



CHANGES TO TITLE IX

LPRO: LEGISLATIVE POLICY AND RESEARCH OFFICE

BACKGROUND BRIEF

In May 2020 the U.S. Department of Education issued a rewrite of the regulations governing Title IX implementation and enforcement. The new rules replace existing rules, the provisions of a *Dear Colleague* letter which had governed Title IX enforcement since 2011, and guidance to education institutions that was published in 1997 and 2001.

SUMMARY

Title IX, codified at [20 U.S.C. Section 1681](#), is the common term for the federal law banning sex discrimination in educational institutions that receive federal funding, including all programs and activities associated with those institutions. In May 2020, the U.S. Department of Education promulgated [new regulations](#) governing the application of the law. This brief explains the history of Title IX, the various iterations of regulations governing its implementation, and related Oregon statutes.

BACKGROUND

Title IX of the Education Amendments of 1972 is the federal law banning discrimination based on sex in any educational institution receiving federal funds, or in any program or activity of those institutions. The law itself makes no mention of sexual harassment or sexual violence. However, the responsibility of school districts, colleges, and universities to respond to sexual harassment has been established in case law as well as by rule and guidance. Title IX's provisions are primarily enforced through private rights of action and by the federal government.

The U.S. Department of Education issued [guidance](#) on the inclusion of sexual harassment in Title IX in 1997, including both *quid pro quo* and hostile environment harassment in its definition of sexual

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harassment.¹ Between 1979 and 1999, the Supreme Court confirmed in a series of cases an implied right of private action against schools that failed to fulfill their duties under Title IX.² In 2001, the U.S. Department of Education's Office for Civil Rights issued [Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties](#).³ On April 4, 2011, then-Secretary of Education Arne Duncan issued a [Dear Colleague letter](#) based on the 2001 guidance to govern the way K-12 schools, colleges, and universities should treat instances of sexual violence under Title IX, which had not been included in previous definitions.⁴ In none of these instances was the definition of sexual harassment codified into federal regulations.

The 2011 letter emphasized the inclusion of sexual violence and consideration to complainants in Title IX cases. The letter gave specific examples of how schools ought to handle complaints, including guidance that schools should take interim steps to protect victims. These interim steps included separating complainants from their alleged perpetrators. The guidance also prohibited mediation in cases of sexual assault, clarified that involvement of law enforcement officials did not absolve a school of its responsibility to investigate, required schools to use a "preponderance of the evidence" standard to evaluate complaints, and included instructions for prevention and awareness campaigns.

NEW RULES

In September 2017, Secretary of Education Betsy DeVos announced a rescission of the 2011 *Dear Colleague* letter along with plans to rewrite Title IX rules, and issued a [question and answer document](#).⁵ The [rules enacted in May 2020](#)⁶ take effect August 14, 2020 and represent the promised rewrite. The department provided a [summary of the new rules](#). These rules codify a definition of sexual harassment and generally provide increased rights and protections to those accused of sexual harassment under Title IX complaints.⁷ In June 2020, Oregon and sixteen other states as well as the District of Columbia sued Secretary of Education Betsy DeVos to stop implementation of the new

¹ U.S. Department of Education, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 1997. <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited June 30, 2020).

² See *Cannon v University of Chicago*, 441 U.S. 677 (1979), *Franklin v Gwinnett County Public Schools*, 503 U.S. 66 (1992), *Gebser v Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v Monroe County Board of Education*, 526 U.S. 629 (1999).

³ U.S. Department of Education, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, January 19, 2001. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (last visited June 30, 2020).

⁴ U.S. Department of Education, *Dear Colleague Letter*, April 4, 2011. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (last visited June 4, 2020).

⁵ U.S. Department of Education, *September 2017 Q and A on Campus Sexual Misconduct*, September 2017. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (last visited June 30, 2020).

⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020).

⁷ U.S. Department of Education, *Summary of Major Provisions of the Department of Education's Title IX Rule*, May 2020. <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf> (last visited June 5, 2020).

rules.⁸ The plaintiffs claim that the new rules discourage reporting, strip away existing protections, require schools to revamp their procedures too quickly during a pandemic, create arbitrary and unlawful procedural requirements, encourage parallel processes, discount local needs and experience, and contain substantive provisions that are not “logical outgrowths” of the proposed rules.

Table 1 compares major provisions in the new Title IX rules to the guidelines issued in 2001 and 2011.

