



Title IX: Reporting Sexual Harassment under the New Rules

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Norwich Public Schools

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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

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

New 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.

New Final Regulations – What's New?



A definition of sexual harassment



A duty for schools to investigate only 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

Reporting under Title IX

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. Standard for reporting is “actual knowledge.”



Only conduct that is alleged to have occurred in the District’s programs 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 must respond **promptly** and in a manner that is not **deliberately indifferent**.

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

“Actual Knowledge”

The District must respond when it has “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

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.

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.

“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)).

Types of Sexual Harassment



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.

“Sexual Assault”

Sexual assault means an offence classified as forcible or nonforcible sex offense under the uniform crime reporting system of the FBI:

- Rape, forcible sodomy, sexual assault with an object, fondling, incest, statutory rape.

20 U.S.C. 1092(f)(6)(A)(v)

“Dating Violence”

Dating violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

34 U.S.C. 12291(a)(10)

“Domestic Violence”

Domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

34 U.S.C. 12291(a)(8)

“Stalking”

Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others; or suffer substantial emotional distress.

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
- 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

Online Sexual Harassment



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.

Query: Under what circumstances might the District be required to investigate circumstances relating to online, off-campus behavior?

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*

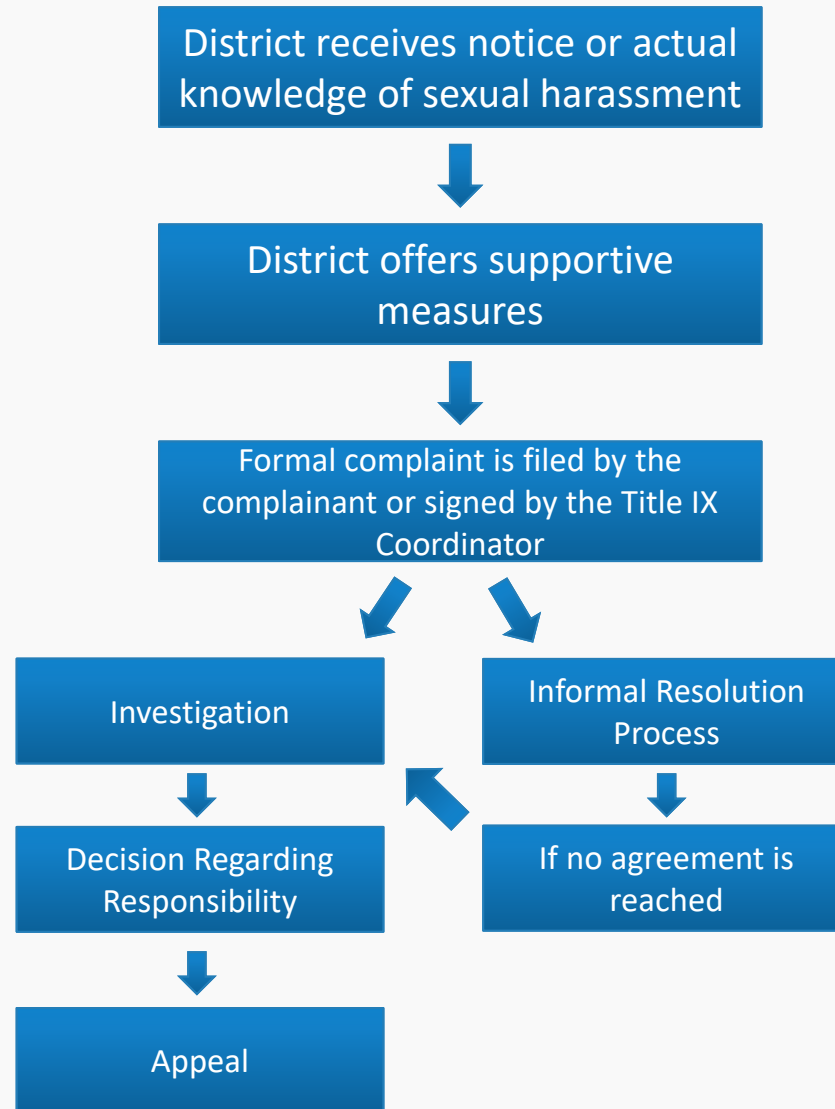
Complaints of sex
discrimination that DO NOT
involve sexual harassment



Grievance
Procedure

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

Grievance Process for Allegations of Sexual Harassment



Key Personnel



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

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:

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

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
- Presumption of innocence

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

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.

