



## 2020 TITLE IX REGS OVERVIEW & INTERSECTION WITH MARYLAND LAW

---

Maryland Affinity Group  
August 5, 2020



**Tanyka M. Barber, J.D.**

Senior Associate, TNG

Advisory Board Member, ATIXA

# CURRENT STATE



- Withdrawn:
  - 2011 Dear Colleague Letter (DCL)
  - 2014 Q&A on Title IX and Sexual Violence
  - 2016 DCL on Transgender Students
- Still in effect:
  - 1975 Regs, as amended
  - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 Regs)
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2015 DCL on the role of Title IX Coordinators
  - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still apparently in place

# 2020 TITLE IX REGULATIONS



- Issued May 6, 2020 (Publication date May 19, 2020)
- Effective and enforceable August 14, 2020
  - Amend the Code of Federal Regs. and have force and effect of law
  - Some provisions already mandated by due process case law in some jurisdictions
  - Intervening variables (e.g. litigation and election) may impact enforcement going forward
- Regulations are significant, legalistic, prescriptive, very due-process heavy.
- Preempts State law

# OVERVIEW OF REGULATORY CHANGES

- Terminology
- Jurisdiction
- Deliberate Indifference
- Notice & Formal Complaint
- Sexual Harassment Definition
- Grievance Procedures
- Investigation Process
- Hearing Process
- Appeals
- Informal Resolution
- Additional Issues

# SHIFTING TERMINOLOGY



ATIXA IS SHIFTING ITS TERMINOLOGY TO MATCH THE NEW REGS

- You = Recipient
- Various titles = Title IX Coordinator
- Reporting Party = Complainant
- Responding Party = Respondent
- Resolution = Grievance Process
- ATIXA model policy offenses NCSC/NCSI = sexual assault
- Intimate Partner Violence = Dating and domestic violence

AND OCR DEFINITIONS OF THESE OFFENSES MUST BE ADOPTED:

- Including OCR definition of Sexual Harassment, Clery Act definition of sexual assault, and VAWA definitions of DV/DV and stalking.
  - Now when OCR says sexual harassment, they mean the Big Five Offenses: sexual harassment, sexual assault, domestic violence, dating violence, and stalking.

# JURISDICTIONAL ISSUES



- Emphasizes the *Davis* standard
  - Control over the harasser and the context of the harassment
  - “education program or activity” means...
    - locations, events, or circumstances under substantial control
    - any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment...against a person in the United States”
  - What about off-campus conduct, study abroad programs, or school-sponsored international trips?
    - “nothing in these final regulations would prevent...”

# JURISDICTIONAL ISSUES



- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
  - OCR adopts in the discussion a fairly broad definition of what could constitute attempting to participate

# “DELIBERATE INDIFFERENCE” STANDARD



- A recipient with **actual knowledge** of sexual harassment in an education program or activity of a recipient in the United States must respond in a manner that is **not deliberately indifferent**
  - **Clearly unreasonable in light of the known circumstances**

NOT FOR DISTRIBUTION

# NOTICE & FORMAL COMPLAINT

—

NOT FOR DISTRIBUTION

# ACTUAL KNOWLEDGE/NOTICE



- Define actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient (can include anonymous reports).
- We have replaced Responsible Employees with OWAs (Officials With Authority)
  - Also define actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school, regardless of confidentiality.
  - Notice would also include personal observation of sexual harassing conduct by any employee.
  - This standard is not met when the only official of the recipient with actual knowledge is the respondent.

