

SHIPMAN

Title IX Final Regulations:

Coordinator, Investigator, Decision-Maker and Informal Resolution Facilitator Training

Lyme-Old Lyme 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."



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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**.

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Denial of Equal Opportunity

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

1. Equal opportunities in sports
2. Access to facilities based on gender identity
3. Denial of access to education due to sex discrimination, the definition of which includes sexual harassment and sexual assault

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Additional Laws May Come Into Play

Connecticut 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.

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New definition of "Bullying" in CT

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.

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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

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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.

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New Final Regulations: When Do They Apply?

- The Final Regulations are **not retroactive**.
- The Final Regulations apply only if the **alleged incident** took place **on or after August 14, 2020.**
- If the alleged incident took place before August 14, 2020, the Final Regulations do **not apply even if** the complaint was filed with the school on or after August 14, 2020.*
- If the Final Regulations do not apply, a school must follow the requirements of Title IX and regulations in place at the time of the alleged incident.

* But see ***Doe v. Rensselaer Polytechnic Institute***, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020).

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New Final Regulations: What's New?

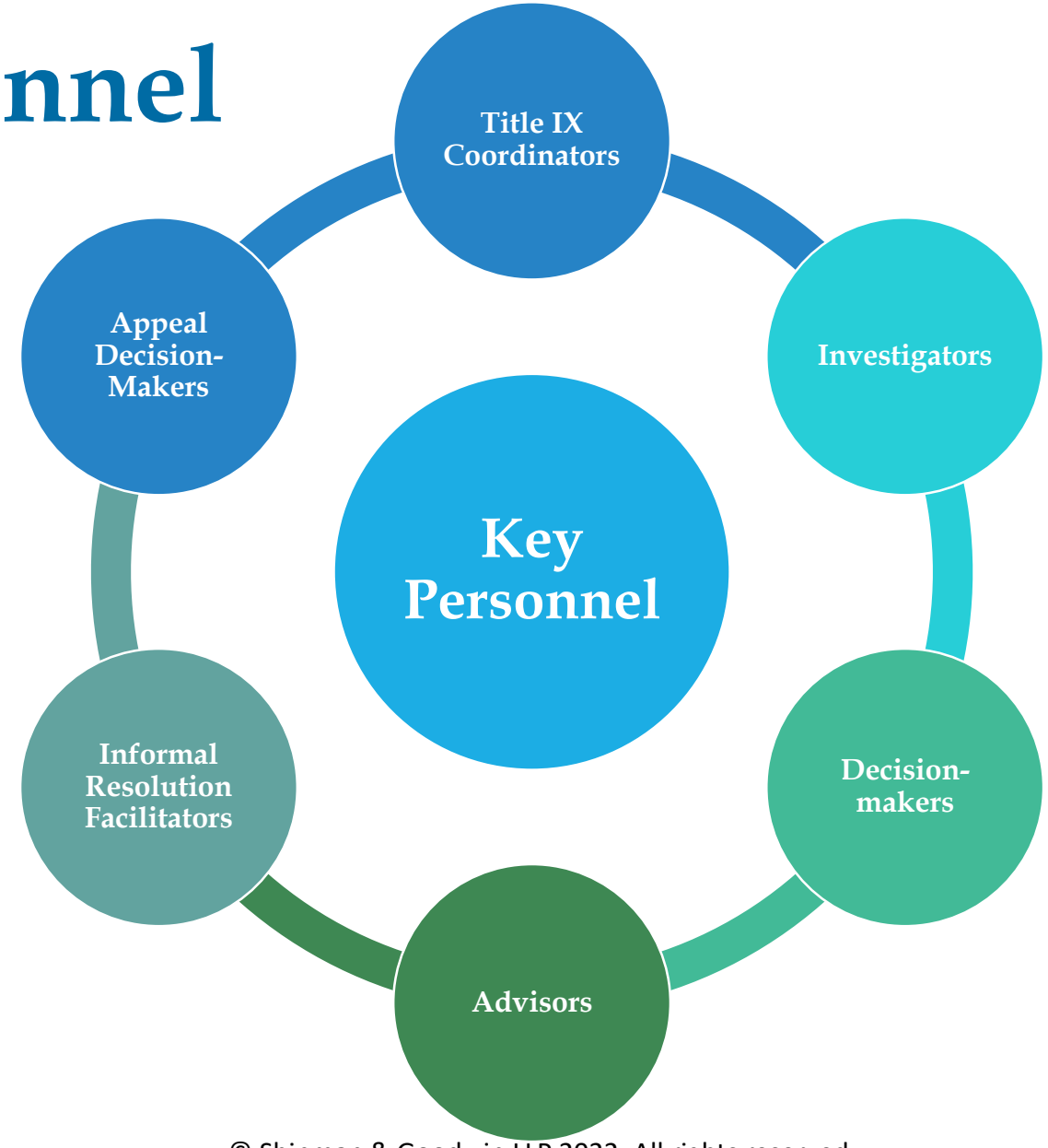
- A **definition** of sexual harassment
- A **duty** for schools to only investigate complaints of **conduct that occurred within their program or activity**
- Adoption of an **"actual knowledge" and "deliberate indifference"** standard

> 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

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Key Personnel



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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

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"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.

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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.

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"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.

