



ABERNATHY ROEDER  
BOYD HULLETT

EST. 1876

## Title IX – Past, Present & Future

Rebecca Bradley

Senior Associate

Abernathy, Roeder, Boyd & Hullett, P.C.

Sadia Ahmed

Senior Associate

Abernathy, Roeder, Boyd & Hullett, P.C.

# TITLE IX

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# Presentation Agenda

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- History of Title IX
- Current Title IX
- Proposed Changes



# History of Title IX

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# Title IX – 1970's

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- President Richard Nixon signed Title IX of the Education Amendments Act of 1972 into law on June 23, 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 subject to discrimination under any education programs or activity receiving federal financial assistance.
- It was the first comprehensive federal law to prohibit sex discrimination against students and employees.
- In 1975, President Ford signed an Amendment that included provisions regarding discrimination in athletics. The amendment:
  - Required reasonable opportunities for both sexes to receive athletic scholarships;
  - Prohibited discrimination in any intercollegiate, club or intramural athletics;
  - Allowed for separate teams when the teams were based on a competitive skill or if the students were in a contact sport;
  - Required schools to designate an employee to coordinate the school's efforts to comply with Title IX; and
  - Required schools to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints that the school was discriminating on the basis of sex.



## Cannon v. University of Chicago

The U.S. Supreme Court held that the objectives of Title IX were two-fold:

1. To avoid the use of federal resources to support discriminatory practices; and
2. To provide individual citizens effective protection against those practices.



# Title IX – 1990's

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1992: Franklin v Gwinnett County Public Schools: The U.S. Supreme Court held that Title IX Plaintiffs were entitled to monetary damages for intentional discrimination. The Court also expanded Title IX protections to include sexual assault, specifically rape as a form of sex discrimination.

1997: Office for Civil Rights ("OCR") issued "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."

- Document was released as a result of years of enforcement which showed a significant number of students had experienced sexual harassment which interfered with and/or impacted the student's academic performance.

1998: Davis v. Monroe County Board of Education: The U.S. Supreme Court held that a student can sue for student-on-student sexual harassment under Title IX and schools are liable for money damages if:

1. The harassment is so severe, pervasive, and offensive that it interferes with a victim's educational environment; and
2. The school knows about the harassment and its response is clearly unreasonable under the circumstances.



# Title IX – 2000's

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2001: Office for Civil Rights at the United States Department of Education released guidance on what constitutes sexual harassment under the law and specified how the Department expects institutions to respond.

2002: Department of Education Appointed a Title IX Commission

2005: Jackson v. Birmingham Board of Education: Supreme Court held that retaliation against a person because that person has complained of sex discrimination is a form of intentional sex discrimination encompassed by Title IX





# Title IX – 2010's

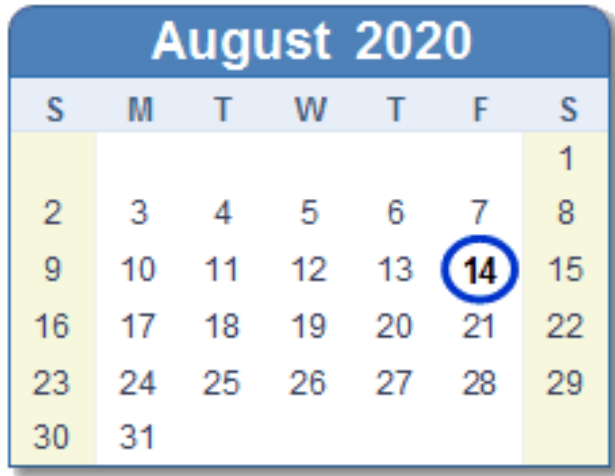
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Department of Education addressed issues through a series of guidance documents and Dear Colleague Letters ("DCL"). Some notable ones included:

- 2011 DCL which included sexual violence in the definition of sexual harassment under Title IX.
- 2014 detailed Question and Answer document that clearly explained institutional responsibilities under Title IX in adjudicating instances of alleged sexual misconduct.
- 2016 DCL on transgender rights, requiring schools to allocate access to sex-segregated facilities such as bathrooms, showers, and dorm rooms on the basis of gender identity rather than biological sex. This was revoked by the Trump Administration.

