

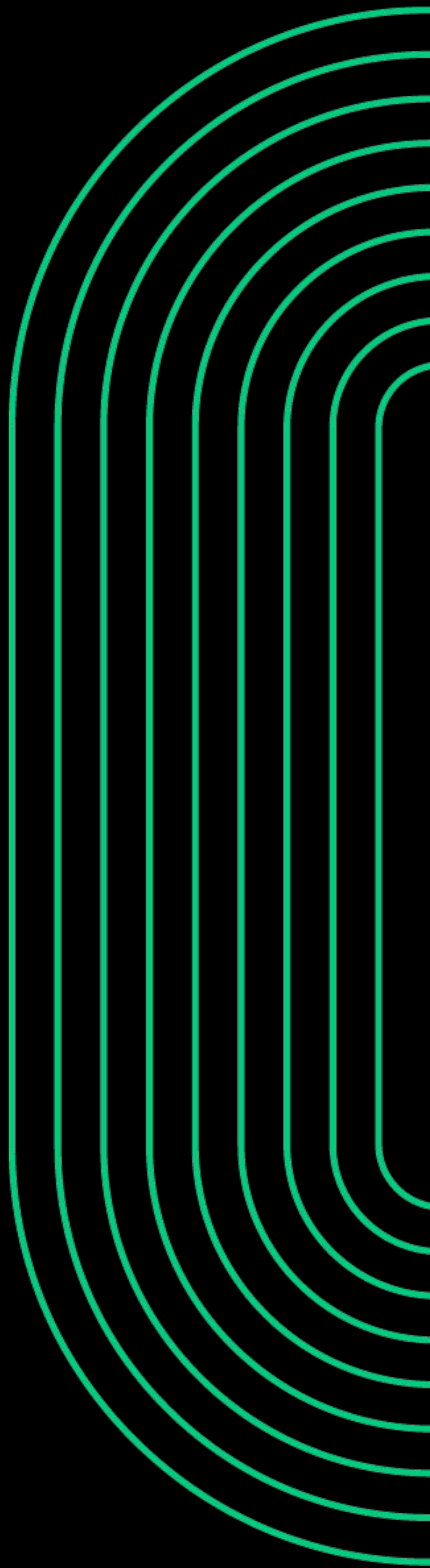
# Title IX: *2024 New and Amended Regulations*

Berrien Regional Education Service Agency

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# New Title IX Regulations Are Here – For Good??

- June 23, 2022: USDOE released proposed Title IX regulations.
- April 19, 2024: USDOE released final Title IX regulations (1,577 pages including responses to public comments).
- Effective **August 1, 2024**.
- Many states and interest groups initiated federal litigation to enjoin new regulations; some states have affirmatively stated they would not follow new regulations.
- Many have succeeded in obtaining preliminary injunctions halting the USDOE's enforcement of the new regulations (Michigan was **NOT** a plaintiff in any litigation). Much uncertainty about the future and new regs.

• 2<sup>nd</sup> set of regulations re: athletics and transgender students not issued by USDOE.

**DISCLAIMER!!!!!!**





# AGENDA

- **Summary of Changes/Definitions**
- **Scope and Coverage**
- **Reporting/Complaint Process**
- **Grievance Procedure**
- **Informal Resolution**
- **Discrimination based on Pregnancy or Related Conditions**
- **LGBTQ+ Considerations**
- **Training Requirements**

# CHANGES TO DEFINITIONS

## *Additions and Changes*



# Definition of Sex Discrimination

## §106.2 and §106.10

- Sex Based harassment is a form of sex discrimination
- Prohibits all forms of **Sex Discrimination** and expands “on the basis of **sex**” to:
  - sex stereotypes
  - sex characteristics
  - pregnancy or related conditions
  - Sexual orientation
  - Gender identity



# *Quid Pro Quo* Harassment, NO CHANGE



- *Quid Pro Quo* harassment by a school employee or other person authorized by the District to provide an aid, benefit, or service, who conditions that aid, benefit, or service on participation in unwelcome sexual conduct
  - Includes incidents of sexual assault, dating violence, domestic violence and stalking
  - No substantial changes to this portion

# Quid Pro Quo Sex-Based Harassment

## §106.2

- Any employee, agent, or other person authorized by the District to provide
  - Aid
  - Benefit
  - Service
- Under the District's educational program/activity
- Conditions receipt of the benefit on a person's participation in unwelcome sexual conduct