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Types of Sexual Harassment

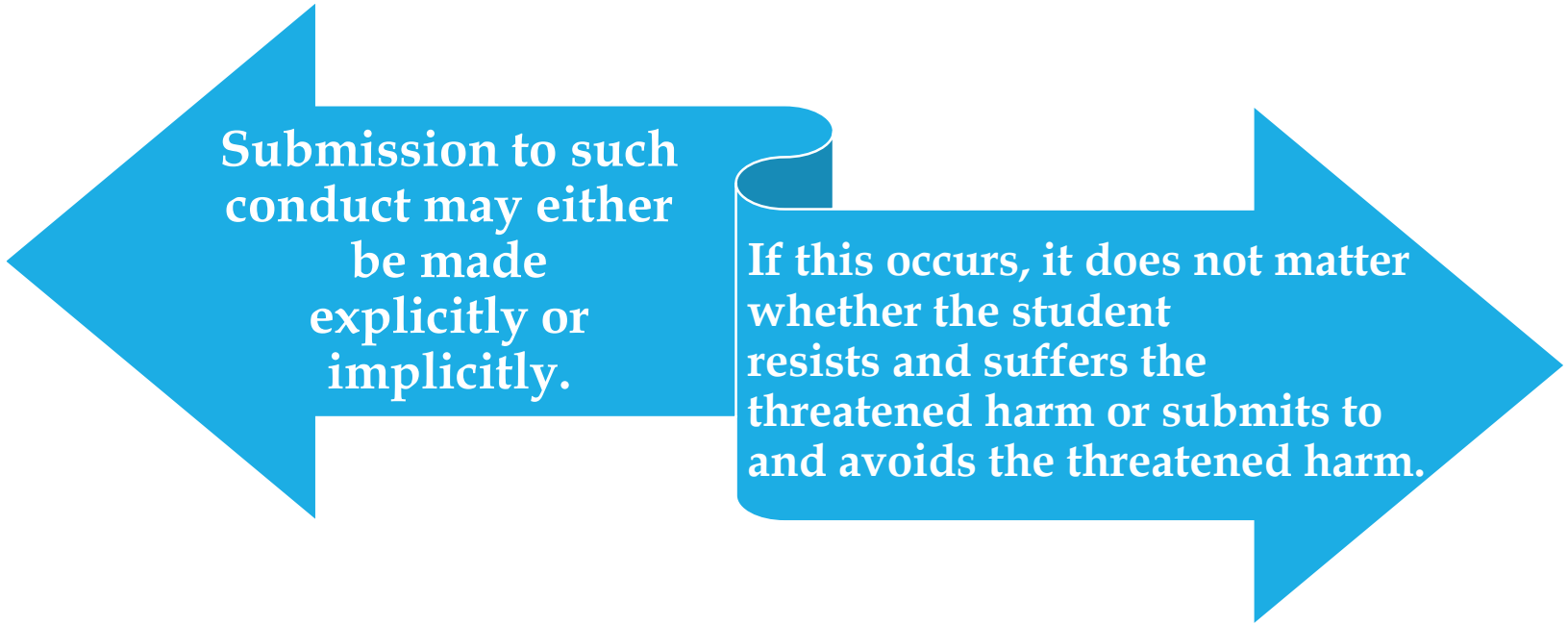


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Quid Pro Quo – "This for That"

- When a teacher or other school employee conditions an educational decision or benefit on the student's submission to **unwelcome sexual conduct**.



- Quid pro quo harassment can also occur when a District employee conditions a benefit or service on another employee's submission to **unwelcome conduct**.

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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.

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"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)).

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"Sexual Assault"

Encompasses separate definitions of rape, sodomy, sexual assault with an object, fondling, incest, statutory rape

For Example:

Rape—(Except Statutory Rape) The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of the person's age or because of the person's temporary or permanent mental or physical incapacity.

Fondling—The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of the person's age or because of the person's temporary or permanent mental or physical incapacity.

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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.

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"Actual Knowledge"

"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.**"

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"Employee"

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.

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"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

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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.

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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

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Formal Complaint – Does a Complainant's Enrollment or Attendance Status Matter?

- A school must accept a formal complaint of sexual harassment from a complainant **not currently enrolled in or attending the school** only if the complainant is **"attempting to participate"** in the school's educational program or activity at the time they file the complaint.

Examples of "attempting to participate":

- A complainant has withdrawn from the school because of the alleged sexual harassment and expresses a desire to re-enroll if the school responds appropriately to the allegations,
- A complainant graduated but intends to apply to a new program or participate in alumni programs and activities,
- A complainant is on a leave of absence and is still enrolled as a student or intends to re-apply after the leave of absence, or
- A complainant has applied for admission.

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Scope of District's Education Program 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

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Title IX Jurisdiction: What is an "Educational Program or Activity"

- Whether a school has "substantial control" is a fact-specific inquiry.

Preamble says:

- 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.

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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 and there is no jurisdiction under Title IX.

Query: What if the off campus conduct is the subject of alleged harassment that occurs within the school?

The District may be required to investigate the matter under the different policies (i.e. student discipline, bullying, etc.), even if not required by Title IX.

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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.

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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**.