Table 1: Comparison of Major Provisions in New Title IX Rules and 2011 Guidance

Notice; Requirement to Respond	
Provision in Final Rule May 2020	<p><u>K-12</u>: schools are required to respond when any employee is notified of allegations.</p> <p><u>Higher Education</u>: institutions may choose whether to require mandatory reporting or to designate some employees as confidential resources.</p> <p><u>All</u>: notice to a Title IX Coordinator or other official triggers the school’s response obligations.</p>
Previous rule/guidance	<p><u>2001</u>: No differentiation between K-12 and higher education. “To comply with these regulatory requirements, schools need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties.”</p> <p>“A school has notice if a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment.”</p> <p><u>2011</u>: No differentiation between K-12 and higher education. “If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”</p> <p>“Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity.”</p>
Notable changes	Differentiation between K-12 and higher education; new guidance specifies that K-12 schools are required to respond when any

⁸ *Commonwealth of Pennsylvania, et al v. Elisabeth D. DeVos*, No. 1:20-cv-01468 (D. Columbia, filed June 4, 2020).

	employee is notified rather than if the school knows or reasonably should know.
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Definition of Sexual Harassment for Title IX Purposes	
Provision in Final Rule May 2020	Includes <i>quid pro quo</i> harassment, hostile environment harassment, and sexual violence. “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).”
Previous rule/guidance	<u>2001</u> : Included <i>quid pro quo</i> harassment and hostile environment harassment. <u>2011</u> : Added sexual violence to definition of sexual harassment.
Notable changes	New rules incorporate definitions from both 2001 and 2011 guidance documents but rely on language from the U.S. Supreme Court decision in <i>Davis</i> requiring harassment to be so severe and pervasive as to deny a person equal access; new rules rely on existing statutory definitions of sexual assault.

Where Sexual Harassment Occurs	
Provision in Final Rule May 2020	Schools must respond when sexual harassment occurs in the school’s education program or activity against a person in the United States. Education program or activity includes locations, events, or circumstances in which the school exercises substantial control over both the respondent and the context in which the harassment occurs. Includes buildings owned or controlled by officially recognized student organizations, such as fraternity or sorority houses. Schools may choose how to address sexual harassment affecting students or employees that falls outside the Title IX definition.
Previous rule/guidance	<u>2001</u> : States that the Office for Civil Rights will take under consideration where and when the alleged harassment occurred in

	<p>determining whether harassment took place. Additionally, states that “Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.”</p> <p><u>2011</u>: Same as 2001.</p>
Notable changes	<p>New rules limit school’s responsibility to respond to only those events which take place in the school’s education program or activity. Excludes off-campus housing or parties, for example.</p>

Title IX Coordinator	
Provision in Final Rule May 2020	<p>Requires designation of coordinator. Includes the following categories for notification: applicants for admission, students, parents and guardians of elementary and secondary students, employees, and unions or professional organizations. Requires prominent display of name and contact information for Title IX Coordinator.</p>
Previous rule/guidance	<p><u>2001</u>: Required designation of coordinator and notification to students and employees.</p> <p><u>2011</u>: Continued required designation of coordinator. Required notification to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons.</p>
Notable changes	<p>New rules add unions and professional organizations to required notification recipients.</p>

School’s Obligation to Respond	
Provision in Final Rule May 2020	<p>Schools must:</p> <ul style="list-style-type: none"> • not respond indifferently; • offer supportive measures to complainant; • contact complainant confidentially to inform of supportive measures; • follow a grievance process that complies with rule before imposition of disciplinary sanctions against respondent; • not restrict rights under the First, Fifth, and Fourteenth Amendments;

	<ul style="list-style-type: none"> investigate all formal complaints; and respect complainant’s wishes about whether to conduct an investigation unless Title IX Coordinator overrules. <p>Schools may still address allegations that do not meet the definition of Title IX under their own codes of conduct.</p>
Previous rule/guidance	<p><u>2001</u>: “Once a school has notice of possible sexual harassment of students whether carried out by employees, other students, or third parties it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”</p> <p><u>2011</u>: “If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”</p> <p>“Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.”</p>
Notable changes	New rules emphasize rights of accused.

