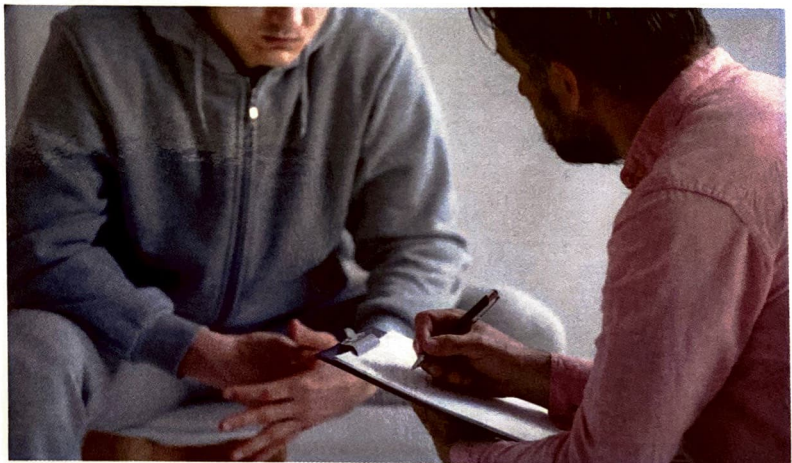


2ND EDITION

Problematic Sexual Behavior in Schools



*How to Spot It and
What to Do about It*

J. WILSON KENNEY

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Chapter 9

Title IX

Mary Kane and Liane O'Banion

Title IX of the Education Amendments Act is an often misunderstood, sometimes controversial, and frequently wrongly maligned law that has important bearing on the work of protecting students from sexual harm. It is apparent that the work of SIRC bumps up against Title IX but it's not immediately clear how these elements can and should fit together. The following chapter, which was written by Mary Kane, JD (legal counsel at Portland Public School) and Liane O'Banion, EdD (Title IX director at Portland Public School), provides an excellent example of how the largest district in Oregon elegantly incorporates these two systems in a collaborative fashion.

TITLE IX THROUGH THE YEARS

Title IX of the Education Amendments Act was codified in 1972 by the federal government. The law states: "No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance" (fn 20 U.S.C. 1681 and 34 C.F.R. Part 106).

Initially, the emphasis of Title IX was the protection of equity in athletics. Later interpretations added attention to educational equity and access throughout single-sex and career/technical programs, and more recently specific protections for transgender (nonbinary) and pregnant or parenting students enrolled in publicly funded educational programs and services. Through a number of Supreme Court cases (fn *Franklin v. Gwinnet County*

Public Schools, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. School*, 524 U.S. 274 [1998]; *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 [1999]), the definition of gender-based or sex discrimination was expanded to include discrimination through incidents of sexual harassment and other kinds of sexual misconduct, the impact of which the court saw as also depriving a student of his or her educational opportunities.

As the Supreme Court found in *Davis v. Monroe Cty. Bd. of Educ.*, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from a school's programs or activities, a hostile environment exists and the school must respond. In furtherance of these decisions, the federal government has promulgated regulations and the United States Department of Education have issued Dear Colleague letters to provide guidance to schools on its responsibilities under Title IX.

Definitions of what constitutes sexual harassment vary and each school must consider the complicated nuances of problematic sexualized behavior and their impact on students' ability to feel safe while at school. Generally, Title IX considers sexual harassment as any form of sex discrimination when the behavior "can interfere with a student's academic performance and emotional and physical well-being" (OCR, 2001, p. ii), or in other words, the harassment creates a hostile environment.

One example of what is broadly prohibited by Title IX in a K-12 school is illustrated as follows:

PROHIBITED UNDER T9:



In this example, the categories broadly described as sexual assault or dating violence, sexual harassment, transmission of explicit images, and harassment or cyberbullying are all variations of sexual harassment as delineated by Title IX.

