

Title IX Final Regulations: Coordinator, Investigator, Decision-Maker and Informal Resolution Facilitator Training

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March 8, 2022

Title IX of the
Education Amendments of 1972

“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 educational program or activity receiving Federal financial assistance.”



Title IX: The Basics

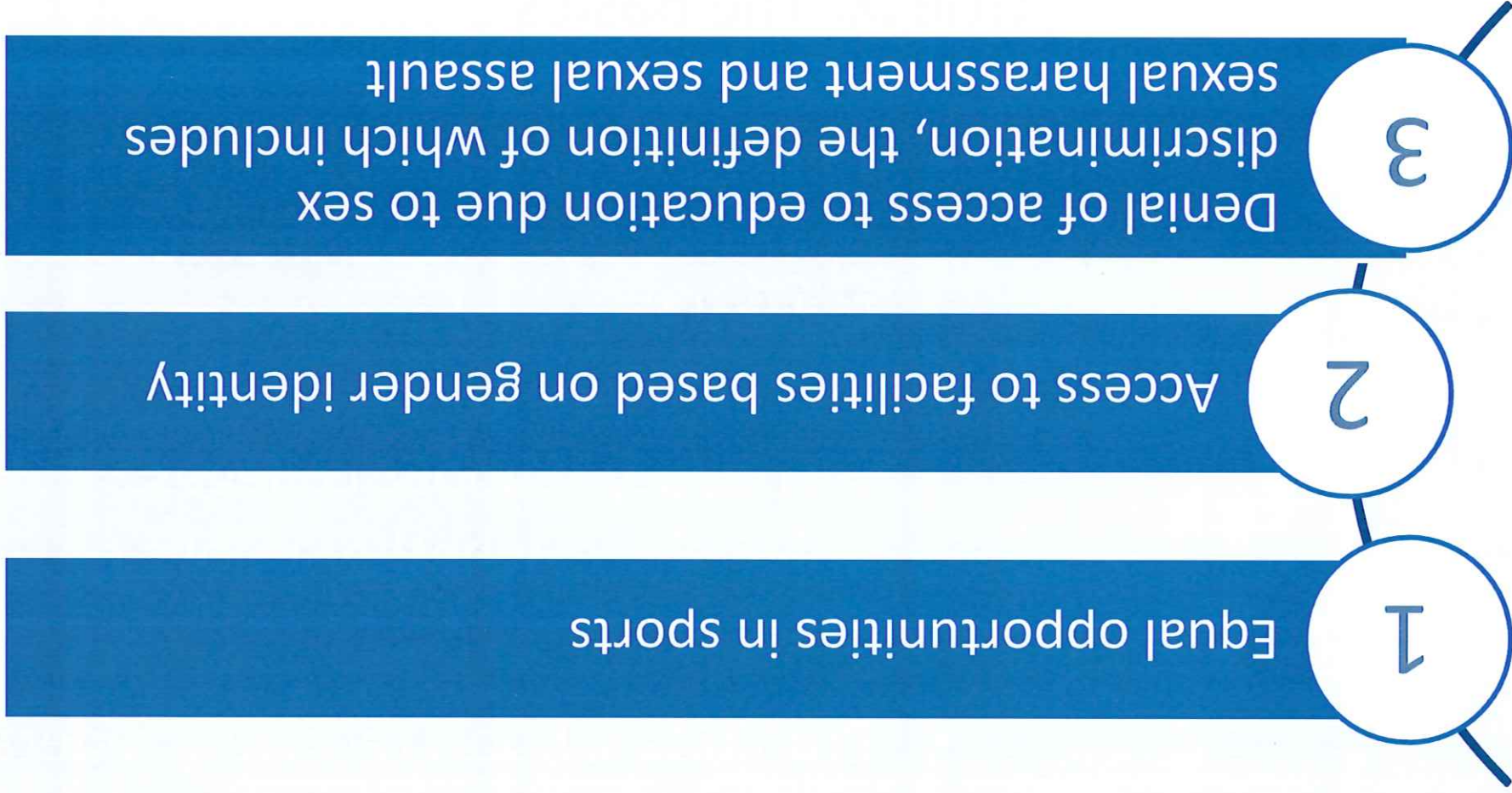


- Applies to programs or activities operated by schools that receive federal financial assistance, including elementary and secondary schools, colleges, universities, whether public or private.
- Prohibits schools receiving federal funds from discriminating on the basis of sex.

Connecticut law also protects individuals from discrimination on the basis of sexual orientation and gender identity/expression.

Denial of Equal Opportunity

There are three main areas where a school may face a Title IX student issue:



Additional Laws May Come Into Play

CT Law

- CT law protects students and employees against discrimination on the basis of sex
- This includes protection on the basis of sexual orientation and gender identity and expression

Title VII

- Protects employees against discrimination on the basis of sex.
- SCOTUS has determined that this includes protection on the basis of sexual orientation and gender identity and expression.

New Definition of “Bullying” in Connecticut

- Effective July 1, 2021, the new definition of “bullying” under Connecticut Public Act No. 19-166 reads:
 - An act that is direct or indirect and severe, persistent or pervasive, which:

- (A) causes physical or emotional harm to an individual,
- (B) places an individual in reasonable fear of physical or emotional harm, or
- (C) infringes on the rights or opportunities of an individual at school.

No requirement for conduct to be “repeated.”
Any Title IX investigation will also need to address bullying.

Title IX Enforcement

OCR

- Federal DOE agency responsible for ensuring equal access to education and promoting educational excellence through enforcement of civil rights
- Investigates allegations of discrimination and obtains remedies for complainants to address discrimination

Courts

- Federal government (DOJ)
- Individual legal claims
- Class claims

2020 Final Regulations

- On May 6, 2020 the United States Department of Education issued the 2,033 page document that amended the regulations implementing Title IX of the Education Amendments of 1972 and which contained the new **Final Regulations**.
- Final Regulations became effective August 14, 2020.
- New Title IX regulation holds schools accountable for failure to respond **equitably and promptly** to sexual misconduct incidents.

- These Final Regulations, unlike past guidance issued from the Office of Civil Rights (OCR), have the full effect of law and override any past guidance.

- Final Regulations are a significant change to how Title IX is managed and include extensive procedural requirements.

2020 Final Regulations – What’s New?



A definition of sexual harassment



A duty for schools to only investigate complaints of conduct that occurred within their program or activity



Adoption of an “actual knowledge” and “deliberate indifference” standard

Under the Final Regulations, if a school district has **actual knowledge** of sexual harassment in a district education program or activity, the district must respond **promptly** in a manner that is not **deliberately indifferent**.



A detailed grievance process for formal complaints of sexual harassment – specific roles for administrators in grievance process

Key Personnel



Grievance Process v. Procedure

Complaints of sex
discrimination involving
allegations of sexual
harassment



Grievance
Process

*This process is outlined in
great detail in
the Final Regulations*

Complaints of sex
discrimination that DO NOT
involve sexual harassment



Grievance
Procedure

*Districts have more flexibility
in the details of the
grievance procedure, so long as it is
prompt and equitable*

“Sex Discrimination”

occurs when a person, because of the person's sex, is denied participation in or the benefits of any education program or activity receiving federal financial assistance.

“Sex Discrimination” – What About Sexual Orientation and Gender Identity?

- On March 8, 2021, President Biden issued Executive Order 14021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*.
- The OCR is currently reviewing the Final Regulations following this Executive Order.
- On June 16, 2021, the OCR issued a Notice of Interpretation explaining that it will enforce Title IX’s prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity.

