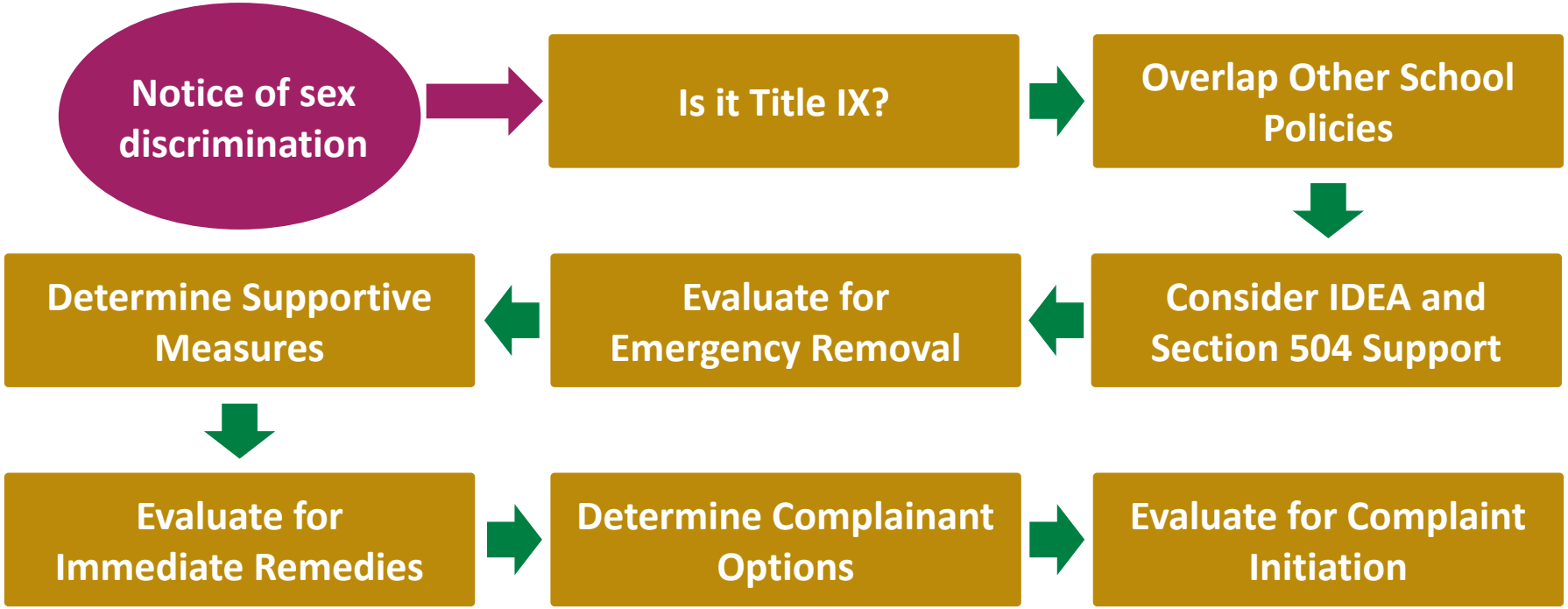
(3) To carry out the purposes of this part, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity;

(4) As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or

(5) To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

§ 106.44(j)

Evaluating and Triaging Reports



Evaluating and Triaging Reports

Is it Title IX?

On face value is the complaint alleging:

- sex discrimination;
- sex-based harassment; or
- retaliation

Includes based on sex stereotypes, sex characteristics, pregnancy, sexual orientation, and gender identity

Overlap Other Policies

Do any other district/school policies or procedures apply?

- Every Student Belongs, Sexual Harassment, SIRC, Bullying/Harassment, HR, Behavioral Safety Assessment

Consider any outside reporting or notification requirements.

- External Reporting: law enforcement, child abuse, sexual conduct
- Parental Notification: bullying

Other Oregon Policies

External Reporting:

- Mandatory Reporting of Child Abuse
- Sexual Misconduct (SB 155)

Possible Overlapping Internal Policies:

- Oregon Sexual Harassment Policies
- Every Student Belongs
- Bullying, Harassment, and Intimidation

Possible Overlapping Processes:

- Bias Incident Response Protocols
- Behavior Safety Assessment
- Sexual Incident Response Committee (SIRC)

What if multiple policies apply?