THE FEDERAL FRAMEWORK

All educational agencies are required to designate at least one employee as a Title IX coordinator in charge of overseeing compliance within the agency; however, it is expected that the entire institution will share in this responsibility. At a minimum, the OCR requires a designated Title IX official responsible for “coordinating the implementation and administration of the recipient’s procedures for resolving Title IX complaints, including educating the school community on how to file a complaint alleging a violation of Title IX, investigating complaints, working with law enforcement when necessary, and ensuring that complaints are resolved promptly and appropriately” (Lhamon, 2015, p. 2).

In addition to investigating all complaints of gender discrimination, schools must provide notice to students and employees of the name and contact information of the Title IX coordinator. This information must be visible, offered in a variety of modalities (online, in schools), and use clear language that children of all ages can understand. In some cases, this may require translation services, posted in languages other than English.

The Supreme Court decisions noted above caused the U.S. Department of Education to revise its guidance on Title IX. The January 2001 Dear Colleague letter sets out the framework which governs all Title IX investigations. Subsequent Dear Colleague letters from 2011, 2014, and most recently from 2017, have offered updates and amendments to the process.

In the 2014 Dear Colleague letter, the Obama administration specifically included protections against discrimination for transgender students. This guidance was rescinded by the Trump administration; however, some states, including Oregon, have determined to continue the protections afforded to transgender students and to uphold discrimination findings under Title IX.

The Oregon guidance directs Oregon educators to provide transgender students with access which allows them the freedom of choice in dress, preferred names and pronouns, use of lockers and restrooms, and so on. In addition, the guidance echoes the 2014 Dear Colleague letter’s determination that gender-based discrimination is included within the meaning of discrimination on the basis of sex. <https://www.oregon.gov/ode/students-and-family/equity/civilrights/Documents/TransgenderStudentGuidance.pdf>)

OFFICE OF CIVIL RIGHTS

The Office for Civil Rights of the U.S. Department of Education is responsible for Title IX enforcement. OCR is in charge of evaluating, investigating, and resolving complaints of school-based sex discrimination. As part of its

purview, it may also conduct compliance reviews of educational institutions to investigate potential systemic violations.

Additionally, it has the authority to develop policy and compliance standards on the regulations it enforces. Under OCR compliance standards, when an educational agency has notice of an allegation of sexual harassment, it must immediately take appropriate steps to investigate the allegation. It is also required to provide interim measures to prevent further harm to the student, while an investigation is pending and to enact structural changes to remedy the effects and prevent its recurrence.

