



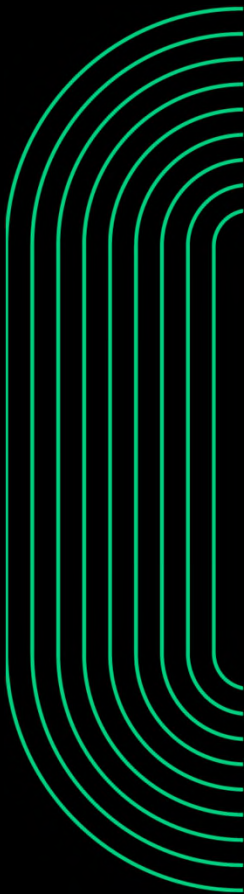
Title IX: The Final Rule

Then, Now and What To Come with Title IX

Eaton Regional Education Service Agency

Kara T. Rozin
+1 616.608.1110
krozin@clarkhill.com

August 14, 2023



Title IX: What You Need to Know under the Current Final Rule



What is Title IX of the Education Amendments of 1972?

No **person** in the United States shall, **on the basis of sex**, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681, *et seq.*



Title IX's Protections

Protects ALL students

- Elementary → High School
- Male + female + straight + gay + lesbian + bisexual + transgender + questioning students
- Gender Identity claims/LGTBQ Students
 - Failure to conform to stereotypical notions of “masculinity” or “femininity.”
- “Same sex” discrimination claims must be handled with same procedures as opposite sex claims



Title IX is More Than Athletics

Title IX protects students in all:

- Academics and Education
- Extracurricular and Athletic Programs
- Other programs or activities of the school:
 - in a school's facilities;
 - in classrooms (including virtual);
 - on school transportation; and
 - at an activity or program sponsored by the school at another location or where the school has substantial control over the students (i.e. field trips, sporting events)



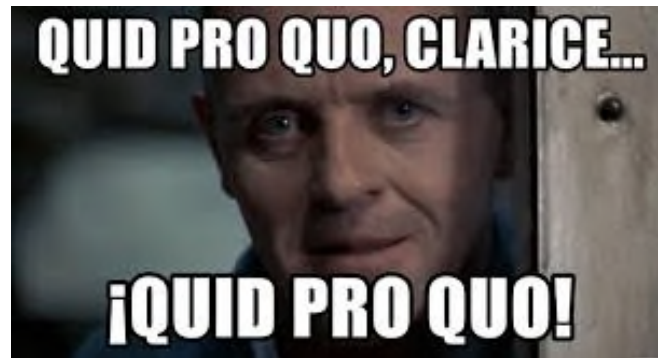
Within School District's Educational Program or Activity

- All operations of the School District, including but not limited to:
 - In-person and online educational instruction
 - Employment
 - Extracurricular activities, athletics, performances, and community engagement and outreach programs
- All activity that occurs on school grounds or on other property owned or occupied by the Board
- Also includes locations, events and circumstances that take place off-school property/grounds over which the Board exercises substantial control over both the Respondent and the context in which the Sexual Harassment occurs
- Does not apply to Sexual Harassment that occurs off school grounds, in a private setting, and outside the scope of the District's education programs and activities



2020 Final Rule Definition of Sexual Harassment

- "Quid Pro Quo" harassment by a school employee.
- 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 school's education program or activity.
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under other Federal laws called the Clery Act and the Violence Against Women Act.



Sexual Harassment – What Changed?

OLD DEFINITION (OCR Guidance)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, or persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities or opportunities

NEW DEFINITION (Final Rule)

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the recipient's education program or activity



Is It Title IX Sexual Harassment?

Doe v. Plymouth-Canton Community Schools (2022)

- **SEVERE:**
 - “Severe” means something more than just juvenile behavior that is antagonistic, non-consensual, and crass.... “simple acts of teasing and name-calling” are not enough, “even where these comments target differences in gender.”
- **PERVASIVE**
 - “Pervasive” means “systematic” or “widespread,” ... one incident of harassment is not enough.
- **OBJECTIVELY OFFENSIVE**
 - “Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively. The victim’s perceptions are not determinative.



Is It Title IX Sexual Harassment?

Going to require individual case-by-case analysis by frontline Administrators first.

- **Single, isolated, events = unlikely, but could qualify (e.g. rape)**
 - Butt smack in hallway; horseplay; sexual misconduct
 - Name-calling (“slut” “ho” “whore”)
 - Single inappropriate text/photo (isolated vs. systemic disclosure?)
 - Verbal allegations only = not common
 - Mutual sexual conduct/communication (consent = not Title IX)
- **Severe, pervasive AND objectively offensive**
- **Effectively denies equal access to education**
 - Drop out/withdrawal from program or activity
 - Increased absences
 - Decline in grades
 - Increased emotional or academic supports



If Not Title IX, What Is It?

- **Bullying/Cyberbullying?**
- **Other discrimination/harassment?**
 - State law Sexual Harassment?
- **Student Code of Conduct Offenses?**
 - Inappropriate Displays of Affection
 - Undesirable Physical Conduct
 - Sexual Misconduct
 - Profanity/Obscenity
 - Inappropriate Conduct/Communication (Teasing/Disorderly Conduct)
 - Acceptable Use Violation/Technology Abuse
- **What is your duty to investigate? Who is your investigator? What type of investigation required?**



If Not Title IX, What Is It?