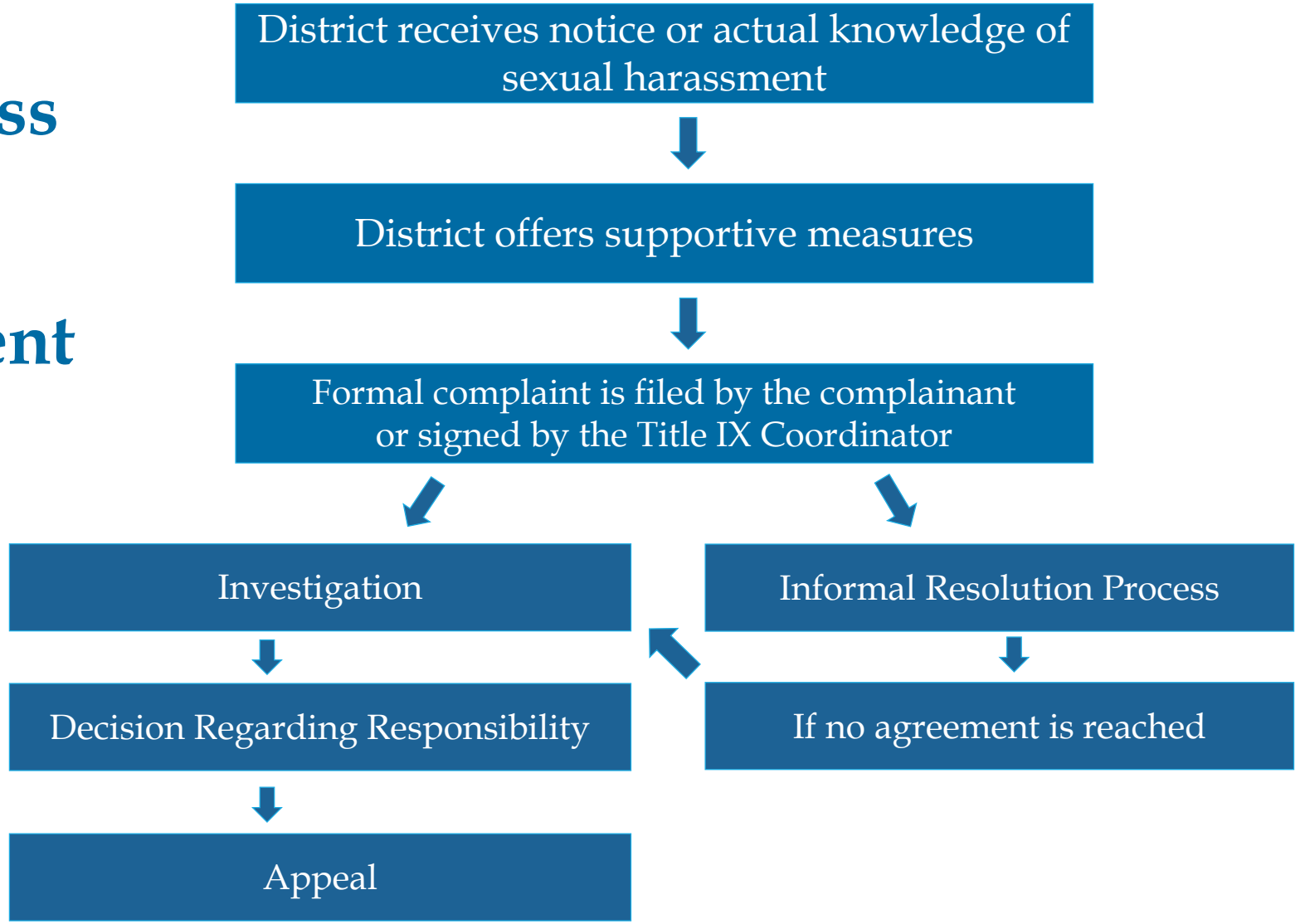
The District's response must treat complainants and respondents **equitably** by offering supportive measures to the complainant and by following the grievance process outlined here *before* the imposition of any disciplinary sanctions or other actions that are not supportive measures.

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

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Grievance Process for Allegations of Sexual Harassment



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Principles Under 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

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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.

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Title IX Coordinator:

Responsibilities within the Grievance Process:

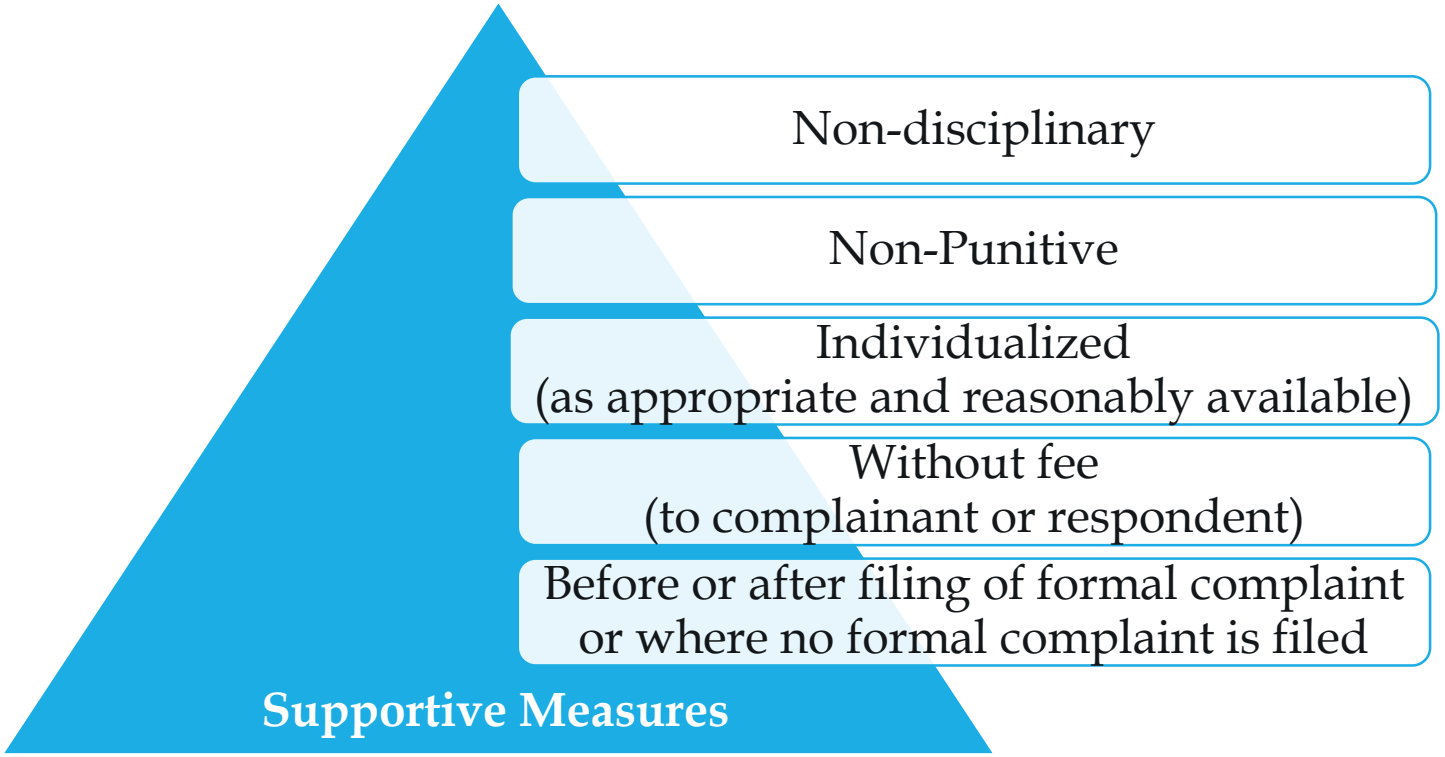
- Contact each complainant (defined as a person who is alleged to be the victim of sexual harassment) to discuss supportive measures and inform the complainant of the availability of these measures with or without filing a formal complaint
- Consider the complainant's wishes regarding supportive measures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

