

CAREER EDUCATION REVIEW AND
RITZERT & LEYTON, P.C. WEBINAR:

**A CURRENT LOOK AT
TITLE IX AND SEXUAL VIOLENCE
IN A COLLEGE SETTING**

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The Career College Information Source

TITLE IX

...no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.” 34 C.F.R. § 106.31(a) (implementing Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq.).

TITLE IX-TITLE IV-CLERY ACT RELATIONSHIP

- All public and private elementary and secondary schools, school districts, colleges and universities (institutions of higher education or IHEs) receiving any federal financial assistance must comply with Title IX.
- Title IV Program Participation Agreement Terms and Conditions: IHE certifies that it will comply with Title IX as a condition of Title IV program participation.
- All Title IV institutions must comply with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), Section 485(h) of the Higher Education Act, as amended, 20 U.S.C. § 1092(f), 34 C.F.R. § § 668.41; 668.46. Only Title IV institutions are subject to Clery Act.

Title IV institutions are subject to both Title IX and the Clery Act, and both statutes address sexual violence on IHE campuses. ED's Office for Civil Rights (OCR) handles Title IX enforcement but ED's Office of Student Financial Assistance handles Clery Act enforcement.

TITLE IX: SEXUAL VIOLENCE IN THE COLLEGE SETTING

- Sexual violence and its impact on students attending IHEs has been a renewed focus of the OCR since the start of the Obama Administration (early 2009) and the topic has received extensive coverage in the media.
- In January 2014, President Obama signed a Presidential Memorandum establishing a White House Task Force to Protect Students from Sexual Assault. The Task Force issued a report in April 2014 and created a website for schools, students and the public (www.notalone.gov)
- OCR has made public its settlements with IHEs regarding Title IX violations and the names of schools for which it has received Title IX complaints.

SEXUAL VIOLENCE AND TITLE IX

What is it?

Physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (i.e., due to age, use of drugs or alcohol, intellectual or other disability that prevents the capacity to give consent). Such acts include rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.

All such acts are forms of sex discrimination prohibited by Title IX.

SEXUAL VIOLENCE AND TITLE IX

- Sexual violence can be carried out by IHE employees, other students or third parties. In each case, **students are protected by Title IX when the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the IHE's educational program** (i.e., the conduct creates a **hostile environment**.)
- Title IX protects all students against sexual violence, as well as sexual harassment (unwelcome sexual advances, requests for sexual favors, verbal or nonverbal or physical conduct of a sexual nature).
- IHEs must take **prompt and effective steps** reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its reoccurrence and, as appropriate, remedy its effects, or the IHE will violate Title IX.

CLERY ACT

Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, PL 101-542 (“Clery Act”) (Section 485(f) of the HEA) requires Title IV participating IHEs to:

- **Collect, classify and count crime reports and crime statistics as reported to Campus Security Authorities**
- **Issue Timely Warnings and Emergency Notifications**
- **Publish and distribute to students, employees and prospective students and employees an Annual Security Report (ASR) that includes crime statistics for the previous 3 calendar years AND all policy statements required under 34 CFR 668.46(b) (newly revised by VAWA Reauthorization Act of 2013)**
- **Submit crime statistics to ED annually**
- **Compliance enforced during program reviews or targeted Clery reviews by ED Office of Federal Student Aid**
- **Fines up to \$35,000 per offense and/or limitation, suspension or termination of institutional eligibility, denial of recertification or revocation of PPA [but latter has never happened]**

CLERY ACT

- IHEs that participate in Title IV federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX.
- The Clery Act requires IHEs to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies.
- The requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply (sexual violence), the institution must comply with both laws.