The Guidance letters were not law but the courts deferred to them so they could not be ignored. Betsy DeVos withdrew all of the Obama Administration's guidelines on sexual harassment and announced that the era of rule by letter and guidance was over. She launched a year long process to make revisions to Title IX through the rule making process





August 2020						
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**Friday, Aug 14th 2020**

May 2020 – OCR published the “Final Rule” in the Federal Register. The Final Rules created:

- New definitions
- Response obligations
- Grievance Process
- Investigation Process
- New Roles in the Title IX Process

**BREAKING NEWS**

**Title IX Regs  
FINAL**

# Who is Involved in the Process?

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Title IX Coordinator

Informal  
Resolution Facilitator

Investigator

Decision Maker

Appeals Officer

New Terminology	
<i>Complainant:</i> Person alleged to be the victim of sexual harassment.	<i>Respondent:</i> Person alleged to be the perpetrator of sexual harassment.

A parent may act on behalf of a minor student who is a complainant or respondent.



# What is Sexual Harassment?

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## OLD DEFINITION

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Previously, the regulations described sexual harassment as “unwelcome conduct of a sexual nature.”



# Definition – Sexual Harassment

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The new Title IX regulation provides for a *narrower definition* of sexual harassment that constitutes sex discrimination. The new definition has (3) types of sex-based conduct which would constitute sexual harassment:

Sexual assault, dating violence, domestic violence, and stalking;

“Unwelcome conduct that is so severe, pervasive and objectively offensive that it effectively denies a person equal educational access; AND

An employee conditioning the aid, benefit or service on participation of unwelcomed sexual conduct (Quid pro Quo).

# When is a Response Required?

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Response  
Required



The District has actual knowledge of sexual harassment;



The alleged sexual harassment occurred within the District's education program or activity;  
AND



The alleged sexual harassment was against a person in the United States.



# When Must a District Respond?

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- “Actual knowledge” includes *notice to any elementary or secondary school employee*; and
- Any person (e.g., the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail.

# When Must a District Respond?

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- **“Education program or activity”** includes situations over which the District exercises substantial control.
- Substantial control over activities includes field trips, academic conferences, or other school-sponsored travel. Substantial control also applies to District-owned buildings.

The new regulations establish a first response protocol for Title IX Coordinators. Specifically, if anyone reports sexual harassment, the Title IX Coordinator must:

- Promptly contact the complainant to confidentially discuss the availability of supportive measures.
- Explain that supportive measures are available with or without the filing of a formal complaint.
- Explain to the complainant the process for filing a formal complaint.

# First Response Protocols

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## What are Supportive Measures?

- Individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment.
- Can include counseling, extensions of deadlines or other course-related adjustments, changes in work locations, leaves of absence, escort services, modifications in class or work schedules, restrictions on contact between the parties and/or increased security in certain areas of the campus.
- Cannot be punitive or disciplinary.
- Completely removing a respondent from an activity would likely be considered *punitive* except in emergency removals.
- Must be provided free of charge to the complainant.



- Title IX regulations do not prohibit immediate removal of a Respondent from the education program or activity on an emergency basis.
  - This is only if the District conducts an individualized safety and risk analysis and determines emergency removal is necessary in order to protect a student or other individuals from an immediate threat to physical health or safety.
  - The District must provide the respondent with notice and an opportunity to challenge the decision immediately after the removal.

## What is a formal complaint?

- A formal complaint is a document filed by the Complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting an investigation into the allegations.



- An administrator designated as the Title IX Coordinator to coordinate efforts to comply with Title IX responsibilities.
- The Title IX Coordinator's information including title, address, email and phone number must be given to:
  - Parents and Legal Guardians of elementary and secondary school students;
  - Students;
  - Employees;
  - Applicants for admission; and
  - Applicants for employment

**TITLE IX**

Districts must investigate allegations in any formal complaint and send written notices to the Complainant, Respondent, and the Parents of the allegations upon receipt of a formal complaint.