# Hostile Environment Harassment – Changed to Sex Based Harassment

- Unwelcome sex-based conduct that:
  - based on the **totality of the circumstances** is **subjectively and objectively** offensive
  - and is so severe **or** pervasive that it
  - denies **or** limits a person's ability to participate in or benefit from an educational program or activity
- Also Includes:
  - sexual assault
  - dating violence
  - domestic violence
  - stalking



# Clery Act and VAWA Definitions

- **Sexual Assault** - “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting [UCR] system of the Federal Bureau of Investigation [FBI].”
- **Dating Violence** - violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship; (ii) The type of relationship; and (iii) The frequency of interaction between the persons involved in the relationship.
- **Stalking** - a course of conduct directed at a specific person that would cause a reasonable person to either fear for their safety or the safety of others or suffer substantial emotional distress.
- **Domestic Violence** - mirrors VAWA 2022 but removed the words “of violence” that were modifying “felony and misdemeanor crimes” in the definition of domestic violence.

# Differences Between Current Reg and New Reg

## Sex Harassment – Hostile Environment

- Differences:
- Current regulation “*so severe, pervasive, and objectively offensive ...*”
- Current regulation covers *sexual harassment, but not other forms of sex-based harassment*

*Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe **or** pervasive that it limits **or** denies a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following factors . . .*

# Hostile Environment Factors

## §106.2

- Department noted that the factors were similar to those used in evaluating hostile environment under Title VII (29 CFR 1604.11)
  - Totality of the circumstances
  - Nature of conduct
  - Frequency and duration of conduct
  - Context of conduct



# Hostile Environment Factors Con't

## §106.2

- Degree of impact (on complainant, school community, multiple individuals)
- Ages, roles, previous interactions, other factors
  - Relative power dynamics (esp. with student and employee)
- Location of conduct
  - Provides info on unwelcomeness, subjective or objective offensiveness, severity or pervasiveness and effect on complainant's ability to access or benefit from program or activity
- A District is not prohibited from considering additional relevant factors to determine whether a hostile environment has been created



# Definitions

## §106.2

- **Complaint** – an **oral** or written request to the District that objectively can be understood to request to investigate and make a determination
  - Need not use any “magic words” or refer to Title IX, grievance process, to trigger obligation to investigate and initiate the grievance process
  - Objective standard – reasonably be understood as a request to investigate and make a determination
  - Doesn’t require complainant’s actual or digital signature
  - Doesn’t require complainant to be the person initiating the process
  - Recordkeeping – left up to the District how to keep records on oral reports that are subject to recordkeeping
- **Current regs.** refer to a “formal complaint” and only as to sex harassment. Only Complainant or Title IX Coordinator can sign and must be written.



# Definitions

## §106.2

- **Complainant** – anyone who is alleged to have been subjected to conduct that constitutes sex discrimination
  - Removes “victim” from definition (i.e. now includes “bystander” claims)
  - Need not be current student or employee if person was participating or attempting to participate in educational program/activity at the time of the incident
    - **Current regulations** reference the time of filing complaint
  - Refers to persons who have been subject to “sex discrimination” vs. sex harassment (sex harassment – must be person subjected to conduct)
  - Applies to third-parties who are participating in the educational program or activity – e.g., visiting student athlete, contracted employee.

# Definitions

## §106.2

- **Respondent** – an individual who is alleged to have violated the District’s prohibition on sex discrimination
- **Party**
  - Refers only to a complainant or respondent
  - “Parties” refers to both complainant and respondent
  - Does not include Title IX Coordinator, witnesses, adjudicators



# Definitions

- **Supportive Measures** – same definition retained:
  - non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or when no formal complaint has been filed.
  - Examples: no contact order, modifications to work/school schedule, increased monitoring/supervision, extended time for school assignments/exams, leave of absence, etc.
  - Still ability to “err” on side of complainant when offering/implementing supportive measures. Does not amount to “retaliation.”
  - Emergency removal of a student may now also be imposed for immediate threats of emotional or mental harm (vs. only physical).

# Definitions

## §106.2

- **Disciplinary Sanctions** - consequences imposed on a respondent following a determination that the respondent violated the District's prohibition on sex discrimination under Title IX
- Broad range of disciplinary sanctions included in Title IX Grievance Procedures
  - Suspension up to and including permanent expulsion
  - Discipline up to and including termination
  - “Other” disciplinary sanctions (in-school detention, suspension of bus privileges, co-curricular/extracurricular, required training or education, etc.)
  - Must still consider Restorative Practices, IDEA/Section 504, etc.



# Definitions

- **Remedies** - measures provided, as appropriate, to a complainant or any other person the District identifies as having had equal access to the Districts' education program or activity limited or denied by sex discrimination.
  - Remedies are designed to restore or preserve access to the District's education program or activity after a District determines that sex discrimination occurred.
  - Remedies can also be imposed with or without a finding that sex discrimination has occurred.
  - Remedies can be disciplinary or non-disciplinary, depending on the outcome of the Title IX grievance procedure.