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Supportive Measures

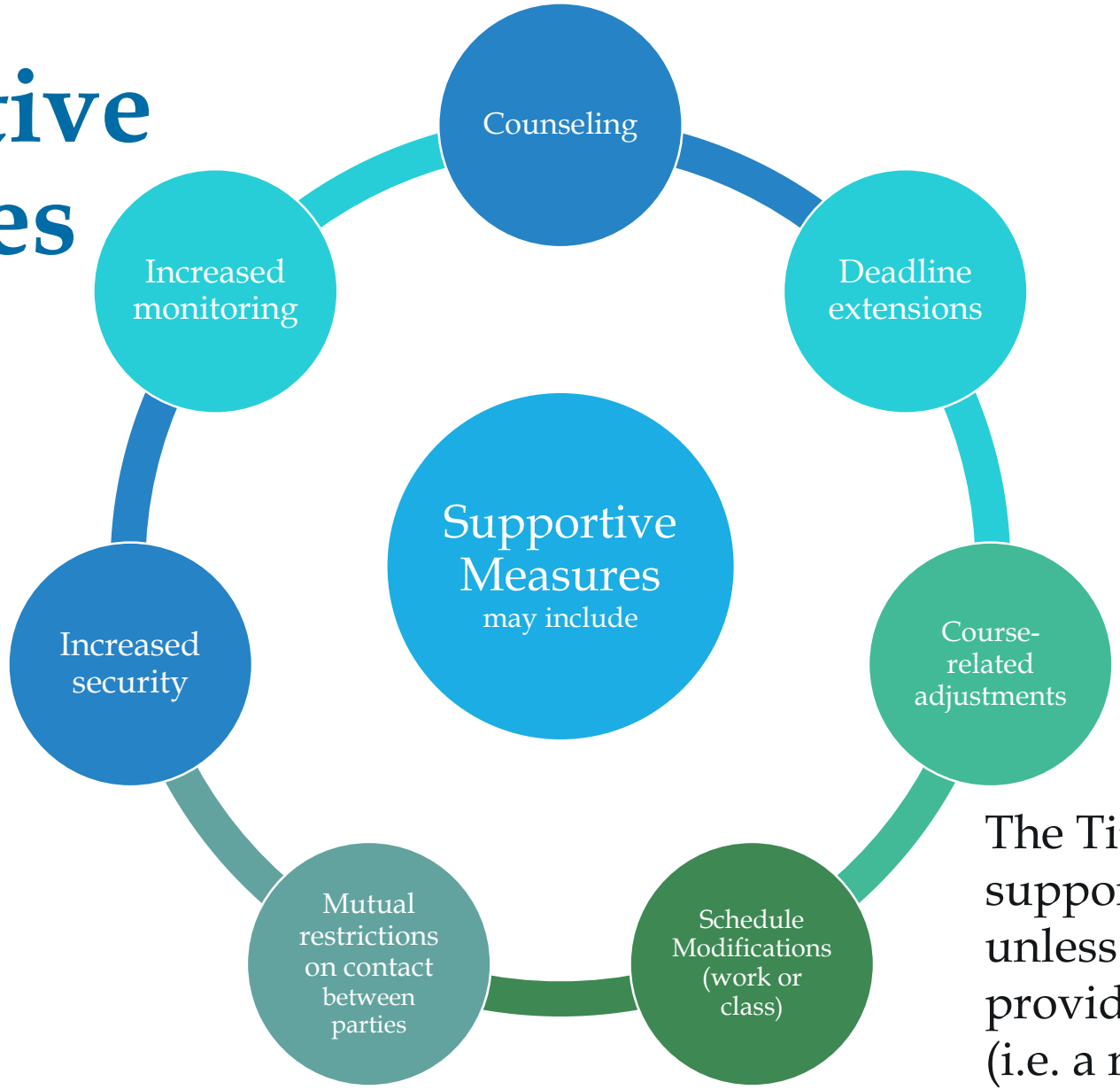
The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainants wishes with respect to supportive measures, inform the complainant of the availability of supportive measures ***with*** or ***without*** filing a formal complaint,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



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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).

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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.

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Outstanding Questions

- How does this impact the student discipline process in Connecticut?
- How does the district preserve the rights of all parties?
- What is the impact on students under the IDEA and Section 504?