# OFFICIALS WITH AUTHORITY



- Shift in “Responsible Employee” designations
- Previous definition
  - Who has the authority to take action to redress the harassment; or
  - Who has the duty to report harassment or other types of misconduct to appropriate officials; or
  - A student could reasonably believe has this authority or responsibility
- New definition
  - Title IX Coordinator
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
  - Any employee of an elementary and secondary school

# OFFICIALS WITH AUTHORITY



- Change tracks the *Davis* standard for actual notice
- Therefore, a report must go to Title IX Coordinator or any official who has the authority to institute corrective measures
  - Most faculty in higher education **do not** have sufficient authority
  - Knowledge by employee who is harasser does not constitute actual knowledge by employer/recipient
- Restricts OCR enforcement mandate for officials with authority, but IHEs have discretion to keep current policies or define a broader mandated reporter requirement

# REPORTING/MAKING A COMPLAINT



- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

# ACTUAL KNOWLEDGE/NOTICE



- Distinct procedural steps - **actual knowledge** and **formal complaint**
  - Actual knowledge = notice of sexual harassment [or allegations] to TIXC
  - Formal complaint = document filed by a complainant or signed by TIXC alleging sexual harassment against a respondent and requesting investigation
  - TIXC is not party when signing formal complaint
- Constructive notice – insufficient under TIX, but can be acted upon discretionarily by a recipient
- **Actual knowledge** triggers the obligation to offer supportive measures, explain grievance process
- **Formal complaint** triggers the obligation to investigate

# SUPPORTIVE MEASURES



- Previously referred to by OCR as “interim measures”
- Title IX Coordinator must coordinate effective implementation of all supportive measures
- Non-disciplinary, non-punitive individualized services for all parties
- Offered as appropriate and as reasonably available
- Designed to restore or preserve access to educational program or activity, protect the safety of all parties or the educational environment, or to deter sexual harassment
- Must not unreasonably burden the other party

# SUPPORTIVE MEASURES (CON'T)



- Must be offered to complainant upon notice of harassment
- Must be available before, after, or in lieu of formal complaint
- Must be kept confidential to the extent that it would not impair ability to provide supportive measures
- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, contact limitations between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, etc.

# EMERGENCY REMOVAL



- May remove a respondent from a recipient's education program or activity on an emergency basis, provided that the school:
  - Undertakes an individualized safety and risk analysis,
  - Determines that an immediate threat to the *physical* health or safety of students or employees justifies removal, and
  - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal
- May place a non-student employee respondent on administrative leave during the pendency of an investigation under current procedures for doing so

# MANDATORY DISMISSAL (FOUR GROUNDS)



- If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, and/or
- If the conduct did not occur in the recipient's education program or activity, or
- If the conduct did not occur against a person in the United States, or
- If at the time of filing a formal complaint, a complainant is not participating in or attempting to participate in the education program or activity of the recipient.

# PERMISSIVE DISMISSAL ELEMENTS



A recipient may dismiss a claim if any of the following elements are present:

1. If at any time during the investigation or hearing a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations
2. The respondent is not longer enrolled or employed by the recipient
3. Circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations

# NOTICE OF DISMISSAL



- Upon a required or permitted dismissal, promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.
- Dismissal is appealable

NOT FOR DISTRIBUTION

# OCR SEXUAL HARASSMENT DEFINITION

- Sexual Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

# DEFINITION OF SEXUAL HARASSMENT



- Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:
  - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - 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 recipient's education program or activity; or
  - “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

# DEFINITION NOTES



The following definition set is not taken verbatim from the Summary Reporting System/National Incident Based Reporting System (SRS/NIBRS).

ATIXA has substituted Complainant for “victim”, has removed references to his/her throughout, has defined “private body parts”, has removed the confusing and unnecessary term “unlawfully”, and has inserted language clarifying that the Recipient interprets “against the person’s will” to mean “non-consensually.”

These are liberties ATIXA believes are important to take, but users should consult legal counsel before adopting them.

# SEXUAL ASSAULT



- Define Sexual Assault as (six sub offenses now):
  - Sex Offenses, Forcible—Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.
    - Forcible Rape—Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
    - Forcible Sodomy—Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (*non-consensually*) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# SEXUAL ASSAULT



- Sexual Assault With An Object—To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (*non-consensually*) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- Forcible Fondling—The touching of the private body parts of another person (*buttocks, groin, breasts*) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# SEXUAL ASSAULT



- Sex Offenses, Nonforcible—Nonforcible sexual intercourse.
  - Incest—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
  - Statutory Rape—Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].
    - This offense only applies if conduct is “consensual” with minor. If forced or against will of victim, revert to Forcible Rape definition.