STATE LAW = ELLIOT-LARSEN CIVIL RIGHTS ACT

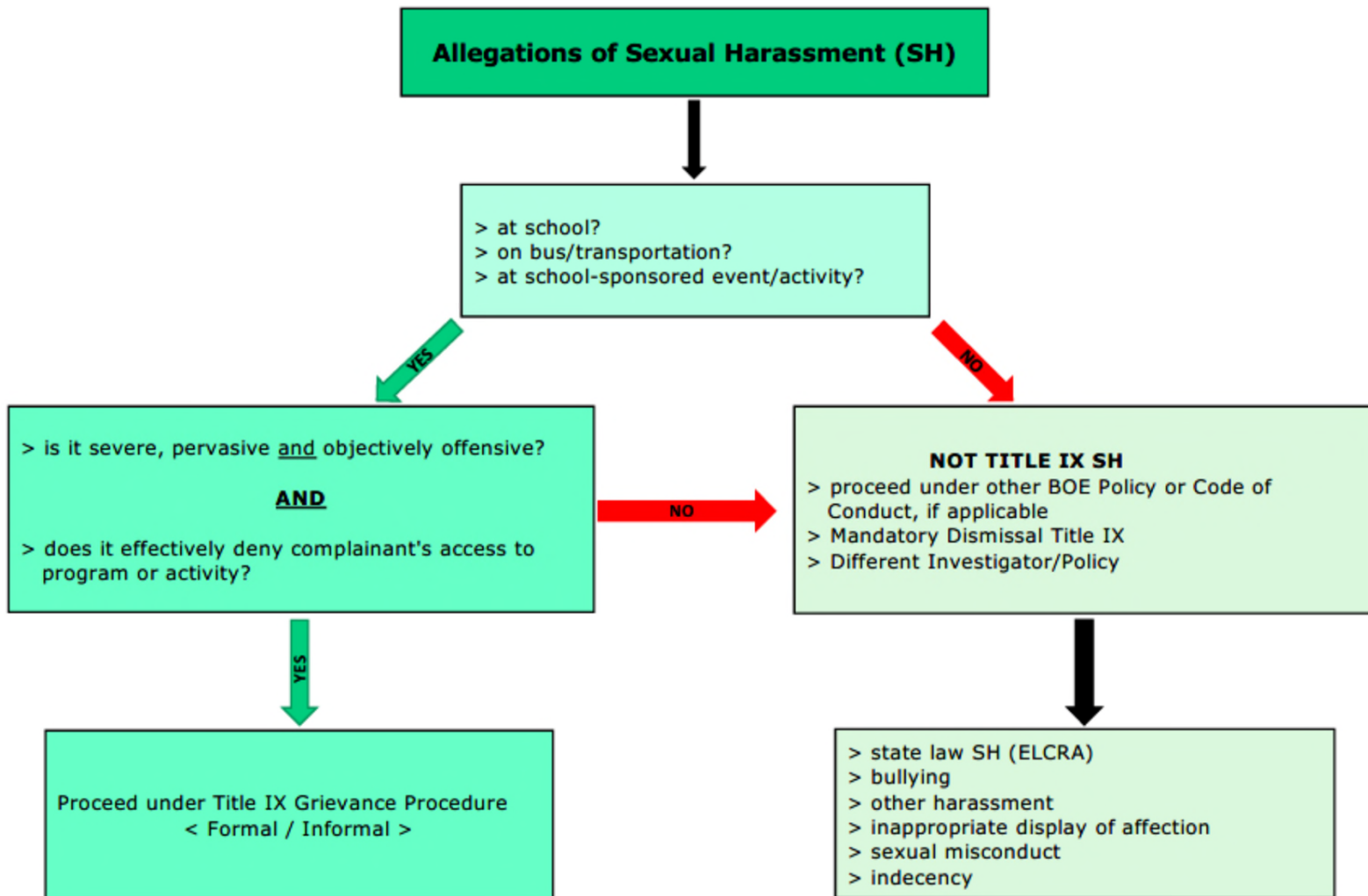
"Sexual harassment" is defined under Michigan law as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- Submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, or status in a class, educational program, or activity;
- Submission or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting such individual;
- Such conduct has the purpose or effect of **interfering** with the individual's work or educational performance; of creating an intimidating, hostile, **or** offensive working, and/or learning environment; or of **interfering** with one's ability to participate in or benefit from a class or an educational program or activity.

Board Policy (Anti-Harassment) vs. Title IX Sexual Harassment

Informal/Formal Investigation vs. Title IX Grievance Procedure





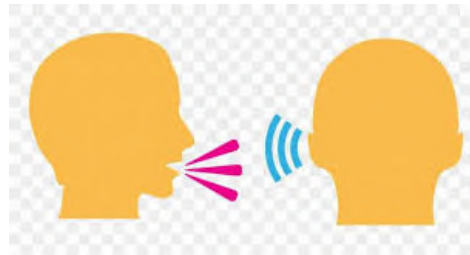
When Does a School Have Notice?

- Once a school has actual knowledge of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has actual knowledge when the school has notice that a person may have been victimized by sexual harassment.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.
- And sometimes school personnel will personally witness sexual harassment.



Actual Knowledge and School Personnel

- The Title IX Coordinator(s) for the school district.
- Schools have to provide the contact information for the Title IX Coordinator(s).
 - Board Policies, Handbooks, Website
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator(s).
- In elementary and secondary schools, telling any school employee always puts the school on notice.



Actual Knowledge – What Changed?

OLD RULE (OCR Guidance)

- A school has a responsibility to respond promptly and effectively if a school **knows or should have known** about sexual harassment

2020 RULE (Final Rule)

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent



Deliberate Indifference – What Changed?