- Federal law preempts state law
- Where not in conflict, may overlap multiple processes
- May be able to conduct Title IX process with some small additions

Evaluating and Triaging Reports, cont.

IDEA and Section 504

Do any of the individuals involved have an IEP, 504 plan, or other accommodations?

IF YES:

- Required to consult with IEP or 504 team
- What do we need to do to ensure FAPE throughout the investigation?

Emergency Removals

Based the allegations known, is any of the conduct severe enough to necessitate:

- temporary removal of a student respondent, or
- administrative leave for an employee respondent?

You may revisit this consideration as the investigation progresses.

Emergency Removal and Administrative Leave

Emergency Removal = Student

- Must conduct an "individualized safety and risk analysis" that "determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons"
- Provide the respondent with notice and an immediate opportunity to challenge the decision
- Cannot deny a student rights under IDEA or Section 504

§ 106.44(h)

Admin Leave = Employee

- While grievance process is pending
- May be paid or unpaid

§ 106.44(i)

Evaluating and Triaging Reports, cont.

Supportive Measures

What supportive measures and safety plans are needed to ensure access to the educational programs and activities and safety of the parties? Consider:

- Range of options available
- Party requests

You may revisit this consideration as the investigation progresses.

Immediate Remedies: Prompt and Effective Steps

Based the information known, are there any immediate steps the school could take to remedy the discrimination? For example:

- Reviewing policies and procedures
- Employee or student education
- Facilities monitoring or updating

Supportive Measures

Supportive measures means individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

(1) Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or

(2) Provide support during the recipient's grievance procedures or during the informal resolution process.

§ 106.2

Examples of Supportive Measures/Safety Strategies

- academic support: deadline extensions, re-doing assignments or exams, etc.
- changes in class schedules
- changes in classroom seating, supervision, etc.
- increased hallway supervision
- escort between classes or to/from bus or parking
- different parking location
- no-contact orders (mutual or directional)
- counseling
- designated support contact
- check-in meetings, designated safe space, or designated “out of class” time
- excused leaves of absence
- policy flexibility (transfer policy, absence policy, athletic policy, etc.)

Requirements for Supportive Measures

- Cannot unreasonably burden either party
- Must not be for disciplinary or punitive reasons
- At the conclusion of the grievance process or informal resolution process, measures may be modified or terminated, or may be continued
- Must not disclose information about supportive measures to anyone other than to whom they apply, unless the implementation of the measure requires it
- If the party has a disability, required to consult with one or more members of the student's IEP or 504 team to determine how to effectively implement supportive measures

§ 106.44(g)

Appeals Regarding Supportive Measures

Must provide “complainant or respondent with a timely opportunity to seek… modification or reversal of the recipient’s decision to provide, deny, modify, or terminate supportive measures applicable to them.”

- Decision must be made by an impartial employee, who must be different than the person who originally made the decision about the measure(s)
- Impartial decisionmaker must have the authority to modify or reverse the decision if a determination is made that the original decision was inconsistent with the regulatory requirements

“A recipient must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially.”

§ 106.44(g)(4)

Evaluating and Triaging Reports, cont.

Complainant Wishes

What options does the complainant want to pursue?

- Formal complaint process
- Informal resolution (if available and appropriate)
- Supportive measures only

What is the complainant's desired outcome?

Complaint Initiation

With or without a complainant-filed complaint, does a complaint need to be initiated? Consider:

- Complainant's wishes and safety concerns
- Risk of additional discrimination
- The severity of the allegations
- Age, relationship, and roles of the parties
- Scope, including possible patterns, ongoing discrimination, and number of possible victims
- Availability of evidence
- If discrimination could be ended and remedied without a grievance process

Informal Resolution Processes

Offering an informal resolution is an option, not a requirement:

- Available anytime before reaching a determination in an investigation
- NOT allowed in cases where a employee is accused of sex-based harassment against a student
- Otherwise can use situational discretion to determine appropriateness

Participation must be voluntary and cannot be compelled, or made a condition of continued enrollment or employment.

Informal resolution process facilitator cannot be the same person as investigator or decisionmaker for grievance process.