# Definitions

## §106.2

- **Relevant** - not currently defined in the Regs.
  - Proposed regs definition: *evidence that is related to the allegations of sex discrimination under investigation and/or when it may aid the decisionmaker in determining whether the alleged sex discrimination occurred*
  - New regulations mentions relevance several times:
    - Need to train investigators on relevance
    - Investigation Report (if provided) must summarize relevant evidence
    - Districts cannot restrict the ability of either party to gather and present relevant evidence (i.e. no “gag” orders)
- 



# 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.

# Relevancy

## Definitions Continued

- New Regs. clarify that questions are relevant
  - “when they seek evidence that may aid in showing whether the alleged sex discrimination occurred,” and
  - “when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”
- **Prohibitions:** (i) complainant’s sexual interests; (ii) complainant’s prior sexual conduct; (iii) private health info; and (iv) privileged by law

# Definitions

## §106.2

- **Retaliation:** Retaliation is defined as: *intimidation, threats, coercion, or discrimination against any person by the school, a student, or an employee or other person authorized to provide an aid, benefit or service under the District’s education program or activity, for the purpose of interfering with a right or privilege under Title IX, or because the person reported possible sex discrimination, made a complaint or participated in the investigation.*
- **Peer Retaliation:** *retaliation by one student against another student.*
- A District must prohibit retaliation, including peer retaliation; must respond to conduct that “reasonably might constitute retaliation”; and must use same procedures to investigate as it does for other forms of sex discrimination.

# Definitions

## §106.30(A)

- **Consent** - removed the definition for sexual assault
- Best left to discretion of Districts to define for their own institutions
- State law may be consulted and included in the definition

*Consent refers to words or actions that a reasonable person would understand as agreement to engage in the sexual conduct at issue. A person may be incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. A person who is incapacitated is not capable of giving consent.*



# SCOPE OF

# COVERAGE

# Scope of Title IX – Under New Regulations

- On Campus Conduct
- Conduct whose effects have an impact on campus (Title IX covers all aspects of the District's education program or activity, including extracurricular activities)
- ***Current regulations do not require District to address activity outside of the U.S. or happened outside of the District's educational program or activity – 2024 Regulations Expand to Outside of the United States (think: Overseas study program or mission trips)***