Definitions: “Complainant,” “Respondent,” “Formal Complaint,” “Supportive Measures”	
Provision in Final Rule May 2020	<ul style="list-style-type: none"> Defines “complainant” as alleged victim. Allows third party reporting. Recognizes the right of parents and guardians to act on behalf of complainants. Defines “respondent” as an individual who has been reported as a perpetrator of sexual harassment. Defines “formal complaint” as a document filed by a complainant and requesting that the school investigate. Requires that complainant be participating in education program or activity at time complaint is filed. Allows filing in person, by mail, or by email or any additional method designated by school. Allows electronic submission via email or online portal. In cases where Title IX Coordinator signs complaint, Coordinator is not considered a complainant and must remain free from conflicts and bias.

	<ul style="list-style-type: none"> • Defines “supportive measures” as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal access, protect safety, or deter harassment.
<p>Previous rule/guidance</p>	<p><u>2001:</u></p> <ul style="list-style-type: none"> • Complainant: Definition implied to be student who was harassed or his or her parent. • Respondent: Uses “alleged harasser” instead of “respondent.” • Formal Complaint: Does not specifically define term. Requires schools to take action regardless of whether “the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student’s behalf.” • Supportive measures: Makes schools responsible for stopping harassment, preventing its recurrence, and remedying effects on victim. Makes schools responsible for taking prompt and effective action to eliminate hostile environment and prevent recurrence. Allows for appropriate steps to differ based on context. “In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed.” <p><u>2011:</u></p> <ul style="list-style-type: none"> • Defines complainant as harassed student, his or her parent, or third party. • Uses “alleged perpetrator” instead of “respondent.” • Does not distinguish between formal and informal complaints. Allows for voluntary informal mechanisms to resolve complaints. • Does not use term “supportive measures.” Recommends that schools make comprehensive victim services available. Requires that schools take immediate action to eliminate hostile environment, take interim steps to protect complainant, allow complainant to avoid contact with alleged perpetrator. Requires that school minimize burden on complainant and not remove complainant from classes or housing.
<p>Notable changes</p>	<p>New rules use different terminology, require schools to allow online submissions, and differentiate between formal and informal complaints.</p>

Grievance Procedure	
<p>Provision in Final Rule May 2020</p>	<p>Requires school grievance processes to:</p> <ul style="list-style-type: none"> • Provide remedies to complainant any time a respondent is found responsible, and not impose disciplinary sanctions without following prescribed grievance process. • Design remedies to maintain complainant’s equal access to education. • Require objective evaluation of all relevant evidence and avoid credibility determinations based on a person’s status. • Require Title IX personnel to be free from bias or conflicts of interest. • Train Title IX personnel on the definition of sexual harassment, how to investigate, the grievance process, and impartiality.
<p>Previous rule/guidance</p>	<p><u>2001</u>: School’s grievance procedures must provide for prompt and equitable resolution of complaints. Requires investigation of both formal and informal complaints. Procedure must provide for:</p> <ul style="list-style-type: none"> • notice to students, parents, and employees; • application of procedure to complaints alleging harassment carried out by employees, other students, or third parties; • adequate, reliable, and impartial investigation of complaints, including opportunity to present witnesses and other evidence; • designated and reasonably prompt timeframes for major stages of process; • notice to parties of outcome; and • assurance that school will take steps to prevent recurrence and correct discriminatory effects. <p>Encourages schools to prohibit retaliation. Allows for inclusion of informal mechanisms for resolving complaints, within limitations. Permits use of student disciplinary procedure not designed specifically for Title IX.</p> <p><u>2011</u>: Requires schools to adopt and publish grievance procedures applying to sex discrimination complaints filed by students against school employees, other students, or third parties. Does not require separate procedures for sexual harassment and sexual violence complaints. Schools permitted to use student disciplinary procedures or separate procedures to resolve complaints. All procedures must meet Title IX requirement of giving complainant a prompt and equitable resolution. Allows for inclusion of voluntary informal mechanisms to resolve complaints within limits, except in cases of sexual assault. Continues requirements of 2001 guidance. Requires designated and reasonably prompt timeframes. Requires written notification of outcome.</p>