Scenarios





Scenario:

A kindergarten student kisses another kindergarten student on the cheek on the playground.

How do you respond?

What information do you want to know?

Is this sexual harassment?

A background image showing a line of students in a school cafeteria. In the foreground, a boy with brown hair is looking down at his food. Behind him, several girls are smiling and looking towards the camera. They are standing in front of a food service counter with various food items like pizza, broccoli, and grapes. A dark blue circle is overlaid on the left side of the image, containing the word 'Scenario:'.

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?



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. The parents file a complaint with OCR.



Is this harassment?

- If yes, what type of harassment?
- Is a Title IX investigation required?
- Is this bullying?
- Assess the counselor's actions – what, if anything, would you do differently?
- Assess the principal's actions – what, if anything, would you do differently?

A background image of a basketball player in a red jersey with the number 7, smiling and holding a basketball. The image is partially obscured by a dark blue circle on the left and a white rounded rectangle on the right.

Scenario:

Consider this:

Eighth grade boys played “lights out” where they would turn the locker room lights off and then they would “hump” and “gyrate” on seventh grade boys. They also played a game called “blind-folded sit ups,” involving convincing one of the students that he could not do a sit-up while blindfolded, so that when he attempted to do the blindfolded sit-up, he hit his face on the naked buttocks of one of the eighth graders. On one occasion, eighth graders grabbed one of the students, forced him to the ground, pulled his pants down and anally penetrated him with a marker. When coach learned of the incident, he did not report it to administrators while he attempted to determine if rumors about the incident were true.



Mathis v. Wayne County Bd. of Ed.

No. 11-5979, 2012 U.S. App. LEXIS 18013, 2012 WL 3608598 (6th Cir. Aug. 23, 2012)

- After the eighth graders were suspended, students faced further harassment at school, including students repeatedly making comments about one of the student's sexuality after learning about the marker incident.
- In response to the incidents, the school required seventh and eighth graders to use the locker room at different times, required the door to the locker room to be kept open while in use, required an extra coach to monitor the boys while in the locker room, required the coach to monitor the team more closely, offered instruction on bullying and provided counseling. The school also suspended the students for 11 days from school and one month from the team and issued a written reprimand to the coach for failing to report the marker incident.
- Court found school's conduct deliberately indifferent. Any decision to return the students to the team was clearly unreasonable in light of the known circumstances.
- Jury awarded \$100,000 per student in damages
- **Sixth Circuit affirmed**

Lessons Learned - Mathis v. Wayne County

Intervene promptly whenever school personnel observe or are aware of mean-spirited student conduct, even if such conduct does not meet the state or district definition of “bullying” or “harassment.”

In addition to disciplinary measures, schools may consider appropriate alternative to disciplinary sanctions, including age-appropriate consequences and other restorative or remedial interventions.

When in doubt, follow the most comprehensive complaint procedures (likely Title IX).

Be alert to retaliation issues and check in on the situation. It’s not over until its over.

