Title IX & Clery Act Annual Training

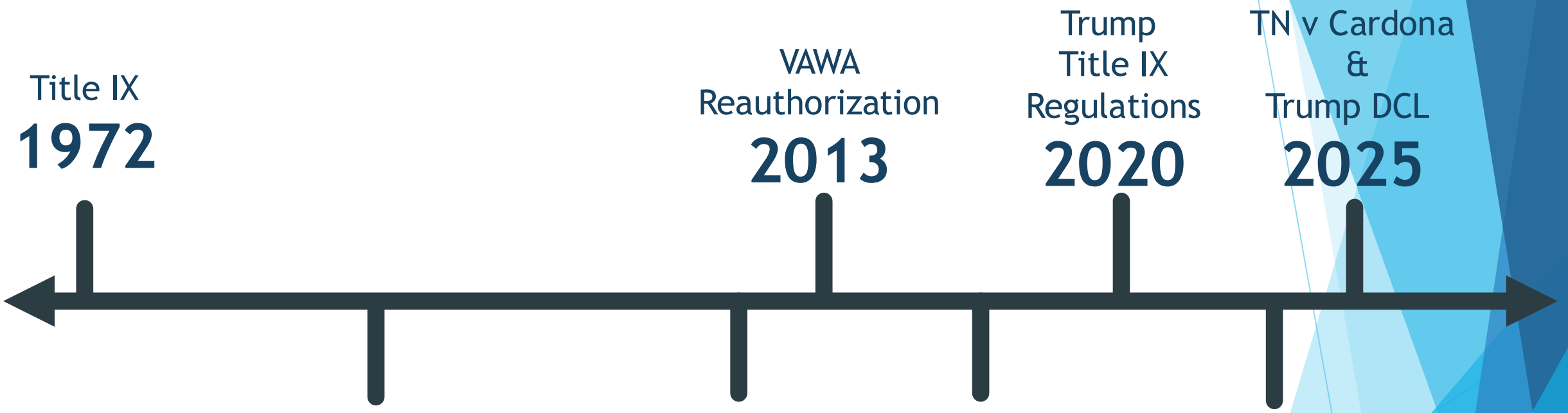
Christopher DeLuca
DL Training Solutions LLC

July 14, 2026

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Title IX Timeline



Title IX of the Education Amendments of 1972

Prohibits sex discrimination in education programs that receive federal funding.

- Sexual harassment, including sexual assault, is a type of sex discrimination that is banned by Title IX.

Clery Act of 1990

Every institution must:

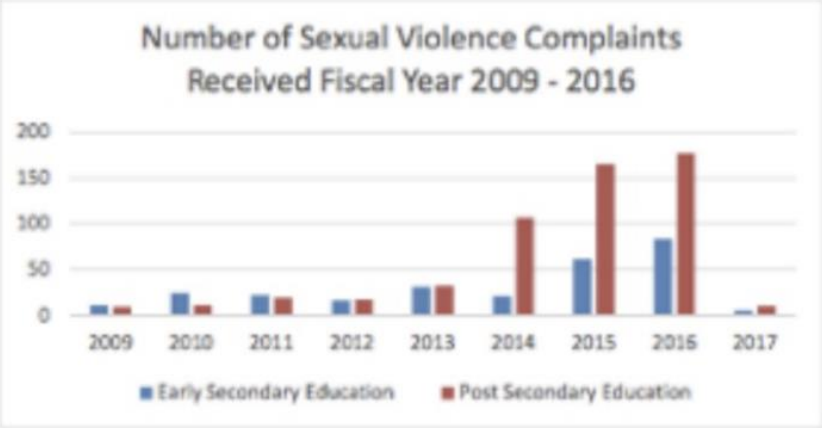
- **Collect, classify, and count crime reports and crime statistics.**
- Issue a **timely warning** for any *Clery Act* crime that represents an ongoing threat to the safety of students or employees.
- Issue an **emergency notification** upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.
- **Publish an annual security report** containing safety- and security-related policy statements and crime statistics and distribute it to all current students and employees. Schools also must inform prospective students and employees about the availability of the report.
- **Submit crime statistics to ED.** Each year in the fall schools must participate in a Web-based data collection to disclose crime statistics by type, location, and year.
- ED can issue civil **fines of up to $71,545 per violation** for a substantial misrepresentation of the number, location, or nature of the crimes required to be reported or for a violation of any other provision of the safety- and security-related *HEA* regulations.