# Off-Campus Conduct that Creates or Contributes to a Hostile Environment in a District's Education Program or Activity

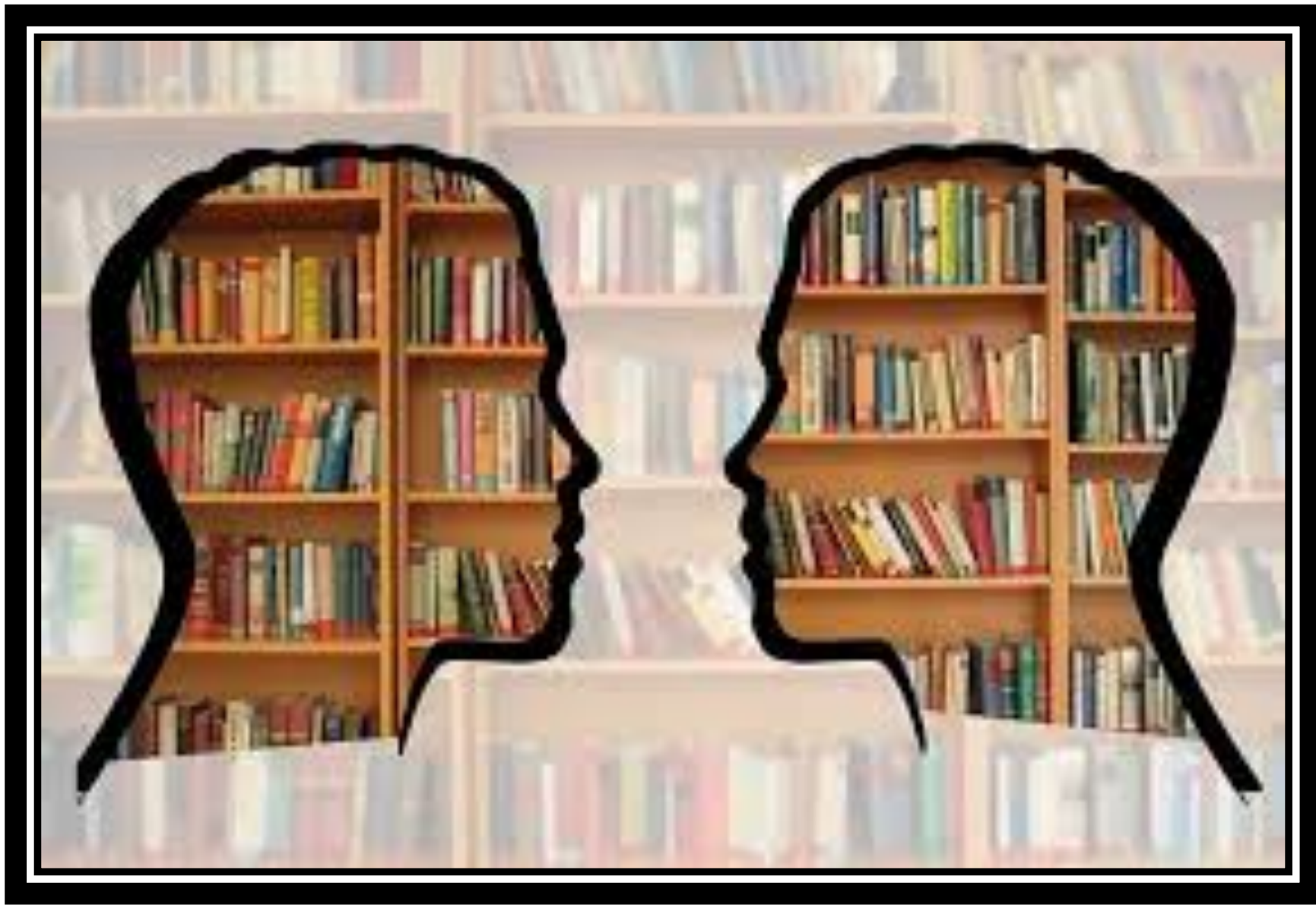
## §106.11

- Expands coverage to a District's education program or activity where:
  - Conduct occurs in any building owned or controlled by the District
  - Conduct that occurs off-campus when the respondent is a representative or otherwise engaged in conduct under the District's disciplinary authority
  - Covers sex-based harassment outside of the District's education program or activity or outside the United States contributing to hostile environment within the District's education program or activity

# HOW IS THE TITLE IX COMPLAINT INITIATED?



# Response to Sex Discrimination/Harassment



- **Current Regulations:** only require a response to possible sex harassment when the District has “actual knowledge” of the harassment
  - Only employees with authority to institute corrective measures can have actual knowledge
  - In elementary schools and secondary schools, the actual knowledge requirement applies to all employees
  - Response standard: NOT deliberately indifferent

# Responding to Sex Discrimination

## §106.44

- **New Regulations** require *prompt and effective action* to end any prohibited sex discrimination that occurred in its education program
- Take *action* to prevent its recurrence and remedy its effects.



