



Title IX Final Regulations: Investigations and Decision-Making

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Granby Public Schools

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.”



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.

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.”

“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.

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

General Response to Sexual Harassment

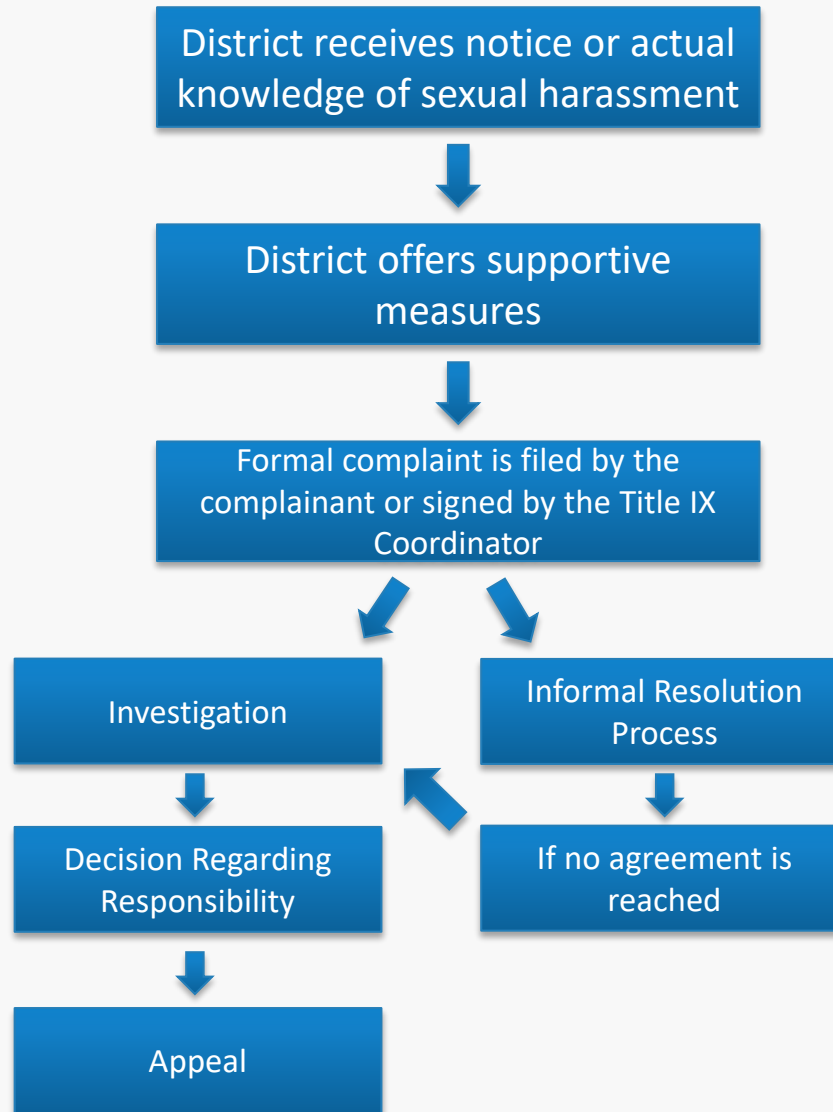
If the District has **actual knowledge** of sexual harassment in a District education program or activity...

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.

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

“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.

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
- Grievance process must be **reasonably prompt**
- Presumption of innocence