§ 106.44(k)

Informal Resolutions: Notice

(3) Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:

(i) The allegations;

(ii) The requirements of the informal resolution process;

(iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;

(iv) That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;

(v) The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and

(vi) What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.

§ 106.44(k)(3)

TIXC-Initiated Complaint

In the absence of a filed complaint, can initiate when "...the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity."

§ 106.44(f)(1)(v)(B)

Must consider:

- Complainant's wishes and safety risk
- Risk of further sex discrimination
- Severity
- Age and relationship of parties
- Scope of conduct
- Available evidence
- Whether alternative intervention is possible

Triage and Evaluation Walk-Through

Leah's father emails the high school principal on Tuesday evening to report that another student, Kenny, has been harassing her. Leah and Kenny used to date, and ever since they broke up Kenny has been spreading rumors about Leah, implying she has had sex with many boys in the school, and has threatened to release explicit photos of her. On Tuesday in the school parking lot, Kenny walked past Leah and pulled down her shirt, exposing her bra, while his friends filmed. Leah's father says "I want this to be taken care of immediately, my daughter deserves to be safe at school."

Work through the triage and evaluation questions on this scenario.

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Grievance Procedures:
Investigation, Determination, & Appeals

Grievance Process Personnel

Title IX Coordinator
Central designated compliance authority. May also serve in one or more of the roles described below.

Complaint Investigator
Individual who investigates a complaint of sex discrimination. *May be the same person as the decisionmaker.*

Complaint Decisionmaker
Individual who makes a determination about whether sex discrimination occurred. *May be the same person as the investigator.*

Informal Process Facilitator
Individual trained to facilitate the school's optional informal process. *Cannot be the same person as the investigator or decisionmaker in the grievance process.*

Complaint Appeals Decisionmaker
Appeals processes must be the same as those in the school/district's similar processes (i.e., discrimination processes). *Any prohibitions on personnel in those processes would apply here.*

Complaints

Complaint means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.

§ 106.2

Photo by Christin Hume on Unsplash

Complaint Dismissal: Reasons **MAY** Dismiss

(i) The recipient is unable to identify the respondent after taking reasonable steps to do so;

(ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;

(iii) The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint under § 106.44(f)(1)(v), and the recipient determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or this part even if proven; or

(iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or this part. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

§ 106.45(d)(1)

Complaint Dismissal: Requirements

Must notify applicable parties of the basis for dismissal, either in an immediate subsequent fashion or simultaneously if in writing.

Must notify parties that dismissal may be appealed.

If dismissed, must:

- Offer supportive measures to applicable parties
- Title IX Cordinator must take “other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur”

§ 106.45(d)

Complaint Dismissal Appeal

Allowable bases for an appeal:

- Procedural irregularities
- New evidence that out alter the outcome or that was not available
- Bias or conflict of interest

If appealed:

- Notify parties of the appeal
- Implement equal appeal procedures
- Provide parties a reasonable opportunity to make a “statement in support of, or challenging, the outcome”
- Notify parties of the result and rationale for the appeal decision

Complaint Consolidation

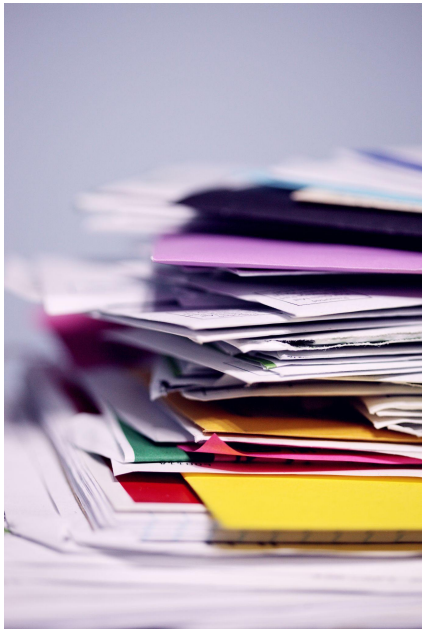


Photo by Alexander Grey on Unsplash

A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances.