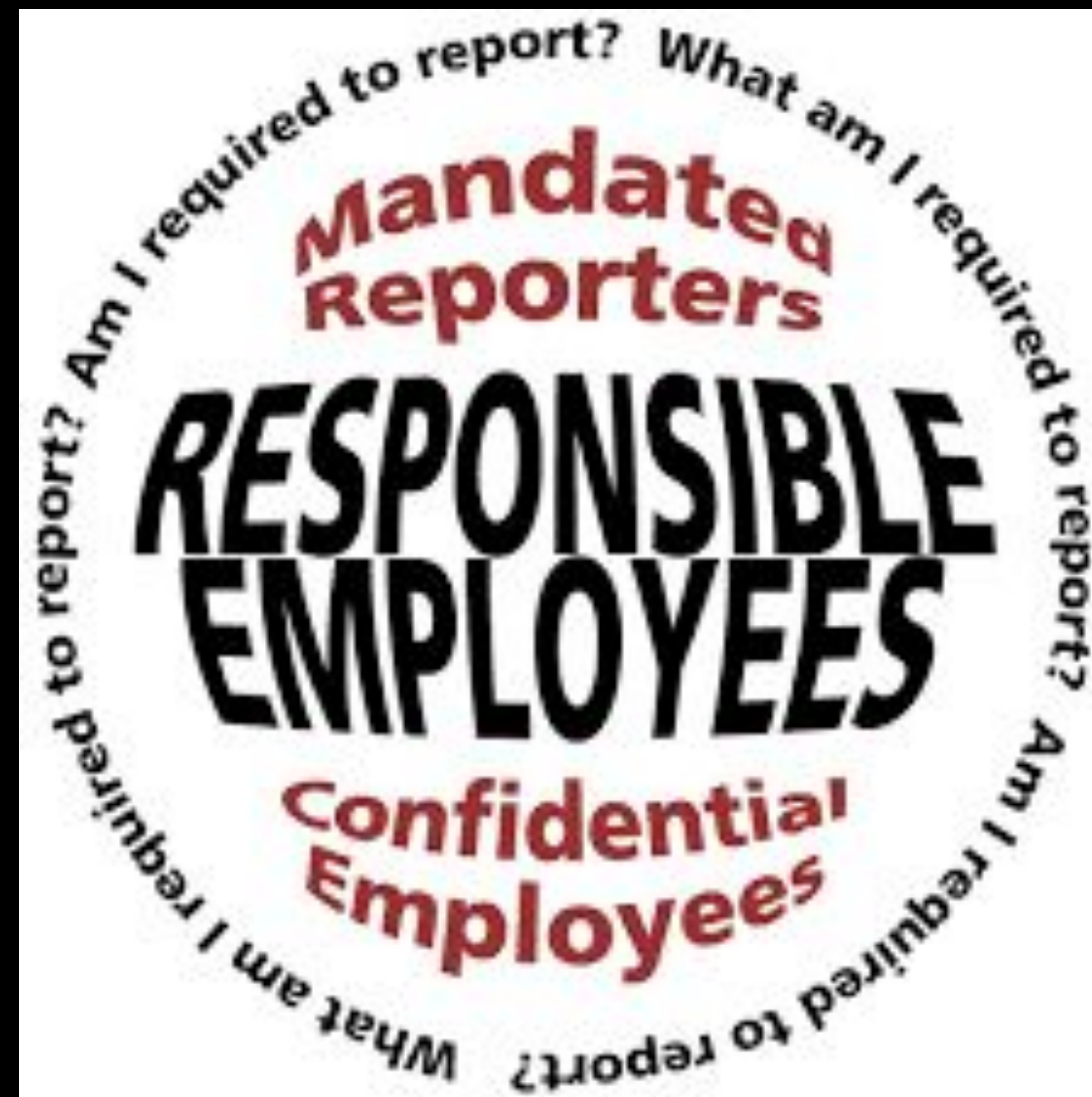
# When Recipient “*has knowledge*” of Conduct that “*may reasonably*” Constitute Sex Discrimination

## §106.44

- Offering and coordinating supportive measures
- Discussion regarding initiating complaint
- Taking prompt and effective action to end sex discrimination and prevent recurrence
- Permits offering informal resolution **EXCEPT** in K-12 schools involving employee/student or if it conflicts with federal, state or local law
- Prohibits disclosure of personally identifiable information unless disclosure required by law or to persons with legitimate interest



# WHO IS A MANDATORY REPORTER?





# Who Must Report?

## Category 1:

- Any employee must notify the Title IX Coordinator (or another Administrator, who then should report to the Title IX Coordinator) when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations.

## Category 2 (Confidential Employee):

- Employees must either notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations **or** provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations.



# Confidential Employee(s)?

- Confidential employees are Board employee(s) whose communications are privileged under Federal or State law. A confidential employee is not required to notify the Title IX Coordinator when a person informs them of conduct that reasonably may constitute sex discrimination under Title IX or this part.
- The employee's confidential status is only with respect to information received while the employee is functioning within the scope of their duties for which privilege or confidentiality applies.
- For purposes of Title IX, a confidential employee's status is only in respect to information received about sex discrimination in connection with providing the confidential services.
- We did not recommend that Districts list a confidential employee, as this position/title is more appropriate for higher educational institutions than elementary and secondary schools.
  - Safer for students, staff and parents, and those acting on their behalf, to operate on the assumption that if they tell a Board employee about alleged sex discrimination or harassment, that the Board employee will report it to the Title IX Coordinator.

# Mandatory Reporting

- In the elementary school and secondary school setting, school administrators, teachers, and other employees exercise a considerable degree of control and supervision over a District's students, in addition to being mandatory reporters of child abuse under State laws.
- Therefore, requiring all employees to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination under Title IX would implement Title IX's guarantee of protection against sex discrimination in a manner that **best serves** the needs and expectations of those students.



# TITLE IX GRIEVANCE PROCESS



# What's Different in the New Regs on the Grievance Process?

**Current regs include specific requirements for grievance procedures for complaints of sex harassment only.**

Current Regulation: live hearings and cross-exam are required at post-secondary institutions only. Elementary and secondary have option for live hearings or written, relevant questions. New regulations no longer require written relevant questions by parties.