Grievance Process: Basic Requirements

Evaluation of Evidence

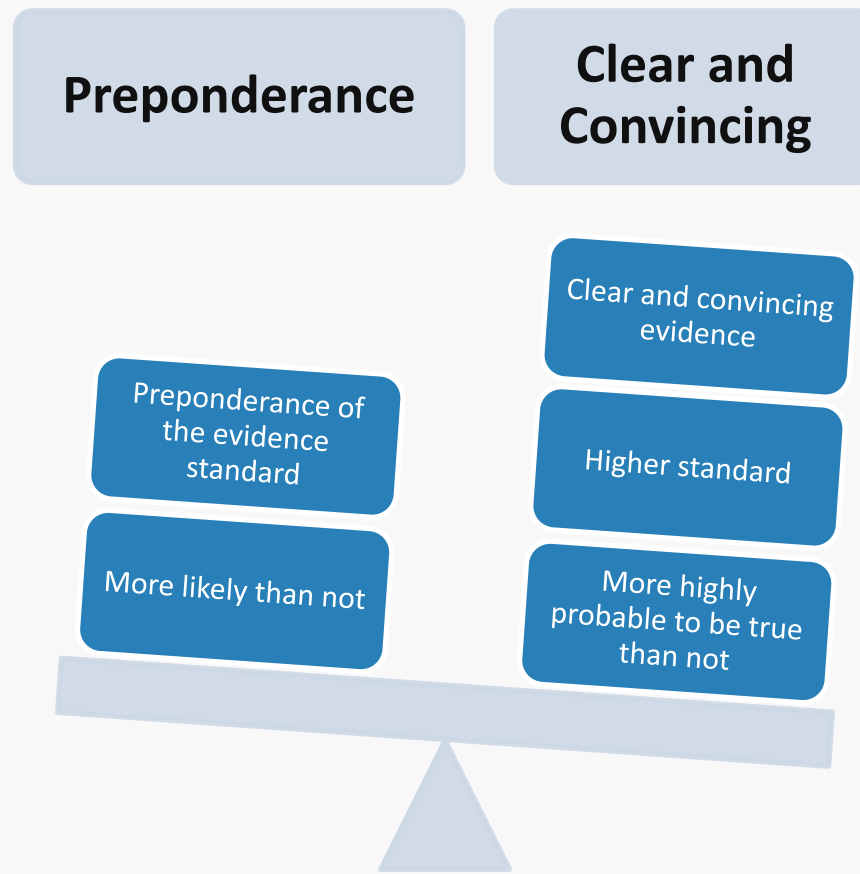
- The grievance process requires an evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

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

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 (Students), 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 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 is 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 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 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.

- 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**.

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 opportunity 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.

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.

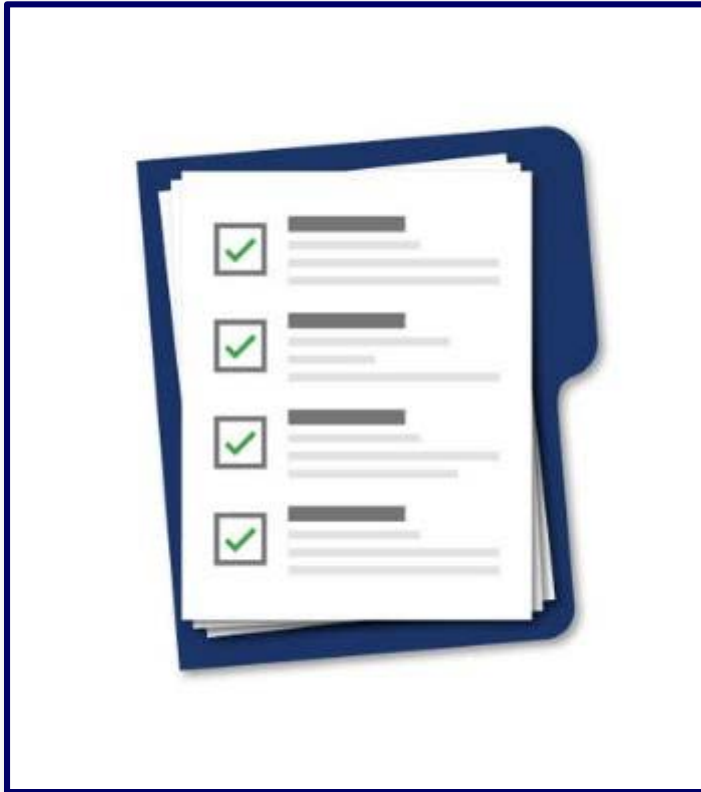


The District may establish restrictions regarding the extent to which the advisor may participate in the proceedings, **as long as the restrictions apply equally to both parties.**

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.

Conducting a Thorough Investigation

1

Conduct Investigation Interviews

- Interview of 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.