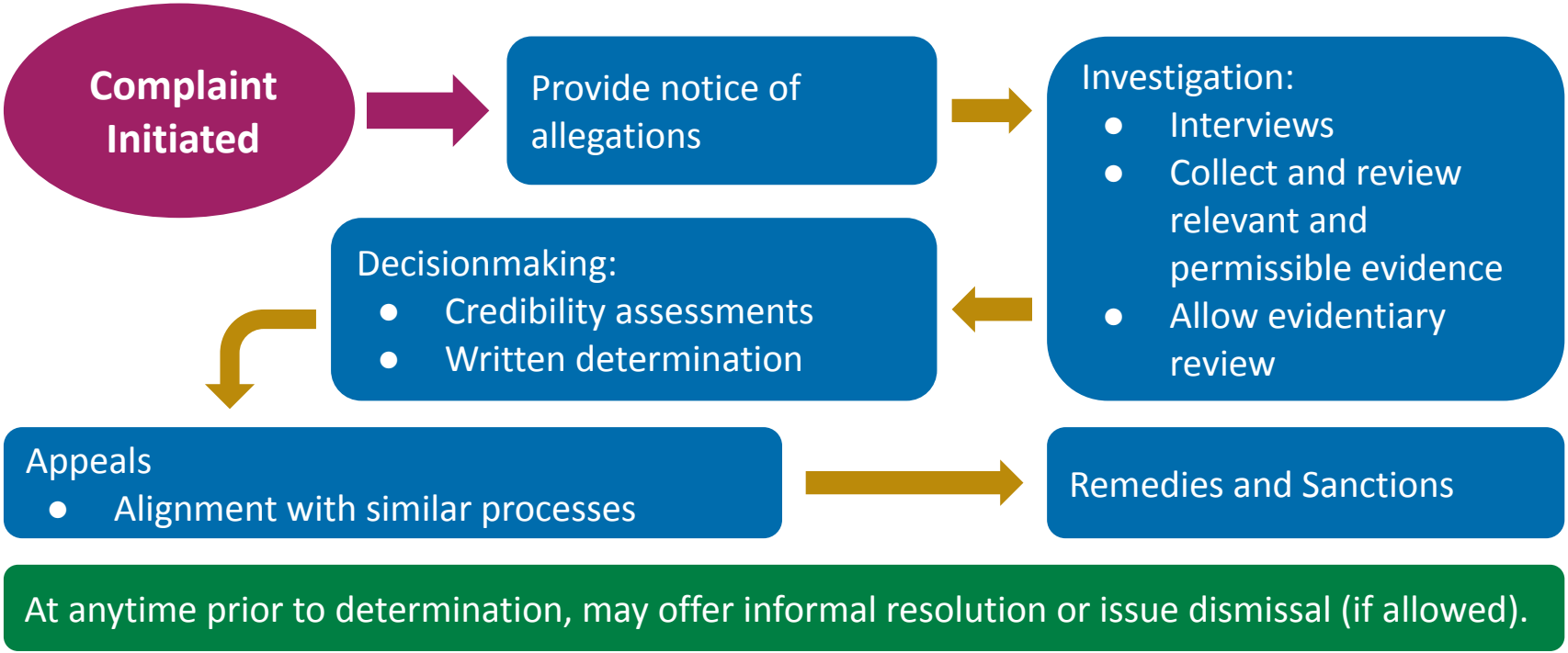
§ 106.45(e)

Basic Requirements for the Grievance Process

- Treat complainants and respondents equally
- Personnel conducting the grievance process must be free from conflict of interest and bias
- Presumption of non-responsibility for the respondent until determination is made by the grievance process
- Reasonably prompt timeframes, delineated by stage of the grievance process
- Protect the privacy of parties
- Require an objective evaluation of all relevant and not otherwise impermissible evidence
- Exclude impermissible evidence and questions

§ 106.45(b)

Complaint Process Overview



Notice of Allegations

Must provide a written or oral notice of allegations that includes:

- The grievance process, and any informal resolution processes available
- Sufficient information to allow the parties to respond to the allegations. Includes, to the extent available, "identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s)"
- A statement that retaliation is prohibited
- A statement that "parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence," and "if the recipient provides a description of the evidence, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party."

§ 106.45(c)

Investigation

“must provide for adequate, reliable, and impartial investigation of complaints.”