Notable changes	New rules are not as specific as previous guidance.
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Investigations	
Provision in Final Rule May 2020	<ul style="list-style-type: none"> • Schools must investigate allegations in any formal complaint and send written notice to both parties. • Burden of gathering evidence and burden of proof remains on schools. • Schools must provide equal opportunity for both parties to present facts, expert witnesses, and other evidence. • Schools must not restrict parties' ability to discuss allegations or gather evidence. • Parties must have same opportunity to select advisor who may be an attorney. • Schools must send written notice of investigative interviews, meetings, or hearings. • Schools must send parties and advisors evidence and give parties at least 10 days to inspect, review, and respond. • Schools must send parties and advisors an investigative report and give at least 10 days to respond. • Schools must dismiss allegations of conduct that do not meet definition of sexual harassment or did not occur in a school's education program or activity. • Schools may dismiss formal complaints if complainant desires to withdraw, if respondent is no longer enrolled or employed, or if specific circumstances prevent gathering of evidence. • Schools must give parties written notice of dismissal and reasons for dismissal. • Schools may consolidate formal complaints where allegations arise out of same facts. • Privacy of a party's medical, psychological, and treatment records are protected unless school obtains party's voluntary, written consent.
Previous rule/guidance	<p><u>2001</u>: Title IX Coordinator required to coordinate investigations. Prohibits reliance on police or insurance investigations. "The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial." Encourages school to inform students that confidentiality request may limit school's ability to respond.</p> <p><u>2011</u>: Requires consent of complainant before beginning an investigation. If complainant insists that name not be disclosed to</p>

	alleged perpetrator, school encouraged to inform complainant that ability to respond may be limited.
Notable changes	New rules are more specific than previous guidance, requiring schools to take specific steps during the course of an investigation.

Hearings	
Provision in Final Rule May 2020	Hearings are optional for K-12 schools; adds provisions to “live hearing with cross-examination” requirement for post-secondary institutions.
Previous rule/guidance	<u>2001</u> : No specific requirements. <u>2011</u> : No differentiation between K-12 and higher education.
Notable changes	New rules add provisions to requirements for live hearings with cross-examinations for higher education institutions.

Live Hearings and Cross-Examination	
Provision in Final Rule May 2020	<p>Applies only to postsecondary. School's grievance process must provide for live hearing:</p> <ul style="list-style-type: none"> • Decision-maker must permit each party's advisor to ask the other party and relevant witnesses all relevant questions and follow-ups, including those challenging credibility. • Cross-examination must be direct, oral, and in real time by party's advisor, not by the party themselves. • At request of either party, recipient must provide for entire live hearing, including cross-examination, to occur with parties located in separate rooms with technology enabling parties to see and hear each other. • Only relevant cross-examination and other questions may be asked. Before complainant, respondent, or witness answers a question, decision-maker must first determine relevance. • If party does not have advisor, school must provide an advisor to conduct cross-examination. • If party or witness does not submit to cross-examination at live hearing, decision-maker must not rely on any statement in reaching a determination regarding responsibility provided that decision-maker cannot draw an inference about determination regarding responsibility based solely on a party's or witness's absence from hearing or refusal to answer. • Live hearings may be conducted with all parties physically present in same location or virtually.

	<ul style="list-style-type: none"> Schools must create audio or audiovisual recording, or transcript, of all live hearings.
Previous rule/guidance	<p><u>2001</u>: No specific requirements.</p> <p><u>2011</u>: Parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. If schools permit lawyers, must do so for both parties. Restrictions on lawyers must apply equally to both parties. Schools discouraged from allowing parties to personally cross-examine each other. Schools required to maintain documentation of all proceedings. In sexual violence cases, requires fact-finder and decision-maker to have training or knowledge regarding sexual violence. Encourages disclosure of real or perceived conflicts of interest.</p>
Notable changes	New rules are more specific about requirements for hearings to include cross- examination; new rules allow for parties to be present virtually.

K-12: Hearings are Optional, Written Questions Required	
Provision in Final Rule May 2020	For K-12 schools and non-post-secondary institutions, recipient’s grievance process may, but need not provide for a hearing. With or without a hearing, after school has sent investigative report to parties and before reaching a determination regarding responsibility, decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with answers, and allow for additional follow-up questions.
Previous rule/guidance	<p><u>2001</u>: No specific requirements.</p> <p><u>2011</u>: No differentiation between K-12 and higher education.</p>
Notable changes	New rules specify written questions are required and hearings are optional for K-12 schools.