OLD DEFINITION (OCR Guidance)

- The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

2020 DEFINITION (Final Rule)

- Failure to respond reasonably in light of known circumstances



Current Title IX Policy and Procedure Requirements



Title IX Board Policies and Grievance Procedure

- Definition of Sexual Harassment under Title IX Final Rule
 - *Cleary Act and VAWA definitions/citations*
- Identify **Title IX Coordinators**, or that the school will designate at least one (most schools identify 2: one male and one female Administrator)
- Continue to identify **Compliance Officers**: responsible for other complaints of discrimination/harassment (e.g., race, religion, disability, etc.) and non-Title IX sexual harassment
- Separate grievance procedure for investigation of non-Title IX sexual harassment complaints – know your policies & procedures!



Who Are the Title IX Players at your District?

- Title IX Coordinator(s)
- Investigators: Title IX Coordinator(s), Central Office Admins, Principals, Assistant Principals, Athletic Director
- Decision-Maker: **NOT** Title IX Coordinator, **NOT** Investigating Administrator
- Appeal: Superintendent? BOE? Committee appointed by the BOE?
- Informal Resolution Facilitators: Administrator, School Counselor, School Social Worker
- Legal counsel may be consulted at any/all stages of Title IX Grievance Procedure; legal counsel may be assigned or designated as Investigator, Decision-Maker or Appeal Officer



Written Grievance Procedures

- Schools must have a written grievance procedure for dealing with sexual harassment which must abide by the new regulations
- The grievance procedures themselves can't discriminate on the basis of sex, and any additional provisions that a school adds must apply equally to complainants and respondents
- Written grievance procedures need to include 10 specific items



Requirement 1: Treat Parties Equitably

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
- The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.
- Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies CAN be punitive or disciplinary against the respondent.



Requirement 2: Objective Evaluation of Evidence

- The school's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.



Requirement 3: Training; No Conflicts of Interest

- The individuals involved in the process – Title IX Coordinator, investigators, appeals, decision-makers, appeal or facilitators of informal, voluntary resolution efforts – must not have any bias or conflict of interest.
- These individuals must also be trained. The materials used to train Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).
- Investigator cannot be decision-maker. Decision-maker cannot be investigator or Title IX Coordinator. Appellate person/body cannot be anyone involved previously.



Requirement 4: Presumption of Innocence

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.



Requirement 5: Reasonably Prompt Timeframes

- The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment.
 - Prior OCR guidance 60 days.
- Temporary delays are permitted only for good cause. Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.
- Some timeframes are proscribed (Investigation Report, Decision-Maker).



Requirement 6: Description of Range of Outcomes

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.



Range of Outcomes?

- **Possible disciplinary sanctions:**

- Suspension up to and including permanent expulsion
- Discipline up to and including termination



- **Possible remedies:**

- AKA: Remedial Measures
 - No Contact Order (for both parties)
 - Change in classroom, lunchroom, bus, locker assignment
 - Restorative Justice, if applicable
 - Job Transfer/Reassignment
 - Supportive measures to be continued after investigation



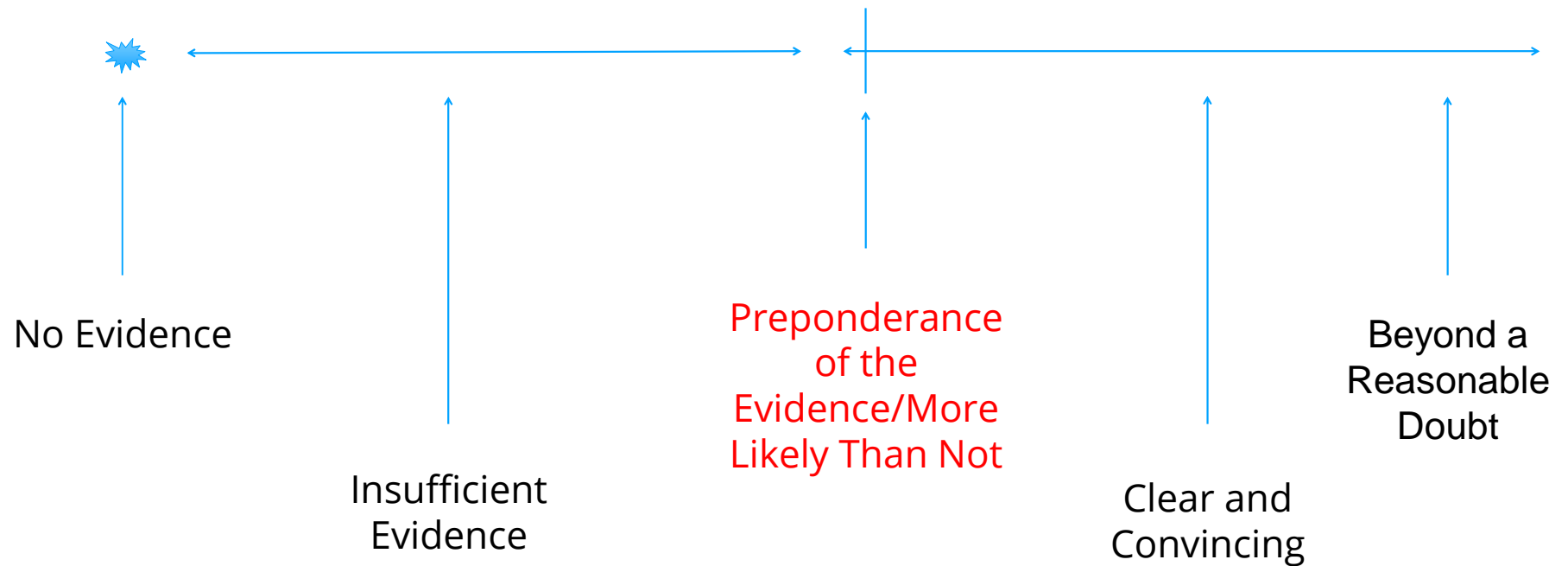
Requirement 7: Standard of Evidence

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility, to be used for all sexual harassment proceedings.
- Schools can choose between the preponderance of the evidence standard and the clear and convincing evidence standard.
- Whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student or employee, including a faculty member.
- All sexual harassment proceedings must have the same standard of evidence.