*New regulations provide more flexibility for single decisionmaker*

- Title IX Coordinator
- Investigator
- Or can be separate decisionmaker



# Single Investigator Model

- The Title IX Coordinator may serve as an investigator and/or decisionmaker because an evaluation of all relevant and not otherwise impermissible evidence is also not inherently inconsistent with the Title IX Coordinator's responsibility to coordinate the District's compliance with its obligations under Title IX and the final regulations.
- Section 106.45(b)(2) prohibits any person from serving as a Title IX Coordinator, investigator, or decisionmaker if they have a conflict of interest or bias, either for or against complainants or respondents generally or an individual complainant or respondent.
- The person who facilitates informal resolution cannot be the same person as the investigator or decisionmaker in order to allow the parties to participate fully and candidly in the informal resolution process.
- Relieves Administrative Burden.



# Title IX Coordinator Response to Sex Discrimination

## §106.44(f) – (g)

- Title IX Coordinator must take the following steps after being notified of sex discrimination:
  - Treat complainant and respondent equitably at every stage of the District's response
  - Notify parties of grievance procedures and if complaint is made
  - Notify parties about informal resolution process (if appropriate)
  - Offer and coordinate supportive measures to both complainant and respondent

# Title IX Coordinator Response if No Complaint Made

- In absence of complaint/informal resolution process, determine whether to initiate a complaint to address sex discrimination.
- Under 2020 Regulations, when a Title IX Coordinator determined that a non-deliberately indifferent response to alleged sex discrimination required an investigation, the Title IX Coordinator had the discretion to initiate a recipient's grievance process.
- Take other prompt and effective steps to ensure sex discrimination does not continue or recur in addition to providing remedies to the individual complainant.
- Provide supportive measures to both complainant and respondent.



# When Can a Title IX Coordinator Initiate a Complaint?

## New 8 Factor Consideration

1. The complainant's request not to proceed with initiation of a complaint.
2. The complainant's reasonable safety concerns regarding initiation of a complaint.
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated.
4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from school or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence.
5. The age and relationship of the parties, including whether the respondent is an employee of the recipient.



# When Can a Title IX Coordinator Initiate a Complaint?

## New 8 Factor Consideration

6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals.
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred.
8. Whether the District could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures.

# 504/IEP Coordination

- Schools must consult with one or more members of a student's IEP or Section 504 team when a **student with a disability** is a complainant or respondent.
  - If the complainant or respondent is a student with a disability, the school must require the Title IX Coordinator to consult with one or more members of the student's IEP or Section 504 team, to determine how to comply with the requirements of the IDEA and Section 504 throughout the grievance procedures
- “One or more members of the student's IEP or Section 504 team”
  - Does not mandate consultation with the full IEP or Section 504 team, but schools can still convene full meetings if deemed necessary. Does not identify which individual(s) must be part of the consultation or the decision-making process.
  - The Department left these decisions to the discretion of the District.



# Title IX Dismissals

- No more *mandatory* dismissals. Only *permissive* dismissals.
- Must give notice to parties in event of dismissal; must offer appeal to dismissal.
- **Dismissal reasons:**
  - Unable to identify the respondent after taking reasonable steps to do so.
  - Respondent is not participating in the school's education program or activity or is not employed by the school.
  - Complainant voluntarily withdraws some or all of the allegations in the complaint, Title IX Coordinator declines to initiate a complaint, and determines that the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven.
  - School determines the conduct alleged, even if proven, would not constitute sex discrimination under Title IX. Before dismissing, the Title IX Coordinator will make reasonable efforts to clarify allegations with complainant.

# Grievance Procedures for all Sex Discrimination Complaints

## §106.45

- General requirements:
  - Grievance processes in writing
  - Equitable treatment for complainants and respondents
  - Title IX Coordinator, investigators, decisionmakers must be free of conflicts or bias
  - Decisionmaker can be the Title IX Coordinator or the Investigator
  - Presumption respondent is **NOT RESPONSIBLE** until end of grievance process



# Proposed Regs: Grievance Process Continued

## §106.45

- Reasonably prompt timeframes for all major stages
- Reasonable steps to protect privacy of parties and witnesses
- Objective evaluation of relevant and not otherwise impermissible evidence
- Notice of allegations to parties
- Dismissals permitted under certain circumstances, but not required



# Investigations



- Investigation Requirements:
  - No more requirement to allow parties “advisors”
  - Burden on District to gather evidence – shifts from the parties
  - Equal opportunity to present relevant fact witnesses and evidence
  - Determination by decisionmaker on relevant and impermissible evidence
  - Allow parties access to evidence or summary of evidence
  - Questioning the parties/witnesses; no longer requirement to allow parties to ask written, relevant questions