Rape Shield Protections for Complainants	
Provision in Final Rule May 2020	Final rule provides rape shield protections for complainants in both post-secondary and K-12, deeming irrelevant questions and evidence about a complainant’s prior sexual behavior unless

	offered to prove that someone other than the respondent committed alleged misconduct or offered to prove consent.
Previous rule/guidance	<u>2001</u> : No specific requirements. <u>2011</u> : No specific requirements.
Notable changes	New rules specify rape shield protections for complainants in both K-12 and higher education.

Standard of Evidence and Written Determination	
Provision in Final Rule May 2020	<ul style="list-style-type: none"> • Requires school's grievance process to state whether standard of evidence is <i>preponderance of the evidence</i> standard or the <i>clear and convincing evidence</i> standard. Requires schools to apply the same standard of evidence for all formal complaints. • Decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue written determination regarding responsibility with findings of fact, conclusions about whether alleged conduct occurred, rationale for result, any disciplinary sanctions imposed, and whether remedies will be provided to complainant. • Written determination must be sent simultaneously to parties along with information about how to appeal.
Previous rule/guidance	<u>2001</u> : No specific requirement for standard of evidence. Required notice to parties of outcome of complaint. <u>2011</u> : Schools required to use <i>preponderance of evidence</i> standard. Recommendation that schools provide written determination to both parties concurrently. Specifies that there is no requirement to notify alleged perpetrator before notifying complainant.
Notable changes	New rules allow schools to choose the standard of evidence to be applied in all cases.

Appeals	
Provision in Final Rule May 2020	School must offer both parties an appeal from a determination of responsibility, or from dismissals, based on procedural irregularities, newly discovered evidence, conflict of interest, or bias on the part of personnel involved. Schools may also establish additional bases for appeals.

Previous rule/guidance	<p><u>2001</u>: States that many schools provide an opportunity to appeal findings or remedy. No requirement specified.</p> <p><u>2011</u>: Recommends that schools provide an appeal process.</p>
Notable changes	New rules require schools to offer appeal process to both parties.

Informal Resolution	
Provision in Final Rule May 2020	<ul style="list-style-type: none"> • Allows a school to offer and facilitate informal resolutions, such as mediation or restorative justice, so long as both parties agree and provide written consent. Facilitators must be well-trained. • Schools may not require as condition of enrollment or employment a waiver of rights to formal investigation and adjudication. • Schools may not require parties to participate in informal resolution processes and may not offer informal processes unless formal complaint is filed. • At any time, any party has the right to withdraw from informal process and resume formal grievance process. • Schools may not offer informal process to resolve allegations that an employee sexually harassed a student.
Previous rule/guidance	<p><u>2001</u>: Requires investigation of both formal and informal complaints. Allows for inclusion of informal mechanisms for resolving complaints, within limitations.</p> <p><u>2011</u>: Does not distinguish between formal and informal complaints. Allows for voluntary informal mechanisms to resolve complaints.</p>
Notable changes	New rules place more specific requirements on schools.

Retaliation	
Provision in Final Rule May 2020	<p>Expressly prohibits retaliation, including:</p> <ul style="list-style-type: none"> • charging an individual with a code of conduct violation that does not involve sexual harassment but arises out of same facts or circumstances; • requiring that school keep confidential the identity of complainants, respondents, and witnesses, with some exceptions; • allowing complaints alleging retaliation to be filed according to school’s grievance procedures; • specifying exercise of rights protected under First Amendment does not constitute retaliation; and

	<ul style="list-style-type: none"> charging an individual with a code of conduct violation for making a materially false statement does not constitute retaliation; however, determination of responsibility is not sufficient to conclude any party made a bad faith materially false statement.
Previous rule/guidance	<p><u>2001</u>: Encourages schools to prohibit retaliation.</p> <p><u>2011</u>: Requires schools to have policies in place protecting against retaliatory harassment. Requires schools to inform complainants about prohibition on retaliation and that school will take “strong responsive action” if retaliation occurs.</p>
Notable changes	New rules include more specific requirements relating to retaliation.

OREGON

In Oregon, Title IX-related requirements and similar provisions are codified in several statutes:

- ORS 659.850 to 659.870 prohibit discrimination in education.
- ORS 339.351 to 339.364 prohibit harassment, intimidation, and bullying.
- ORS 342.700 and 342.704 prohibit sexual harassment.
- ORS 339.366 and 339.368 enact requirements related to teen dating violence and domestic violence.
- ORS 339.370 to 339.400 govern K-12 schools’ treatment of sexual abuse and sexual conduct accusations against staff.