# Written Notice

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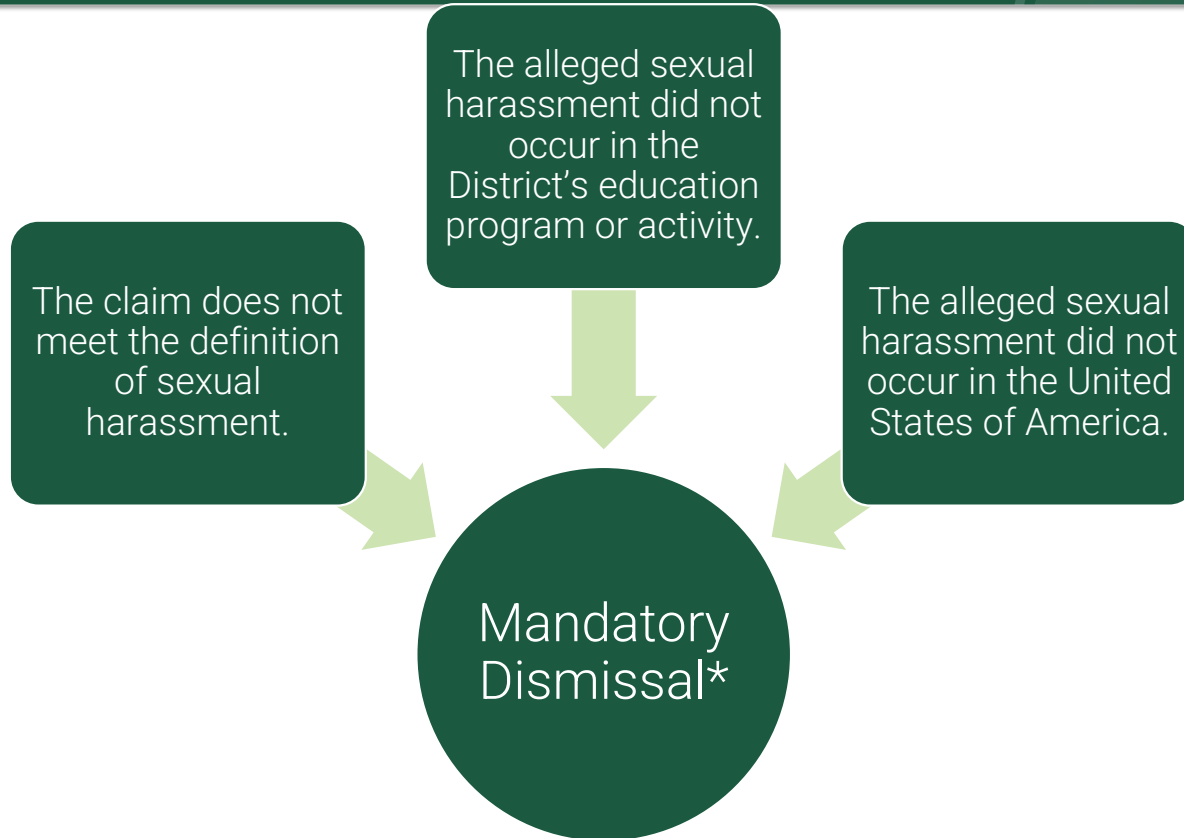
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- Include presumption of innocence at the onset of the grievance process;
  - Inform both parties of the District's grievance process;
  - Include if there is an opportunity for an informal resolution process;

- 
- Include key details of the allegations of sexual harassment including parties involved, date and location of the alleged incident (if known), and the alleged conduct that constitutes sexual harassment;
  - Include a statement that the parties are entitled to an advisor of their choice;
  - Notice that the parties can inspect and review certain evidence;

- 
- Include information regarding any provisions from the Code of Conduct (if one exists) regarding making false statements during the grievance process; and
  - If in the course of an investigation, the District decides to investigate allegations about the Respondent or Complainant that were not included in the original notice, notice of the additional allegations must be provided in writing to the parties.