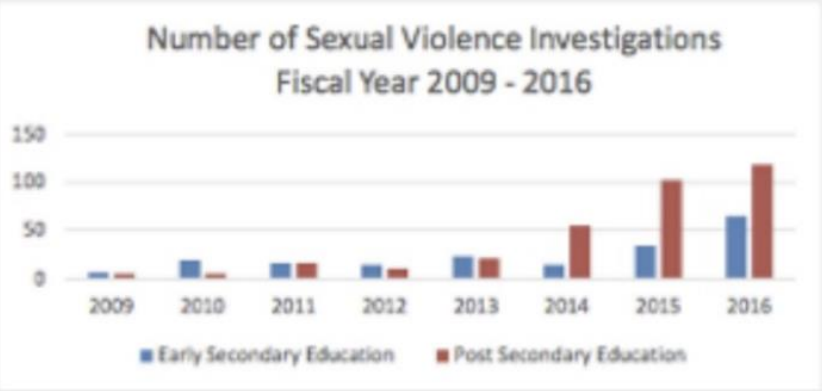
2011 Dear Colleague Letter

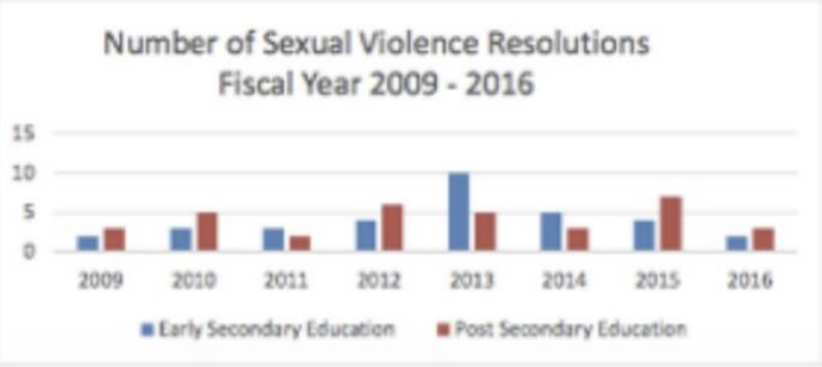
- Was deemed a “significant guidance document” by ED
- Detailed schools’ obligations and the appropriate response to sexual harassment and violence
- Guidance was repealed by Trump Administration in September 2017

Appendix D: Number of Title IX Complaints, Investigations, and Resolutions 2009-2016

Source: Department of Education, Office for Civil Rights







"The Second Report of the White House Task Force to Protect Students from Sexual Assault," January 5, 2017, (originally retrieved from https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF [January 18, 2017]

Retrieved from: http://www.changingourcampus.org/resources/not-alone/Second-Report-VAW-Event-TF-Report.PDF (June 20, 2022)

Violence Against Women Reauthorization Act (2013)

Amended the definition of “sexual assault” under the Clery Act and added three new crimes for Clery crime reporting purposes:

- domestic violence
- dating violence
- stalking

Violence Against Women Reauthorization Act (2013)

Updated requirements for school's Annual Security Reports. The ASR must include:

- the school's ***education programs*** to promote awareness of sexual misconduct;
- Possible ***sanctions*** schools may impose regarding sexual misconduct;
- ***Procedures that victims should*** follow if an incident of sexual misconduct has occurred;
- The school's procedures for conducting a ***disciplinary proceeding*** in cases of alleged sexual misconduct;

2014 White House Task Force – First Report Findings:

- One in five women is sexually assaulted in college
- Most often by someone she knows
- Most often not reported
- Many survivors feel isolated, ashamed, or to blame
- Although less often, men also victims

Source: Not Alone, The First Report of the White House Task Force to Protect Students From Sexual Assault, April, 2014, accessed June 20, 2022, https://www.justice.gov/ovw/page/file/905942/download

BJS 2016 Campus Climate Survey

- The Bureau of Justice Statistics developed a pilot campus climate survey to address key Task Force goals and issues related to the measurement of rape and sexual assault in self-report surveys.
- Completed surveys were collected from more than 23,000 undergraduate students at nine schools
  - Data collection occurred March through May 2015
- The overall prevalence rate for completed sexual assault experienced by undergraduate females, averaged across the nine schools, was 10.3%

”Campus Climate Survey Validation Study Final Technical Report,” (January 2016). Bureau of Justice Statistics, accessed January 21, 2016 (http://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf)

2017 Title IX Interim Guidance

- In September 2017, the first Trump administration rescinded Obama-era campus sexual assault guidance
- Announced intention to engage in rule making to establish formal regulations re: schools' obligations to respond to allegations of sexual harassment

Title IX Compliance Challenges – Postsecondary Career Education

Title IX (& the Clery Act/VAWA) requirements present particular challenges to postsecondary trade and career schools.

- These schools typically do not have on-campus police or dedicated security forces.
- The Title IX coordinator at these schools is often the director or another administrator whose primary job functions pertain to school operations.
- Given the size of the student body, lack of residential student housing, and limited school-sponsored extracurricular activities, incidents of sexual misconduct may be infrequent at these types of institutes.

Title IX Compliance Challenges – Postsecondary Career Education

Commenters have noted the significant compliance burden that the regulations place on small institutions.