2013 VAWA AMENDMENTS TO CLERY ACT

- Violence Against Women Reauthorization Act of 2013, P.L. 113-4, amended the Clery Act to require institutions to compile statistics for crimes of **sexual assault**, **domestic violence**, **dating violence** and **stalking** that are reported to Campus Security Authorities (CSAs) or local police agencies.
- 2013 and 2014 statistics will be reported to ED in Fall 2015.
- Also adds “national origin” and “gender identity” to the hate crime categories reportable under the Clery Act that involve intentional targeting or bias against a victim based on an actual or perceived characteristic.

VAWA AMENDMENTS - NEW CRIME CATEGORIES

Domestic Violence: A felony or misdemeanor crime of violence committed by –

- a current or former spouse or intimate partner of the victim,
- a person with whom a victim shares a child in common,
- a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred or
- any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

VAWA AMENDMENTS - NEW CRIME CATEGORIES

Dating Violence: Violence committed by a person –

- **Who is or has been in a social relationship of a romantic or intimate nature with the victim, and**
- **Where the existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the following factors:**
 - The length of the relationship
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

VAWA AMENDMENTS - NEW CRIME CATEGORIES

Stalking: Means engaging in a course of conduct (two or more acts) directed at a specific person that would cause a reasonable person to –

- Fear for his or her safety or the safety of others; or
- Suffer substantial emotional distress.

Sexual Assault: An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Uniform Crime Reporting System.

CLERY ACT – RELATION TO TITLE IX

- The Violence Against Women Reauthorization Act of 2013 (VAWA), PL 113-4, amended the Violence Against Women Act and the Clery Act.
- ED has stated that VAWA amendments have “no effect” on a school’s obligations under Title IX: i.e., all of its existing guidance remains valid and IHE’s must still comply with their basic Title IX obligations for all sex discrimination, including sexual violence.
- However, the VAWA amendments did impose significant new policy, procedure and training requirements applicable to sexual assault, dating violence, domestic violence and stalking, that supplement IHE’s pre-existing Title IX obligations.

NOTICE OF SEXUAL VIOLENCE – TITLE IX

- An IHE is on notice of sexual violence if a “**responsible employee**” knew, or in the exercise of reasonable care, should have known, about the incident.
- Notice to the IHE can be received various ways including filing of a student grievance, notice to the Title IX Coordinator, reporting of the incident to a school employee by a student, parent, friend or third party, a report to campus law enforcement or CSA, student affairs or another responsible employee. Notice can also be received through a media report, or social networking site.
- Where the IHE should have known about sexual violence had it made a proper inquiry but did not, knowledge will be imputed to the IHE. Failure of the IHE to take **prompt and effective correction action** violates Title IX in such case even if a student did not report the incident to the IHE.

SCHOOL OBLIGATION TO RESPOND – TITLE IX

- When an IHE knows (or reasonably should know) of possible sexual violence, it must take **immediate and appropriate steps to investigate** or otherwise determine **what occurred**. If the investigation concludes that the sexual violence created a hostile environment, the IHE must take **prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects**.
- An IHE must protect the complainant including taking **interim steps** while an investigation is pending and as soon as it is on notice of a sexual violence allegation.

TITLE IX PROCEDURAL REQUIREMENTS

1. Dissemination of Notice of Nondiscrimination
2. Designation of a Title IX Coordinator
3. Adoption and publication of grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints

These three requirements apply to all forms of sex discrimination and, as stated by OCR, are important to preventing and effectively responding to sexual violence.

The 2013 VAWA amendments to the Clery Act established additional IHE procedural requirements for victims of domestic violence, dating violence and stalking (to be discussed in later slides).

TITLE IX PROCEDURAL REQUIREMENTS – NOTICE OF NONDISCRIMINATION

The IHE Title IX policy must state that the IHE does not discriminate on the basis of sex in its educational programs and activities and that the IHE is required by Title IX not to discriminate in such manner. The notice must state that questions regarding Title IX may be referred to the Title IX coordinator or to the OCR.