# Mandatory Dismissals

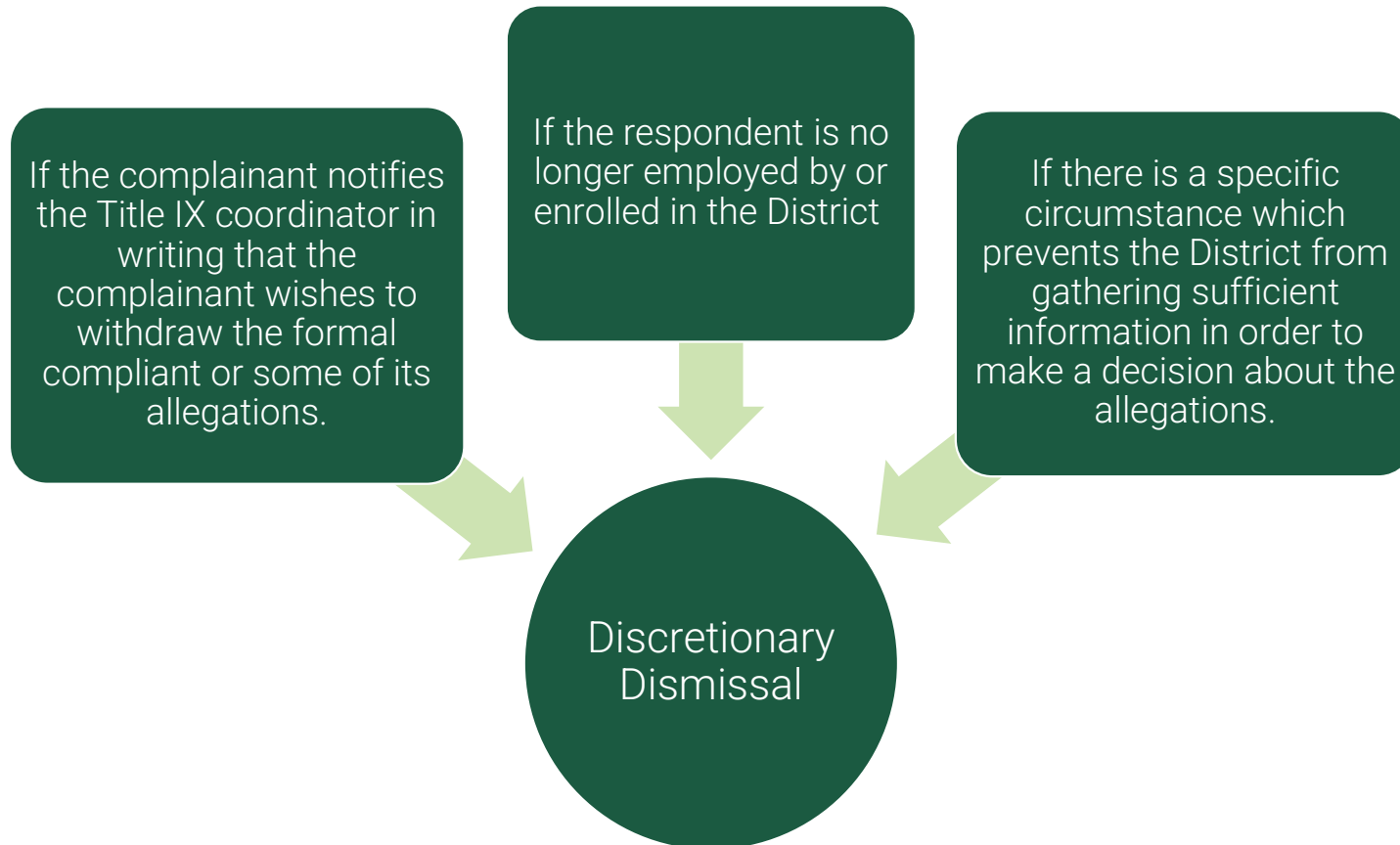
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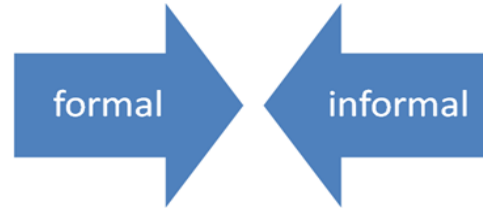


\*Districts can still investigate these claims under their Code of Conduct.

# Discretionary Dismissals

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- Districts are not required to but are able to facilitate a resolution through an informal process. With the exception of one type of claim, districts can provide parties with written notice of the allegations, the requirements of the informal resolution process, and any consequences from participating (i.e. records that will be maintained and could be shared), and obtain voluntary written consent to use the informal resolution process.
- Informal resolutions must be before a neutral third party who is trained.



Districts cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. This is because of the power differentials inherent in such circumstances.

- The new Title IX legislation provides rape shield protections to complainants.
- All questions and evidence about a complainant's prior sexual behavior will be deemed irrelevant.
- It will only be allowed to prove that someone other than the respondent committed the alleged misconduct, or it can be offered to prove consent.

Districts can choose which standard of evidence they want to use – but must use the same standard for all proceedings with students and employees.

Clear and Convincing Evidence

Preponderance of Evidence



# Standard of Evidence

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## Clear and Convincing

Higher standard of proof.

Evidence being presented must be “highly” and substantially more probable to be true rather than untrue.

## Preponderance of Evidence

More likely than not, or anything above a “fifty-fifty” likelihood of guilt.

Standard under the old rule.