- For example, commenters have referenced the requirement for institutional disciplinary proceedings in the case of alleged sexual harassment.
- In response, the Department has noted that institutions are not making determinations of criminal responsibility but are determining whether the institution's own rules have been violated.
- The Department further noted that students at smaller institutions should have the same protections as their counterparts at larger institutions.

2020 Title IX Regulations

Then-U.S. Secretary of Education Betsy DeVos' Press Release on May 6, 2020, upon the publication of the Trump Administration's Title IX Regulations:

"This new regulation requires schools to act in meaningful ways to support survivors of sexual misconduct, without sacrificing important safeguards to ensure a fair and transparent process. We can and must continue to fight sexual misconduct in our nation's schools, and this rule makes certain that fight continues."

Biden Administration
Title IX Rulemaking Timeline

- ***August 2020*** - Title IX Regulations promulgated under the first Trump Administration became effective
- ***April 2021:*** U.S Department of Education Office for Civil Rights (OCR) undertook a comprehensive review of the Department's existing regulations, orders, guidance, policies, and any other similar agency actions, including the 2020 Rules
  - Public hearings held June 7 to 11, 2021 (ED received over 30,000 written comments)
- ***July 12, 2022 – ED released NPRM.***
  - ***240,085*** public comments received by ED
    - 2020 Title IX regulations – Over 140,000 public comments
  - ED originally said final regulations may be published in May 2023
- ***BIDEN ADMINISTRATION'S REGULATIONS PUBLISHED APRIL 19, 2024***

Legal Challenges to 2024 Title IX Rules

- There were injunctions in 26 states blocking ED's enforcement of the new Title IX rules
  - Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, & Wyoming
  - Injunction also applied to any school attended by a member of Young America's Foundation, Female Athletes United, & Moms for Liberty
- Most vocal challenges were to new rules on sexual orientation and gender identity, but also challenged the definition of sex-based harassment and procedural safeguards for accused students.

Confusion re Implementation of 2024 Rule Post-8/1/24 Effective Date

- While 26 states challenged the 2024 Title IX Rule, other states are supported the new rules
- ED appealed injunction rulings to the US Supreme Court
  - Argued that even if injunction related to sexual orientation and sexual identity provisions allowed to stand, the rest of the regulations should be allowed to go into effect
  - Supreme Court in 5-4 ruling upheld the injunctions
- At the end of 2024 we had two sets of rules depending on school's location
  - And whether school has any students who are a member of Young America's Foundation, Female Athletes United, or Moms for Liberty

So Where Do Things Stand Now?

- *Tennessee v. Cardona*: January 2025 - US District Court ruled in favor of plaintiffs' motion for summary judgment, the effect of which was to vacate the 2024 Rule nationwide
- 1/31/2025: ED sent a "Dear Colleague" letter to K-12 schools and institutions of higher education
  - Announced it would not appeal judge's decision in *Tennessee v. Cardona*
  - Advised educators and administrators that ED's Office for Civil Rights will enforce the Trump Administration's 2020 Title IX Rule.

- ***NOTE***: In 2021 a Federal district court upheld legal challenges to 2020 Title IX regulations, with minor modification (*Victim Rights Law Center v. Cardona*, United States District Court, District of Massachusetts. Jul 28, 2021).

General Response to Sexual Harassment

2024 Rule: A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively.

VACATED

2020 Rule: A recipient with *actual knowledge* of *sexual harassment* in an *education program or activity* of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

- **A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances**

Clery Act Basics

Clery Act Requirements – The Basics

Clery Act Requirements – The Basics	
• Collect, classify, and count crime reports and statistics	
• Issue campus alerts and warning notices	• Publish an Annual Security Report (Due date: October 1)
• Disclose missing student notification procedures, when applicable	• Submit crime and fire statistics to the Department, when applicable
• Disclose procedures for institutional disciplinary actions	• Provide educational programs and campaigns
• Keep a daily crime log, when applicable	• Disclose fire safety information, when applicable

Clery Act Appendix for FSA Handbook, p. 1

Stop Campus Hazing Act

- Signed into law in December 2024
- Updates name of the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act” to “**Jeanne Clery Campus Safety Act**”
- Requires Title IV institutions to:
  - include hazing incidents in their annual security reports;
  - publish a statement regarding the institution's current policies relating to hazing, how to report incidents of hazing and the process used to investigate hazing incidents, and information on applicable local laws on hazing; and
  - publish a statement of policy regarding prevention and awareness programs related to hazing
- **January 1, 2025** – must start collecting statistics on hazing incidents
  - First published in ASR due by **October 1, 2026**

Hazing Definition for Clery Act Purposes:

The term '**hazing**', for purposes of reporting statistics on hazing incidents…means any intentional, knowing, or reckless act committed by a person (whether individually or in concert with other persons) against another person or persons regardless of the willingness of such other person or persons to participate, that:

- is committed in the course of an initiation into, an affiliation with, or the maintenance of membership in, a student organization; and
- causes or creates a risk, above the reasonable risk encountered in the course of participation in the institution of higher education or the organization (such as the physical preparation necessary for participation in an athletic team), of physical or psychological injury

A "**student organization**" is defined as "an organization at an institution of higher education (such as a club, society, association, varsity or junior varsity athletic team, club sports team, fraternity, sorority, band, or student government) in which two or more of the members are students enrolled at the institution of higher education, whether or not the organization is established or recognized by the institution"

Campus Hazing Transparency Report

Each institution must develop a Campus Hazing Transparency Report summarizing findings concerning any student organization found to be in violation of an institution's hazing policies.