Must:

(1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;

(2) Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible;

(3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section

§ 106.45(f)

Investigation: Relevant Evidence

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

§ 106.2

In practice:

- Does it relate to the facts or issues in dispute?
- Does it make the facts or issues in dispute more or less likely to have occurred?

Investigation: Impermissible Evidence

The following types of **evidence and questions** are impermissible, regardless of whether it is relevant or not:

- Evidence "protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality"
- Any party or witness records from a "physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment" unless voluntary, written consent is obtained
- Evidence related to "the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred."

§ 106.45(b)(4)

Investigation: Evidentiary Review

(i) A recipient must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence. If the recipient provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;

(ii) A recipient must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence described in paragraph (f)(4)(i) of this section; and

(iii) A recipient must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.

§ 106.45(f)(4)

Decisionmaking: Credibility Assessments

A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

§ 106.45(g)

Credibility helps a fact-finder or decisionmaker determine what is plausible (***which is different than believable***). Credibility should be assessed when it is in dispute and relevant to evaluating the allegations. Credibility should not be based on a person's status as a complainant, respondent, or witness.

PREA: Credibility Assessments

Decisionmaking

Standard of proof: preponderance of the evidence, unless clear and convincing is utilized for other comparable processes.

Decisionamker must “evaluate relevant and not otherwise impermissible evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred.”

§ 106.45(h)

Written Determination

Determination must be in writing, and must include:

- whether sex discrimination occurred under Title IX
- the rationale for the determination
- procedures and permissible bases for the complainant and respondent to appeal

§ 106.45(h)(2)

Photo by Aaron Burden on Unsplash

Appeals

Must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.

§ 106.45(i)

Other similar processes in Oregon K-12 schools:

- Nondiscrimination policies and procedures
- Bullying and harassment policies and procedures

Remedies and Sanctions

If there is a determination that sex discrimination occurred, Title IX Coordinator must:

- coordinate the provision and implementation of remedies to complainant and other persons the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination,
- coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions, and
- require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity

May not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination.

May not discipline a party for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred.

§ 106.45(h)

Remedies and Sanctions

Remedies are measures provided to restore and preserve full access to the educational programs and activities following a determination of discrimination. Remedies may be provided to a complaint or to any other people identified to have been impacted by discrimination. They should be designed and tailored to address all substantiated discrimination.

Disciplinary Sanctions are consequences imposed on a respondent at the conclusion of a discrimination complaint process. They should be appropriate to the conduct and its consequences.

Individual Remedies

Individual remedies are provided to an individual complainant or other harmed person to remedy the discrimination. Remedies may overlap with supportive or safety measures, but may be more extensive, and may place a higher burden on the respondent. Examples of remedies include:

- Restored access (ability to take classes, participate in extracurricular programs, attending field trips, etc.)
- Tutoring, accommodations in classes, academic remediation, etc.
- Counseling, including outside services paid for by the school/district
- Records corrections
- Additional supportive measures

Community-Based and Structural Remedies

Remedies may also be needed for the wider school community, or in policy or procedure, to correct discriminatory practices. Examples include:

- Student educational programs, which may be targeted towards specific schools, grades, or groups
- Staff training regarding the discrimination
- Statements issued to the whole school community
- Regular climate surveys
- Policy or procedure changes or implementation
- Creating or closing programs, facilities, classes, etc.
- Fund specific programs, student groups, initiatives, etc.
- Partner with CBOs or other organizations to address climate concerns

Discipline:
Selected Oregon Legal Requirements

Schools are required to adopt written rules with respect to student discipline. OAR 581-021-0050

Expulsion is limited to specific circumstances by OAR 581-021-0070, including threats to student and community safety. Expulsion of K-5 severely limited. Similarly, suspension is limited by OAR 581-021-0065.

Specific provisions apply to the discipline of students with disabilities:

- If the discipline constitutes a "significant change of placement", a manifestation determination review (MDR) is required by 34 CFR 300.530 and 34 CFR 104.35(a) as cited by Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline (OCR, 2022)
- A BIP based on an FBA is required if the student put themselves or others at risk of serious bodily injury by OAR 581-015-2181

Discrimination and Free Speech

Students have a right to free political speech. Students do not “leave their First Amendment rights at the schoolhouse gate.” Students can express their opinions orally and in writing, on armbands, t-shirts, etc.