“Sexual Harassment”

- ... Conduct on the basis of sex that satisfies one or more of the following:
- An **employee** of the District conditioning the provision of an aid, benefit, or service of the District on an individual's **participation in unwelcome sexual conduct** (i.e., *quid pro quo*);
 - **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 District's education programs or activities; or
 - **“Sexual assault”*** (20 U.S.C. 1092(f)(6)(A)(v)), **“dating violence”*** (34 U.S.C. 12291(a)(10)), **“domestic violence”*** (34 U.S.C. 12291(a)(8)) or **“stalking”*** (34 U.S.C. 12291(a)(30)).

*These definitions can be found in Appendix A of the Shipman & Goodwin model Administrative Regulations.

“Actual Knowledge”

The District must respond to “actual knowledge” of sexual harassment.



In elementary and secondary schools, the District is deemed to have **actual knowledge** when notice of sexual harassment or allegations of sexual harassment:

1. is given to the Title IX Coordinator
2. is given to any official of the District
3. is given **to any employee of an elementary or secondary school.**



If **any** employee is on notice of sexual harassment, the employee must alert the administration as promptly as possible.

“Deliberate Indifference”

Once the District has “actual knowledge” of sexual harassment, it must respond in a way that is not “deliberately indifferent.” Response must:

Be prompt



Treat the parties equitably



Include offering supportive measures to the complainant and ensuring that the Title IX Coordinator contacts the complainant to discuss supportive measures (even if no formal complaint has been filed)



Consider the complainant’s wishes with regard to supportive measures



Explain the process for filing a formal complaint and the grievance process



Follow the grievance process before making a responsibility determination and before imposing any disciplinary sanctions



Implement remedies designed to restore or preserve educational access



More Definitions



Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent means an individual who has been alleged to be the perpetrator of conduct that could constitute sexual harassment.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the Administration investigate the allegation of sexual harassment.



A “document filed by a complainant” means a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

More Definitions



Employee means:

- a teacher, substitute teacher, school administrator, school superintendent, guidance counselor, school counselor, psychologist, social worker, nurse, physician, school paraprofessional or coach employed by the District or working in a public elementary, middle or high school; *or*
- any other individual who, in the performance of his or her duties, has regular contact with students and who provides services to or on behalf of students enrolled in a public elementary, middle or high school, pursuant to a contract with the District.

This definition is taken from state law and is not included in the Final Regulations.

Types of Sexual Harassment



Important Note: Definition of sexual harassment under Title VII (employees) and Connecticut law is broader (more protective) than this new Title IX definition.

Quid Pro Quo

“This for That”

- When a teacher or other school employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct.
 - Submission to such conduct may either be made explicitly or implicitly.
 - If this occurs, it does not matter whether the student resists and suffers the threatened harm or submits to and avoids the threatened harm.
- Quid pro quo harassment can also occur when a District employee conditions a benefit or service on another employee's submission to unwelcome conduct.

Severe, Pervasive, Offensive Unwelcome Conduct



When a teacher, school employee, other student, or third party engages in unwelcome conduct that is determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity.

Sex-Based Offenses

- “Sexual assault” (20 U.S.C. 1092(f)(6)(A)(v)), “dating violence” (34 U.S.C. 12291(a)(10)), “domestic violence” (34 U.S.C. 12291(a)(8)) or “stalking” (34 U.S.C. 12291(a)(30)).

Examples of Sexual Harassment

Unwanted sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature including:

- Statements or other conduct indicating that a student's submission to, or rejection of, sexual overtures or advances will affect the student's grades and/or other academic progress.
- Unwelcome attention and/or advances of a sexual nature, including verbal comments, sexual invitations, leering and physical touching.
- Display of sexually suggestive objects, or use of sexually suggestive or obscene remarks, invitations, letters, emails, text messages, notes, slurs, jokes, pictures, cartoons, epithets or gestures.
- Touching of a sexual nature or telling sexual or dirty jokes.
- Making sexual comments, jokes or gestures (written or verbal).
- Distributing sexually explicit images such as drawings or pictures, or written materials (including cyber-distribution).
- Transmitting or displaying emails or websites of a sexual nature.
- Calling students sexually charged names.
- Spreading sexual rumors.

Title IX Jurisdiction

- The complainant must be a current student or employee or attempting to enroll in the District's programs
- Has student dropped out because of the harassment and wants to participate?
- Covers sexual harassment that happens in a school's **"education program or activity"**
- Must occur in the United States
- Includes sexual harassment by or against students or employees

Scope of District's Education Programs and Activities

For purposes of investigations and complaints of sexual harassment, **education program or activity** includes locations, events, or circumstances over which the District exercises substantial control over the context in which the sexual harassment occurs and the person accused of committing harassment.



School buildings/
on campus



At school, on school
bus, on field trips, at
school-sponsored
activities (including
athletics), academic
conferences, etc.



Distance learning

What is an “Educational Program or Activity”?

- A student sexually harassing another student online while off campus and not participating in the school’s programming is not covered under the new Final Regulations and there is no jurisdiction under Title IX.
- But what if the off campus conduct is the subject of alleged harassment that occurs in the school?

• Whether a school has “substantial control” is a fact-specific inquiry

- A school may have “substantial control” if the program or activity is funded, promoted, or sponsored by the school
- A school may have “substantial control” where “a teacher employed by a school visits a student’s home ostensibly to give the student a book but in reality to instigate sexual activity with the student”
- Off-campus buildings that are owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a sorority or fraternity.

Reporting



Any person may report sex discrimination, including sexual harassment, whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment.

All employees of the District have an obligation to report instances of sexual harassment.

Only conduct that is alleged to have occurred against a current student or employee, or an applicant, and in the United States, falls under Title IX.

General Response to Sexual Harassment

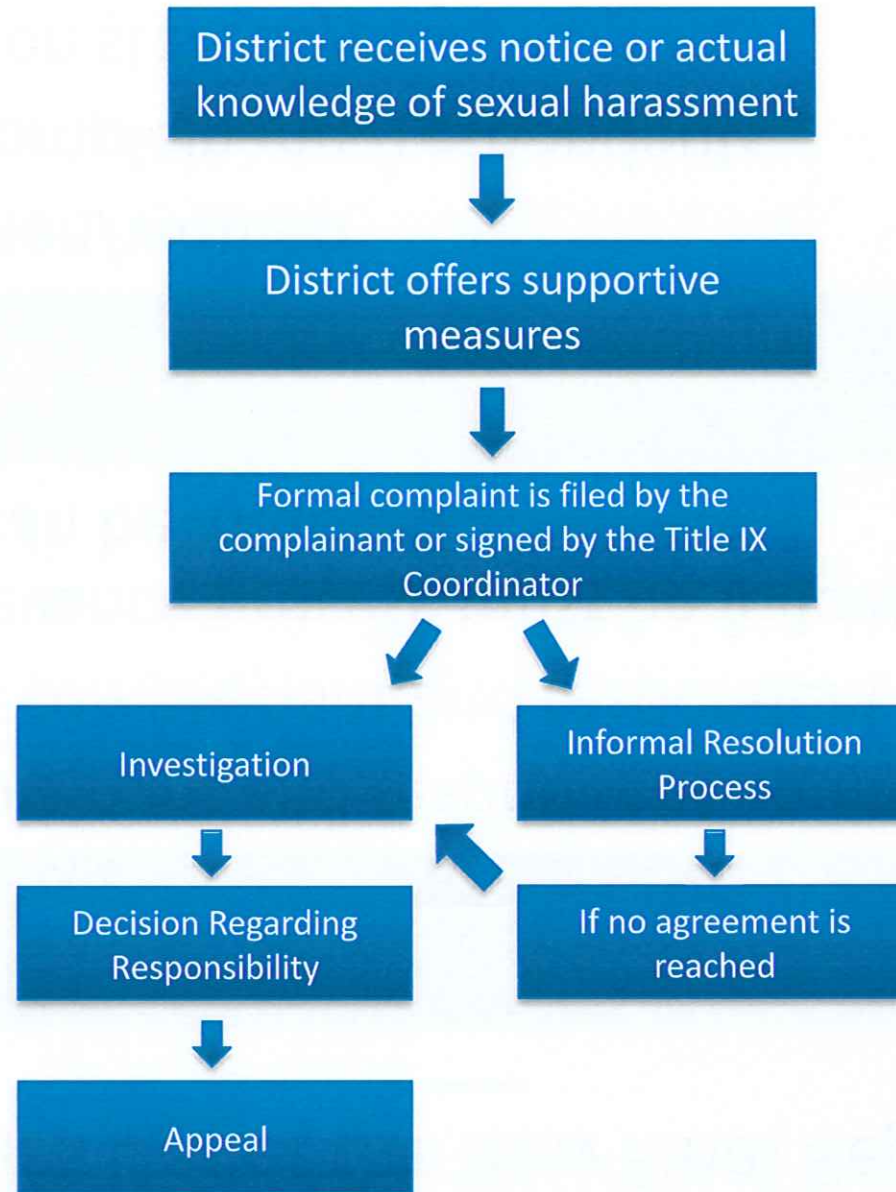
If the District has **actual knowledge** of sexual harassment in a District education program or activity...