- The Campus Hazing Transparency Report must include each incident involving a student organization for which a finding of responsibility is issued relating to a hazing violation
- First Report must be released by 12/23/25
  - Includes data from 7/1/25 through release date
  - Updated biannually (at least 2 time per year)
    - Not required to update Transparency Report if no findings since last publication
  - Maintained for five calendar years
  - NOTE: Report not required unless/until there is a hazing violation

Clery Crimes

Criminal Offense

- Murder/Non-negligent manslaughter
- Negligent manslaughter
- Rape
- Fondling
- Incest
- Statutory Rape
- Robbery
- Aggravated assault
- Burglary
- Motor vehicle theft
- Arson

VAWA Offenses

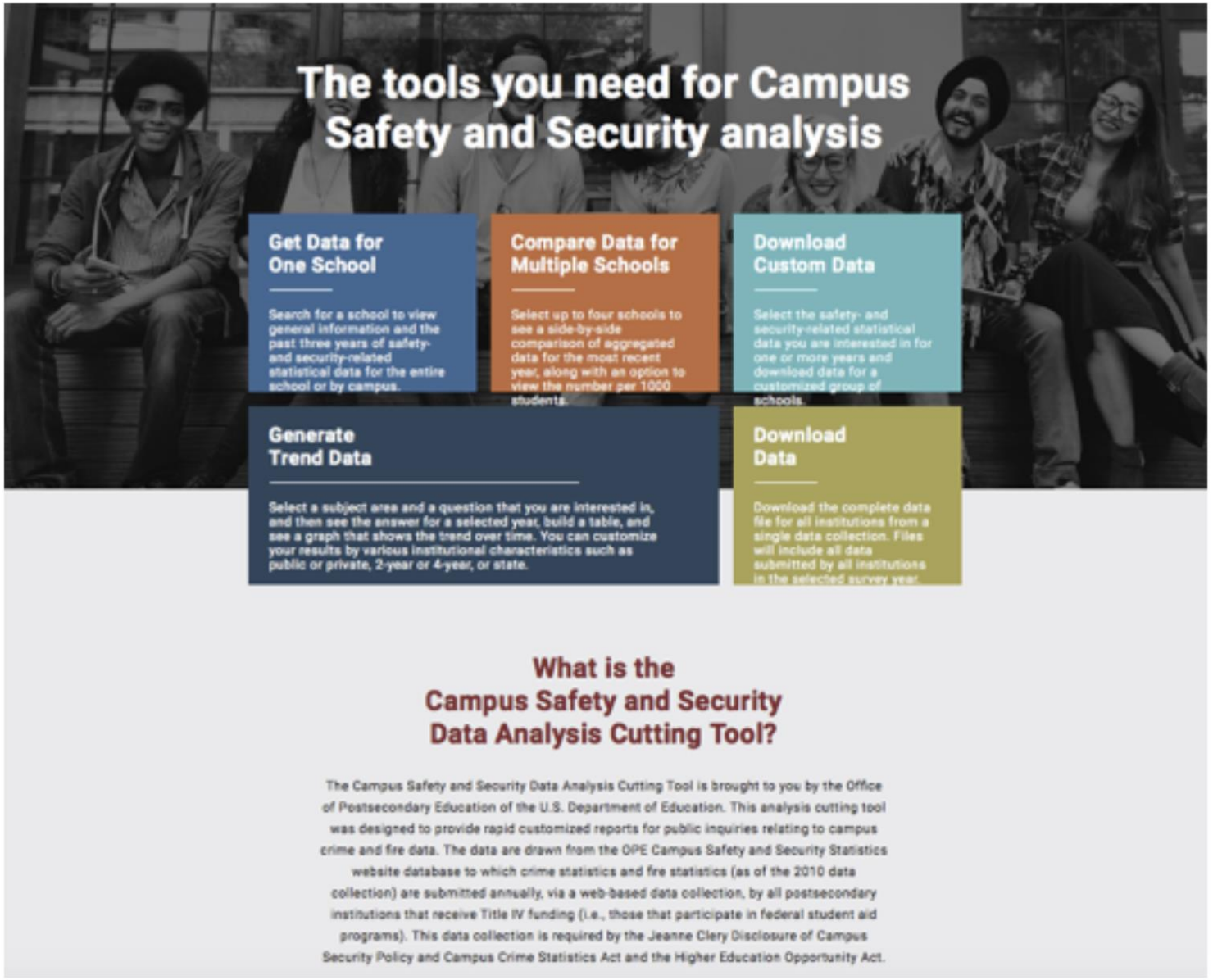
- Domestic Violence
- Dating Violence
- Stalking