TITLE IX PROCEDURAL REQUIREMENTS – DESIGNATION OF TITLE IX COORDINATOR

Designation of Title IX Coordinator

- **The IHE must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.**

The Title IX Coordinator's Role:

- **Overseeing the IHE's response to Title IX reports and complaints and identifying and addressing patterns or systemic problems.**
- **Must have knowledge of Title IX requirements, the IHE's own policies and procedures on sex discrimination (including Clery Act policies) and all complaints raising Title IX issues at the IHE.**
- **To accomplish this, the Title IX coordinator (subject to confidentiality protections) must be within a reporting structure that funnels all reports and complaints arising from Title IX issues to the Title IX coordinator even if it was initially reported to or investigated by another individual or office.**
- **The Title IX coordinator must be visible, trained and authoritative.**

TITLE IX PROCEDURAL REQUIREMENTS – DESIGNATION OF TITLE IX COORDINATOR

Other Acceptable Roles for The Title IX Coordinator:

- **Training students, faculty and staff on Title IX issues**
- **Conducting Title IX investigations**
- **Determining appropriate sanctions and remedies**
- **Determining appropriate interim measures during pendency of an investigation**
- **Maintaining relationships with local law enforcement and victim resource and advocacy groups**

Title IX coordinators should not be within the General Counsel's office at the IHE due to potential/actual conflict of interests. OCR advises against Directors of Athletics, Deans of Students or employees who serve on hearing or appeal boards from serving as the Title IX coordinator.

TITLE IX PROCEDURAL REQUIREMENTS – GRIEVANCE PROCEDURE

Title IX requires that an IHE adopt and publish grievance procedures providing for **prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence**. OCR will review such policies for the following elements:

- a. **Notice to students and employees of the procedures including where complaints can be filed;**
- b. **Application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;**
- c. **Provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and the alleged perpetrator to present witnesses and evidence;**

TITLE IX PROCEDURAL REQUIREMENTS – GRIEVANCE PROCEDURE

Title IX requires that an IHE adopt and publish grievance procedures providing for **prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence**. OCR will review such policies for the following elements (continued):

- d. Designated and reasonably prompt time frames for the major stages of the complaint process;**
- e. Written notice to the complainant and alleged perpetrator of the outcome of the complaint; and**
- f. Assurance that the IHE will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.**

TITLE IX PROCEDURAL REQUIREMENTS – GRIEVANCE PROCEDURE

Grievance procedures must explicitly include the following in writing:

- 1. A statement of the school’s jurisdiction over Title IX complaints**
- 2. Adequate definitions of sexual harassment (including sexual violence) and an explanation as to when such conduct creates a hostile environment**
- 3. Reporting policies and protocols including for confidential reporting**
- 4. Identification of the employee or employees responsible for evaluating requests for confidentiality**
- 5. Notice that Title IX prohibits retaliation**

TITLE IX PROCEDURAL REQUIREMENTS – GRIEVANCE PROCEDURE

Grievance procedures must explicitly include the following in writing (continued):

- 6. Notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously**
- 7. Notice of available interim measures that may be taken to protect the student in an educational setting**
- 8. The evidentiary standard that may be used (preponderance of the evidence) (more likely than not that sexual violence occurred) in resolving a complaint**
- 9. Notice of potential remedies for students**
- 10. Notice of potential sanctions for perpetrators and**
- 11. Sources of counseling, advocacy and support**

TITLE IX PROCEDURAL REQUIREMENTS – GRIEVANCE PROCEDURE

Under Title IX, an IHE is not required to have separate grievance procedures for sexual violence complaints. The IHE may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures for sexual violence complaints. However, it must be clear that sexual violence complaints must meet the Title IX requirement of affording a complainant a prompt and equitable resolution and the application of the preponderance of the evidence standard.