In an elementary or secondary school, whether there has been a hearing or not, the decision-maker needs to objectively evaluate the evidence and reach a conclusion regarding the sexual harassment claims.

- The decision maker cannot be the same person who conducted the investigation and cannot be the same as the Title IX Coordinator.
- Decision makers must be free from conflicts of interests or bias for or against either party.
- Decision makers must receive special training on how to be impartial and how to determine what evidence is relevant.
- The decision maker must issue a written decision (even if there is no hearing).

The written decision must include the following:

- ✓ The portion of the District's policy that was violated.
- ✓ A description of all the procedural steps that were taken by the District. This includes all the interviews that were conducted.
- ✓ A findings of facts section.
- ✓ A section that draws a conclusion after the finding of facts.
- ✓ A statement or rationale for the ultimate determination.

- ✓ Any disciplinary actions the District will impose on the respondent and state if any remedies are provided to the complainant.
- ✓ A statement and rationale for any remedies provided to the complainant, and explain how that remedy will restore or preserve equal access to education.
- ✓ A statement of the procedures, the right to appeal, and permissible basis for appeal.

- The new regulations place a heavy emphasis on training. Districts must ensure Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the following:
  - The definitions of prohibited conduct, including harassment;
  - How both the informal and formal processes work;
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias; and
  - How to apply the rape shield protections provided for complainants.
  - Districts must make all materials used to train Title IX personnel publicly available on the District's website or, if the District does not maintain a website, make these materials available upon request for inspection by members of the public.

Districts must offer both parties an appeal from a determination regarding:

- Responsibility; and
- From a districts' dismissal of a formal complaint.

Both parties can appeal for the following reasons:

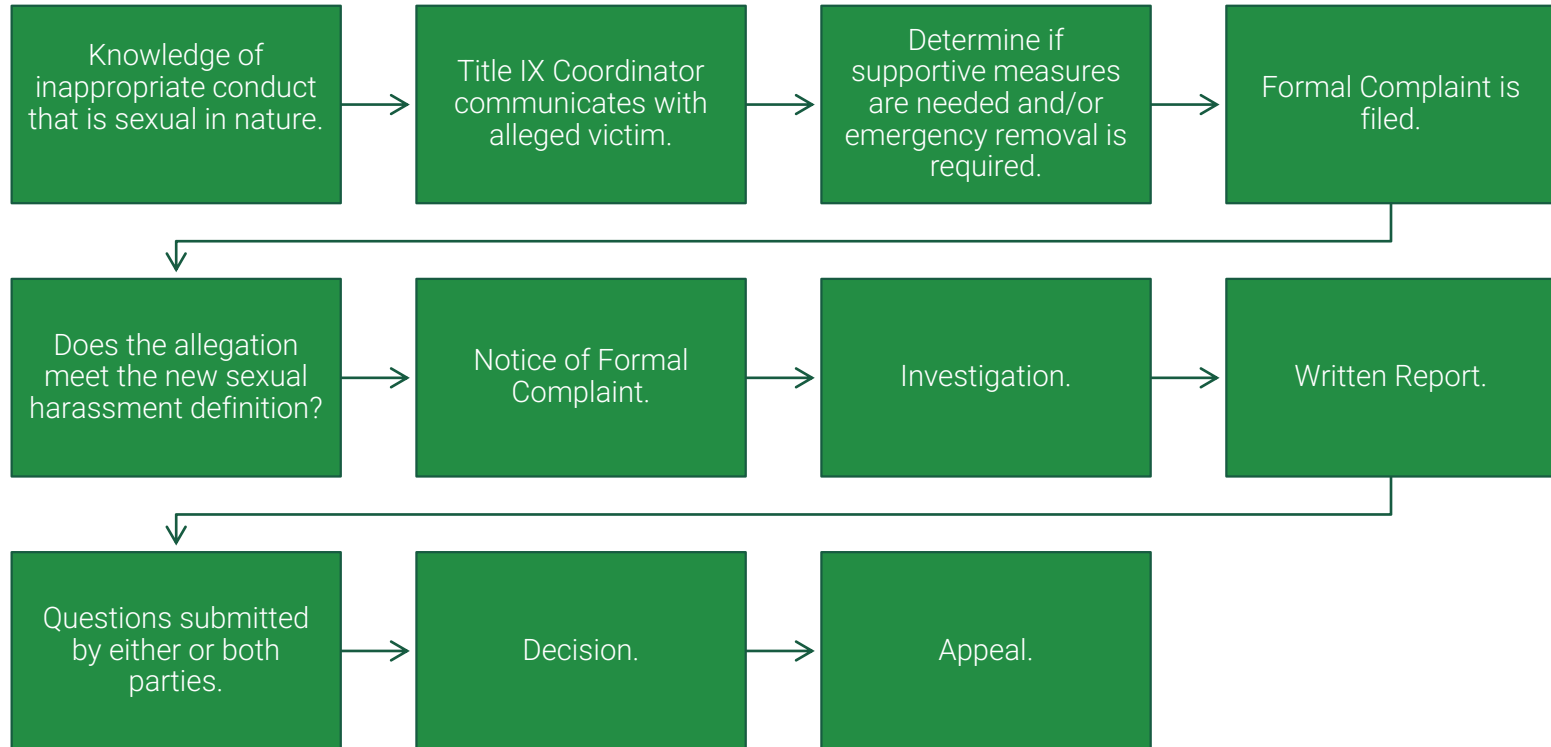
- Procedural irregularity that affected the outcome of the matter;
- Newly discovered evidence that could affect the outcome of the matter; and/or
- Conflict of interest or bias by Title IX personnel that affected the outcome of the matter.