Definitions. Table 2 lists the federal definition of sexual harassment under Title IX, and the relevant or associated definitions in state law.

Table 2: Definitions of Sexual Harassment and Related Terms

Term	Citation	Definition
Sexual Harassment (federal)	34 CFR, Subt. B, Part I, Section 106.30 (soon to be published)	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 to the recipient on an individual’s participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

		(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).
Discrimination	ORS 659.850 (1)	As used in this section, "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 race, color, religion, sex, sexual orientation, national origin, marital status, age or disability. "Discrimination" does not include enforcement of an otherwise valid dress code or policy, as long as the code or policy provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual.
Cyberbullying	ORS 339.351 (1)	"Cyberbullying" means the use of any electronic communication device to harass, intimidate, or bully.
Harassment, Intimidation, Bullying	ORS 339.351 (2)	<p>"Harassment, intimidation or bullying" means any act that:</p> <p>(a) Substantially interferes with a student's educational benefits, opportunities, or performance;</p> <p>(b) 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;</p> <p>(c) Has the effect of:</p> <p>(A) Physically harming a student or damaging a student's property;</p> <p>(B) Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student's property; or</p> <p>(C) Creating a hostile educational environment, including interfering with the psychological well-being of a student; and</p> <p>(d) May be based on, but not be limited to, the protected class status of a person.</p> <p>(3) "Protected class" means a group of persons distinguished, or perceived to be distinguished, by race, color, religion, sex, sexual orientation,</p>

		national origin, marital status, familial status, source of income, or disability.
Sexual Harassment of a Student	ORS 342.704 (2)(b)	<p>(b) Sexual harassment of students includes:</p> <p>(A) A demand or request for sexual favors in exchange for benefits;</p> <p>(B) Unwelcome conduct of a sexual nature that is physical, verbal or nonverbal and that interferes with a student's educational program or activity or that creates an intimidating, offensive or hostile educational environment; and</p> <p>(C) Assault when sexual contact occurs without a student's consent because the student is under the influence of drugs or alcohol, is unconscious or is pressured through physical force, coercion or explicit or implied threats.</p>
Sexual Harassment of Staff	ORS 342.704 (3)(b)	<p>(b) Sexual harassment of staff members includes:</p> <p>(A) A demand or request for sexual favors in exchange for benefits;</p> <p>(B) Unwelcome conduct of a sexual nature that is physical, verbal, or nonverbal and that interferes with a staff member's ability to perform the job or that creates an intimidating, offensive, or hostile work environment; and</p> <p>(C) Assault when sexual contact occurs without a staff member's consent because the staff member is under the influence of drugs or alcohol, is unconscious, or is pressured through physical force, coercion, or explicit or implied threats.</p>
Sexual Harassment of Other Persons	ORS 342.704 (4)(c)	<p>(c) Sexual harassment of persons described in paragraph (b) of this subsection includes:</p> <p>(A) A demand or request for sexual favors in exchange for benefits;</p> <p>(B) Unwelcome conduct of a sexual nature that is physical, verbal, or nonverbal and that creates an intimidating, offensive or hostile environment; and</p> <p>(C) Assault when sexual contact occurs without a person's consent because the person is under the influence of drugs or alcohol, is unconscious, or is pressured through physical force, coercion, or explicit or implied threats.</p>

Teen Dating Violence	ORS 339.366	<p>(c) "Teen dating violence" means:</p> <p>(A) A pattern of behavior in which a person uses or threatens to use physical, mental, or emotional abuse to control another person who is in a dating relationship with the person, where one or both persons are 13 to 19 years of age; or</p> <p>(B) Behavior by which a person uses or threatens to use sexual violence against another person who is in a dating relationship with the person, where one or both persons are 13 to 19 years of age.</p>
Domestic Violence	ORS 339.368	Not defined.
Sexual Conduct	ORS 339.370 (11)(a)	<p>"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:</p> <p>(A) Sexual advances or requests for sexual favors directed toward the student; or</p> <p>(B) Of a sexual nature that are directed toward the student or that have the effect of unreasonably interfering with the student's educational performance, or of creating an intimidating, hostile or offensive educational environment.</p> <p>(b) "Sexual conduct" does not include touching:</p> <p>(A) That is necessitated by the nature of the school employee's job duties or by the services required to be provided by the contractor, agent or volunteer; and</p> <p>(B) For which there is no sexual intent.</p>
Abuse	ORS 419b.005 (1)(a)	<p>"Abuse" means:</p> <p>(A) Any assault, as defined in ORS chapter 163, of a child and any physical injury to a child which has been caused by other than accidental means, including any injury which appears to be at variance with the explanation given of the injury.</p> <p>(B) Any mental injury to a child, which shall include only observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child.</p> <p>(C) Rape of a child, which includes but is not limited to rape, sodomy, unlawful sexual</p>