Arrests & Disciplinary Actions

- Weapons
- Drug abuse violations
- Liquor law violations

Hate Crimes

Hazing



https://ope.ed.gov/campussafety/#/

Clery Reporting

Clery Geography

You must disclose statistics for reported Clery crimes that occur:

- on campus
- on public property within or immediately adjacent to the campus, and
- in or on noncampus buildings or property that your institution owns or controls

Clery Geography: On-Campus

Under Clery, the **on-campus** category encompasses the following:

- Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and
- Any building or property that is within or reasonably contiguous to the property described above, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or retail vendor).

For Clery reporting purposes, your campus includes buildings and properties that meet all of the following criteria:

- Your institution owns or controls them;
- They are reasonably contiguous to one another; and
- They directly support or relate to the institution's educational purposes

Clery Geography: On-Campus

Institutions that lease space in strip malls:

- Your campus consists of any space within the strip mall that is covered by your written agreement.
- If the lease includes use of the parking lot, or selected spaces in the lot, include the lot (or selected spaces) as part of your campus.
- If your students need to use stairwells or elevators or hallways to access the space your institution controls, include them as part of your campus as well.
- Do not include any of the strip mall's stores, restaurants, offices, etc., in your on-campus category because your institution doesn't control them.

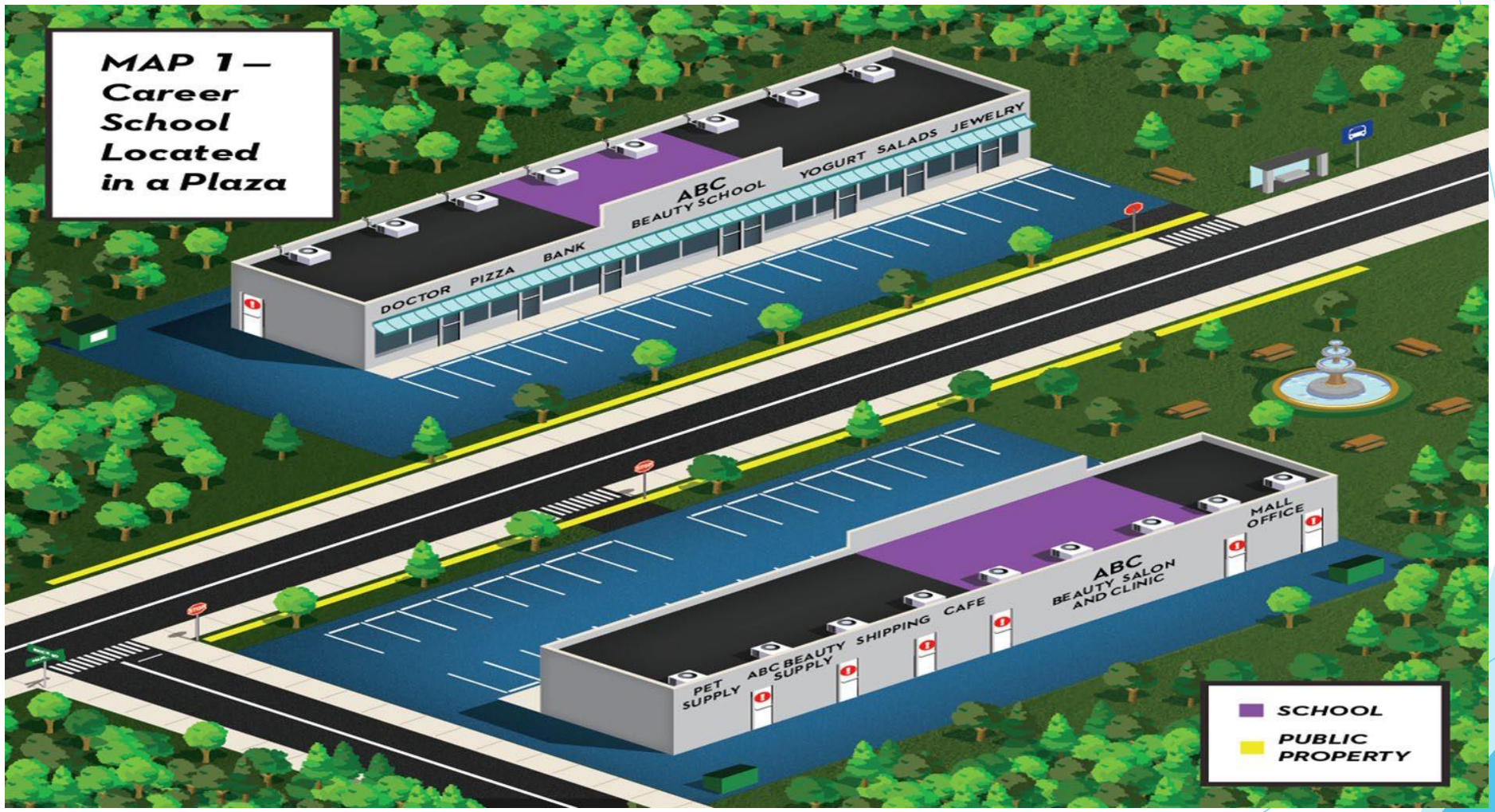
Clery Geography: Public Property

- *All public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution's educational purposes."*
- In order for this definition to apply, the property in question must satisfy all three conditions: 1) public (e.g., publicly-owned); 2) within or adjacent to campus; and 3) accessible from campus.
- This definition excludes any private property, and may in some cases exclude areas such as property divided by a fence or wall, or property with clearly posted signs indicating that it is not part of the campus or that trespassing is prohibited.
- The Department applies no specific measurable distance definition into adjacent public property.

Clery Geography: Noncampus

- The Clery definition of **noncampus buildings or property is:**
  - any building or property owned or controlled by a student organization that is officially recognized by the institution; or
  - any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.
- The noncampus category encompasses two distinct types of buildings and property:
  - those owned or controlled by officially recognized student organizations, and
  - those located off campus but owned or controlled by your institution.

CLERY GEOGRAPHY SIMPLIFIED



2024 FSA Training Conference for Financial Aid Professionals, Breakout Session #09, The Clery Act: Compliance Basics, Managing Campus Protests, and Understanding Emerging Trends, Jim Moore, U.S. Department of Education, https://fsapartners.ed.gov/training/federal-student-aid-fsa-training-conference/program/sessions/2024/clery-act-managing-campus-protests-and-understanding-emerging-trends-qa, accessed August 20, 2025.

Space versus Program Agreements

Perhaps your institution sends students to an off-campus site for internships, externships, clinical training, or student teacher.

- If you own or control the site or any space within the site, include the site or the specified space in your non-campus category.
- If you do not own or control the space, don't include it.