# Reasonably Prompt Timeframes

- Strict timelines removed
  - 10-day timelines removed, only require “*reasonably prompt timeframes*” for major steps in the Grievance Procedure such as:
    - Evaluation
    - Investigation
    - Access to Evidence
    - Determination
    - Appeal
- Reasonable extensions can be made on a case-by-case basis with notice to parties
- Extension requests/approvals provided to both parties





# Notice to Parties

- Notice to parties upon initiation of grievance procedure
  - Notify parties of the following:
    - The District's grievance procedure and any informal resolution process
    - Sufficient information available at the time to allow the parties to respond to the allegations, including:
      - Identities of the parties
      - The conduct alleged to constitute sex discrimination
      - Date(s) and location(s) of the alleged incidents
    - Retaliation is prohibited
    - Parties entitled to an equal opportunity to access relevant evidence or an accurate description of the evidence. If the District provides a description of the evidence, the parties are entitled opportunity to access relevant evidence upon request of the party.



# Parties' Access to Evidence



- 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.
- Schools must allow parties opportunity to respond to the evidence before decision
- Timelines on access to evidence and response up to District

# Questioning the Parties/Witnesses

- No requirement for written relevant questions by the parties; only requirement that the investigator/decisionmaker question parties and witnesses to adequately assess credibility and to evaluate the allegations of sex discrimination.
- Examples of credibility factors:
  - Possible biases, prejudices, or ulterior motives;
  - Inconsistent statements;
  - Personal knowledge of the facts;
  - Ability to perceive or remember facts;
  - Character for truthfulness;
  - Overall demeanor of the witness; and
  - Tonal quality, volume, and speech patterns.



# Determination

- Notify parties in writing of determination whether sex discrimination has occurred, including rationale for the decision and the procedures and permissible basis for appeal.
- Evidence relied on for determination must be relevant and otherwise not impermissible.
- Standard of proof in making determination is “preponderance of the evidence.” Preponderance of the evidence “means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” The standard requires “only a determination that, when considering all the evidence, it is **more likely than not** the alleged conduct occurred.”
- If determination that sex discrimination has occurred, District may proceed with disciplinary sanctions under Title IX.

# Appeal Procedures

- Appeal process required that is at least the same as that is offered in comparable proceedings. (Appeal person/body did not take part in investigation/dismissal).
- Permissible basis for appeal:
  - Procedural irregularity that would change the outcome;
  - New evidence that would change the outcome and was not reasonably available previously; or
  - Conflict of interest or bias on part of Title IX Coordinator, investigator or decisionmaker.
- Other bases may be offered equally to parties.
- Appeal timelines and process left to District to decide, but appeal process for Title IX must be consistent with appeal process for other non-Title IX discrimination and harassment complaints.

# INFORMAL RESOLUTION PROCESS AND PROCEDURE



# Informal Resolution

## §106.44(k)

- District can offer informal resolution
  - Upon receipt of a complaint, or
  - Has info about conduct that may constitute sex discrimination
- Must be a voluntary process
- NOT permitted where an employee is accused of sex discrimination against a student



***Current Regs: Permit informal resolution only if a complaint has been filed***

# When Is It Appropriate?

- With the exception of when there is an allegation that an employee engaged in sex-based harassment of an elementary school or secondary school student or when an informal resolution process would conflict with applicable federal, state, or local law, a District has discretion to determine when informal resolution is not appropriate, notwithstanding the parties' consent.
- In making this determination, a recipient may consider the 8 factors a Title IX Coordinator must consider when determining whether to initiate a complaint of sex discrimination.
- Just because process is *informal*, doesn't mean formal documentation should not take place (i.e., parties' consent, notice of informal resolution, informal resolution agreement, etc.).



# The Beginning Stages of Informal (e.g., Mediation/RJ)

- Consider the needs/wishes of the parties.
  - Will this occur in person?
  - Via Zoom?
  - In the same room?
  - In separate/breakout rooms (i.e., caucus)?
  - Do they wish to communicate directly to one another? At beginning, end, or at all?
  - Do they have parent/support person present?
  - Should you provide parties with a chance to make an opening statement?



- 
- Together or separate?

# Consider for the Actual Day

- “Shuttle diplomacy” could be considered at the beginning.
  - Truly consider meeting with the parties separately, first, to judge viability of togetherness. Do they WANT to be together at anytime? Use your judgement.
- Begin by providing an overview of the expectations of the parties and process for resolution (introductions, rules for behavior, outcomes/agreement, confidentiality).
- Allow each party (whether together or separate) to provide their narrative and perspective of the underlying issues.
- Separation of parties, especially considering emotions and/or factual disputes.
- Ask open-ended questions to get the best results.
- How did what happen affect them? Did they learn? What will they do to prevent it from happening again?