The District's response must treat complainants and respondents **equitably** by offering supportive measures to the complainant and by following the grievance process outlined here *before* the imposition of any disciplinary sanctions or other actions that are not supportive measures.

The District must respond **promptly** and in a manner that is not **deliberately indifferent**.

The District is **deliberately indifferent** only if its response to sexual harassment is **clearly unreasonable** in light of known circumstances.

Grievance Process for Allegations of Sexual Harassment



Principles Under the New Final Regulations

Focus on Due Process

- Treat complainant and respondent equitably
- Fairness to complainant and respondent
- Formal grievance process must be followed before discipline can be imposed

No Bias – Must be Neutral

- Between men/women
- Between complainants/respondents
- Not based on stereotypes

Title IX Coordinator: Obligations

Title

- The District must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX. This is the “Title IX Coordinator.”
- This specific title must be used to identify this individual.

Training

- Must be trained on Title IX policies and procedures.
- All training materials must be posted on the District’s website.

Obligations

- Monitor the District’s compliance with Title IX.
- Ensure appropriate education and training is provided.
- Coordinate the response to all reports of sex discrimination and sexual harassment.

Title IX Coordinator: Responsibilities within the Grievance Process

Contact each complainant (defined as a person who is alleged to be the victim of sexual harassment) to discuss supportive measures and inform the complainant of the availability of these measures with or without filing a formal complaint



Consider the complainant's wishes regarding supportive measures



Explain to the complainant the process for filing a formal complaint



Follow grievance process before imposing disciplinary sanctions if respondent is found responsible



If respondent is found responsible, then effectively implement remedies for the complainant, designed to restore or preserve the complainant's equal educational access

