

New Title IX Regulations and their intersection with Maryland Law

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Objectives...

- Review the major changes to Title IX compliance
- Compare school obligations under MD Education Article § 11-601 and the new Title IX regulations
- Compare application of Title IX to Higher Education and K-12
- Know when your policy can be more trauma-informed than required under Title IX

New Title IX Regulations

- Go into effect August 14, 2020
- Several legal challenges have already been filed, high likelihood of success
- **DISCLAIMER:** this presentation is legal information, NOT legal advice



Also:

FERPA

**Clergy
Act**

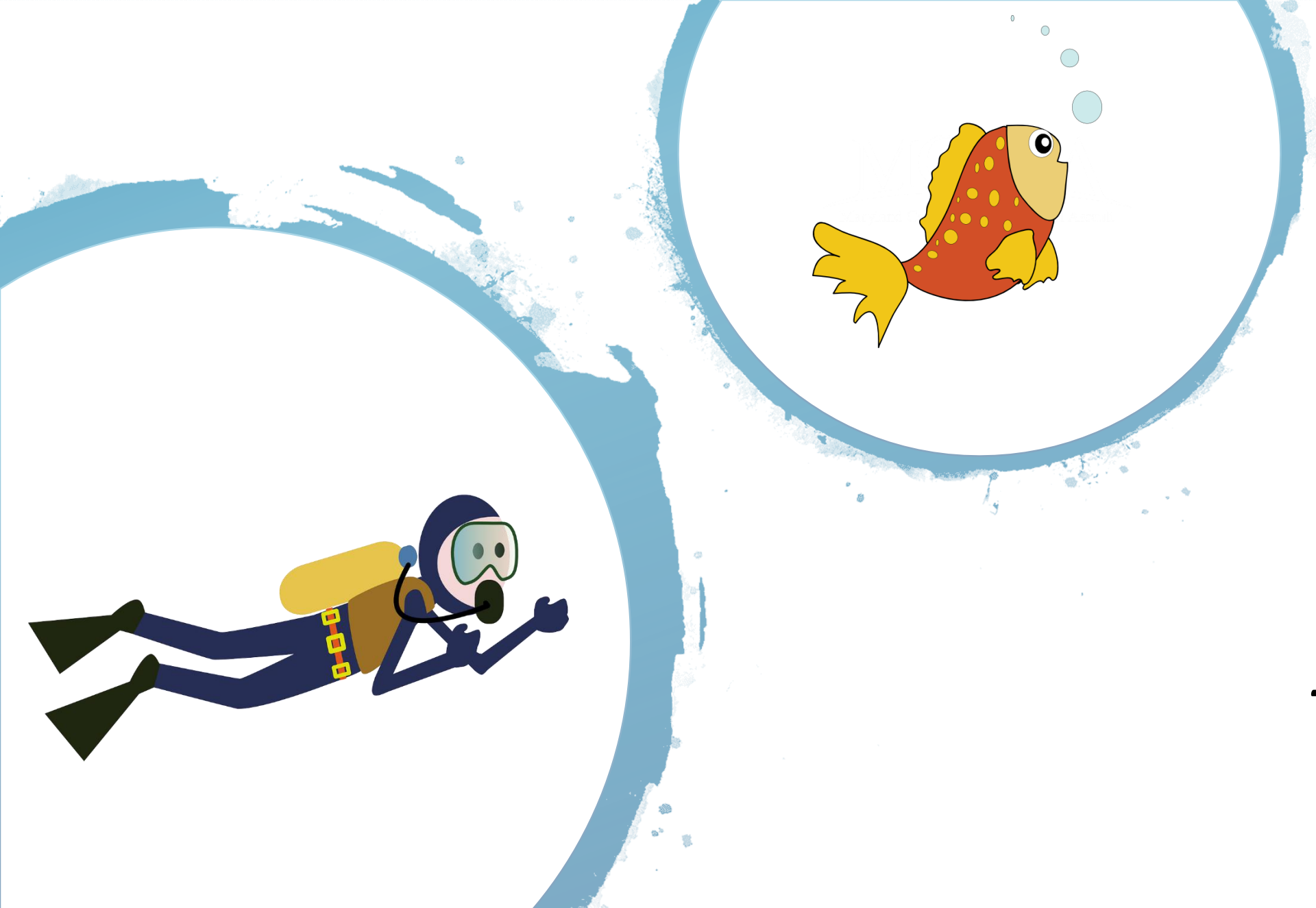
**MD Education
Article § 11-601**

Preemption

“a federal statute implicitly overrides state law... when state law is in actual conflict with federal law” either because it is:

1. “impossible for a private party to comply with both state and federal requirements” or
2. “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”





Title IX

Title IX

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

20 USC § 1681



*The What, Where, and
Who of Title IX Sexual
Harassment....*

“Sexual Harassment”

Sex offenses, defined by the Clery Act:

- Sexual Assault
 - Rape, fondling, incest, statutory rape
- Domestic violence
- Stalking
- Dating violence



Or:

- An explicit quid pro quo *from an employee or*
- Conduct that a reasonable person would deem so “severe, pervasive, and objectively offensive that it effectively denies a person equal access to” education

Be Better!

- Federal law does not require schools to have a definition of “consent,” but you should have one.
- Make sure it is the correct one: consent is knowing and voluntary. Consent to one act is not consent to another, you cannot consent if incapacitated.



Jurisdiction

- Conduct must occur in the U.S.
- Conduct must occur under an “education program or activity”
 - Location or event controlled or owned by the school
 - Includes buildings owned or controlled by an officially recognized student org.



Jurisdiction in cyber space

- Regulations do not expressly address cyber-harassment
- Concern that online harassment will not meet the new, restrictive definition of sexual harassment
- Preamble clarifies that online spaces may fall under the definition of “education program or activity” – fact-specific inquiry depending on if the school has control over the respondent and the context in which the harassment occurs



“Actual Knowledge”

- Schools are only required to respond to sexual harassment upon receipt of actual knowledge
- For higher education, this means only reports made directly to the Title IX Coordinator
- For K-12 schools, this means reports to any employee



Supportive Measures

- **Federal Law:** no-cost measures designed to restore equal access to education or restore campus safety



- Must be offered to complainant upon receipt of actual knowledge
- Must be non-burdensome to respondent (except *mutual* no-contact orders are allowed)



- **Maryland Law:** more specific measures must be offered
- Notifying victim of their right to file criminal charges and assisting with filing
- Designation of nearest SAFE hospital and transportation
- Offer campus counseling or referral to designated RCC
- If feasible and upon request, transfer complainant's classes or housing.

EMERGENCY REMOVAL!

- **School may remove a respondent if they determine there is an immediate threat to the physical health and safety of any student**
- **Risk assessment must be individualized**
- **Provide respondent with notice and opportunity challenge immediately following removal**
- **If respondent is an employee, may place them on administrative leave during the grievance process**



“Formal Complaint”

- May only investigate upon receipt of a formal, WRITTEN complaint
- Complaint may be signed by the complainant or by Title IX coordinator (or parent if victim is a minor)
- But, the complainant must be actively participating in or seeking to participate in the educational program or activity at the time of filing

“Formal Complaint”

- When should a Title IX Coordinator sign a complaint?
 - New regulations discourage this
 - Decision must not be deliberately indifferent
 - Suggests you **MAY** want to sign a complaint when school has actual knowledge of repeated perpetration or pattern of harassment by an employee

Mandatory/Voluntary Dismissal

- Schools MUST dismiss a sexual harassment complaints if:
 - The conduct, if true, does not meet definition of “sexual harassment”
 - The conduct occurred outside of an education program or activity
 - Did not occur in the United States
- Schools MAY dismiss a sexual harassment complaint if:
 - The complainant requests it
 - The respondent withdraws or quits
 - Circumstances prevent school from being able to gather sufficient evidence

Be Better!

- Train employees in “actual knowledge” requirements so they can educate students on how to file a complaint
- Have a non-Title IX policy for investigating and addressing conduct that occurs off campus, does not meet SH definition
- Offer supportive measures regardless of where conduct occurs
- DO NOT dismiss complaints when respondent withdraws or quits



A note about Clery

- Clery Act requires higher education institutions to have policies and procedures for preventing sexual assault, dating violence, stalking, and domestic violence
- You are required to disclose your policies for investigating these claims
- Not geographically bound
- Some argue you will be required to have two disciplinary procedures – “Title IX sexual harassment” and “non-Title IX sexual harassment”