# Utilize Separation to Learn...

- What do they want out of the process and from the other party?
- What would make you feel safe?
- What do you want your days at school/work to look like after this resolution?
- What could the District do to make you feel safer?
- What could the other party do to make you feel safer/to repair the harm?
- What do you **need** versus what do you **want**? Are they different?
- What could you live with? What are you unwilling to accept?



# Utilize Separation to Learn...

- Confirm primary (or top two/three) for each party.
- Clarify with each party what you will share with the other party or what they are willing to share with the other party. It may not be everything they've discussed with you. Trust is crucial.
- Go through the lists to attempt to identify any areas of overlap, if any.
- This may require multiple trips between parties until a resolution can be reached.
- Once reached, ensure both parties understand the terms and have agreed to the same terms.



# When an Agreement is Reached

- Document the terms of the agreement while you are still with the parties – it's important to be quick and efficient once the agreement is made.
- Ensure the parties review the document and specific terms, make changes as necessary.
- The parties must sign the document to confirm that it accurately reflects their understanding of the agreement.
- Consider including confidentiality provisions.
- Provide a copy to the appropriate school official(s).
- The agreement to a resolution at the conclusion of the informal process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations.

\*Once approved/signed, ensure each party receives a copy and Title IX Coordinator keeps the original.



# ADDITIONAL TITLE IX REQUIREMENTS



# Prohibit Pregnancy Discrimination or Harassment

- Schools must protect students and employees from discrimination based on pregnancy or related conditions (including childbirth, recovery, lactation, recovery from related medical conditions) by providing:
  - Reasonable modifications for students and employees (including leave of absence for medical reasons and reinstatement rights);
  - Reasonable breaktime for students and employees for lactation; and
  - Clean and private 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. Schools cannot disclose personally identifiable information about reasonable modifications for pregnancy or related conditions, with limited exceptions.
- 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.

# Definition of “Pregnancy and Related Conditions”

## §106.2

- Pregnancy and Related Conditions
- Includes
  - Pregnancy
  - Childbirth
  - Termination of pregnancy
  - Lactation
  - Related medical conditions and recovery
- Condition does not need to meet the ADA definition of disability





# Restrooms and Locker Rooms/Athletics

- The Department did not specifically address use of *restrooms and locker rooms* or *athletics* but did create a “*de minimis*” harm standard for sex separation that is allowed by existing regulations.
  - Current regulations allow recipients to provide separate toilet, locker room, and shower facilities on the basis of sex, so long as the facilities are comparable.
  - The new regulations clarify that such “otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than *de minimis* harm on affected students.”
  - The new regulations clarify that preventing someone from participating in school (**including in sex-separate activities**) consistent with their gender identity causes that person more than *de minimis* harm.

# Evolving Legal Requirements for LGBTQ+

- 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 protections and guidance:
  - Elliott-Larsen Civil Rights Act (ELCRA)
  - Michigan Department of Education (MDE) Guidance
  - MHSAA Policy and Guidance
- Board of Education Policies and Procedures
- Caselaw: SCOTUS, 6<sup>th</sup> Circuit, MI Supreme Court



# *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: *“Under settled law in this Circuit, gender nonconformity. . . is an individual's fail[ure] to act and/or identify with his or her gender.... Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.”*
- This is binding precedential authority on the 6th Circuit, which includes Michigan.



# 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. Lower court previously ruled that sex discrimination includes sexual identity.
  - **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.



# Title IX Training Requirements



- **All** employees will be required to be trained on the school’s obligation to address sex discrimination in its education program or activity, the scope of the conduct that constitutes sex discrimination (including the definition of sex-based harassment), and certain notification and information requirements.
- This marks a shift away from the discretion currently afforded to schools to determine which employees, outside of its grievance process, should receive this type of training.
- Title IX Coordinators, investigators, decisionmakers, facilitators of informal resolution and other people responsible for implementing the school’s grievance procedures or who can modify or terminate supportive measures have additional training requirements.

# Notice of Nondiscrimination

- District shall provide notice of nondiscrimination to students, parents, guardians, employees, applicants for admission and employment, and all unions and professional organizations holding collective bargaining or professional agreements with the Board. Notice of nondiscrimination shall be posted on District's:
  - Website
  - Handbooks
  - Code of Conduct
  - Announcement
  - Bulletin
  - Employment application form
  - Enrollment forms



# QUESTIONS

# Thank You



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## 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.