- If you have an agreement, even a written agreement, to send your students to a location for one of the aforementioned reasons, but that written agreement is for the program rather than for the use of the physical space, you do not have control of the location and do not have to include statistics for crimes that occur there.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 2-21. **NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020.**

Space versus Program Agreements

For example:

If you have a written agreement to send students to a privately owned hospital for clinical training, but you don't have a written agreement for use of the hospital or any space within the hospital, you do not have to include statistics for the crimes that occur there.

- However, if you rent classroom space for students within the same hospital, you are required to include crime statistics for that space, as well as for any other areas, such as lobby or hallways and elevators used to access that space for the period of time specified in the agreement.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 2-21. **NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020.**

Definition of Sexual Harassment

Under Title IX:

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

- So: What is “Sexual Harassment”?

Definition of Sexual Harassment

Definition of sex-based harassment includes:

- Quid Pro Quo harassment
- VAWA Offenses
  - Domestic Violence
  - Dating Violence
  - Sexual Assault
  - Stalking

2020 Title IX Rules – Definition of Sexual Harassment

2020 Title IX Regulations §106.30 Definitions. ***Sexual harassment*** includes:

> *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*

> *Note: 2024 Rule defined sexual harassment to include conduct that created a "hostile environment" – that definition has been vacated*

2020 Title IX Rules
Equal Access to Program or Activity

- Does not require showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a “breaking point” in order to report and receive a recipient’s supportive response to sexual harassment.
- Evaluating whether a reasonable person in the complainant’s position would deem the alleged harassment to deny a person “equal access” to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment.

2020 Title IX Rules
Equal Access to Program or Activity

2020 Rules do not require complete exclusion from an education, but rather denial of “equal” access.

Signs of enduring unequal educational access due to severe, pervasive, and objectively offensive sexual harassment may include:

- skipping class to avoid a harasser,
- a decline in a student’s grade point average, or
- having difficulty concentrating in class;

No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant’s position of the ability to access the recipient’s education program or activity on an equal basis with persons who are not suffering such harassment.

Identifying and Reporting Sexual Misconduct

Domestic Violence

The term "domestic violence" includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction receiving grant funding and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who—

A. is a current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim;
B. is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
C. shares a child in common with the victim; or
D. commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

34 USC §12291(a)(12)

Examples of Domestic Violence

Scenario 1: A student's wife is waiting for her husband outside of his on-campus classroom building. She attacks her husband with a knife when he exits the building. Include this as one on-campus incident of Domestic Violence and one on-campus Aggravated Assault.

Scenario 2: A neighbor reports yelling in the apartment next door in a university housing complex. The officer who arrives at the apartment finds a husband and wife having an argument. Neither party reports any physical injuries and neither party reports being intimidated. Do not include this incident in your *Clery Act* statistics.