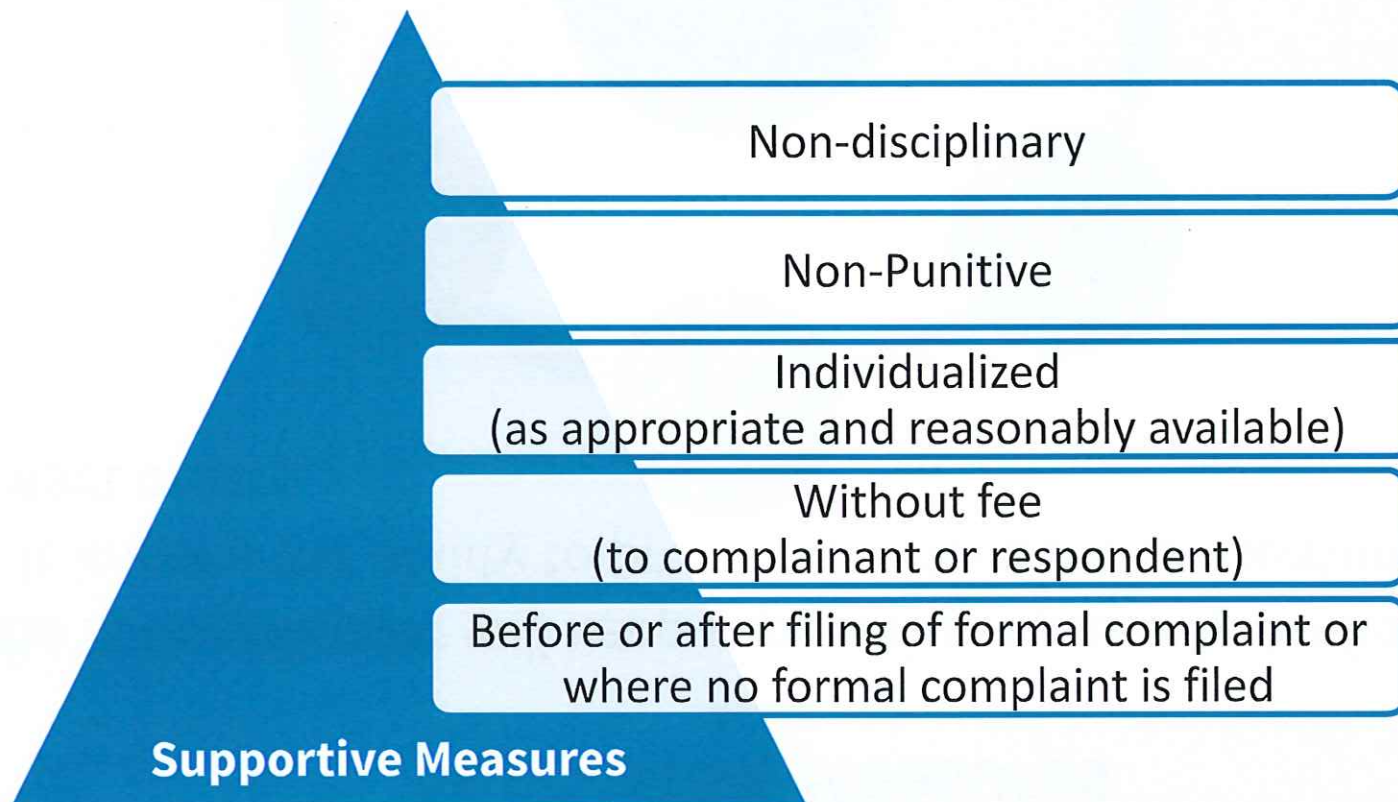


Must be impartial, unbiased, and free from conflicts



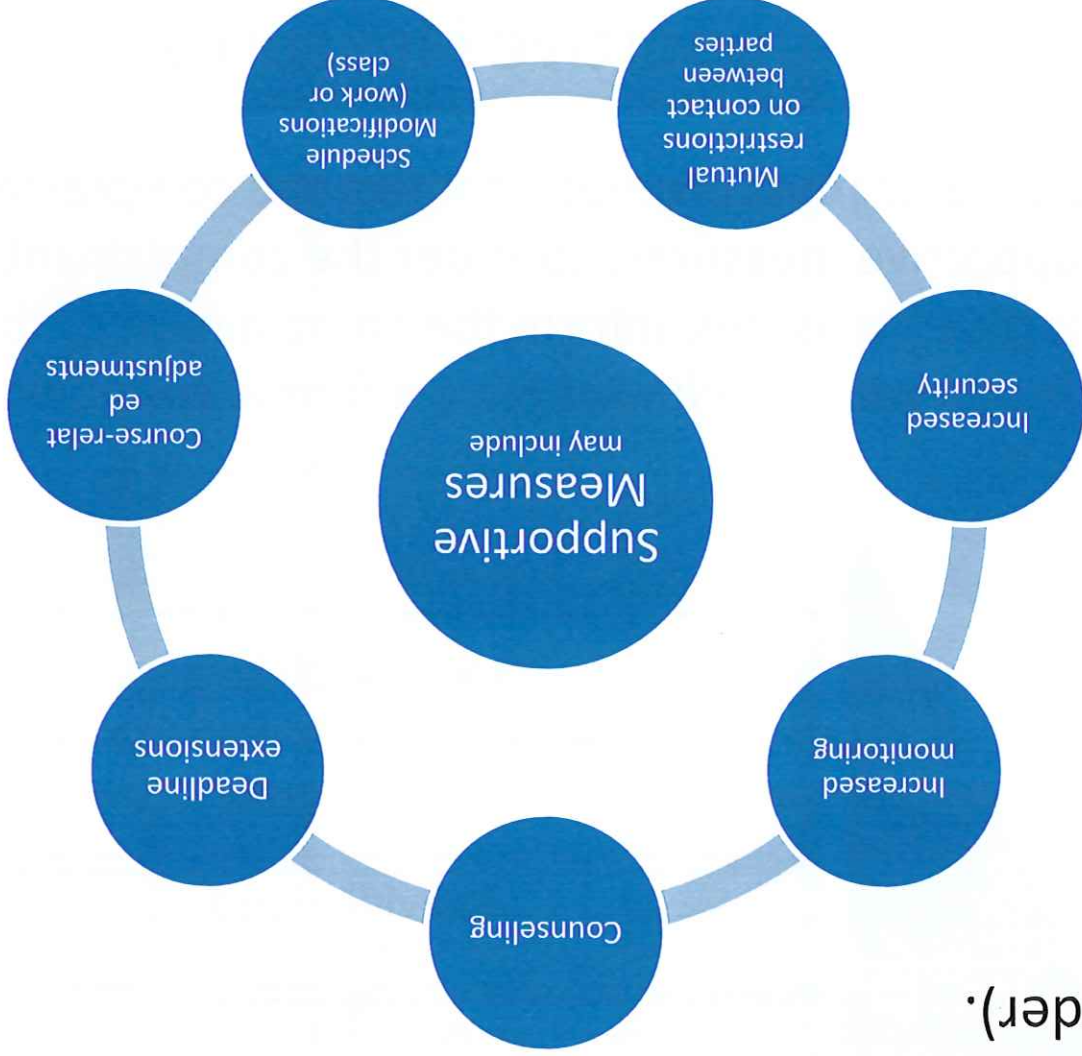
Supportive Measures

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures *with* or *without* filing a formal complaint, and explain to the complainant the process for filing a formal complaint.



Supportive Measures

The Title IX Coordinator will keep supportive measures confidential unless it impairs the ability to provide the supportive measures (i.e. a no-contact order).



Emergency Removal

While the District must go through the grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures, the District can remove a student respondent on an emergency basis.



The District must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegation justifies removal.



The respondent must be provided with written notice and an opportunity to challenge the decision immediately following removal.

This does not change any rights students have under the IDEA, Section 504, or the ADA.

Emergency Removal/Administrative Leave

Similarly, the District may place an employee respondent on administrative leave during the pendency of the grievance process.

This does not change any rights employees have under Section 504 or the ADA.

“Formal Complaint”



Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.



Formal Complaint

The filing of a formal complaint triggers the beginning of the formal grievance process.



- Title IX Coordinator will inform complainant about the right to file a formal complaint
- **But, will not encourage or discourage** a person to file a formal complaint

- At the time of filing, the complainant must be participating or attempting to participate in the District's education program or activity
- Formal complaints can be filed by a student's parent or the Title IX Coordinator.
- When the Title IX Coordinator signs a formal complaint, he/she is NOT the complainant or otherwise a party

When Should Title IX Coordinator Sign a Formal Complaint?

- There may be times when a complainant does not want to file a formal complaint. The Title IX Coordinator may respect the complainant's wishes if doing so is **not clearly unreasonable** in light of the known circumstances.
- If the Title IX Coordinator deems it **clearly unreasonable** in light of the known circumstances to not proceed with the formal grievance process, the Title IX Coordinator must sign a formal complaint. Thus, the formal grievance process would begin.

Query: Under what circumstances may a decision not to sign a complaint be considered “clearly unreasonable?”

Grievance Process: Basic Requirements

The filing of a formal complaint is the first step in the formal sexual harassment grievance process. The process must treat complainants and respondents **equitably** by:

Disciplinary Sanctions ONLY Following Grievance Process

- Grievance process must be followed before any imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent
- Grievance process must be **reasonably prompt**
- Presumption of innocence

Providing Remedies to Complainant if/when Respondent is Found Responsible

- Remedies must be designed to restore or preserve equal access to the District's education program or activity
- Remedies may include supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent

Grievance Process: Basic Requirements

Evaluation of Evidence

- The grievance process requires an evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

Without Bias or Conflict of Interest

- The designated Title IX Coordinator, investigators, decision-makers, and informal resolution facilitators must not have a **conflict of interest** or **bias** against complainants or respondents generally, or an individual complainant or respondent

“Conflict of Interest”

A **conflict of interest** occurs when it is proven that the Title IX Coordinator, investigator(s), and/or decision-maker(s) have personal, financial and/or familial interests that affected the outcome of the investigation.

Definition of “conflict of interest” is not included in the Final Regulations. This definition is taken from other areas of the law and is intended to be illustrative of the concept.

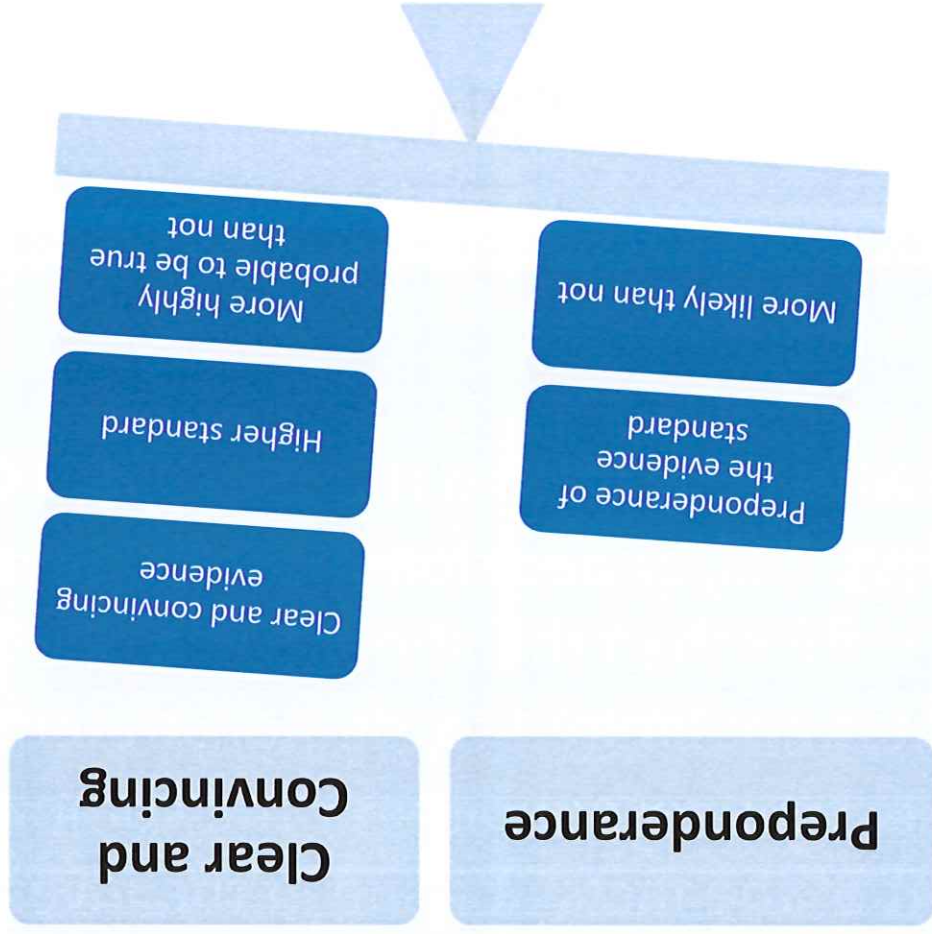
“Bias”

Bias occurs when it is proven that the Title IX Coordinator, investigator(s), and/or decision-maker(s) demonstrate actual bias, rather than the appearance of bias. Actual bias includes, but is not limited to, demonstrated personal animus against the respondent or the complainant and/or prejudgment of the facts at issue in the investigation.