Evidence Thresholds

EVIDENTIARY STANDARDS



Requirement 8: Right to Appeal

- The grievance procedures have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.
- Schools must offer an appeal to every party on certain bases, and schools also have the option to expand the bases on which an appeal may be taken, as long as they apply those bases equally to both parties.



Appeals – What Changed?

OLD REQUIREMENTS (OCR Guidance)

- Not required
- Must be provided equally to both parties, if provided
- No limitation on basis for appeals, if provided
- No requirement that the decision-maker on appeal be different from investigators/decision-makers in other phases of the process

2020 REQUIREMENTS (Final Rule)

- Must offer to both parties for dismissals and final determinations in the following circumstances:
 - Procedural irregularity
 - New evidence not reasonably available
 - Conflict of interest against Title IX Coordinator, investigator, decision-maker
- Can offer for other reasons on equal terms
- No Title IX Coordinator or decision-maker



Requirement 9: Description of Range of Supportive Measures

- The school's grievance process must describe the range of supportive measures available to complainants and respondents.



What Are Supportive Measures?

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety or deter sexual harassment.
- There doesn't need to be a formal complaint for an alleged victim to receive supportive measures.
- Supportive measures support a student, and they aren't punitive or disciplinary with respect to another student.
- Supportive measures don't unreasonably burden any other person.
- The Title IX Coordinator is responsible for implementing and monitoring supportive measures.
- Still the implication to "err" on the side of the victim as school always has to consider the alleged victim's wishes when it comes to requests for supportive measures.



Supportive Measures

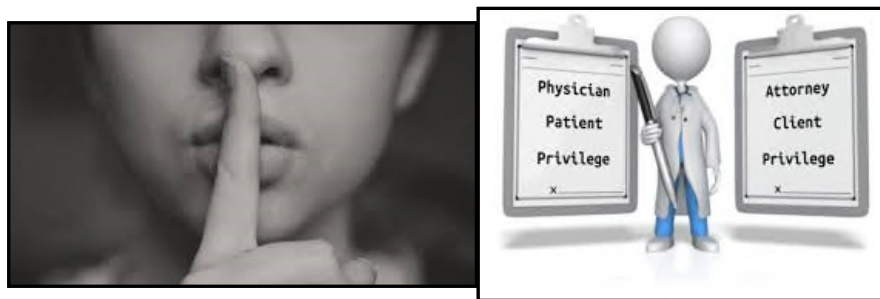
Examples:

- No Contact Orders (both ways)
- Counseling
- Extensions of deadlines for assignments/tests
- Changes in classroom/lunchroom/bus assignments
- Increased Monitoring and Supervision
- Assigning a “safe” person
- Administrative Leave/Temporary Transfer



Requirement 10: Privileges

- The school's grievance process must explain that no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges, if they want, but they don't have to.



Mandatory Dismissals

A school **must** dismiss a complaint:

- that does not describe conduct that meets the definition of sexual harassment;
 - that alleges sexual harassment that did not occur in the school's education program or activity;
 - that alleges sexual harassment that did not occur in the United States at all.
- Schools can still address these complaints under the code of conduct/other BOE policies, even if the misconduct is not sexual harassment under Title IX.



Discretionary Dismissals

A school **may** dismiss a complaint:

- if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the school; or
- if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.



Dismissal Procedures

- Whenever a school dismisses a formal complaint, or any allegations in it, the school has to promptly send written notice of the dismissal and the reasons to the parties.
- Both parties have the right to appeal a school's dismissal decisions.



Informal Resolution

- Schools can offer informal resolution in appropriate cases.
 - *Exception:* Where the respondent is an employee of the school.
- Informal resolution may only be attempted if each party enters the process completely voluntarily.
- A school can never force, threaten, or require any party, complainant or respondent, into going into informal resolution.
- If informal resolution proceeds, the school must provide a facilitator who is free from conflicts of interest or bias, and who has received special training.
- The school still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.



Informal Investigation Procedure

- **Just because it's *informal*, doesn't mean you can skip *formal* documentation!**
 - Document parties' agreement to participate.
 - Document discussions with both parties and parents/advisors (if applicable).
 - Document actions agreed to remedy the complaint.
 - Follow up via written correspondence.
 - Keep Title IX Coordinator "in the loop" to assure procedures are followed.
 - Supportive measures must still be considered (and documented)!
 - Check Grievance Procedure for any additional requirements.