# CONSENT



- Regs do not proscribe a definition of consent.
- Define consent per state law or best practices.
- See ATIXA Model Definition found in 1P2P.

NOT FOR DISTRIBUTION

# DATING VIOLENCE



- Dating Violence, defined as: violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

# DOMESTIC VIOLENCE



- Domestic Violence, defined as: a felony or misdemeanor crime of violence committed—
  - By a current or former spouse or intimate partner of the Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

# DOMESTIC VIOLENCE



- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

NOT FOR DISTRIBUTION

# STALKING



- Stalking, defined as: engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition—
  - Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
  - Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
  - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
  - ***Be mindful of First Amendment implications.***

# GRIEVANCE PROCEDURES

---

NOT FOR DISTRIBUTION

# GRIEVANCE PROCEDURES



- Must include:
  - Presumption that responding party is not responsible until determination is reached
  - “Reasonably prompt” timeframes
    - Requirement to set specific timelines for major stages of the grievance process now gone
  - Range of possible sanctions and remedies (mirrors Clery Act mandate)
  - Description of standard of evidence
  - Bases and procedures for appeal
    - Appeal now required, equitably, on three grounds
  - Range of supportive measures available to all parties
    - Note shift from “interim measures” terminology

# PROMPTNESS



- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does **not** relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
  - Complexity of the investigation
  - Concurrent law enforcement investigation with time-dependent release of evidence
  - Delays for administrative needs are insufficient

# NEUTRALITY, CONFLICT OF INTEREST, OBJECTIVITY



- Grievance process must treat parties “equitably”
  - Must be designed to restore or preserve access to education programs
  - Must include enhanced due process protections before disciplinary sanctions are imposed
  - Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest

# NOTICE TO PARTIES



- Upon receipt of a formal complaint indicating that the complainant wants a formal investigation, provide the following written notice to the parties who are known:
  - Notice of the recipient's grievance process that complies with this section, including any informal resolution process.
  - Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview, including.
  - The identities of the parties involved in the incident, if known
  - The conduct allegedly constituting sexual harassment under § 106.30
  - The date and location of the alleged incident, if known

# NOTICE TO THE PARTIES (CON'T)



- A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
- In addition inform the parties that they may inspect and review evidence under paragraph (b)(5)(vi) of 106.30
- Inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- Provide notice of any additional allegations added after the initial notice to the parties whose identities are known.
- MD- must also include range of potential sanctions associated with alleged violation. Md. Code Ann., Educ, § 11-601(d)(3)(iv)(1)

# ADVISOR OF CHOICE



- Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter)
- Must allow advisor to be present at all meetings, interviews, hearings
  - May not restrict who may serve as advisor
  - May restrict advisor participation as long as applied equally to all parties
- If a party does not have an advisor to conduct cross-examination at hearing, the IHE must provide one at not fee or charge

# MD LAW- ASSISTANCE BY LICENSED ATTORNEY



- Parties have the right to be assisted by a licensed attorney, an advocated supervised by an attorney or a trained advocate through the process.

Md. Code Ann., Educ, § 11-601(d)(3)(vi)

- Parties have the right to the presence of no more than two people of their choice.