Definition of “bias” is not included in the Final Regulations. This definition is taken from other areas of the law and is intended to be illustrative of the concept.

Grievance Process: Evidentiary Standard

Districts may choose one of these two standards to be used to determine responsibility, but the same standard must be used for all complaints of sexual harassment, no matter if it is against a student or employee



Notice of Allegations

Upon receipt of a formal complaint of sexual harassment, the District must provide a **written notice** to the known parties and provide the parties with a copy of the grievance process.

SAMPLE WRITTEN NOTICE FOR FORMAL COMPLAINTS OF SEXUAL HARASSMENT
[LETTERHEAD]

NOTICE OF SEXUAL HARASSMENT ALLEGATIONS

In accordance with the Board's Policy and Administrative Regulations Regarding Title IX of the Education Amendments of 1972 - Prohibition of Sex Discrimination and Sexual Harassment (Student), a formal complaint of sexual harassment has been filed with the Title IX Coordinator.

Identify the parties involved. If known: _____ (Complainant(s))
_____ (Respondent(s))

The contact allegedly involved in sexual harassment: _____

The date and the location of the alleged incident, if known: _____

The Title IX Coordinator or designee will contact the parties regarding the next steps in the grievance process. Questions may be directed to the Title IX Coordinator: [INSERT CONTACT INFORMATION FOR TITLE IX COORDINATOR]

The respondent is presumed not responsible for the alleged conduct. A determination regarding responsibility is made at the conclusion of the grievance process.

All parties involved may have an advisor of their choice who may be, but is not required to be, an attorney. The advisor may assist and advise the respondent, as permitted by the Board's Administrative Regulations Regarding Title IX of the Education Amendments of 1972 - Prohibition of Sex Discrimination and Sexual Harassment (Student).

It is a violation of the Board's Student Discipline Policy to be in school attire or otherwise engage in disruptive behavior, which includes knowingly making false statements or knowingly submitting false information during the grievance process. Any student who knowingly makes false statements or knowingly submits false information during the grievance process will be subject to sanctions pursuant to the Board's Student Discipline Policy. Any employee who knowingly makes false statements or knowingly submits false information during the grievance process is subject to discipline, up to and including termination.

A copy of the Board's Policy and Administrative Regulations Regarding Title IX of the Education Amendments of 1972 - Prohibition of Sex Discrimination and Sexual Harassment (Student) is included with this notice.

- The information to be included in the notice can be found in the Final Regulations
- Sample notice is included in the Shipman & Goodwin LLP model administrative regulations

If, in the course of an investigation, the District decides to investigate allegations about the complainant or respondent that are not included in the notice, the District must provide an **additional notice**.

Dismissal of a Formal Complaint

The Title IX Coordinator **must** dismiss any formal complaint that

1. Would not constitute sexual harassment (under the definition in the Final Regulations) even if proved,
2. Did not occur in the District's education program or activity, or
3. Did not occur against a person in the United States.

Dismissal of a Formal Complaint

The Title IX Coordinator **may** dismiss a formal complaint or any allegations therein, under the following circumstances:

1. The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein,
2. The respondent is no longer enrolled in or employed by the District, or
3. Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissal of a Formal Complaint

Upon a dismissal for any reason, the District must ***promptly and simultaneously*** send **written notice** of the dismissal and reason(s) for it to each party. Either party can appeal the dismissal.

A dismissal does not preclude action by the District under the Student Discipline policy, Code of Conduct for students and/or employees, or any other applicable rule, policy, and/or collective bargaining agreement.

Investigation

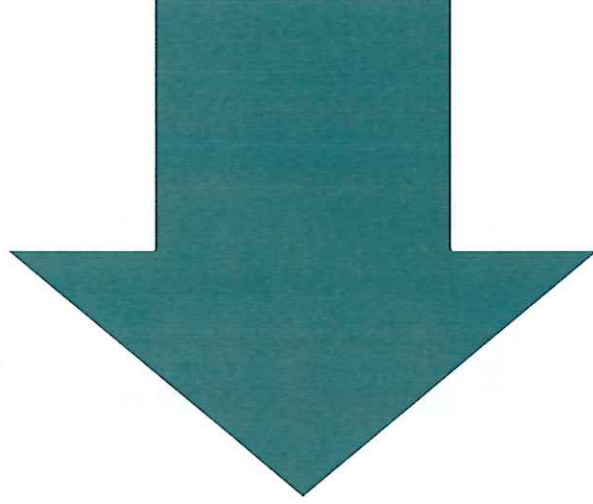
Upon a formal complaint being filed, one or more investigators will be assigned to gather relevant evidence and draft an investigative report.



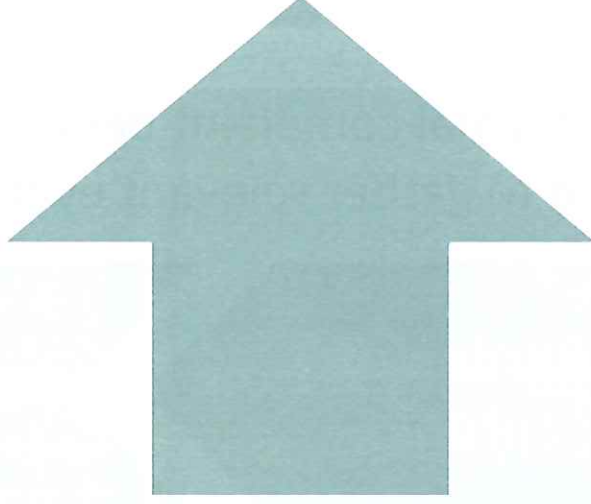
- Burden of proof and of gathering evidence sufficient to reach a responsibility determination rests on the District and not on the parties.
- The District must obtain voluntary, written consent (or consent of a parent/guardian) to obtain medical records to be used in the grievance process.
- The investigator(s) must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- The investigator(s) may not restrict the ability of either party to discuss the allegations under investigation or to gather and present evidence.

Investigation: Right to an Advisor

Both the complainant and the respondent must have the **same** opportunities to have others present during any part of the grievance process, including an opportunity to be accompanied by an **advisor** of their choice. This person can be, but is not required to be, an attorney.