Documentation Requirements During Formal Title IX Investigation



Title IX Formal Complaint Requirement

- Defined as a document filed by a complainant or the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).
- Actually signed by the Complainant or Title IX Coordinator



Terminology: Complainant, Respondent

- Apply to parties in both **reports** and **formal complaints** of sexual harassment
- *Complainant*: A person who is alleged to be the victim of conduct that could constitute sexual harassment
 - NOT a third party who reports alleged sexual harassment perpetrated against someone else
 - NOT the Title IX Coordinator, even if the TIXC “signs” a formal complaint
- *Respondent*: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment



Initial Response

34 C.F.R. 10630(a), .44(a)



- Title IX Coordinator must promptly, even if no formal complaint is filed:
 - Contact the complainant to discuss the availability of “supportive measures”
 - Consider the complainant’s wishes with respect to supportive measures
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 - Explain the process for filing a formal complaint; discuss/offer informal, if appropriate



Emergency Removal / Admin Leave

Immediate Emergency Removal (34 C.F.R. 106.55(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- Notice, opportunity to challenge provided “immediately” following the removal
- Consider other laws, e.g., “change in placement” under IDEA

Employee Administrative Leave (34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements



Title IX: Written Notice to Parties

1. The actual allegations and facts that would constitute sexual harassment.
2. The presumption of innocence.
3. A statement that the parties are entitled to advisor of their choice.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements.



Title IX: Written Notice to Parties

- Include notice to the parties of the school's grievance process, which must comply with the 10 items under Final Rule.
- Whether there is an opportunity to engage in informal resolution (excluding when Respondent is an adult employee of school district).
- The school has to provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.



Gathering Evidence: Schools and Parties



- The school must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised in the formal complaint.
- The school also has to give the parties a meaningful opportunity to respond to the evidence after the school has provided it.
- Formal complaint, witness statements, emails, text messages, video, etc.

Gathering Evidence: Schools and Parties

- The school must provide an equal opportunity for the parties to have witnesses and evidence as well as inculpatory or exculpatory evidence.
- The school can't restrict the ability of either party to discuss the allegations under investigation, or to gather and present relevant evidence (i.e. No Gag Orders).
- The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an advisor of choice for any meetings or hearings.



Title IX Investigation Report Requirements

- Investigator needs to prepare a written investigative report on the allegations of the formal complaint.
- A school has to give the parties at least 10 days to respond to the report and supporting relevant evidence in writing. If a response is submitted, the investigator must consider that response before finalizing the investigative report.
- The investigative report can then be finalized and provided to the parties (advisors) and decision-maker.



Compliance with FERPA? Confidentiality?

- Given that the requirements to comply with Title IX include allowing the parties (and their advisors, if any) an opportunity to inspect/review all relevant evidence as well as providing a copy of the investigation reports, the following safety measures are recommended to ensure confidentiality and FERPA compliance:
 - If there is video evidence, allowing the parties to view the video is sufficient under Title IX and FERPA (i.e., do not provide a copy of the video unless the District can effectively blur the other student(s) faces).
 - Redact student names on documents and replace with identifiers (“Complainant” “Respondent” “Witness 1, 2, 3,” etc.)
 - Provide a “key” only to the Complainant and Respondent identifying the names of the students.
 - Include a watermark (“Complainant” and “Respondent”) on all documents provided to the parties.



Title IX Determination Requirements

- An elementary or secondary school must give the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination (check grievance procedure for timeline).
- The decision-maker must then ask the questions to the party and record the answers, unless the decision-maker determines the questions are not relevant to the investigation.
- May allow for limited follow-up questions.
- Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:
 - Offered to prove that someone other than the respondent committed the alleged misconduct; or
 - Offered to prove consent.



Decision-Making: Objective and Unbiased

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment, so the decision-maker **cannot** be the same person who conducted the investigation and cannot be the school's Title IX Coordinator.
- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents and must receive special training about how to be impartial and how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence, decide whether it meets the school's standard of evidence for sexual harassment allegations and issue the written determination to both parties (i.e., outcome letters).



How To Be Impartial

Impartial = Neutral = Unbias

- You must not have any bias towards either party or special relationship with either party.
 - Do not make assumptions about the evidence before interviewing a party or a witness.
 - “John doesn’t seem like that type of person.”
 - “Jane probably shouldn’t have been wearing that.”
 - “Alex is a troublemaker.”
 - Even if you *think* you know the answer to something, ask the question anyway.
- Allow each party the opportunity to present “their side” of the story.
- Avoid making statements that could lead a party or witness to believe you are bias or have your mind made up.
- Seek advice/counsel from others (note: confidentiality considerations). If you consulted with at least one other person prior to a final determination, less opportunity for a party to allege you were bias or not impartial.



What Is Relevant Evidence?

- Michigan Rules of Evidence define “Relevant evidence” as:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is **of consequence to the determination** of the action **more probable or less probable** than it would be without the evidence.

- Although your investigation does not take place in a courtroom, you need to determine what evidence is relevant to an investigation and what is not.
- Evidence includes both written and oral evidence (i.e. witnesses).
- An investigator has the ability to exclude evidence that is not relevant, but before doing so, you should review the evidence and be prepared to explain why it is not relevant to the investigation.



Title IX Determination Requirements

After the evidence has been weighed, the determination has to be written. It must include:

1. The portion of the school's policies that was violated.
2. A description of the procedural steps that were taken by the school on the way to getting to that point.
3. A findings of fact section.
4. A section that draws conclusions after applying the facts to the portion of the school's policy that applies.
5. A statement and rationale for the ultimate determination of responsibility.



Title IX Determination Requirements

6. Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant.
7. A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.
8. A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.



Decision-Making: After the Decision

- The school must send the written determination to the parties **simultaneously**, along with information about how to appeal the determination.
- A school has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt timeframe.
- The Title IX Coordinator is responsible for carrying out the remedies contained in the written decision.