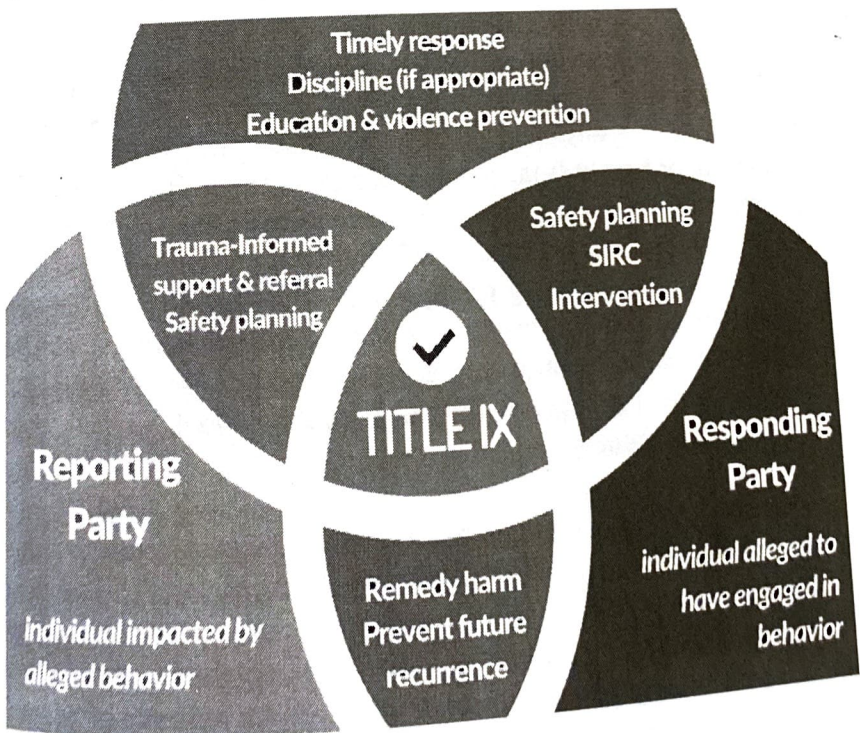
TITLE IX IN K-12

In 2001, the Office of Civil Rights published the Revised Sexual Harassment Guidance, which remains the most instructive for K-12 application. The underlying principle reflected in the publication is that "Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn" (OCR, January 2001, p. ii). Behaviors that may create a hostile environment require the school immediately act to "end the harassment, prevent its recurrence" and, as appropriate, "remedy its effects" (OCR, p. iii).

For postsecondary education, the release of the 2014 Dear Colleague Letter, a "53-page document focused on procedural protections, confidentiality and responsible employee definitions, investigation and hearing protocol, interim measures, remedies and appeals, and training requirements" (O'Banion, 2018, p. 49) had a remarkable effect. While colleges and universities scrambled to create Title IX offices, appoint coordinators and implement new policies and procedures, K-12 schools were largely left out of the recommendations offered. While this may not have been intended by the Obama administration, K-12 schools did not see their unique environments reflected in guidance and emerging practice recommendations, thus, the 2001 revised guidance remains the most influential for K-12 administrators.

While SIRC is not an investigatory framework for comprehensive Title IX response, it does provide an option for safety planning specific to the child exhibiting problematic behaviors, which in turn can keep other children in the school community safe. SIRC offers a particularly useful tool for interim measures, and, when applied appropriately, can also play a role in remedying the effects on children in school. Interim measures, first defined by the 2001 federal guidance as "individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending" (2001) was further clarified in 2017 with the release of OCR's Q&A on Sexual Misconduct.

The updated language about interim measures specifically delineated actions for interim safety such as “counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations” (OCR, 2017, p. 2). Clearly, not all these examples are applicable to the K–12 landscape, however, many, such as schedule changes, no contact orders and flexibility of academic deadlines, are absolutely appropriate for K–12 schools. The following Venn diagram, used by Portland Public Schools, illustrates the necessary components of a comprehensive Title IX response framework.



INVESTIGATIONS IN K–12 SCHOOLS

Not all incidents of problematic sexual behavior constitute sexual harassment under Title IX. OCR has cautioned K–12 schools not to overreact to what may be developmentally appropriate behavior, such as a kiss on the cheek by a young child (OCR, 2001) and encouraged “School personnel to consider the age and maturity of students in responding to allegations of sexual harassment” (OCR, 2001, p. iii). Broadly, the 2001 guidance outlined three types of sexual harassment complaint that would trigger a Title IX investigation: quid pro quo harassment; retaliatory harassment; and harassment that creates a hostile environment.

Quid pro quo harassment occurs when a school employee explicitly or implicitly conditions a student's participation in an educational program or makes an educational decision on that student's submission to sexual requests or advances, or any other verbal, nonverbal, or physical conduct of a sexual nature. Because of the nature of the staff/student relationship, this type of harassment is unlawful whether or not the student resists and suffers actual harm.

Retaliatory harassment occurs when an adverse action is taken against a person because of that person's participation, either as a complainant, a witness, or reporter, in a complaint of discrimination or sexual harassment.

The most prevalent type of harassment seen in the school setting is where a hostile environment has been created. This occurs when an employee or student engages in sexually harassing conduct, which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature that is sufficiently severe, persistent, or pervasive and which is objectively offensive in that it limits a student's ability to participate in or benefit from an education program or activity.