	<p>penetration, and incest, as those acts are described in ORS chapter 163.</p> <p>(D) Sexual abuse, as described in ORS chapter 163.</p> <p>(E) Sexual exploitation, including but not limited to:</p> <p>(i) Contributing to the sexual delinquency of a minor, as defined in ORS chapter 163, and any other conduct which allows, employs, authorizes, permits, induces, or encourages a child to engage in the performing for people to observe or the photographing, filming, tape recording, or other exhibition which, in whole or in part, depicts sexual conduct or contact, as defined in ORS 167.002 or described in ORS 163.665 and 163.670, sexual abuse involving a child or rape of a child, but not including any conduct which is part of any investigation conducted pursuant to ORS 419b.020 or which is designed to serve educational or other legitimate purposes; and</p> <p>(ii) Allowing, permitting, encouraging or hiring a child to engage in prostitution as described in ORS 167.007 or a commercial sex act as defined in ORS 163.266, to purchase sex with a minor as described in ORS 163.413 or to engage in commercial sexual solicitation as described in ORS 167.008.</p> <p>(F) Negligent treatment or maltreatment of a child, including but not limited to the failure to provide adequate food, clothing, shelter, or medical care that is likely to endanger the health or welfare of the child.</p> <p>(G) Threatened harm to a child, which means subjecting a child to a substantial risk of harm to the child’s health or welfare.</p> <p>(H) Buying or selling a person under 18 years of age as described in ORS 163.537.</p> <p>(I) Permitting a person under 18 years of age to enter or remain in or upon premises where methamphetamines are being manufactured.</p> <p>(J) Unlawful exposure to a controlled substance, as defined in ORS 475.005, or to the unlawful manufacturing of a cannabinoid extract, as defined in ORS 475B.015, that subjects a child to a substantial risk of harm to the child’s health or safety.</p> <p>(b) “Abuse” does not include reasonable discipline unless the discipline results in one of the</p>
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		conditions described in paragraph (a) of this subsection.
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Recent Legislation. During the 2019 legislative session, the legislature enacted several measures to address sexual harassment among Oregon’s educational institutions. [Senate Bill 155 \(2019\)](#) was in response to Portland Public Schools’ [report on Mitchell Whitehurst](#).⁹ The bill overhauled the way Oregon’s K-12 schools are required to respond to accusations of sexual misconduct by employees, agents, contractors, and volunteers. Broadly, the bill required state agencies to investigate complaints and retain records while allowing school districts to conduct their own investigations if they wish.

[House Bill 3077](#) (2019) clarified the definition of sexual harassment for schools and school districts’ responsibilities for investigating, including a provision that participation in an investigation cannot adversely affect staff assignments and protections for individuals who may have violated schools’ drug or alcohol policies and are reporting sexual harassment.

[House Bill 3415](#) (2019) required institutions of higher education to adopt written policies concerning sexual harassment, sexual assault, domestic violence, dating violence, and stalking. The bill required those policies to include a definition of sexual harassment, procedures to address sexual harassment, and a jurisdictional statement. The bill required institutions of higher education to make policies readily available to students and to train relevant staff.

[House Bill 5015](#) (2019) added one Program Analyst 4 position (0.92 FTE) in the Oregon Department of Education to provide technical assistance to meet the requirements of federal Title IX. Title IX and Oregon state law prohibit discrimination in education programs on the basis of sex. This position provides training to districts and schools on how to meet both the state and federal requirements. The position also serves as a resource for students and parents.

[Senate Bill 912](#) (2019) was not enacted but sought to regulate sexual harassment and assaults among private school students and staff.

⁹ Weaver, Robert C. et al. *Report to the Portland Public Schools Board of Education: Findings and Recommendations of the Whitehurst Investigation Team*, May 8, 2018. <https://www.pps.net/cms/lib/OR01913224/Centricity/Domain/4/MW-Report.pdf> (last visited June 5, 2020).