Investigation



Promptness

- Both MD and Federal law say process should be “prompt” or “reasonably prompt”
- Federal law says delay for good cause only
- Federal law gives specific examples that MAY be good cause for temporary delays :
 - Absence of either party
 - Concurrent law enforcement activity
 - Need for language assistance

Notification Requirements

- Notice of allegations (identities, date, time, location)
- Right to an advisor
- Prohibition on making false statements
- Presumption that respondent is not responsible until a determination has been made



Notification Requirements

- Written notice of alleged violation, including range of potential sanctions
- Rights under sexual assault policy
- Right to assistance by an attorney or advocate
- Right to have a support person



Right to an Attorney/Support Person

Maryland:

- Right to assistance by an attorney or advocate at all phases
- No more than two people at any physical meeting, hearing, interview.



Federal Law:

- Right to an advisor who does not need to be an attorney
- School may not put limitations on choice of advisor
- Any restrictions on support people must apply equally



Be Better!

- Explain the presumption of non-responsibility
 - “federal law requires us to tell you...”
 - This means that we cannot take any disciplinary action until we have completed this complaint process.
- DO NOT delay process for concurrent police activity
- Do have a written policy or plan for language access



Informal Resolution

Maryland:

- Prohibited in sexual assault and sexual coercion cases
- Only if complainant requests it, all parties agree, school has trained staff, either party may withdraw at any time



Federal Law:

- May never be required
- May not be used in student v. employee allegations
- Both parties must consent in writing and may withdraw at any time.



Investigation

- Each party has equal opportunity to review any evidence, regardless of if the school will rely on that evidence. School must send evidence to each party and their advisor and give at least 10 days for them to submit a response.
- School must create an investigative report that summarizes **relevant** evidence, send to each party and advisor at least 10 days before a hearing for a written response



Investigation Cont.

- You may not access, consider, disclose, or otherwise use a party's medical or mental health records without subject's voluntary and written consent
- You may not restrict the ability of the parties to discuss the allegations, gather evidence



A note about FERPA

- Federal law (k-12 and higher education) that protects student's education records.
- Cannot disclose records maintained by the school without student's consent
- Potential conflict with requirement to allow inspection of all evidence, regardless of if school intends to rely on it.



Adjudication

Hearings

- Entitled to cross examination at a live hearing
 - Conducted by parties' advisor
 - May be done with use of technology at request of either party so parties are not in same room!
- Hearings allowed, but not required, for k-12 schools. Must allow parties to submit written questions for others



Hearings Cont.

- MD law says that schools cannot require parties to be in the physical presence of each other. That is not a conflict with Federal law
- Fact finder may not be investigator (no single investigator model)
- Process: questions are posed by advisor, fact-finder determines if the question is relevant, then if relevant student can answer
- If party does not have an advisor at the hearing, the school must appoint them one at no cost to party
- If a party or witness does not submit to cross, you may not consider any statement they have made, may not draw adverse inference from refusal to testify

Hearings – Sexual History



Maryland Law:

- May not consider a student's sexual history with someone other than the other party, except to:
 - Prove the source of injury
 - Prove prior sexual misconduct
 - Support a claim a student has an ulterior motive
 - Impeach student's credibility after that student put their own sexual history at issue

Federal law:

- Questions/evidence about a **complainant's** sexual history is not relevant, unless:
 - Proves someone other than respondent committed the conduct or
 - If it concerns specific incidents between the parties and is offered to prove consent

Relevance

Maryland definition:

“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.”

MD Rule 5-401

Federal definition:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

FRE 401

Hearings – Standard of Proof

Maryland Law:

- The same standard as used for other types of misconduct complaints that involve discrimination or harm to another



Federal law:

- Clear and convincing OR preponderance of the evidence. Must be the same for all Title IX complaints, including those against or between faculty members.



Be Better!