Final Thoughts



- Review district policies and procedures concerning the new federal regulations
- Follow procedures
- Understand the standards for reporting sexual harassment and allegations of sexual harassment
- Do not keep information to yourself. Report.
- Review and implement Safe School Climate Plan (under CT bullying law) and other curricula to prevent incidents of sexual harassment

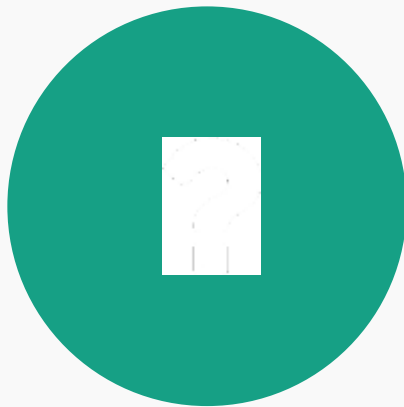
Test Your Knowledge

1. A school district has “actual knowledge” of sexual harassment or allegations of sexual harassment when notice is given to:
 - A. The Title IX Coordinator.
 - B. A school administrator.
 - C. A teacher in the school.
 - D. All of the above.
2. Once a school district has notice of sexual harassment or allegations of sexual harassment, the school district must:
 - A. Respond promptly and in a manner that is not deliberately indifferent.
 - B. Do nothing.
 - C. Wait to receive more information.
 - D. None of the above.

Test Your Knowledge

3. Sexual harassment is conduct, on the basis of sex, that:
- A. Constitutes “quid pro quo.”
 - B. Is unwelcome and 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.
 - C. Constitutes sexual assault, dating violence, domestic violence or stalking.
 - D. All of the above.

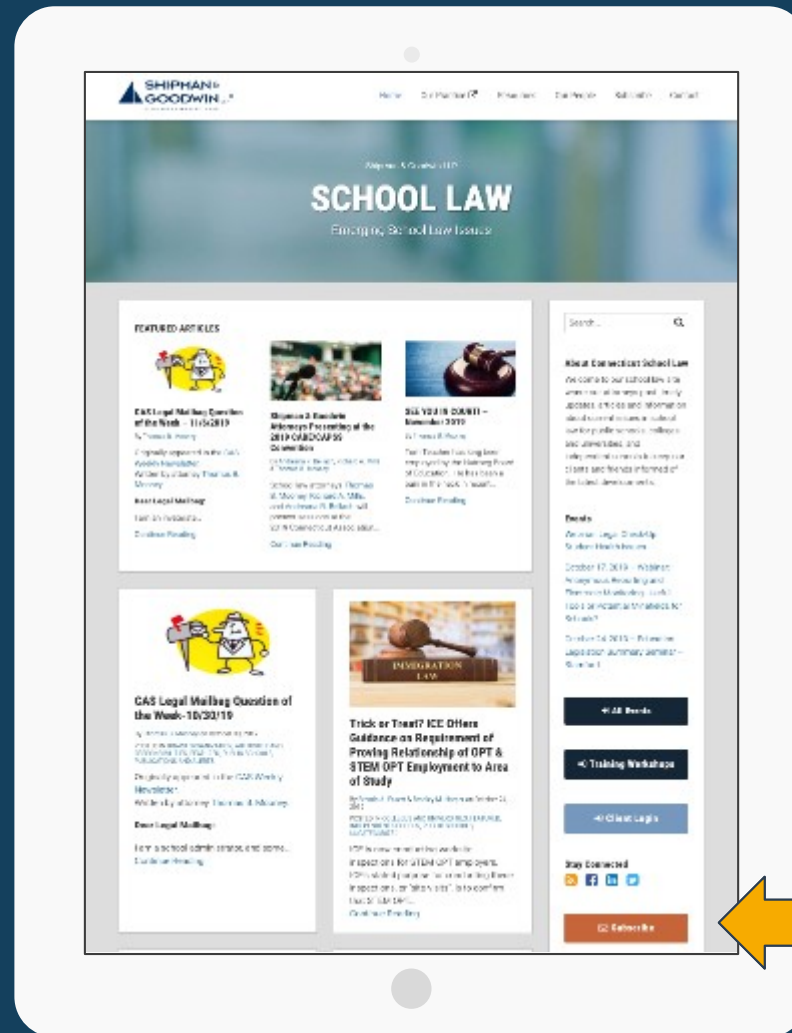
Questions?



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