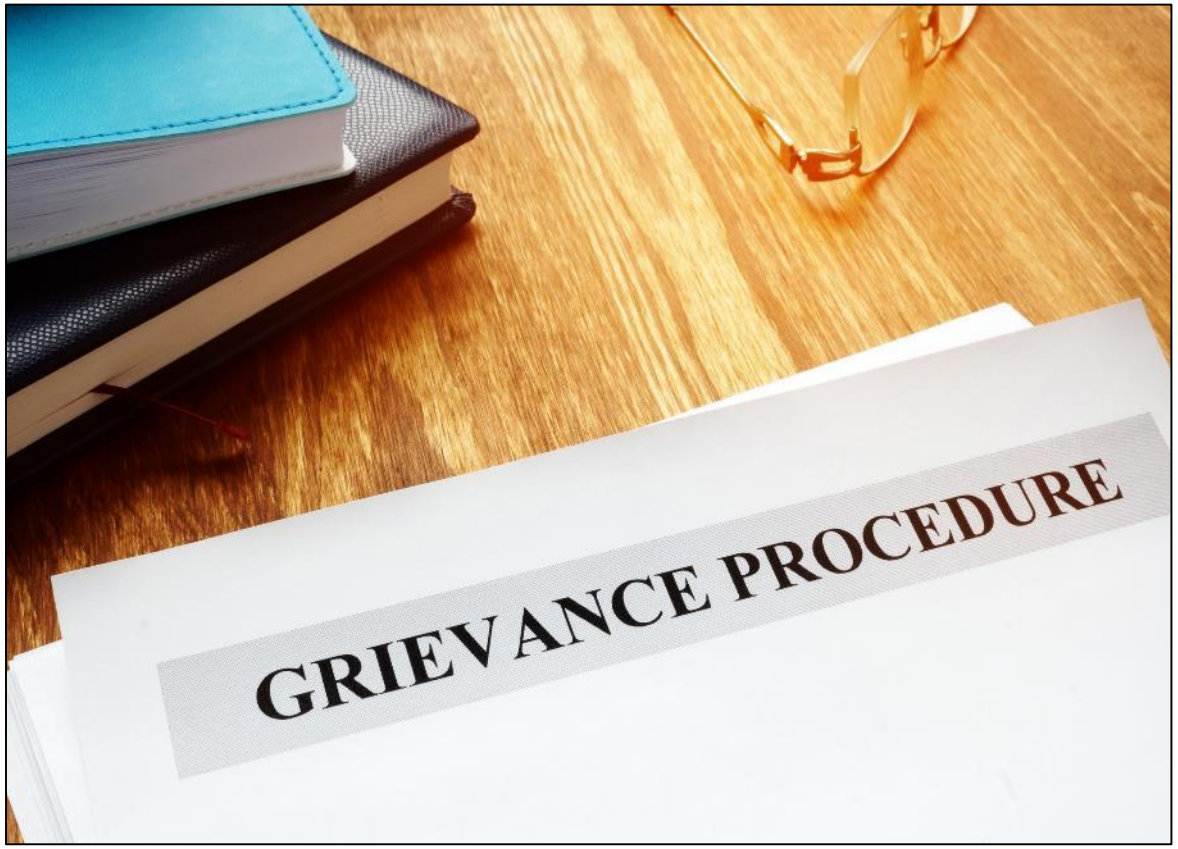


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Emergency Removal/Administrative Leave

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.

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Formal Complaint

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

Inform Complainant

- 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

Ensure Jurisdiction under Title IX

- 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.

Signing of Formal Complaint

- When the Title IX Coordinator signs a formal complaint, he/she is NOT the complainant or otherwise a party

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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?"

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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	Disciplinary Sanctions ONLY Following Grievance Process
• 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 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

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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

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"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.

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"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.

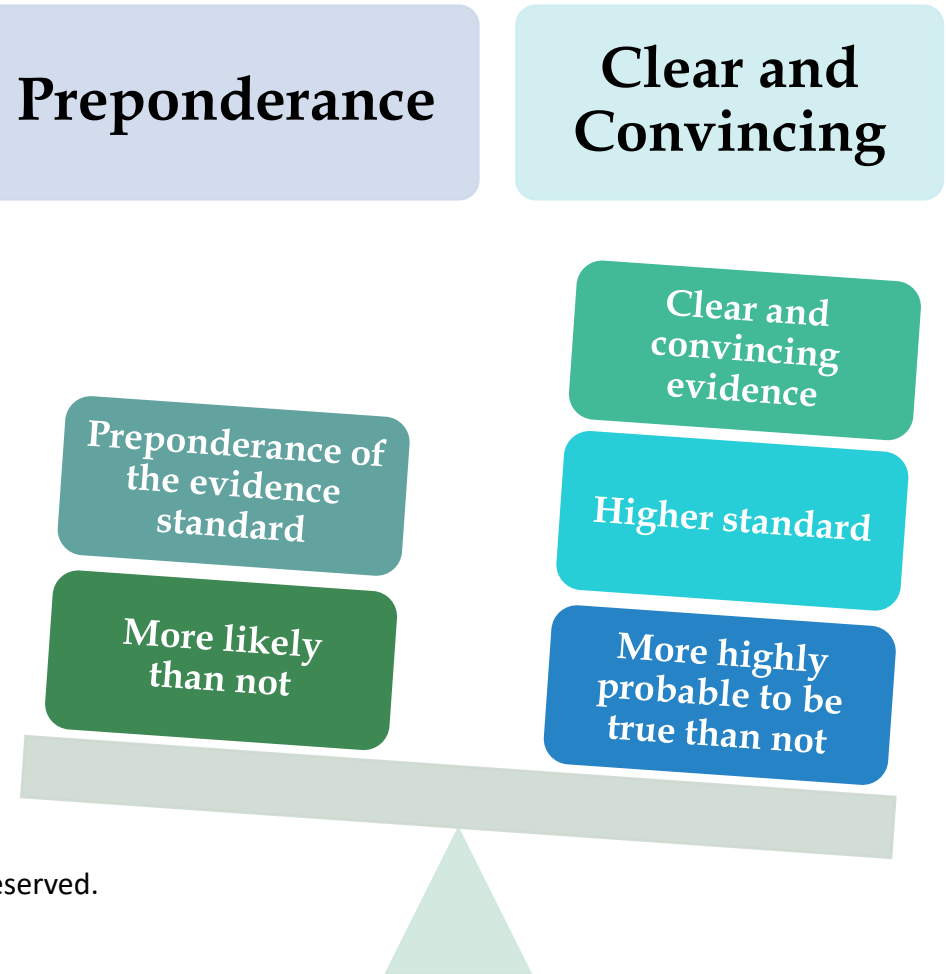
Definition of "bias" is not included in the Final Regulations. This definition is taken from other areas of the law and is intended to be illustrative of the concept.

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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



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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.

- 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



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 (Students), a formal complaint of sexual harassment has been filed with the Title IX Coordinator.

Identities of the parties involved, if known:

_____(Complainant(s))

_____(Respondent(s))

The conduct allegedly constituting 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 step in the grievance process. Questions can 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 it not required to be, an attorney. This advisor may inspect and review evidence as permitted by the Board's Administrative Regulations Regarding Title IX of the Education Amendments of 1972 – Prohibition of Sex Discrimination and Sexual Harassment (Students).

It is a violation of the Board's Student Discipline Policy to lie to school officials or otherwise engage in dishonest 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 this grievance process will be subject to sanctions pursuant to the Board's Student Discipline Policy. Any employee who knowingly makes false statements or knowing submits false information during this 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 (Students) is included with this notice.