Appeals

- A school has to offer both parties an opportunity to appeal.
- Appeals can be taken from two different steps in the process.
 - After a dismissal before the grievance process, whether mandatory or discretionary.
 - At the end of the grievance process.



Appeal Rights? Title IX = YES

1. A procedural irregularity that could affect the outcome of the matter.
2. New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal.
3. A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled evidence, or a decision-maker, and the conflict of interest affected the outcome.
4. Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.



Appellate Processes

- The recipient has to notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome.
- The person or body who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.
- After considering the parties' written statements, the decision-maker on appeal has to issue a written decision and send it to the parties simultaneously.
- The school's determination about whether the respondent is responsible for the sexual harassment allegations becomes **final** after appeal.



Other Requirements: Recordkeeping

This duty extends for 7 years, and includes several categories of documents:

1. Records of a school's investigation.
2. Records of any appeal and the materials associated with an appeal.
3. Records of any informal resolution process.
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution. These materials also have to be posted on a recipient's website or made available for public inspection if the recipient doesn't have a website.
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment.



Other Requirements: Recordkeeping

106.45(b)(10)

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years
 - Investigation records
 - Disciplinary sanctions
 - Remedies
 - Appeals
 - Records of any actions taken, including supportive measures
- Must document for every instance:
 - Why response was not deliberately indifferent
 - That measures were taken to restore or preserve equal access to the educational program or activity
 - If no supportive measures provided, why that was not deliberately indifferent



Other Issues: Retaliation

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a complaint with the school and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws or is necessary in order to conduct the grievance process.



A Look Forward: What Can We Expect With Title IX?



Definitions under Title IX



- *Sexual Harassment and Discrimination Expanded*
 - Included **sex-based** harassment in definition of sexual harassment: harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity
 - Sex Discrimination includes discrimination based on sexual orientation, gender identity and sex characteristics (sex stereotypes and pregnancy or related conditions)
 - Grievance Procedure covers both Sex Harassment and Sex Discrimination
- *Hostile Environment Sexual Harassment*
 - Severe **or** pervasive unwelcome sex-based conduct that, based on the totality of the circumstances, and evaluated objectively and subjectively, **denies or limits** a person's ability to participate in or benefit from the school's education program or activity

Title IX Addressing Off-Campus Misconduct

- Conduct that occurs “within a school’s program or activity” includes:
 - Conduct that occurs off-campus or outside of the United States when the Respondent is a representative of the school or otherwise engaged in conduct under the school’s disciplinary authority
 - Conduct that occurs off-campus or outside of the United States when the conduct contributes to a hostile environment on-campus
- Schools must address the on-campus effects of off-campus sex harassment/discrimination
- What does this mean?



Procedural Changes

- Require schools to respond to all complaints of sex-based discrimination through the Title IX Grievance Procedures, which must be in writing and provided to the parties.
 - Complaints may be oral or written;
 - Complaints may be formal or informal;
 - Complaints may be made by former students or former employees (as well as 3rd parties);
 - Not require dismissals for Title IX purposes (mandatory dismissals);
 - Informal resolution may be offered without a formal complaint;
 - Single investigator model is allowed (Title IX Coordinator or investigator may be the decision-maker);
 - Emergency removal of a student may now also be imposed for immediate threats of emotional or mental harm (vs. only physical);
 - Strict timelines removed and only require “prompt timeframes” for major steps in the Grievance Procedure such as intake, investigation, adjudication and appeal.



Procedural Changes

- No investigation report required. Schools may either provide parties access to evidence gathered during investigation or a written investigation report (with evidence provided upon request), but not both.
- Definition of “relevant evidence” = evidence that is related to the allegations of sex discrimination under investigation and/or when it may aid the decision-maker in determining whether the alleged sex discrimination occurred.
- Supportive measures may be restrictive on a Respondent, but no more than what is necessary to preserve a Complainant’s access to educational programs or activities.
- Impose a rule that provides if a party does not respond to questions related to credibility, the decision-maker must not rely on any statement of that party that supports that party’s position.



Prohibit Pregnancy Discrimination or Harassment

- Clarify that schools must protect students and employees from discrimination based on pregnancy or related conditions (including childbirth, recovery, lactation) including by providing:
 - reasonable modifications for students (including leave of absence for medical reasons and reinstatement rights);
 - reasonable breaktime for employees for lactation; and
 - lactation space for both students and employees (not a bathroom).
- Title IX Coordinators will be responsible for ensuring that students who are pregnant are aware of the supports and resources available to them to ensure equal access to the educational program. The Title IX Coordinator is responsible for providing information and assistance.
- Modernize and clarify Title IX's prohibition about treating parents differently on the basis of sex, including defining "parental status" to include adoptive, stepparents or legal guardians.



What about Athletics and Transgender?

- Prohibit schools from engaging in discrimination based on sexual orientation, gender identity and sex characteristics by separating or treating any person differently based on sex in a manner that subjects the person to more than minimal harm.
- This includes policies and practices that prevent a student from participating in a school's educational program or activity consistent with their gender identity.
- The USDOE engaged in **separate rulemaking** to address Title IX's application to the context of athletics and, in particular, what criteria schools may be permitted to use to establish students' eligibility to participate on a particular male or female athletic team.