RESPONSIBLE EMPLOYEES AND REPORTING

- Under Title IX, “**responsible employees**” at an IHE are obligated to report incidences of alleged sexual violence to the Title IX coordinator or other appropriate IHE designee, subject to confidentiality obligations.
- A “**responsible employee**” includes any employee who has the authority to take action to redress sexual violence, who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate IHE designee, **or whom a student could reasonably believe has the authority or duty.**
- **An IHE must make clear to all of its employees and students which staff members are responsible employees.**

RESPONSIBLE EMPLOYEES AND REPORTING

- When a **responsible employee** knows or reasonably should know of possible sexual violence, OCR deems an IHE to have notice of the sexual violence.
- The IHE must take immediate steps to **investigate** or otherwise determine what occurred (subject to confidentiality limitations) and, if the IHE determines the sexual violence created a hostile environment, the IHE must then take appropriate steps to address the situation (sanction and possibly remedy).
- This obligation is regardless of whether a formal complaint is filed with the school.

RESPONSIBLE EMPLOYEES AND REPORTING

- IHEs should consider their own policies and procedures to determine whether certain employees are “responsible employees” who must report incidents of sexual violence.
- If a particular employee has an obligations to report other student violations of school policy (e.g., drug and alcohol violations or physical assault), the employee would likely be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.
- Responsible employees must be made aware of their Title IX reporting obligations and should “make every effort” to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the employee’s reporting obligation and the student’s option to request that the school maintain confidentiality.

CONFIDENTIALITY

- Before a student reveals information that he or she may wish to keep confidential, a **responsible employee** should make every effort to ensure that the student understands:
 - (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials,
 - (ii) the student's option to request that the school maintain his or her confidentiality, which the school (e.g., Title IX coordinator) will consider, and
 - (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services .
- If the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

CONFIDENTIALITY

- An IHE may be required to override a student's request for confidentiality in order to meet its Title IX obligations; OCR advises that "these instances will be limited" and the information should only be shared with individuals who are responsible for handling the IHE's response to incidents of sexual violence.
- The IHE must ensure that information is maintained in a secure manner. An IHE disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence.
- Even if a student does not specifically ask for confidentiality, to the extent possible, an IHE should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response.
- **2013 VAWA amendments require that with respect to timely warnings, victims names be withheld.**

CONFIDENTIALITY

- For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator.
- When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

CONFIDENTIALITY

- If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the IHE not investigate or seek action against the alleged perpetrator, the IHE will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence.
- The Title IX coordinator is generally in the best position to evaluate confidentiality requests but OCR recognizes that an IHE may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests.
- Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them.

CONFIDENTIALITY

- If an IHE determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request.
- Although a student's request to have his or her name withheld may limit the IHE's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence.
- There are steps an IHE can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. An alleged perpetrator can also be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant.

FERPA

- **Permits the release to the victim of any outcome involving an alleged crime of violence. 34 CFR 99.31(a)(13)**
- **Permits an IHE to disclose to anyone the final results of any disciplinary hearing against an alleged perpetrator of a crime of violence where that student was found in violation of the IHE's policy on the offense. 34 CFR 99.31(a)(14).**
- The IHE should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act to request to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained as an education record. In such a case, the IHE must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. See 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the IHE's ability to maintain complete confidentiality.

INVESTIGATIONS AND HEARINGS

- The specific steps in an IHE's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.
- The term “investigation” refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

INVESTIGATIONS AND HEARINGS

- In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence.
- The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.
- Neither Title IX nor ED guidance specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. However, all persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures.
- April 4, 2011 OCR Dear Colleague Letter directs a "preponderance of the evidence standard" for IHE Title IX investigations and hearings.

INVESTIGATIONS AND HEARINGS

- The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence.
- While an IHE has flexibility in how it structures the investigative process, for Title IX purposes, an IHE must give the complainant any rights that it gives to the alleged perpetrator. Specifically:
 - Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
 - The IHE must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.

INVESTIGATIONS AND HEARINGS

- While an IHE has flexibility in how it structures the investigative process, for Title IX purposes, an IHE must give the complainant any rights that it gives to the alleged perpetrator.