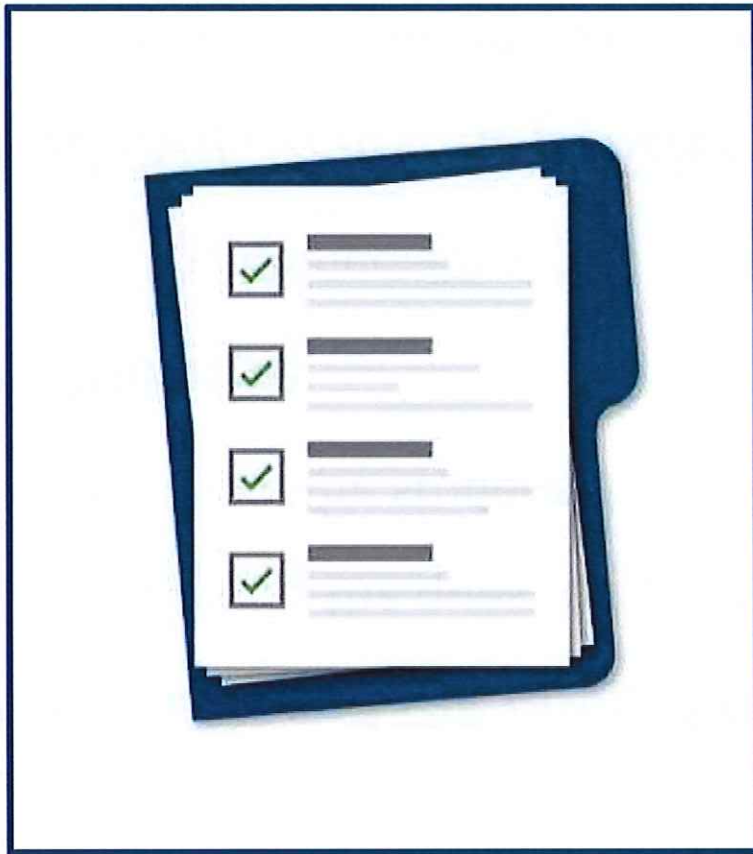
The District may establish restrictions regarding the extent to which the advisor may participate in the proceedings, **as long as the restrictions apply equally to both parties.**



Investigation

For any meeting or investigative interview, the investigator(s) must provide a **written notice** to any party whose **participation is invited or expected**.

The notice must include:



- Date
- Time
- Location
- Participants
- Purpose

The investigator(s) must provide sufficient time for the party to prepare to participate.

Before You Start Investigating

- ***Understand the allegations/complaint***
 - What is the question(s) I need to answer?
 - Is how the student characterized it accurate?
- ***Prioritize***
 - Any immediate safety issues? Need to call 211? Police? Parents?
- ***Identify relevant policies (Title IX, Non-discrimination, 504, etc.)***
 - Contact relevant coordinators
- Does student have ***IEP/504 Plan?***

SHIPMAN

Conducting a Thorough Investigation

- Interview the parties
 - What happened? When did it happen? Where did it happen? Have you talked to others about what happened? Did you write down what happened?
- Witness interviews/statements
 - Do you know what is alleged to have happened? Where were you when it happened? Do you know the respondent and/or complainant? For how long and how would you describe your relationship with them (friend, acquaintance, etc.)?
- Listen carefully to answers. Ask follow up questions.
- Start with broad, general questions, then narrow the questions. Avoid yes/no questions.

Common Pitfalls in Investigations

- Failing to be prompt
- Failing to follow appropriate complaint procedures
- Failing to follow evidence threads
- Failing to collect all relevant evidence
- Prejudging the outcome

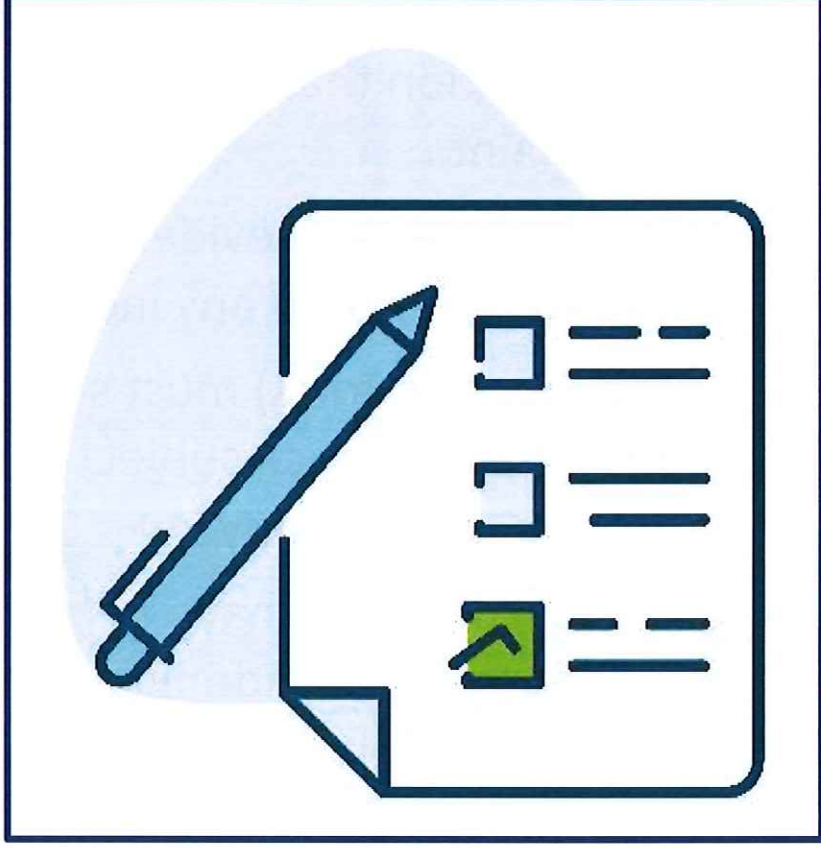


Investigation: Review of Evidence

- The investigator(s) must provide both parties an equal opportunity to inspect and review **any and all evidence** obtained as part of the investigation that is **directly related** to the allegations in the formal complaint.
- This includes any evidence upon which the investigator(s) does not intend to rely and any inculpatory or exculpatory evidence.
- The investigator(s) must send to each party (and the party's advisor, if any), the evidence subject to inspection and review in either electronic format or hard copy.
- The parties must have at least **10 days** (10 school days in the Shipman & Goodwin model Administrative Regulations) to submit a written response.
- The investigator(s) must consider these written responses prior to completing the investigative report.

Investigation: Investigative Report

- The investigator(s) must create an investigative report that fairly summarizes the **relevant** evidence and must send the report to each party (and the party's advisor, if any) in electronic format or hard copy.
- Each party can then provide a written response to the investigative report.

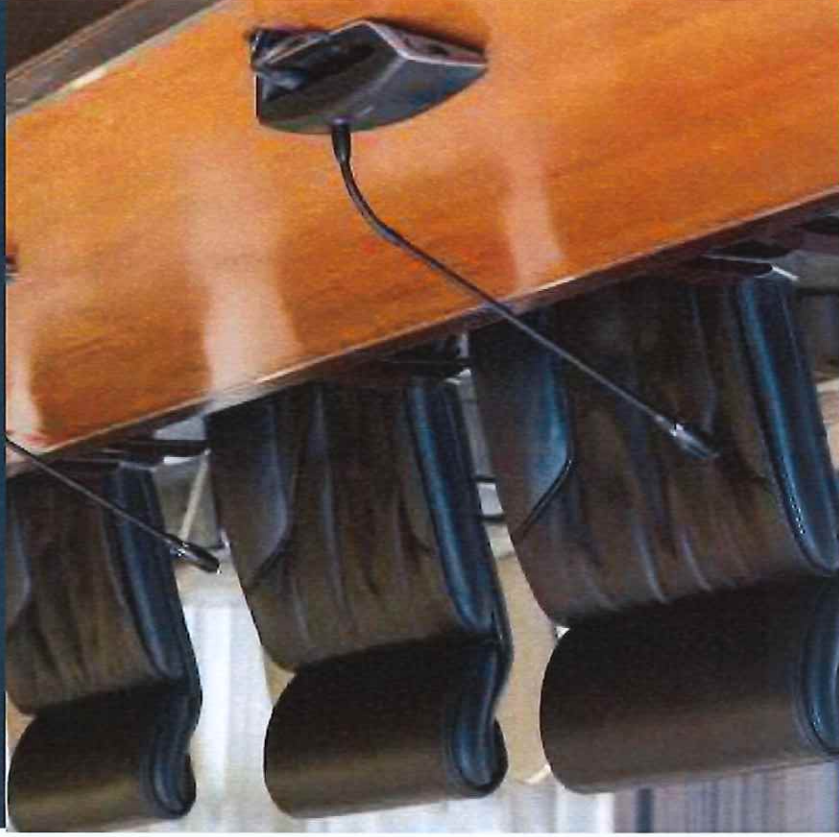


Decision-Maker

- The District shall appoint a decision-maker(s), who must be someone other than the Title IX Coordinator or the investigator(s).
- The investigator(s) and the decision-maker(s) shall not discuss the investigation's facts and/or determination while the formal complaint is pending.