Athletics and Transgender

- Policies violate Title IX when they categorically ban transgender students from participating on sports teams consistent with their gender identity just because of who they are.
- The proposed regulation would be in the Title IX regulations in section 106.41 (b) (2):

“If a recipient adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”



Athletics and Transgender

Schools would have to take into account the following considerations when developing a policy for athletic participation:

- 1. Recognize differences among students and school sports teams depending on grade and education level.** For example, the Department expects that, under its proposed regulation, elementary school students would generally be able to participate on school sports teams consistent with their gender identity whereas considerations may be different for competitive high school and college teams.
- 2. Recognize that school athletic teams vary in the level of competition.** School athletic teams vary, with some that are very competitive, especially for high school and college students with advanced skills, and others, such as “no cut” teams, that allow all students to join and participate. Sex-related eligibility criteria that restrict students from participating consistent with their gender identity would have to reflect these differences in competition.
- 3. Recognize that the types of sports offered vary widely and that sport governing bodies vary in their participation criteria.** Schools that seek to restrict students from participating consistent with their gender identity must take into account the nature of the sports to which the restriction would apply.

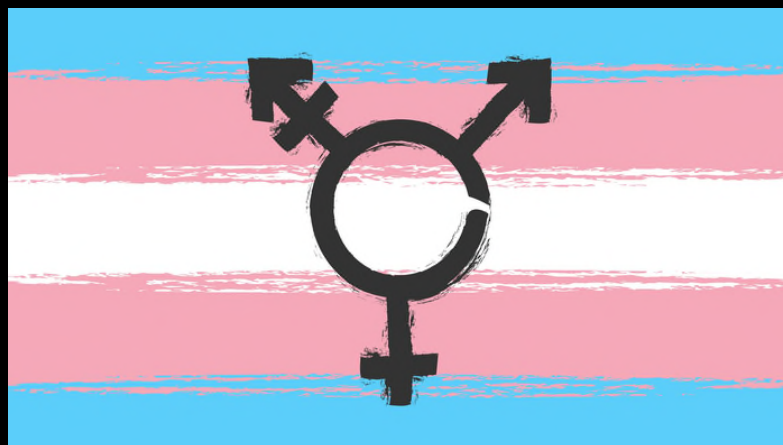


When Should We Expect the New Regs?



- June 23, 2022: USDOE released proposed Title IX regulations (Title IX 50th Birthday)
 - Projected date for final regulations: May 2023
- April 6, 2023: USDOE released proposed Title IX regulations related to Transgender students and athletics.
- May 26, 2023: USDOE announced **final** regulations related to both sexual harassment and Transgender students/athletics to be released **October 2023**.
- Likely will have a delayed effective date to allow Districts to revise policies/procedures and conduct training on new regulations.

Current Legal Rights and Accommodations for Transgender Students



Keeping Up with the Evolving Legal Requirements

- The District has a legal obligation to engage in reasonable and good faith efforts to protect LGBTQ students from discrimination and harassment
- Federal protections and guidance re: LGBTQ students:
 - Equal Protection Clause of the US Constitution
 - Title IX of the Education Amendments of 1972
 - White House Executive Orders and Guidance
 - Office for Civil Rights
- State law guidance:
 - Michigan Department of Education Guidance
 - MHSAA Policies
- Board of Education Policies and Procedures
- Caselaw: SCOTUS, 6th Circuit, MI Supreme Court



Board of Education Policies

- Nondiscrimination on the basis of sexual orientation or transgender identity
 - Board Policy re: Anti-Harassment
 - Board Policy re: Sexual Violence
 - Board Policy re: Nondiscrimination and Equal Access to Educational Opportunity
- Board Policy re: Title IX: Nondiscrimination on the Basis of Sex in District Programs or Activities
 - The Board “does not discriminate on the basis of sex (***including sexual orientation or gender identity***), in its education programs or activities, and is required by Title IX of the Education Amendments Act of 1972, and its implementing regulations, not to discriminate in such a manner.”



Dodds v United States Dep't of Education (CA 6, 2016)

- The US 6th Circuit Court of Appeals upheld a preliminary injunction that ordered a local school district to allow an 11-year-old transgender student, who identified as female, to use the girl's restroom.
- The majority opinion determined that settled law prohibits discrimination based on transgender status.
- This is binding precedential authority on the 6th Circuit, which includes Michigan.



Bostock v Clayton County, 140 S Ct 1731 (2020)

- Landmark decision issued by the US Supreme Court on June 15, 2020.
- Federal employment discrimination laws under Title VII of the 1964 Civil Rights Act prohibit discrimination against individuals for being homosexual or for being a transgender person.
- The Court determined Title VII's prohibition of discrimination "because of sex" includes sexual orientation and sexual identity.
- Legal scholars predicted the interpretation of the phrase "because of sex" will also apply to Title IX's prohibition against discrimination on the basis of sex in education programs and activities.



Grimm v Gloucester County School Board (CA 4, 2020)

- The US Court of Appeals for the 4th Circuit held that a transgender student (who was transitioning from male to female) had a constitutional and statutory right to use a public school's bathrooms consistent with his gender identity and to change his educational records to reflect his gender identity.
- The Court ruled that the school district violated the Equal Protection Clause of the 14th Amendment of the US Constitution and Title IX, which prohibits discrimination against a student on the basis of sex.
- The Court specifically held that "on the basis of sex," in Title IX includes a student's sexual orientation or sexual identity.
- On June 28, 2021, the US Supreme Court declined to hear the school district's petition on appeal, making the 4th Circuit's decision in favor of the transgender student binding authority.