Specifically (continued):

- If the IHE permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal.

INVESTIGATIONS AND HEARINGS

- During investigations of alleged sexual violence, an IHE should coordinate with any other ongoing IHE or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator.
- An IHE should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for the IHE to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by IHE officials.

INVESTIGATIONS AND HEARINGS

- If an IHE uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX.
- If an IHE typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the IHE to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the IHE may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation.
- The Title IX coordinator should review the disciplinary process to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and IHE community where appropriate.

CRIMINAL PROCEEDINGS

- A Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards in a criminal proceeding are not required.
- While a criminal investigation is initiated at the discretion of law enforcement authorities, **a Title IX investigation is not discretionary**; an IHE has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence.
- The termination of a criminal investigation without an arrest or conviction does not affect the IHE's Title IX obligations.
- Even if a criminal investigation is ongoing by campus or other police, an IHE must still conduct its own Title IX investigation.

CRIMINAL PROCEEDINGS

- An IHE should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation.
- If an IHE delays the fact-finding portion of a Title IX investigation at the request of police, the IHE must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation.
- An IHE may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act (“FERPA”) and other applicable privacy laws.

OFF CAMPUS CONDUCT

- Under Title IX, an IHE must process all complaints of sexual violence, regardless of where the conduct occurred, to **determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.**
- If the IHE determines that the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; the IHE must **treat the complaint in the same manner that it treats complaints regarding on-campus conduct.** The fact that the alleged misconduct took place off campus does not relieve the IHE of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

OFF CAMPUS CONDUCT

- Off-campus education programs and activities include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (e.g., a school club trip to another school or to a weekend competition).
- Even if the misconduct did not occur in the context of an education program or activity, an IHE must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity.

OFF CAMPUS CONDUCT

- Once an IHE is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct.
- An IHE should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and an IHE may have to take steps to protect other students from possible assault by the alleged perpetrator.
- Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the IHE still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws.

INTERIM MEASURES

- Title IX requires an IHE to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including **taking interim measures before the final outcome of an investigation.**
- The IHE should take these steps **promptly** once it has notice of a sexual violence allegation and should **provide the complainant with periodic updates on the status of the investigation.**
- The IHE should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate.
- The IHE should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement.

INTERIM MEASURES

- Even when an IHE has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the IHE must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

INTERIM MEASURES

- The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case.
- An IHE should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).
- When taking interim measures, IHEs should **minimize the burden on the complainant**. For example, if the complainant and alleged perpetrator share the same class or residence hall, the IHE should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

REMEDIES AND NOTICE OF OUTCOME

- Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies.
- All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation.
- In any instance in which the complainant did not take advantage of a specific service (e.g., counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

REMEDIES AND NOTICE OF OUTCOME

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;
- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;
- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;
- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and
- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.

REMEDIES AND NOTICE OF OUTCOME

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the IHE's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;
- Training or retraining school employees on the IHE's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;
- Developing materials on sexual violence, which should be distributed to all students;
- Conducting bystander intervention and sexual violence prevention programs with students; and
- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents.

REMEDIES AND NOTICE OF OUTCOME

- Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that the IHE provide written notice of the outcome to the complainant and the alleged perpetrator **concurrently**.
- For Title IX purposes, an IHE must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the IHE has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

REMEDIES AND NOTICE OF OUTCOME

- Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school.
- Additional steps the IHE may take to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the IHE may take to prevent recurrence may include sexual violence training for faculty and staff, revisions to the IHE's policies on sexual violence, and campus climate surveys.
- In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the IHE's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.

APPEALS

- While Title IX does not require that an IHE provide an appeals process, OCR does recommend that the IHE do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings.
- If an IHE chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the IHE, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the IHE takes steps to protect the complainant in the educational setting during the process.
- If an IHE chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal. The appeals process must be equal for both parties.