Live Hearing - Optional

- Upon completion of the investigative report, the District may offer, but is not required to offer, a hearing.
- If the District chooses to hold a hearing (live or otherwise), the Final Regulations provide K-12 school districts significant discretion as to how to conduct such a hearing.



For example, the Title IX Coordinator may determine it is appropriate to hold a live hearing where the students are above a certain age, where the students are in high school, or where both parties request or consent to a hearing.

Decision-Maker – Written Questions

- After the investigative report is sent to the parties, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness.
 - The opportunity to submit written questions must be afforded to the parties even if the District provides a live hearing.
- The decision-maker(s) must then provide each party with the answers and allow for additional, limited follow-up questions from each party.
- The decision-maker(s) must explain to the party proposing the question any decision to exclude a question as not relevant.



What is Relevant Evidence

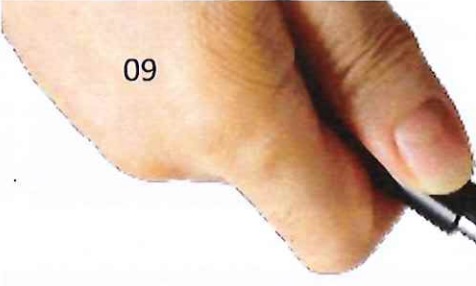
Investigators preparing an investigative report and decision-makers allowing questions must determine if the evidence is **relevant**.

- Evidence is relevant if it has a tendency to make something more or less probable than it would be without the evidence and it is of consequence in determining the question of sexual harassment.

- Relevance is broad and can include questions about the who, what, when, and how of the allegations, as well as issues related to motive or bias, among others.

- Relevant evidence includes both exculpatory and inculpatory evidence (i.e. must look at evidence that is both favorable and unfavorable to any party).

- Evidence that constitutes or seeks disclosure of information protected under a legally recognized privilege (i.e. attorney-client or doctor-patient) cannot be required, allowed, or relied upon unless the person holding the privilege has waived the privilege.



Rape Shield

Investigators and decision-makers are not allowed to ask questions or seek evidence about a complainant's prior sexual acts because such acts are deemed irrelevant. The parties may not ask these questions of each other.

Unless... the evidence is used to prove:

- someone other than the respondent committed the alleged offense, or
- specific incidents of past sexual behavior between the complainant and respondent and is offered to prove consent.



Consent

- Title IX does not define “consent”
- Department of Education intentionally silent on this issue. Districts must provide a definition of consent and use the definition consistently.

- Coordinators, investigators, decision-makers must be trained on the District’s definition of consent.

- Definition may impact whether sexual harassment occurred and whether certain evidence is admissible under Rape Shield.

Affirmative Consent

- Affirmative Consent means an **active, clear** and **voluntary** agreement by a person to engage in sexual activity with another person.
- When determining whether consent for sexual activity was given, consider the following:
 - Was consent given by **all** persons who engaged in the sexual activity?
 - Consent may be revoked at any time.
 - It is the responsibility of each person to ensure that he/she has the consent of all persons engaged in the sexual activity throughout the entirety of the sexual activity.
 - The existence of a prior or current dating/sexual relationship between the parties, in and of itself, is not determinative of consent.

Affirmative Consent

- It is **NOT** a valid excuse that the respondent:
 - believed they had consent because the respondent was intoxicated or reckless or failed to take reasonable steps to ascertain consent; or
 - believed they had consent if the respondent knew or should have known that the complainant was unable to consent because the complainant was unconscious, asleep, incapacitated because of drugs or alcohol, or otherwise unable to communicate; or
 - believed they had consent if the respondent knew or should have known that the complainant was unable to consent due to the age of the complainant or the age difference between the parties.

Decision-Maker: Responsibility Determination



Decision-makers must weigh the relevant evidence and decide whether it meets the standard of evidence to demonstrate that sexual harassment occurred.

- Preponderance of the evidence standard = more likely than not responsible.
- Clear and convincing evidence = highly probable to be true



The decision must be based on an objective evaluation of the evidence, and the decision-maker must be able to explain his/her rationale based on the evidence.



Decision-makers need to use independent judgment and be free from conflict of interest and bias.

Decision-Maker: Responsibility Determination

The decision-maker(s) will issue a written determination regarding responsibility. The written determination will include:

- 1 identification of the allegations potentially constituting sexual harassment;
- 2 a description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held (if applicable);
- 3 findings of fact supporting the determination;
- 4 conclusions regarding the application of the District's code of conduct (student discipline policy) to the facts;
- 5 a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the District will impose on the respondent, and whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the complainant; and
- 6 the District's procedures and permissible bases for the complainant and respondent to appeal.

The written determination will be provided to **both** parties

simultaneously.

Decision-Maker: Disciplinary Sanctions

Student Respondents

- Student respondents found responsible may be subject to discipline up to and including expulsion.

Employee Respondents

- Employee respondents found responsible may be subject to discipline up to and including termination of employment.

Other Respondents

- Other respondents may be subject to exclusion from the District's programs, activities and/or property.

Criminal Referrals

- In appropriate circumstances, the District may make a criminal referral.

Remedies

- Remedies must be designed to restore or preserve equal access to the District's education programs or activities.

Appeals

Either party can appeal from a responsibility determination or a dismissal of a formal complaint on the following bases:

New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;



Procedural irregularity that affected the outcome of the matter; or



The Title IX Coordinator, investigator(s), and/or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.



The District may add other bases for appeal so long as they are offered equally to both parties.

Appeals

When an appeal is filed, the District **must**:

- Provide notice to the other party in writing and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the investigator(s), Title IX Coordinator, or decision-maker(s) for the responsibility determination;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

Supportive measures for either or both parties **may** be continued throughout the appeal process.

Informal Resolution Process

At any time prior to reaching a responsibility determination, the District has the option of suggesting to the parties an informal resolution process, such as mediation, to resolve the formal complaint. The District is **not required** to offer this process. Prior to facilitating an informal resolution to a formal complaint, Title IX Coordinator will:

Provide parties
written notice
disclosing
allegations

Note requirements
of informal
resolution process

Note any consequences
from participating in the
informal resolution
process

Obtain voluntary,
written consent from
both parties to engage
in informal resolution

Informal Resolution Process

- The informal resolution facilitator must be someone other than the investigator or decision-maker (if already assigned) and must be free from conflicts of interest, bias, and must serve impartially.
- May be the Title IX Coordinator
- Prior to agreeing to any resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
- If a satisfactory resolution is reached through this informal process, the matter will be considered resolved. If these efforts are unsuccessful, the formal grievance process will continue.