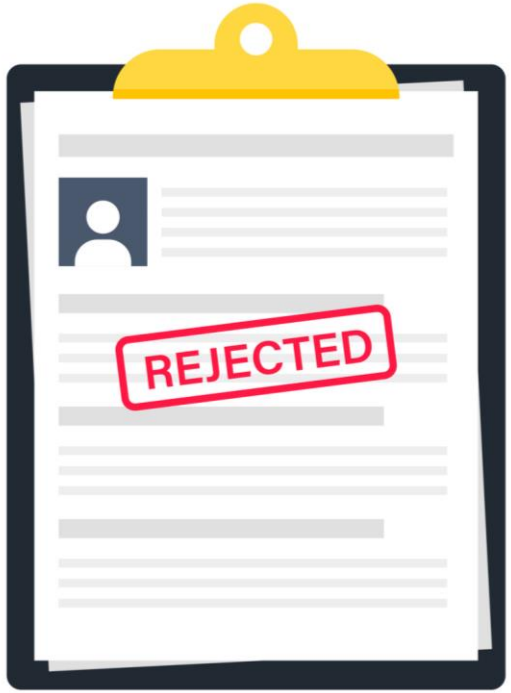
If, in the course of an investigation, the District decides to investigate allegations about the complainant or respondent that are not included in the notice, the District must provide an **additional notice**.

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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.

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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.

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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 mandatory 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.

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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

- 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.

Equal Opportunities for parties

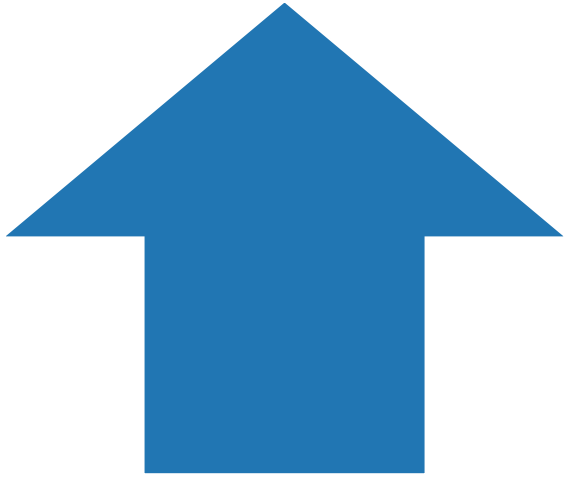
- The investigator(s) must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

No restrictions on either party

- The investigator(s) may not restrict the ability of either party to discuss the allegations under investigation or to gather and present evidence.

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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**.

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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:



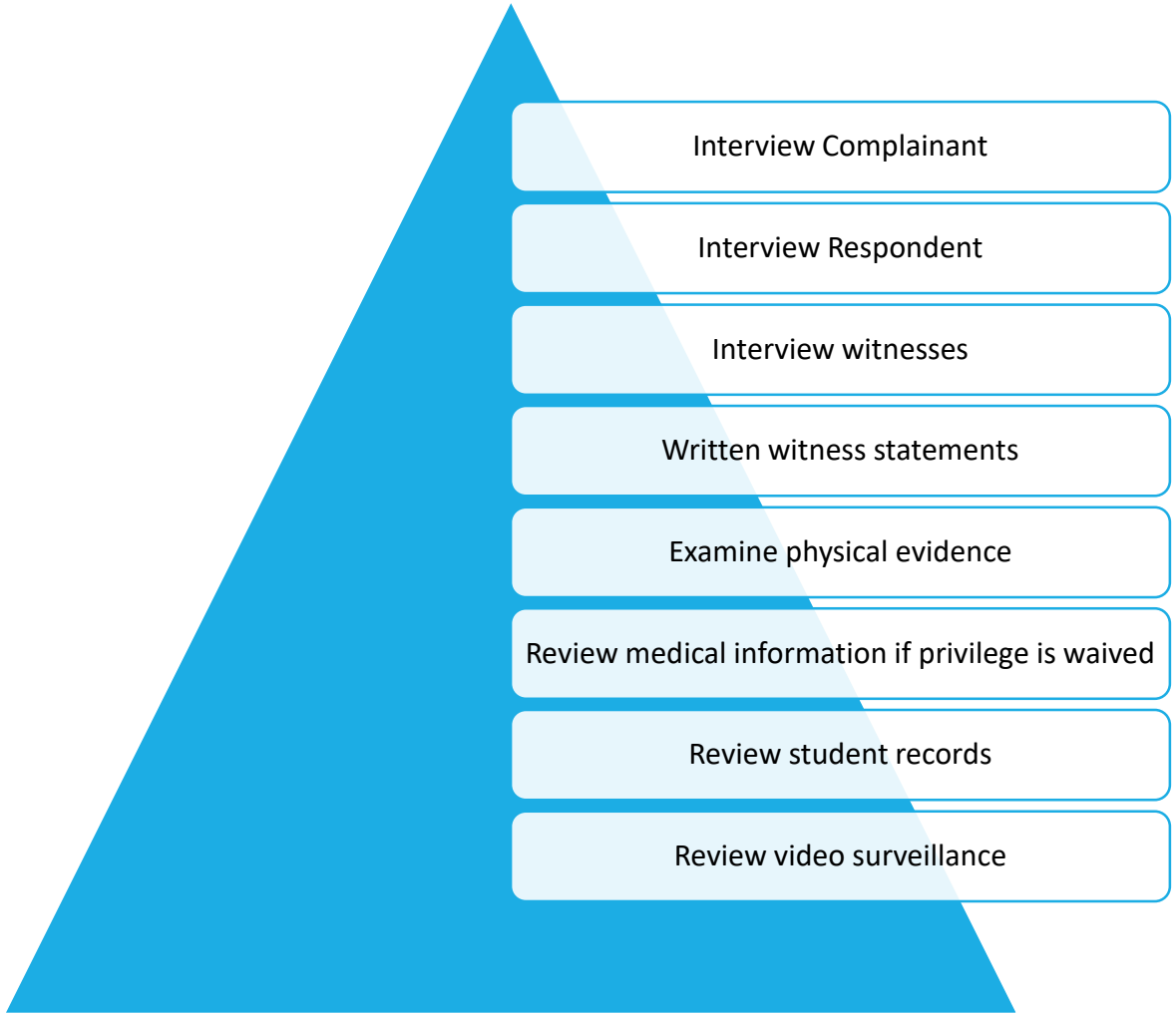
- Date
- Time
- Location
- Participants
- Purpose