TITLE IX TRAINING, EDUCATION AND PREVENTION

- An IHE must ensure that **responsible employees** with the authority to address sexual violence know **how to respond appropriately to reports of sexual violence**, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence.
- An IHE must ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential.
- An IHE should provide **training to all employees likely to witness or receive reports of sexual violence**, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors.

TITLE IX TRAINING, EDUCATION AND PREVENTION

- **Training for employees** should include:
 - practical information about how to prevent and identify sexual violence, including same-sex sexual violence;
 - the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue;
 - the potential for re-victimization by responders and its effect on students;
 - appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language;
 - the impact of trauma on victims;
 - and, as applicable, the person(s) to whom such misconduct must be reported.

TITLE IX TRAINING, EDUCATION AND PREVENTION

- The training should explain responsible employees' reporting obligations, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact for the school's Title IX coordinator.
- An IHE should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.
- **There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis.** Each IHE should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. An IHE should also have methods for verifying that the training was effective.

TITLE IX TRAINING, EDUCATION AND PREVENTION

- All persons involved in implementing an IHE's grievance procedures (e.g., Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the IHE's grievance procedures.
- The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

TITLE IX TRAINING, EDUCATION AND PREVENTION

- To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its **students** regarding Title IX and sexual violence.
- **Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment.**
- However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students.
- The training should encourage students to report incidents of sexual violence.
- A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. **An IHE should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses.**
- OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

TITLE IX TRAINING, EDUCATION AND PREVENTION

OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;

TITLE IX TRAINING, EDUCATION AND PREVENTION

OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training(continued):

- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

TITLE IX TRAINING, EDUCATION AND PREVENTION

- **An IHE should educate students about the persons on campus to whom they can confidentially report incidents of sexual violence.** Clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance.
- An IHE should also identify the school's responsible employees and explain that if students report incidents to responsible employees these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant.

RETALIATION PROTECTION

- The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to an IHE's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the IHE to retaliate against that individual for doing so.
- It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or IHE's investigation or proceeding.

RETALIATION PROTECTION

- An IHE should explain that Title IX includes protections against retaliation, and that IHE officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials.
- When an IHE knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

FIRST AMENDMENT

- ED's guidance on sexual violence does not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.
- However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment, and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying, remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.
- Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.

2013 VAWA AMENDMENTS TO CLERY ACT

- Violence Against Women Reauthorization Act of 2013, P.L. 113-4 amended the Clery Act to require institutions to compile statistics for crimes of **sexual assault**, **domestic violence**, **dating violence** and **stalking** that are reported to Campus Security Authorities (CSAs) or local police agencies.
- 2013 and 2014 statistics will be reported to ED in Fall 2015.
- Also adds “national origin” and “gender identity” to the hate crime categories reportable under the Clery Act that involve intentional targeting or bias against a victim based on an actual or perceived characteristic.

VAWA AMENDMENTS - ASR STATEMENT OF POLICY

IHE must develop and distribute as part of the ASR a Statement of Policy containing:

1. Institution's programs to prevent domestic violence, dating violence, sexual assault and stalking;
2. Procedures that the institution will follow once an incident of domestic violence, dating violence, sexual assault or stalking has been reported, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such report (does not mandate preponderance of the evidence as compared to Title IX proceedings).

VAWA AMENDMENTS - ASR STATEMENT OF POLICY

In more detail, such policy must address the following areas:

1.* Education programs to promote the awareness of domestic violence, dating violence, sexual assault and stalking, which programs must include:

- Primary prevention and awareness programs for all incoming students and new employees
- Ongoing prevention and awareness campaigns for students and faculty, including areas covered by the programs for new students and faculty.