Districts must keep the following records for a minimum of seven (7) years:

- Records of a district's investigation;
- Records of any appeals and materials from the appeal;
- Records of any informal resolution process;
- Title IX training materials; and
  1. Title IX coordinators, investigators, decision makers, and any employee designated to facilitate an informal process.
  2. Districts must also post the training material on their websites, or, if a district does not maintain a website, otherwise make the materials available to the public.
- Records of any supportive measures taken.
  1. If no supportive measures were taken, the District should document why supportive measures were not needed.

# Title IX Flow Chart

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# Proposed Title IX Changes

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- On June 23, 2022, the 50<sup>th</sup> anniversary of when Title IX was signed into law, The U.S. Department of Education announced its proposed changes to Title IX.
- The Department's long-awaited, proposed amendments come more than a year after the Biden Administration issued Executive Order 14021 ("EO 14021"), "Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity." EO 14021 directed the Department to review existing regulations to ensure consistency with the policy that "all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity."
- The public comment period just ended on September 12, 2022.

# Bostock v Clayton County

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- The Supreme Court decided Bostock v. Clayton County, 140 S. Ct. 1731 (2020). Bostock was an employment discrimination case where the Supreme Court wrote it is “impossible to discriminate against a person” on the basis of sexual orientation or gender identity without “discrimination against the individual on the basis on sex.”
- The Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender.
- The U.S. Department of Education has interpreted Bostock to apply to Title IX as well.
- The proposed Title IX regulations focus on ensuring that no person experiences sex discrimination in education.



# Proposed Title IX

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There are seven components to the proposed changes:

1. “Expand the definition of ‘sex discrimination’ to include — sex stereotypes, sex characteristics, sexual orientation, gender identity, pregnancy (or related conditions).” Doing this would allow for a more inclusive interpretation.
2. “Require all employees with positions related to administrative leadership, teaching, or advising to be mandatory reporters. All other employees must be designated as mandatory reporters or must be required to provide the resource of the Title IX Coordinator’s contact information and instructions on how to file a report.”
3. “Remove the requirement that individuals submit a signed ‘formal complaint’ document before institutions can offer investigation or informal resolution options.” The proposed regulations would establish clear requirements for schools to conduct investigations for all sex discrimination complaints, as opposed to the current requirements, which cover only *formal* complaints.
4. Require schools to address all behavior that is under their normal disciplinary authority. For example, if the school addresses other physical violence that occurs off-campus, they must address sexual misconduct that occurs off campus. Doing so would expand the District’s jurisdiction.
5. “Expand the definition of ‘sexual harassment.’” The proposed definition is: something “so severe or pervasive that it denies or limits a person’s ability to participate in or benefit from an educational program or activity (hostile environment).”
6. “Remove the ‘live hearing’ requirement and allow for a ‘single investigator’ model. This provides more autonomy to each individual institution as to what procedures make the most sense for their community, so long as the college meets specific requirements.” (more applicable for the post secondary setting)
7. “Allow former students or former employees to file a complaint even if they have left the institution. This provides for greater accountability and support.”

# Questions?

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# THANK YOU!

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ABERNATHY ROEDER  
BOYD HULLETT

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Rebecca Bradley  
rbradley@abernathy-law.com

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sahmed@abernathy-law.com