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

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Typical Investigation



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Investigator Tips

Prepare	• Prepare the questions in advance
Deviate	• Be prepared to deviate from written lists of questions as the story unfolds
Create	• Create an interview environment that feels safe – Don't be intimidating
Listen	• Listen carefully and objectively (non-biased)
Share	• It is important for parties to know who you are and what your role is

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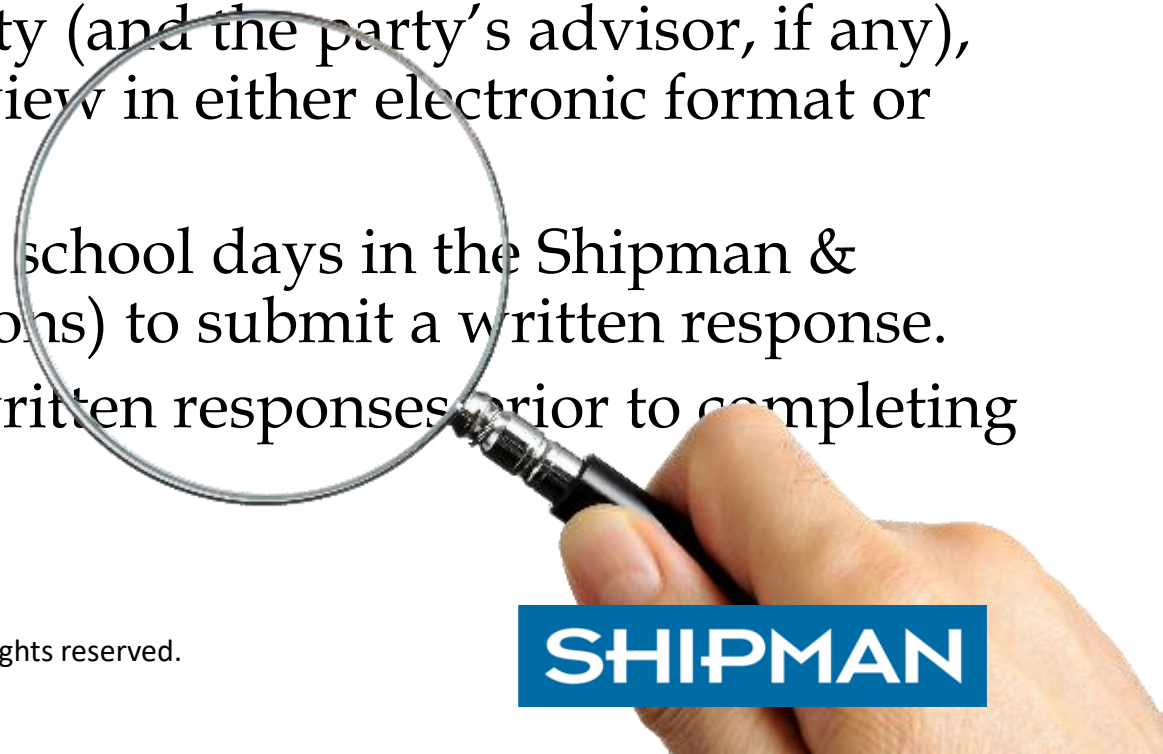
Elements of Fair Investigation

- Prompt, thorough, fair
- Objective
- Opportunity to be heard
- Don't prejudge; don't rush to judgment
- Compile as much "proof" as reasonably possible
- Document every significant step in the investigation (and date)
- Save all evidence you obtain during the investigation
- Be a critical thinker – does the information support the conclusion/meet the standards you need to prove
- Be patient

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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.



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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.
- This is NOT a collection of the evidence. This is a narrative report.
- Best practice: include information decision-maker will need
- Need not include ALL relevant evidence.

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Investigation: Investigative Report



- Each party can then provide a **written response** to the investigative report.
- Report must be provided **at least 10 days** before decision is made by decision-maker
- Written responses **must be considered** by decision-maker

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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) should not discuss the investigation's facts and/or determination while the formal complaint is pending. Allows investigators and decision-makers to remain unbiased.



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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.

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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.



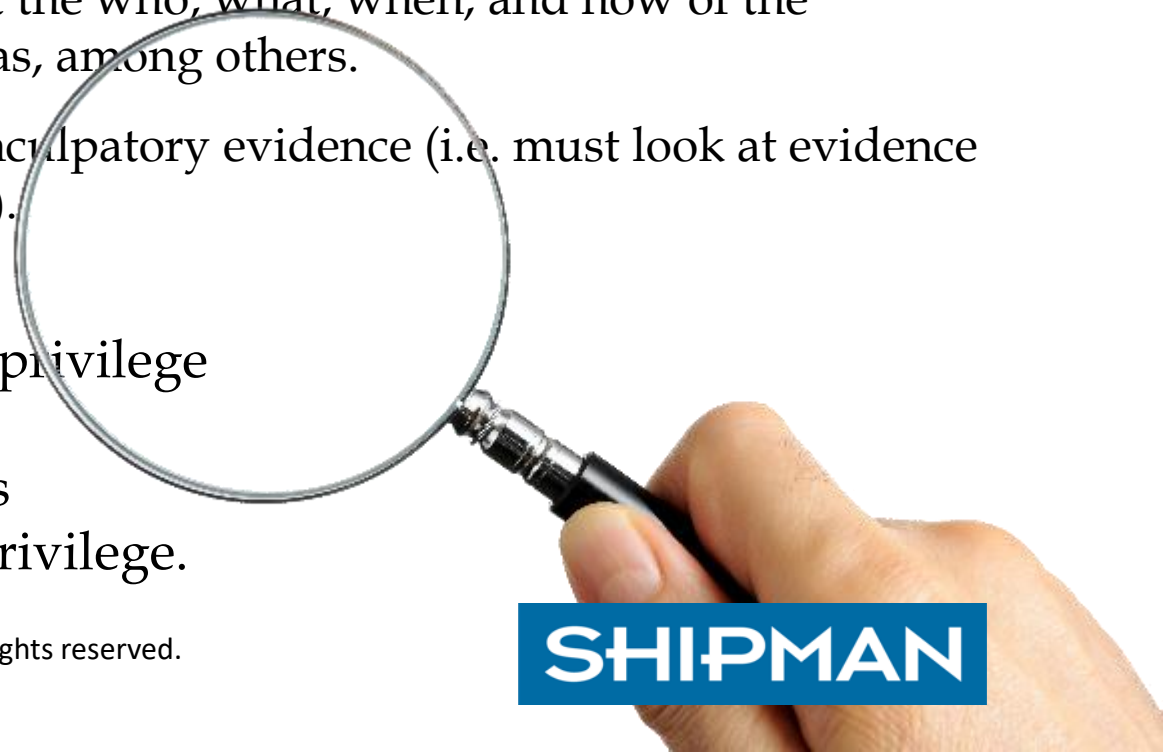
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What is Relevant Evidence?