Scenario 3: An employee reports to the campus police that her ex-husband has physically assaulted her four times. All four assaults occurred at the employee's private residence; however, he has also recently showed up in the noncampus parking lot outside her office and threatened to hurt her. Include one noncampus Domestic Violence incident for the Intimidation that occurred in the noncampus parking lot. Do not include the Aggravated Assaults in your *Clery Act* statistics because they did not occur on *Clery Act* geography. Do not include the Intimidation as a Hate Crime in your *Clery Act* statistics because there was no evidence that it was motivated by bias. Also include one incident of noncampus Stalking (Stalking is discussed below).

Scenario 4: A father argues with his son at a football game in the on-campus stadium. He eventually hits his son, breaking his jaw. Include this as one on-campus incident of Domestic Violence and one Aggravated Assault.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p 3-38.
NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020

Dating Violence

The term "dating violence" means violence committed by a person—

A. who is or has been in a social relationship of a romantic or intimate nature with the victim; and

B. where the existence of such a relationship shall be determined based on a consideration of the following factors:

   i. The length of the relationship.

   ii. The type of relationship.

   iii. The frequency of interaction between the persons involved in the relationship.

34 USC §12291(a)(11)

Examples of Dating Violence

Scenario 1: A female student cuts her ex-boyfriend with a knife during an altercation in an on-campus dining hall. Include this as one incident of on-campus Dating Violence and one on-campus Aggravated Assault.

Scenario 2: A female student reports that her boyfriend forced her into nonconsensual sex in her on-campus dorm room. Include one Rape in both the on-campus category and the on-campus student housing facility category, and one incident of Dating Violence in both the on-campus category and the on-campus student housing facility category.

Scenario 3: After a party on campus, John walked back to his apartment in a noncampus housing complex with Matt, whom he has hooked up with a few times over the past month. When they reached John's apartment, it became clear that Matt was angry that John had been talking with other men at the party, causing Matt to punch two holes in the wall and threaten to beat John if he sees him flirting with any other men on campus. John now fears for his safety around Matt. Include one incident of noncampus Dating Violence for the threat of physical abuse.

Scenario 4: A dating couple is arguing on a public sidewalk in front of a campus building. The male slaps the female and her face is red. Include this as one public property incident of Dating Violence.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p 3-38.
NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020

Sexual Assault

The term "sexual assault" means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.

Rape – The 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 victim***.

Sex Offenses – any sexual act directed against another person, ***without the consent of the victim***, including instances where the victim is incapable of giving consent.

A. *Fondling* – The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

B. *Incest* – Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

C. *Statutory Rape* – Sexual intercourse with a person who is under the statutory age of consent

34 USC §12291(a)(35); 34 CFR 668.46

Examples of Sexual Assault

Scenario 1: A female student reports that she was raped by an unidentified male while jogging along a campus trail. Include this as one on-campus Rape.

Scenario 2: A female student reports that her ex-boyfriend had sex with her in her campus residence hall room while she was unconscious after a night of drinking alcohol. Include this as one Rape in the on-campus category and one Rape in the on-campus student housing facility category. Also include one incident of Dating Violence in both the on-campus and on-campus student housing facility categories (Dating Violence is discussed on pages 3-36 and 3-37).

Scenario 3: A male student reports that another male student fondled him in a campus building while telling him that he was glad they could finally be alone. Include this as one on-campus Fondling.

Scenario 4: A female student reports to the campus police that she was raped in her car in a parking lot on her school's campus by students from another college. Include this as one on-campus Rape.

Scenario 5: Three female students report that they were each raped by five male students at an off-campus fraternity house owned by a recognized fraternity. Each male raped each of the female students. Include this as three noncampus Rapes.

Scenario 6: A female student reports that an unknown male attempted to rape her on a city-owned sidewalk outside a classroom building on campus, but that he was frightened away by another pedestrian before completing the attack. Include this as one public property Rape.

Scenario 7: A woman is walking on a public sidewalk in front of your campus and a man pinches her buttocks as he runs by her. Include this as one public property Fondling only if the victim reports that it was sexual in nature.

Scenario 8: A female student reports that she has been raped three times since January by someone who lives in the same on-campus student housing facility. All three of the sexual assaults occurred in this housing facility. Include this as three Rapes in both the on-campus category and on-campus student housing facility category.

Scenario 9: A 21-year-old student has sex with a 15-year-old juvenile in the student's on-campus apartment. There is no use of force or threat of force (the statutory age of consent is 16). Include this as one Statutory Rape in the on-campus category and one Statutory Rape in the on-campus student housing facility category.

Scenario 10: Campus police respond to a call from the dean reporting that an unknown man exposed himself to a group of female students on campus. Do not include this incident in your *Clery Act* statistics as it is not a *Clery Act* crime.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 3-8.
NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020.

Consent

In both VAWA & the Title IX regulations, the Department of Education considered and ***chose not*** to define consent.