Conducting a Thorough Investigation

2

Notify parents

3

Review video footage, documents and other physical evidence

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

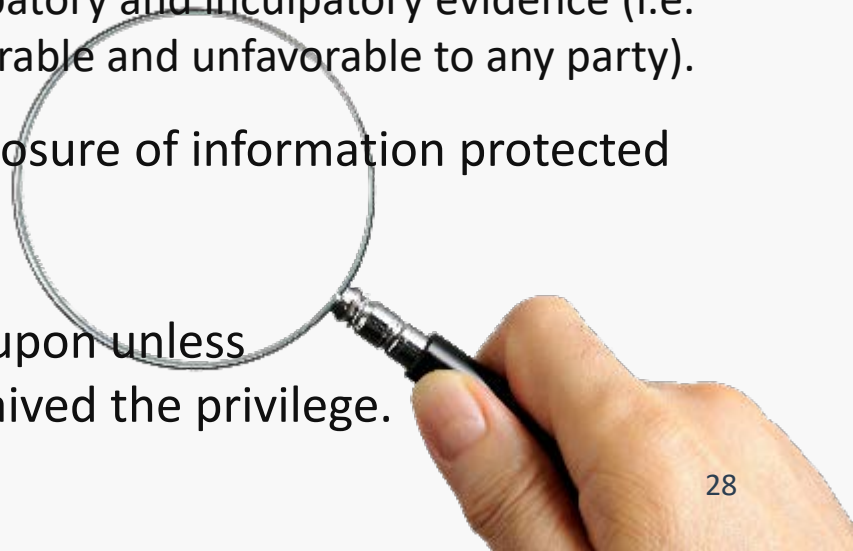
- After the investigative report is sent to the parties, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness.
 - The opportunity to submit written questions must be afforded to the parties even if the District 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.

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

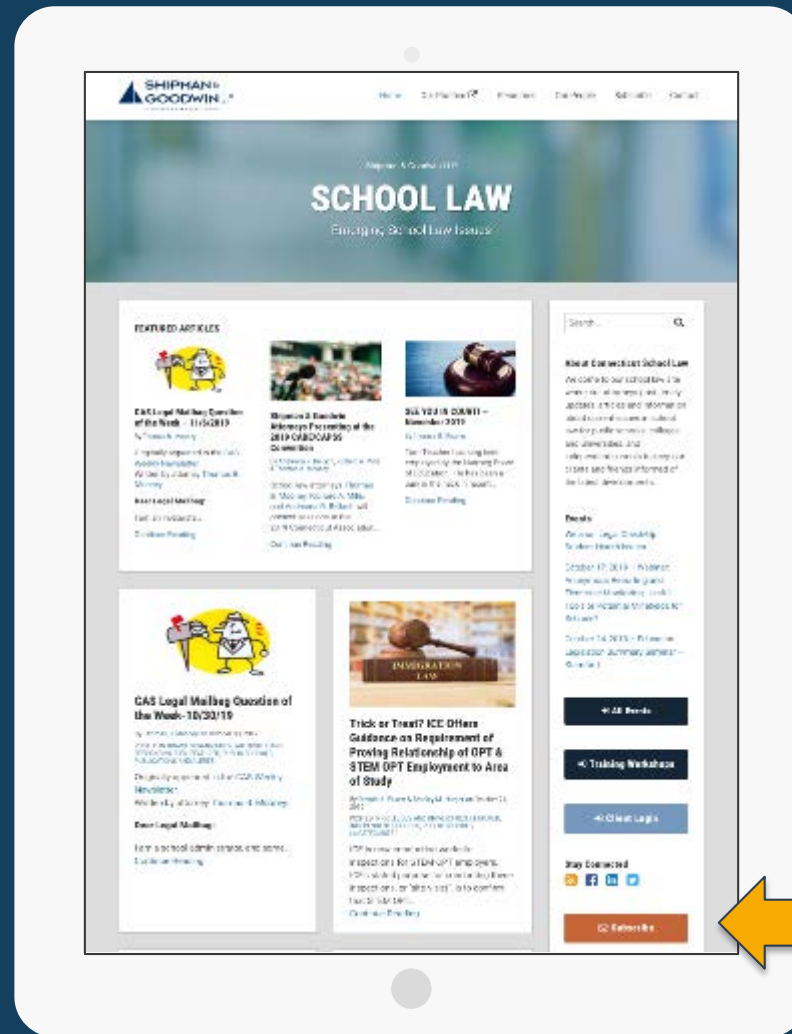
Questions?



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