BUT:

Students still have some restrictions. Students may not be allowed to “materially and substantially” disrupt classes or other school activities (examples could include holding a protest on the school steps to block the entry to a building.) Students can also be prohibited from using language that is “vulgar or indecent.”

In some cases, protected free speech may still contribute to a hostile environment the school must address.

Tinker v. Des Moines Independent Community School District

Free Speech: Remedies and Sanctions

Even if there is a free speech concern, districts can still respond in a manner consistent with the First Amendment. A district could:

- communicate opposition to stereotypical or derogatory opinions;
- provide counseling and support for students affected;
- take steps to establish a welcoming and respectful school campus, such as proclaiming school values and inclusion.

OCR Dear Colleague Letter on Shared Ancestry, 2024

Parental Rights

Nothing in Title IX or this part may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, subject to paragraph (e) of this section, including but not limited to making a complaint through the recipient's grievance procedures for complaints of sex discrimination.

§ 106.6(g)

"As a general matter, it is appropriate for the Title IX Coordinator to respect the wishes of the parent with respect to that parent's child except in cases of serious threat to the health or safety of the child. For example, if a recipient is concerned about potential physical harm to a student, or a student's suicidality, the recipient can act to protect the student."

-p. 488, unofficial copy of the Preamble

Grievance Process: Check Your Knowledge

Andrea and Connor, both student-athletes, are doing a math project on funding for different high school sports teams. They reach out to the Athletic Director and various coaches to conduct interviews about school funding and fundraising. Their project shows that girls teams, when compared with the boys teams, receive less money per student, have less successful fundraisers, and have received fewer directed donations. Andrea and Connor submit their report to the school Principal and Athletic Director, which also contains recommendations for more equal funding distributions. Shortly after, Connor stops getting placed in a starting position for baseball games and sits on the bench for two games in a row. Andrea's softball coach tells her that "people are really mad" about the report she and Connor submitted.

Connor's family submits a complaint alleging that Connor is experiencing retaliation from the coach and AD for uncovering Title IX inequities in the athletics program.

Check your knowledge of the required grievance process by working through the questions.

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Avoiding Conflict of Interest and Bias

What is Bias?

"A tendency, inclination, or prejudice toward or against something or someone."

-Psychology Today

Bias can be…

- positive or negative
- morally neutral (or not…)
- conscious or unconscious
- personal or experience-based
- taught to us growing up
- societal or cultural

What is Bias? **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

- develops from a natural tendency to utilize shortcuts and patterns
- is activated unconsciously and without a choice or control
- can affect the way we think, act, and interact with the world

More Info: What is Unconscious Bias?

family status

ability status

race

age

sexual orientation

social class

Many implicit biases come from our beliefs about identities and protected class groups.

national origin

gender identity

religion

social tradition

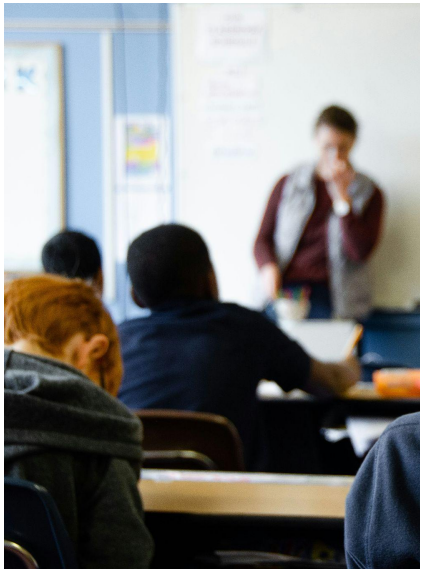
appearance

Example: Implicit Bias in School Discipline

A study of 1,339 teachers from 295 schools across the U.S. found that:

- Teachers were more likely to perceive Black and Latinx/e students as “blameworthy” for classroom misbehavior than white students engaging in the exact same behaviors.
- They were also much more likely to refer Black students to the Principal (or other admin) for further discipline.