2.* Possible sanctions or protective measures that the IHE may impose following a final determination of an institutional disciplinary proceeding regarding domestic violence, dating violence, sexual assault or stalking

VAWA AMENDMENTS - ASR

STATEMENT OF POLICY

3.* Procedures victims should follow if domestic violence, dating violence, sexual assault or stalking has occurred including information in writing about:

- the importance of preserving evidence as may be necessary to the proof of the crime or to obtaining a protection order
- to whom the alleged offense should be reported
- options regarding law enforcement and campus authorities, including notification of a victim's option to (i) notify proper law enforcement authorities, including on-campus and local police, (ii) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses and (iii) to decline to notify such authorities and
- where applicable, the rights of victims and the IHE's responsibilities regarding orders of protection, no contact orders, restraining orders, and similar lawful orders issued by a criminal, civil or tribal court.

VAWA AMENDMENTS - ASR STATEMENT OF POLICY

4.* Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking, which shall include a clear statement that –

- (1) Such proceedings shall (a) provide a prompt, fair and impartial investigation and resolution and (b) be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of the victims and promote accountability.
- (2) The accuser and the accused are entitled to the same opportunities to have others present during an IHE disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice;

VAWA AMENDMENTS - ASR STATEMENT OF POLICY

4.* Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking, which shall include a clear statement that (CONTINUED) –

(3) Both the accuser and accused shall be simultaneously informed in writing of –

(a) the outcome of any IHE disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault or stalking,

(b) the IHE's procedures for the accused and victim to appeal the results of the institutional disciplinary proceeding

(c) any change to the results that occurs prior to the time that such results become final and

(d) when such results become final.

VAWA AMENDMENTS - ASR STATEMENT OF POLICY

5.* Information about how the IHE will protect the confidentiality of the victim(s), including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.

6.* Written notification of students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims, both on campus and in the community.

7.* Written notification of victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if so requested by the victim and if such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.

*** = Each item of the Statement of Policy that must be provided to a student or employee who reports to an IHE that the student or employee has been a victim of domestic violence, dating violence, sexual assault or stalking, whether or not the offense occurred on or off campus.**

PRIMARY PREVENTION AND AWARENESS PROGRAMS

Primary Prevention and Awareness Programs for all Incoming Students, New Employees and Ongoing Prevention and Awareness Campaigns for Current Students and Faculty must include:

- **A statement that the IHE prohibits the offenses of domestic violence, dating violence, sexual assault and stalking**
- **The definition of each crime in the applicable jurisdiction**
- **The definition of consent, in reference to sexual activity, in the applicable jurisdiction**
- **Safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of such crime against a person other than such individual**

VAWA - PRIMARY PREVENTION AND AWARENESS PROGRAMS

Primary Prevention and Awareness Programs for all Incoming Students and New Employees must include (continued):

- **Information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks**
- **All of the other information required to be in the Statement of Policy (listed on previous slides)**

RECOMMENDATIONS

- **Perform an independent audit of current Title IX/VAWA policies and procedures as they relate to sexual violence.**
- **Establish an internal process and timeline for regular review and modification of policies and procedures for handling sexual violence.**
- **Establish and maintain a training schedule for IHE personnel involved in this area, as well as new student/faculty training and ongoing current student and faculty awareness training. Document all training offered.**
- **Be aware of existing IHE policies regarding faculty, student and staff rights under existing IHE handbooks, manuals and other policies that may directly or indirectly relate to Title IX. Seek consistency and clear interrelation of each to the IHE's Title IX/VAWA policies and procedures so that students, faculty and staff understand their rights.**

SUGGESTED RESOURCES

- **Department of Education, Questions and Answers on Title IX and Sexual Violence (April 29, 2014)**
- **Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault (April 2014)**
- **OCR Dear Colleague Letter on Sexual Harassment and Sexual Violence (April 4, 2011)**
- **Final Rule, Violence Against Women Act Reauthorization Act of 2013, 79 Fed. Reg. 62752-62790 (Oct. 20, 2014)**
- **Congressional Research Service, Report 7-5700, Sexual Violence at Institutions of Higher Education (October 23, 2014)**

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