Michigan Supreme Court & Michigan Civil Rights Act

- In *Rouch World, LLC v Michigan Department of Civil Rights*, 2022 WL 3007805 (July 28, 2022), the Michigan Supreme Court ruled that the Michigan Civil Rights Act's prohibition against sex discrimination includes sexual orientation as a protected category.
- The Michigan Supreme Court specifically refused to rule on sexual identity because that issue was not before it.
- March 16, 2023: Gov. Whitmer signed into law a bill expanding the Elliot-Larsen Civil Rights Act (ELCRA) reaffirming legal protections for sexual orientation and expanding coverage to include gender identity, sexual orientation and gender expression.



US Office for Civil Rights (OCR) Guidance

- The US Department of Education, OCR, enforces Title IX in any public school district for which it provides federal funding.
- In July 2021, OCR issued guidance protecting rights of students to an educational environment free from discrimination based on sex, including discrimination in the form of sexual harassment and discrimination based on sexual orientation or gender identity, as guaranteed by Title IX.
- This is the most recent guidance from the OCR on Title IX, and it continues to be in effect and enforced.

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES
**OFFICE FOR
CIVIL RIGHTS**



Michigan Department of Education (MDE) Guidance

- On September 14, 2016, the State Board of Education and MDE issued guidance encouraging public school districts to adopt, implement, and enforce policies protecting students from harassment, violence and discrimination for any reason including based on the student's sexual orientation, gender identity and/or gender expression.
- The MDE guidance continues to be effective today.



Student Names and Preferred Pronouns

- **Gender Identity is Determined by the Student:** “The person best suited to determine a student’s gender identity is the individual student. In the case where a student is not able to self-advocate, the request to treat the student in accordance with their gender identity will likely come from the student’s parents or guardians.”
- **No Documentation Required:** Outside confirmation from medical or legal documentation is not required.
- **Notice to Parents:** When students have not come out to their parent(s), disclosures to the parent should be considered on a case-by-case basis. Consider the student’s age, health, and safety, as well as the responsibility to keep parents informed.



Student Names and Preferred Pronouns

- **No Legal Name Change Necessary:** Upon request by the student and/or parent, school staff should address students by their chosen name and pronouns, regardless of whether there has been a legal name change.
- **District Information Systems:** The student's chosen name and pronouns should be included in the District's information management systems, email addresses, and correspondence.
- **False Claims of Gender Identity:** If a student's gender identity is not genuine, the establishment of a plan to work closely with the student and their parents to identify an individual claiming a false gender identity for improper purposes. "Such matters should be addressed immediately, according to disciplinary procedures."



Student Records



- **Unofficial Records:**

- “When requested, schools should engage in reasonable and good faith efforts to change current unofficial student records (e.g. class and team rosters, yearbooks, school newspapers, and newsletters) with the chosen name and appropriate gender markers to promote consistency among teachers, substitute teachers, school administrators, and staff.”

- **Official Records:**

- Under FERPA, parents or students who are age 18 or older have the right to seek amendment to school records if they are deemed “inaccurate, misleading, or in violation of the student’s privacy.”
- Other official records may require legal/birth name based on other laws (i.e. School State Aid Act, Revised School Code) and would therefore require legal name change.



Restrooms

- Students should be allowed to use the restroom in accordance with their gender identity.
- Alternative options, such as an all-gender or single-user restroom (e.g., staff bathroom or nurse's office), should be made available upon request but not presented as the only option.
- Alternate options can be made available for other students as well.



Locker Rooms and Changing Facilities

- “Locker room usage should be determined on a case-by-case basis, using the guiding principles of safety and honoring the student’s gender identity and expression.”
- Options:
 - An adjusted changing schedule;
 - Use of a private area in the facility (e.g. nearby restroom stall with a door, an area separated by a curtain, a physical education instructor’s office in the locker room);
 - Use of a nearby private area (e.g. restroom, nurse’s office).



Physical Education and Sports



- **PE and Intermural, and Interscholastic Sports**

- Generally, students should be allowed to participate in physical education classes, intermural sports, and interscholastic sports in accordance with their gender identity.

- **Michigan High School Athletic Association (MHSAA)-Sponsored Events**

- Eligibility of transgender students in MHSAA-sponsored post-season tournaments is governed by the MHSAA.
- According to recent MHSAA guidance, the MHSAA does not become involved when a transgender male student wishes to participate in male sporting events. However, it does have procedures for determining whether a transgender female student may participate in a female sporting event.



Dress Code

- The school's dress code should be gender neutral.
- If a dress code has differing expectations for male and female students, students should be permitted to dress in accordance with their gender identity.



In Summary...



- Title IX permits the District to provide gender-segregated restrooms, locker rooms, athletic teams, and classes, provided they are comparable.
- Under Title IX and state and federal guidance, the District must ensure students are guaranteed equal access to educational opportunities regardless of their sexual orientation and/or sexual/gender identity.
- Legal mandates, guidance, case law and Board Policies require the District to allow transgender students to participate in activities and access facilities consistent with their identity.

Dos and Don'ts

- ✓ Do defer to the student's preferred name and gender identity.
- ✓ Do consider disclosures to the parent on a case-by-case basis when a student has not come out to their parent. However, parent involvement is often important, and schools should work with the student on a plan to involve parents.
- ✓ Do allow transgender students to use the restroom/locker room in accordance with their gender identity.
- ✗ Don't require transgender students to use all gender or single-user restrooms as the only option.
- ✗ Don't require transgender students to provide a revised birth certificate or medical documentation when reviewing a request to amend certain student records.



QUESTIONS?



Thank You



Kara T. Rozin
krozin@clarkhill.com
616-608-1110

Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.