Md. Code Ann., Educ, § 11-601(d)(3)(vii)

# INVESTIGATION PROCESS

—

NOT FOR DISTRIBUTION

# BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE



- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Evidence collected by law enforcement *or any other source*
- Contracted/outsources investigators do not absolve the school of responsibility for this provision

# PARTY ACCESS TO EVIDENCE/REPORT



- Regulations mandate creation of an investigation report
  - Report fairly summarizes all relevant evidence
- Prior to the completion of the report, all evidence directly related to allegations must be provided to parties
  - Parties must have at least 10 days to review and submit written responses prior to finalizing investigation report
  - Parties must receive finalized report to review and submit written responses 10 days prior to hearing
  - Essential to develop a clear protocol and workflow for these steps

# DUE PROCESS: EVIDENCE



- All relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restrictions on parties' ability to discuss case or gather and present relevant evidence
- Equal opportunity to:
  - Present witnesses
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

# INVESTIGATION REPORT



- Write a draft investigation report appropriately summarizing the investigation and all relevant evidence obtained. ATIXA recommends reviewing this with the Title IX Coordinator prior to providing to parties
  - OCR has created a two-step vetting process for review of the evidence and completion of the final report. Parties are provided 10 days to review all evidence.
  - This is intended to allow the parties and advisors to comment on the report prior to finalization and then to prepare for the hearing with the report in hand in advance.

# PARTY ACCESS TO EVIDENCE/DRAFT REPORT



- Prior to final completion of the investigation report, send to each party and the party's advisor, if any, all evidence obtained that is **directly related** to the complaint, to review in an electronic format or a hard copy, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.
  - Give the parties at least 10 days to submit a meaningful written response, which the investigator will consider prior to completion of the investigation report.
  - Whether included as relevant in the investigation report or not, make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

# FINAL INVESTIGATION REPORT



- Finalize an investigation report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigation report in an electronic format or a hard copy, for their review and written response.

NOT FOR DISTRIBUTION

# MD LAW- ACCESS TO EVIDENCE/REPORT



- Parties must have access to the case file and evidence regarding the incident obtained by the institution during the investigation with personally identifiable or other information redacted as required by applicable law.

Md. Code Ann., Educ, § 11-601(d)(3)(v)(1)

- Parties must be afforded opportunity to provide written response to investigation report and proposed findings.

Md. Code Ann., Educ, § 11-601(d)(3)(v)(5)

# HEARING PROCESS

—

NOT FOR DISTRIBUTION

# LIVE HEARING/QUESTIONING



- Mandated live hearings for higher education
  - Hearing optional under MD Law. Md. Code Ann., Educ, § 11-601(d)(3)(v)(2)
- Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination
  - Otherwise **all statements** submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
  - Must be able to clearly hear and see other parties

# LIVE HEARING/QUESTIONING



- **Must allow live cross-examination** to be conducted exclusively by each party's advisor
  - Verbal, direct, in real time
    - MD Law- questions posed by adjudicating official or body. Md. Code Ann., Educ, § 11-601(d)(3)(v)(3)
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions
  - Including questions challenging credibility
- Each question must be cleared by hearing administrator after being posed
- Questions deemed irrelevant may be excluded with rationale provided
- Must exclude complainant's sexual disposition or prior sexual behavior unless specifically relevant

# PROVISION OF AN ADVISOR FOR CROSS EXAMINATION



- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- Parties have the right to be assisted by a licensed attorney, an advocated supervised by an attorney or a trained advocate through the process.

Md. Code Ann., Educ, § 11-601(d)(3)(vi)

# QUESTIONING & CROSS-EXAMINATION



- If a party or witness does not submit to cross-examination at the live hearing, policy must clarify that the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- Policy should clarify that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.

# EXCLUDED QUESTIONS



- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.
  - The regs establish a questioning protocol. The advisor poses the question, process pauses while the decision-maker considers the relevance of every question, and then decides whether to permit the question, explaining any decision to exclude.
  - The regs are silent on whether the decision-maker can instruct other options beyond excluding a question, such as rephrasing or asking the advisor to reframe.
  - Abusive and unduly repetitious questions are not relevant.
  - Regs leave open question of whether advisor can/should make a showing of relevance to the decision-maker.