In determining whether a hostile environment exists, the investigator must look at the totality of circumstances including, but not limited to, the effect of the behavior on the reporting party; whether the behavior was directed at one or more persons; whether the behavior unreasonably interfered with those persons' educational or work performances; and so on. For incidents of discriminatory or derogatory speech, investigators should look, as well, at what the statement was, its intention and whether there are any First Amendment protections in play.

Certain conduct, such as sexual assault, would be considered severe and would, in and of itself, constitute a hostile environment. In other instances, a pattern of pervasive or persistent behavior would need to be shown in order to satisfy the conditions of this finding. Pervasive conduct occurs in public places like the classroom or within the workplace. An example of pervasive conduct would be a school-wide acceptance (or at least complacency) of discriminatory treatment toward transgender students. Persistent conduct is repeated behavior or speech over a period of time that continues despite requests to stop. For example, the student who sexually harasses a fellow student on a daily basis despite clear signals from the student or others that this is unwelcome behavior.

Finally, proof that a hostile environment exists is satisfied by the objectively offensive standard as interpreted by a reasonable person. Factors include the age, vulnerability, and relationship of the parties; the number of persons involved; the frequency and severity of the behavior, the existence of violence or the threat of violence; resulting humiliation or ridicule toward the complainant. Hostile environment harassment requires further steps to assess

whether or not the "conduct is sufficiently serious to deny or limit a student's ability to participate in, or benefit from, the school's program based on sex" (OCR, 2001, p. 5).

Analysis regarding the type, frequency, and duration of conduct, the degree to which the behavior was targeted at one or more students, the relationship between those involved, the number involved in the harassment, the age and sex of the harasser, the size, location and context in which the harassment occurred within the school, and whether the incident is sufficiently severe enough to create a hostile environment are also important considerations (OCR, 2001).

Determining whether any of the factors exists is central to the preliminary inquiry in which the investigator determines whether there is reasonable cause to open a formal investigation. This is also the time to reach out to the reporting party to better understand how the person is feeling and what he/she would like the process to be. It is best to approach this in a trauma-informed way and to provide this person with as much control in terms of their participation as possible. This is also the time to put into place interim safety measures to ensure that both parties are kept safe.

GRIEVANCE PROCEDURES

The creation and posting of grievance procedures poses a unique challenge within the K-12 system due to the vast continuum of parents, students, and community members' needs. Posting clear, developmentally and age-appropriate procedures in places that are easy to access is a challenge across K-12 schools. A poster about harassment and bullying that conveys the message well to high schoolers may not work for an elementary school. At a minimum, adopted grievance procedures must provide for prompt and equitable resolution of any complaint and include a districtwide policy against sex discrimination (OCR, 2001).

Kids must have a clear understanding of the kinds of incidents the school must respond to, what constitutes discrimination under Title IX, and perhaps most importantly, what happens once a complaint is made. Attention should be paid to the diversity of children and communities and the uniqueness of each school building when deciding how to post resolution procedures. They may need to vary even within the context of a single school district.

When schools fail to clearly delineate the complexities of the law, Title IX school policy and resulting procedures, additional harm or trauma may occur. A child who discloses to a trusted adult school staff member may believe they can do in a confidential manner, only later to find out that staff member is a mandatory reporter and must share the information with the Title IX coordinator. This can be experienced by the child (and their family) as

retaliatory and when this is combined with feelings that the school ignores or acts against the wishes of someone who has been harmed, it has been closely linked with additional secondary harms suffered, and referred to in the literature as institutional betrayal (Gobin & Freyd, 2013; Goldsmith et al., 2012; Platt et al., 2009). Other manifestations of betrayal can include “indifferent policies which fail to protect, inaccessible reporting procedures, ineffective response by the university, or failure to redress harm” or “when institutions fail to act at all, dismiss a claim, or fail to protect a student from further harm or retaliation” (O’Banion, 2018, p. 70).