- Fact-finder should caution advisors to be polite and respectful.
- Ask advisors to rephrase questions that are harassing or unclear.
- Use the preponderance of the evidence standard
- K-12: DO NOT have live, adversarial hearings



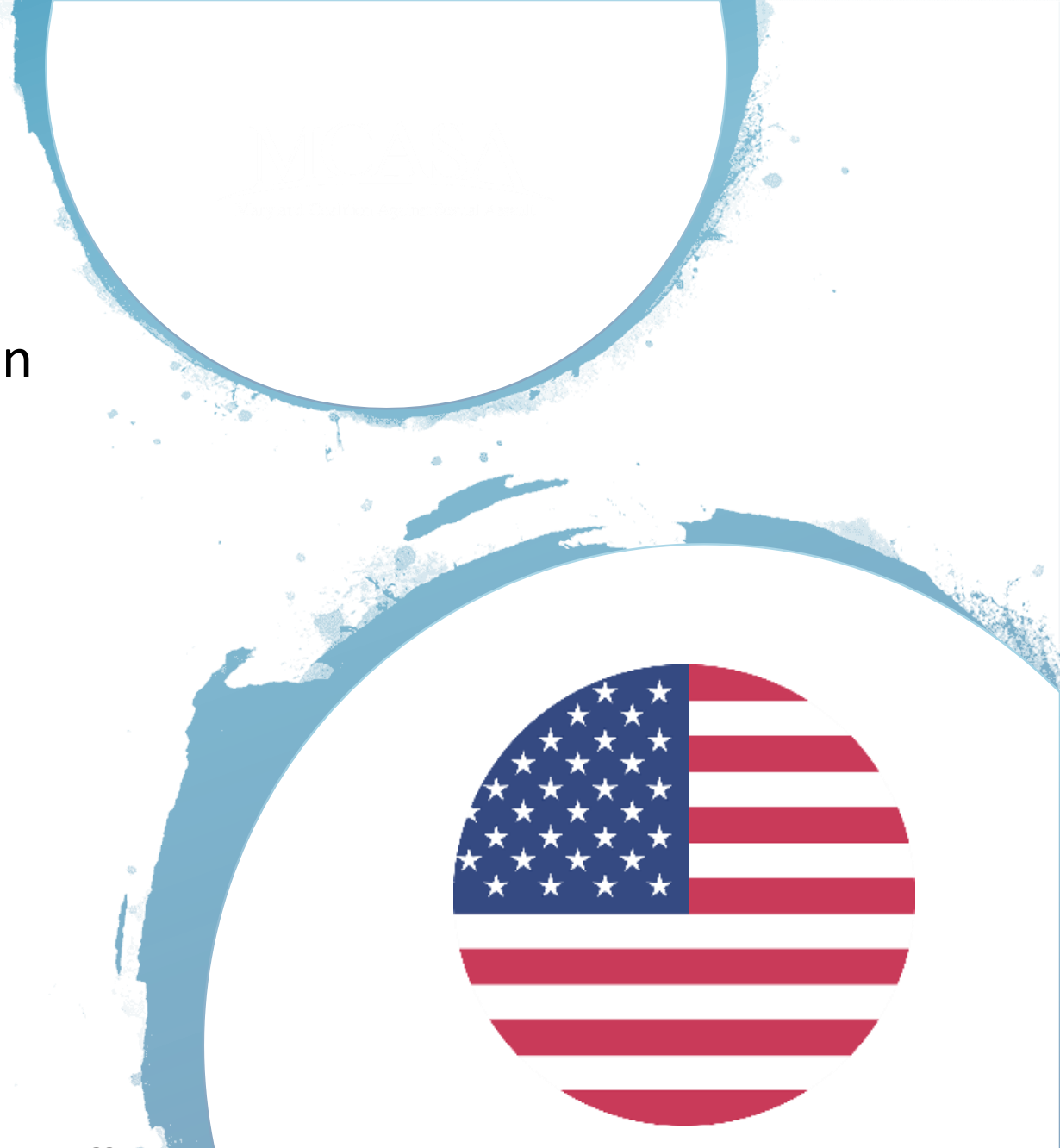
Findings

- Decision maker must issue written findings, including:
 - Identification of the allegations
 - A description of the steps taken from complaint through determination (including notice, interviews, etc.)
 - Findings of fact supporting the determination
 - Conclusion regarding the application of the code of conduct to the facts
 - A rationale for each finding and any sanctions or remedies imposed, appeals process



Appeals

- Both parties have right to appeal, including appeal of initial determination of dismissal
- MUST be allowed to appeal based on
 - Procedural irregularity
 - New evidence not previously available
 - Conflict of interest and or bias by a school actor
- May allow appeals on other bases as long as it's offered equally to both students



Retaliation

- Prohibited under the MD and Federal Laws, however:
- Federal law says that it is not retaliation to charge a party with making false reports provided the allegation is not based solely on the outcome of the case.

CONTACT INFO

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