# PRIOR SEXUAL HISTORY



- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless
  - such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

# MD LAW – PRIOR SEXUAL HISTORY



- Adjudicating official or body is prohibited from considering a student's prior sexual history with an individual other than a party to the proceeding except to:
  - Prove the source of injury;
  - Prove prior sexual misconduct;
  - Support a claim that a student has an ulterior motive; or
  - Impeach a student's credibility after that student has put his or her own prior sexual conduct at issue

Md. Code Ann., Educ, § 11-601(d)(4)(iv)

# HEARING TECHNOLOGY



- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Hearings may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
  - Required under MD Law- Md. Code Ann., Educ, § 11-601(d)(3)(v)(4)
- Create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

# STANDARD OF EVIDENCE



- Current industry standard is preponderance of the evidence
- OCR says recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty
  - MD Law- same standard of evidence used in other disciplinary proceedings for allegations of discrimination or harm to another individual under the code of conduct.

Md. Code Ann., Educ, § 11-601(d)(4)(ii)

# DETERMINATION OF RESPONSIBILITY



- Determine responsibility and issue a written determination applying the standard of evidence described in paragraph (b)(1)(vii) of this section.
  - The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
    - The Coordinator can investigate or serve as hearing facilitator (not both), but not as chair.
  - Provide the written determination to the parties simultaneously
  - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

# WRITTEN DETERMINATIONS



- Required elements for written determinations:
  - Allegations potentially constituting sexual harassment (§ 106.30)
  - All procedural steps taken
  - Findings of fact supporting the determination
  - A determination and rationale on each allegation regarding responsibility, any disciplinary sanctions, remedies
  - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
  - Document how recipient's response was not deliberately indifferent

# APPEALS

—

NOT FOR DISTRIBUTION

# APPEALS



- Offer all parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  1. Procedural irregularity that affected the outcome of the matter
  2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
  4. Other additional bases as long as applied to the parties, equitably.

- Parties must be able to appeal a determination or a sanction.

Md. Code Ann., Educ, § 11-601(d)(3)(v)(6)

NOT FOR DISTRIBUTION

# APPEALS



- Must offer equitable appeal based on determination or dismissal of any allegations
- All parties receive written notification of any appeal that is filed
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- Written decision with rationale delivered simultaneously to the parties
- “Reasonably prompt” timeframe for producing appeal decision

# INFORMAL RESOLUTION

—

NOT FOR DISTRIBUTION

# INFORMAL RESOLUTION OPTIONS



- School and parties will determine when informal resolution is appropriate
  - “[I]n responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”
- Does not preclude certain offenses from informal resolution
- DOES preclude informal resolution for allegations that an employee harassed a student, so presumably, employee-on employee informal resolution is permissible.

# REQUIREMENTS OF INFORMAL RESOLUTION OPTIONS



- Informal resolution allowed at any time prior to a final determination at discretion of TIXC
  - Formal complaint is required
- Must provide detailed notice to the parties:
  - Allegations
  - Requirements of the process
  - Circumstances which would preclude formal resolution
  - Consequences of participation
- Must obtain voluntary, written consent

# MD LAW- INFORMAL RESOLUTION/MEDIATION



- May only use informal resolution or mediation to resolve a complaint relating to the institution's sexual assault policy if:
  - The complainant requests informal resolution;
  - The parties and the institution agree to use informal resolution;
  - The institution participates in the informal resolution by providing trained staff;
  - Any party may end informal resolution at any time in favor of formal resolution; and
  - The alleged misconduct does not involve sexual assault or sexual coercion.

Md. Code Ann., Educ, § 11-601(d)(5)

# ADDITIONAL ISSUES

—

NOT FOR DISTRIBUTION

- Robust training mandates
- Investigators, coordinators, decision-makers, appeal officers, informal resolution facilitators
  - Conflicts of interest and bias
  - Definition of sexual harassment
  - Investigation, credibility, evidence
  - Report and rationale-writing
  - Hearings, appeals, informal resolution
  - No sex stereotypes, promote impartiality
  - Training materials must be maintained for seven years and posted publicly on recipient's website

# TRAINING RECORDS



- Make all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.
  - The most recent materials used to train the Title IX Team should be posted.
  - While seven year of materials need to be maintained, only most recent need to be posted.
  - This requirement is not retroactive, so seven years starts August 14, 2020.