THE NEED FOR FORMAL INVESTIGATION

The school may decide to take appropriate interim measures while an investigation proceeds, including using SIRC for safety planning, adjusting class schedules or even suspending the student pending the disciplinary hearing or outcome. Regardless, if the school determines to proceed to a formal investigation, both the reporting and responding party must be notified both verbally and in writing. The notice should include the allegation, the policy or policies that have been implicated and the process by which the investigation will proceed with a projected timeline for completion. The notice should include how the investigation will work to maintain privacy. It may also include the interim actions identified by the SIRC coordinator for student-on-student incidents or by the Human Resources Department (for staff-on-student incidents). Practice varies by district as to whether parents and guardians are also noticed. Look to your district’s policy for guidance.

Both parties are allowed to have an adviser to assist them during the course of the investigation. The adviser could include a parent or guardian, a school counselor, a union representative, or an attorney, to name a few. The adviser may accompany the party during the interview or later, at a hearing, but they may not, in most cases, speak on behalf of the party. There may be instances where the student’s age or developmental disability requires the adviser to assist in answering questions on behalf of the student.

It is likely that parents or guardians will want to be completely involved in all aspects of the investigation. They have the right to inspect and review all educational records of the student under FERPA and this right extends to the investigation records that directly relate to their child. In the same way that the reporting and responding parties are advised of the investigation and discipline processes in play, the investigator should discuss these processes to them in order with help them understand and support their child.

While there may be instances where behavior is captured on video or through text messaging and other social media platforms, most investigations

will rely on interviews. Best practice is to interview parties and witnesses as soon as possible while their recollections are fresh. It is also better to have a second person in the interview to help take notes. If that isn't possible, create a summary of the interview and then have the witness sign it confirming its accuracy. Witnesses may be identified by one or both parties and the investigator should assess the best order for interviewing them.

Once all of the interviews are completed and any other evidence gathered, the investigator must determine whether the evidence meets the evidentiary standard your district has determined is necessary in order to make a finding of Title IX violation. For many years, the standard of evidence was preponderance, in other words, it was "more likely than not" that the incident occurred. Under the Trump administration, schools and districts were given the option of retaining the preponderance standard or moving to the higher standard of clear and convincing evidence.

Most investigations should be completed quickly and delays such as school vacations or police investigations should be documented along with the evidence and interviews. If an extension is needed, both parties should be notified of the extension.

Once the investigation is completed, the investigator will prepare a report detailing the allegations, the names of the witnesses and other evidence gathered. The report should summarize the findings and the final determination made by the investigator. It should also include any remedial measures, such as no contact orders, that should be in place prior to the completion of the process. The report should be provided to both parties as well as to the person designated to adjudicate the matter.

The adjudicator should review the information provided by the investigator and listen to the testimony of the reporting and responding parties. While the law in this area is in flux, there is language in the guidance that each party has the right of cross-examination. One way to approach this is to use the adjudicator as the intermediary who asks questions on behalf of each party. Once the adjudicator has reviewed the report and heard from the parties, he or she will issue sanctions if the evidence meets the evidentiary threshold of preponderance or clear and convincing evidence. These sanctions are then included in the final report, a copy of which is provided to each party. Sanctions should be proportionate to the severity of the behavior. In cases of adult on student misconduct, schools should also be cognizant of employee protections found in state law.

Both parties have a right to appeal the final order and so each district should have an appeal process in addition to the investigatory process outlined in this chapter. Following a determination that sexual harassment occurred, there are two requirements to fully address the harassment. First, the school must determine a "reasonable, timely, age-appropriate, and effective corrective

action, including steps tailored to the specific situation” (OCR, 2001, p. 16). Lastly, steps must be taken to prevent future recurrence. This protects both parties from retaliation and any witnesses involved in the fact-finding portion of the investigation. There may also be a need to continue to monitor the behavior of the harasser, refer them to educational or counseling options, and/or other scheduled times for follow-up or check-in to ensure the behavior has stopped.