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.



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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.



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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.

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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

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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.

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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.

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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.**

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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.

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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.

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Appeals

When an appeal is filed, the District :

- 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.

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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

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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 a student.

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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.

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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.

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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.



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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.

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Scenarios

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Scenario 1:

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?

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Scenario 2:

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?

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Scenario 3:

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.

Is this harassment?

If yes, what type of harassment?

Is this bullying?

Is the school district liable for the conduct of the coach?

Is the school district liable for the conduct of the students?

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Scenario 4:

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 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?

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Scenario 5:

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.

Is this sexual harassment?

What should the district do?

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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.

- Jury awarded $100,000 per student in damages
- Sixth Circuit affirmed

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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.

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Scenario 6:

Lesbian, gay, bi-sexual, and transgendered students have reported being mocked, urinated on, and physically harmed by classmates. In the past few years this district has seen nine students, four of whom identifying as gay, take their own lives. School deals with the complaints on an individual basis but the harassment continues.

Has the district done anything wrong?

How can the district work to change this environment?

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Title IX Case: Anoka – Hennepin School District

(2012)

- Peer-on-peer sexual harassment and discrimination on the basis of sex and sexual orientation
- Allegations of "relentless" verbal and physical abuse
- 6 student suicides

- DOJ/OCR reached consent decree with school district paying plaintiffs $270,000
- But note recent retraction by OCR regarding protection for transgender students

Does not prevent the District from investigating and taking appropriate action to protect students.

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Further Requirements on Anoka-Hennepin District

- Revise policies and procedures using equity consultant
- Hire Title IX coordinator
- Train students and employees on sexual harassment
- Hire mental health consultant
- Administer anti-bullying survey annually
- Identify bully "hotspots"
- Establish monitoring program to assess effectiveness of anti-harassment efforts
- Provide reports to DOJ and OCR
- Department of Justice and Department of Education maintain authority to oversee district program and may gain entry to evaluate at any time

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Final Thoughts

- Review district policies and procedures concerning the new federal regulations
- Follow procedures
- Be equitable in application of all procedures
- Eliminate bias and conflicts of interest from the investigation and decision-making
- Train all employees concerning "actual knowledge" of sexual harassment and reporting requirements
- Review and implement Safe School Climate Plan (under CT bullying law) and other curricula to prevent incidents of sexual harassment

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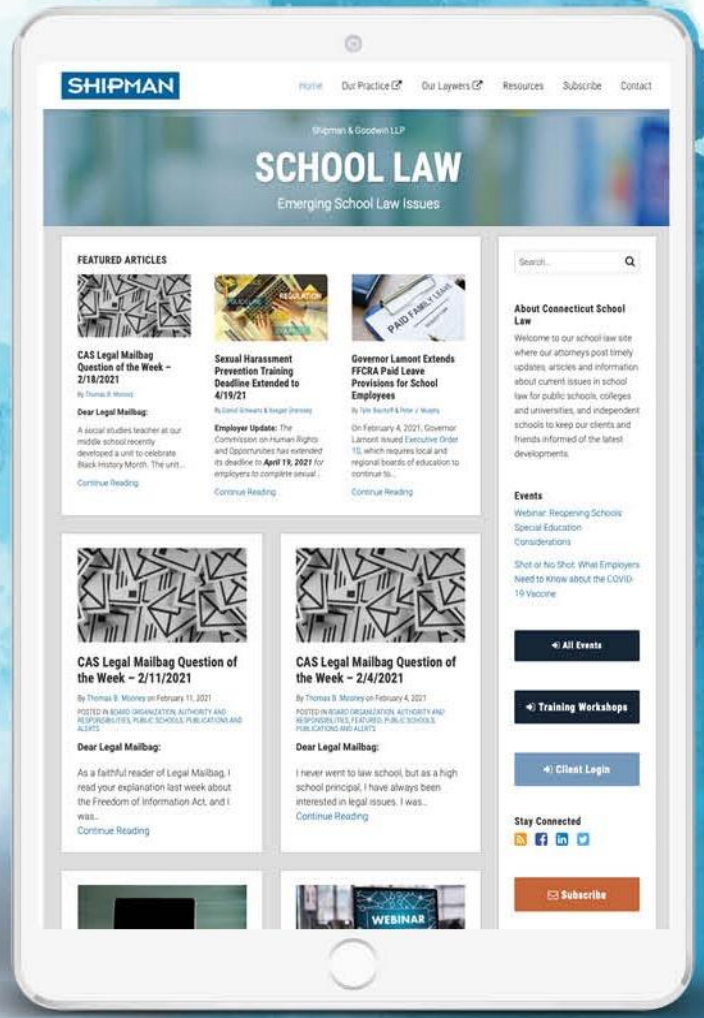
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Questions?



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