# IMPACT ON EMPLOYEES



- Regulations often refer exclusively to “students,” but employees are also protected
- Wholesale revision of faculty resolution/employee grievance processes may be necessary
- Union employees – diminished right to an advisor because of union representation?
- Extends significant due process protections for at-will employees accused of misconduct – not at will anymore under Title IX?
- Potential inequity in employee processes for Title VII-based sexual harassment
  - More due process for sex discrimination than other forms of discrimination

# RECORD-KEEPING



- Certain records must be created, retained, and available to the parties for at least seven years:
  - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
  - Any appeal and related result(s)
  - Any informal resolution implemented
  - Any supportive measures implemented
- For each conclusion, school must document the rationale for its determination
- School must document measures taken to preserve/restore access to education programs/activity

# QUESTIONS?

---



# CONTACT INFORMATION

---

Tanyka M. Barber, J.D.

[Tanyka.Barber@tngconsulting.com](mailto:Tanyka.Barber@tngconsulting.com)

LIMITED LICENSE AND COPYRIGHT. BY PURCHASING, AND/OR RECEIVING, AND/OR USING ATIXA MATERIALS, YOU AGREE TO ACCEPT THIS LIMITED LICENSE AND BECOME A LICENSEE OF PROPRIETARY AND COPYRIGHTED ATIXA-OWNED MATERIALS. THE LICENSEE ACCEPTS ALL TERMS AND CONDITIONS OF THIS LICENSE, AND AGREES TO ABIDE BY ALL PROVISIONS. NO OTHER RIGHTS ARE PROVIDED, AND ALL OTHER RIGHTS ARE RESERVED. THESE MATERIALS ARE PROPRIETARY AND ARE LICENSED TO THE LICENSEE ONLY, FOR ITS USE. THIS LICENSE PERMITS THE LICENSEE TO USE THE MATERIALS PERSONALLY AND/OR INTERNALLY TO THE LICENSEE'S ORGANIZATION FOR TRAINING PURPOSES, ONLY. THESE MATERIALS MAY BE USED TO TRAIN TITLE IX PERSONNEL, AND THUS ARE SUBJECT TO 34 CFR PART 106.45(B)(10), REQUIRING ALL TRAINING MATERIALS TO BE POSTED PUBLICLY ON A WEBSITE. NO PUBLIC DISPLAY, SHARING, OR PUBLICATION OF THESE MATERIALS BY A LICENSEE/PURCHASER IS PERMITTED BY ATIXA. YOU ARE NOT AUTHORIZED TO COPY OR ADAPT THESE MATERIALS WITHOUT EXPLICIT WRITTEN PERMISSION FROM ATIXA. NO ONE MAY REMOVE THIS LICENSE LANGUAGE FROM ANY VERSION OF ATIXA MATERIALS. LICENSEES WILL RECEIVE A LINK TO THEIR MATERIALS FROM ATIXA. THAT LINK, AND THAT LINK ONLY, MAY BE POSTED TO THE LICENSEE'S WEBSITE FOR PURPOSES OF PERMITTING PUBLIC ACCESS OF THE MATERIALS FOR REVIEW/INSPECTION, ONLY. SHOULD ANY LICENSEE POST OR PERMIT SOMEONE TO POST THESE MATERIALS TO A PUBLIC WEBSITE OUTSIDE OF THE AUTHORIZED MATERIALS LINK, ATIXA WILL SEND A LETTER INSTRUCTING THE LICENSEE TO IMMEDIATELY REMOVE THE CONTENT FROM THE PUBLIC WEBSITE UPON PENALTY OF COPYRIGHT VIOLATION. THESE MATERIALS MAY NOT BE USED FOR ANY COMMERCIAL PURPOSE EXCEPT BY ATIXA.