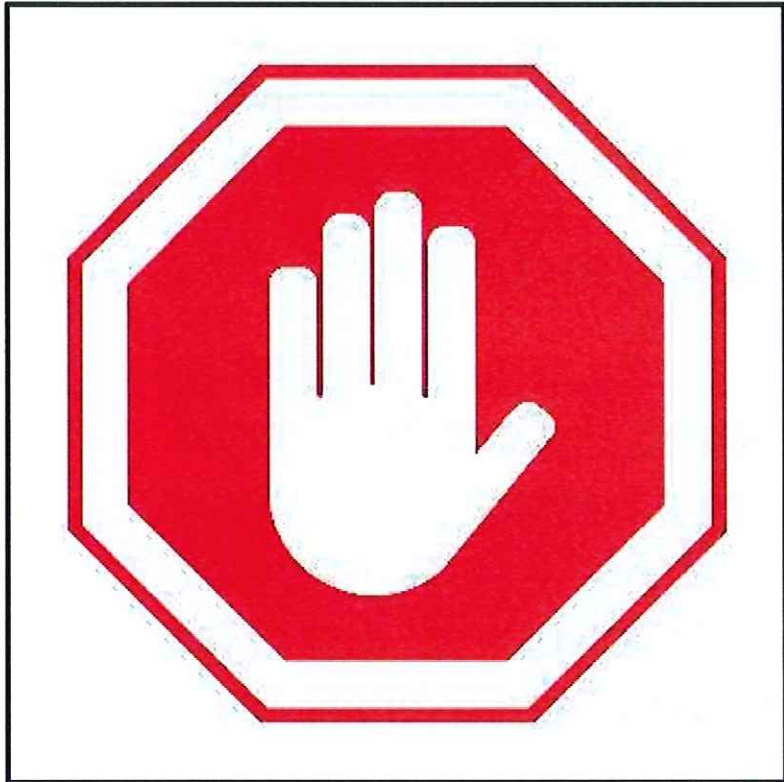
NOTE: This process is not available to resolve a formal complaint that an employee sexually harassed as student.

How To Serve Impartially

- Everyone designated as an investigator, decision-maker, appeal decision-maker, informal resolution facilitator, or Title IX Coordinator must serve impartially and must avoid prejudgment of the facts at issue, conflicts of interest, and bias.
- Investigators and decision-makers cannot evaluate or collect evidence in a way that is based on stereotypes or that favors complainants over respondent or men over women

NOTE: Different treatment of complainants and respondents due to sex-based stereotypes about how men and women behave with respect to sexual violence violates Title IX.

Retaliation



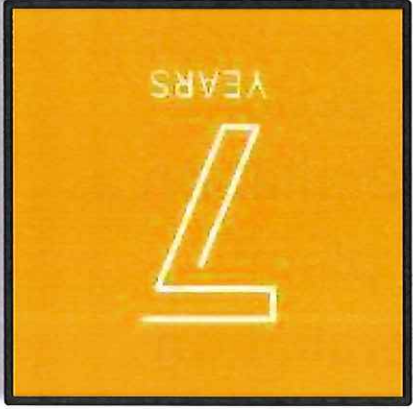
Retaliation against any individual who complains of sexual harassment is **strictly prohibited**. The District must take actions designed to prevent retaliation as a result of filing a complaint. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination.

Record Keeping

The District must maintain for a period of seven (7) years records of:

- Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the District's education program or activity;
- Any appeal and the result therefrom;
- Any informal resolution and the result from that resolution; and

- All material used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. The District will make these training materials publicly available on its website.

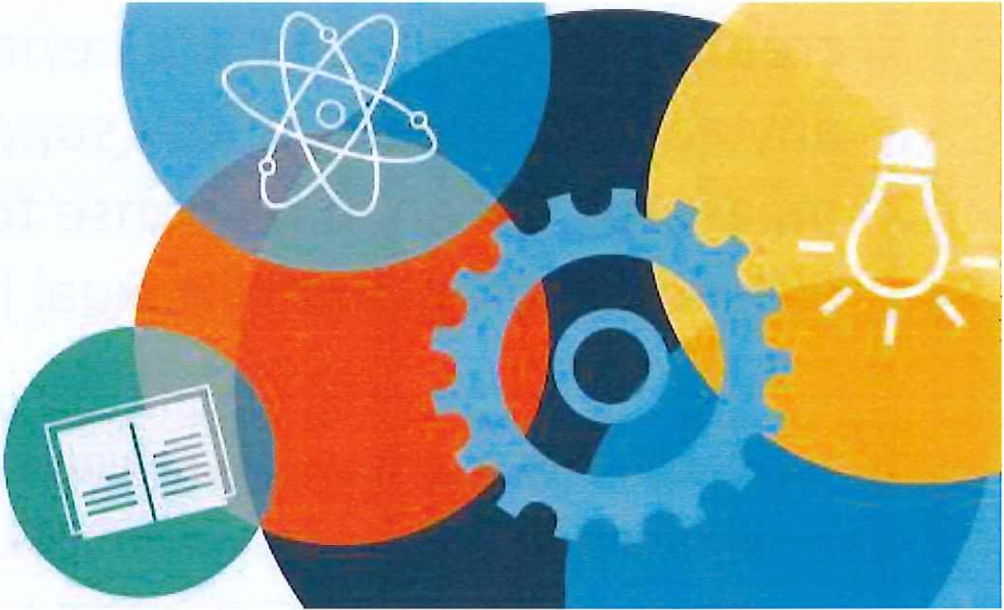


Record Keeping

If the District has actual knowledge of sexual harassment in an education program or activity of the District, and for any report or formal complaint of sexual harassment, the District must create and maintain for a period of seven (7) years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

- The District must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the District's education program or activity. If the District does not provide a complainant with supportive measures, then the District must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.





Scenarios



Scenario:

A second grade student kisses another second grade student on the cheek on the playground.

How do you respond?

What information do you want to know?

Is this sexual harassment?



Scenario:

On numerous occasions over a period of several months, an eighth-grade student touches another student from behind in the lunch line and makes sex-based jokes, remarks and gestures.

How do you respond?

What information do you want to know?

Is this sexual harassment?

Is it bullying?



Scenario:

A female student complains that a male student (1) hikes his shorts up in gym class so that his private parts are exposed; (2) stands up on his chair in class so that his back side is close to her face; (3) plays an inappropriate and sexual song in Spanish class that makes her uncomfortable; and (4) throws his body on her and other students while playing tag at recess. The female and male student are friends and sit together, voluntarily, every day at lunch.

How do you respond?

What information do you want to know?

Is this sexual harassment?

Is it bullying?

Scenario:

Throughout the boys' varsity lacrosse season, the team captain makes sex-based remarks toward another member of the team, calling the student "gay" and "queer." These names are also written in the bathroom stalls in the locker room. The victim complains to one of the assistant coaches. The assistant coach tells the victim that the captain's behavior is just "boys being boys" and reminds the victim that he needs to "toughen up" to play varsity lacrosse. The victim subsequently quits the team.

How do you respond?

What are appropriate next steps for the students? For the assistant coach?



Scenario:

Parents of student in your school recently disclosed to the guidance counselor that their daughter was sexually assaulted off campus by a male student at your school. The counselor encourages the filing of a police report, refers the student to rape counseling, and provides a waiver for all final exams. The counselor also informs the principal. Other students in the school learn about the report and begin to harass the victim at school and on social media. The counselor is able to identify one of the alleged harassers. The parents and student are not informed of any investigation or the outcome of any review of the matter by any district personnel.

Did the district handle this appropriately?



- Is this harassment?
- If yes, what type of harassment?
- Is this bullying? Teen dating violence?
- Assess the counselor's actions – what, if anything, would you do differently?
- Assess the principal's actions – what, if anything, would you do differently?

Questions?



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