RESOURCE: Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in School Discipline



Owens, J. (2022). Double Jeopardy: Teacher Biases, Racialized Organizations, and the Production of Racial/Ethnic Disparities in School Discipline. American Sociological Review, 87(6), 1007-1048. https://doi.org/10.1177/00031224221135810

What is 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

- develops to find things that exist with our views instead of those that challenge them
- is an efficient, albeit ineffective, way to process information
- is strong and widespread because it minimizes discomfort

Bias affects us most when we have...

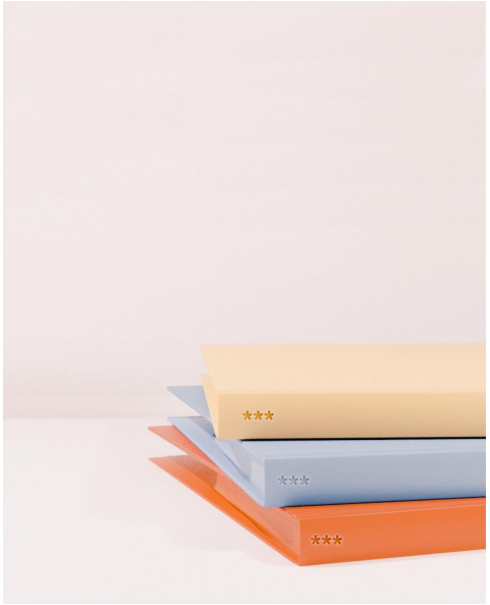


Photo by Agnivesh Jayadeep on Unsplash

- Ambiguous or incomplete information
- Compromised cognitive loads (stress, multi-tasking)
- Time constraints
- Overconfidence in our objectivity
- Tired, hungry, or not operating at your “best self”

The Kirwin Institute, The Ohio State University; The New York Times Implicit Bias Series

Individual Strategies to Decrease Bias

Effective or promising research-driven strategies:

- Empathy-building
- Emotional regulation and mindfulness
- Engaging with counter-stereotypes
- Slow down and build in extra time

FitzGerald, C., Martin, A., Berner, D. *et al.* Interventions designed to reduce implicit prejudices and implicit stereotypes in real world contexts: a systematic review. *BMC Psychol* **7**, 29 (2019). https://doi.org/10.1186/s40359-019-0299-7; U.S. Department of Health and Human Services, https://thinkculturalhealth.hhs.gov/maternal-health-care/assets/pdfs/Combating_implicit_bias_and_stereotypes.pdf

Structural Strategies to Decrease Bias

- Robust process training
- Reduce subjectivity where possible
  - Clear and specific procedures, checklists, templates, etc.
  - Reduce “judgement call” decision-making
- Peer-collaboration models
- Use data and reviews to check your processes – case reviews, statistics, external evaluations, etc

What is a 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

What could a conflict of interest look like?

Financial conflicts, such as yourself or a family member employing a student or a student's family member

Structural/job conflicts, such as directly supervising a student or staff member, or having another role that would benefit/be harmed by an outcome

Imbalance conflicts, where your different relationships with parties or different levels of interaction bias you

Personal conflicts, such as favoritism, bonds, or close relationships

Conflict of Interest: Two Examples

A school district received a Title IX complaint regarding sexual harassment allegations against a high school senior. The school's Title IX Coordinator, who investigated the complaint, used to babysit for the Respondent and is good friends with their mother.

The parent of a middle school student submitted a complaint of discrimination to the school district. The complaint stated that the school's "consult model" of special education services was discriminatory based on disability. The model is a point of pride for the district, and the school's administrative team was paramount in its implementation. The principal, in particular is openly supportive of the model and the budgetary gains it brings.

Perceived vs. Actual Conflicts of Interest

- Actual: Staff are in a position to be influenced by private interests
- Potential: Staff *may* be influenced in the *future* by private interests
- Perceived: Staff *may appear* to be influenced by private interests

Accounting for Conflicts of Interest

- Consider: Is this an *absolute* conflict? Can you *screen* and provide notice? Will *consent* mitigate the conflict?
- Develop a school-specific conflict of interest protocol (consider integrating it into your discrimination 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

*ORS 703.401-411 provides information on qualification of investigators

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