- At minimum, the definition should recognize that:
  - consent is a voluntary agreement to engage in sexual activity;
  - someone who is incapacitated cannot consent;
  - past consent does not imply future consent;
- silence or an absence of resistance does not imply consent;
- consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
- consent can be withdrawn at any time; and
- coercion, force, or threat of either invalidates consent.

Affirmative Consent

- “Affirmative consent” is defined as an affirmative, conscious, and voluntary agreement to engage in sexual activity.
  - Neither the lack of protest or resistance nor silence constitutes consent, and consent may be withdrawn at any time.
  - Affirmative consent must be given by all parties to sexual activity.
- Often referred to as “Yes Means Yes”

Example of Affirmative Consent Standard

N.Y. Education Law Sec. 6441. AFFIRMATIVE CONSENT TO SEXUAL ACTIVITY. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct:

- Affirmative Consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity.
- Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- Silence or lack of resistance, in and of itself, does not demonstrate consent.

Affirmative Consent

- Under VAWA & Title IX, schools have option to adopt an affirmative consent standard to determine whether a student has given consent to sexual activity.
  - BUT: If state law requires affirmative consent, then school must comply with state law standards
- The affirmative consent standard is distinguishable from the standards applicable to criminal proceedings in certain ways.
  - First, the affirmative consent standard does not apply in the criminal context.
  - A criminal trier of fact may consider whether an individual affirmatively consented, but that alone is not determinative of whether the activity was consensual.
  - Other evidence of consent or lack of consent, such as body language or silence, may also be considered in the analysis of whether a crime occurred.
  - Under the affirmative consent law, the question of whether a victim affirmatively consented is by itself determinative of whether wrongdoing occurred.

Stalking

The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

A. fear for his or her safety or the safety of others; or

B. suffer substantial emotional distress.

Course of conduct means two or more acts, including but not limited to, acts in which the stalking 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 victim.

Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

34 USC §12291(a)(36); 34 CFR 668.46

Recording Stalking Reports

- When recording reports of stalking that include activities in more than one calendar year, an institution must record a crime statistic for each and every year in which the course of conduct is reported to a local police agency or to a campus security authority. *34 CFR 668.46(c)(6)*
- Department of Education believes that this approach strikes a balance by ensuring that stalking is adequately captured in an institution's statistics without inflating the number of incidents of stalking by counting each behavior in the pattern.

Violence Against Women Act; Final Rule, 79 Fed. Reg. 62722 (October 20, 2014)

Recording Stalking Reports

- An institution must record each report of stalking as occurring at only the first location within the institution's Clery geography in which:
  - A perpetrator engaged in the stalking course of conduct; or
  - A victim first became aware of the stalking.
- If stalking occurs on more than one institution's Clery geography and is reported to a campus security authority at both institutions, then both institutions must include the stalking in their statistics.

34 CFR 668.46(c)(6)

Examples of Stalking

Scenario 1: A female student reports that she is being followed by a man she met at her job at a café off-campus. He began showing up at the café and would not leave her alone. Since then she has also noticed him following her around campus and she fears for her safety. Include this as one incident of Stalking on-campus since the first occurrence on *Clery Act* geography occurred when the victim noticed the perpetrator following her on-campus.

Scenario 2: Several students belonging to the university association of Hispanic students have reported being watched or followed by the same unknown man on various parts of campus. All of the students reported fearing for their safety as a result of his behavior but none of the students saw the man more than once. Do not include this as Stalking in your *Clery Act* statistics because, given that the man has never approached the same student more than once, the course of conduct was not directed at a single individual,

Scenario 3: A female student reported that she is afraid for her safety because her ex-boyfriend has been sending harassing emails to her private email account over the past several weeks. She opened the first five emails in her off-campus apartment. However, earlier that day she opened another email on her mobile phone while walking on campus. She came directly to the Campus Police to report the behavior. The location of the ex-boyfriend when he was sending the harassing messages is unknown. Include this as one on-campus Stalking because the first incident in the course of conduct to occur on *Clery Act* geography was the victim reading the email on-campus.

Examples of Stalking (continued)

Scenario 4: A male student reports that his ex-girlfriend has been sending him harassing text messages. The ex-girlfriend attends another university 200 miles away. While at home over summer break, the ex-girlfriend showed up at the student's house every day asking if he has a new girlfriend at school. Now that he has returned to school, she sends him daily text messages threatening to "check-in" on him on-campus. The ex-girlfriend sends these text messages late at night and the victim receives them when he is inside his on-campus dorm room. Include one incident of Stalking in both the on-campus category and in the on-campus student housing facility category **if the male student fears for his safety as a result of this behavior.**

Scenario 5: A male student reported a Stalking course of conduct to Campus Police during the spring semester. During the investigation, Campus Police established that the first incident in the Stalking course of conduct to occur on *Clery Act* geography took place on public property. When the student returned to campus for the fall semester, the Stalking continued when the perpetrator repeatedly waited for the victim in the hallway outside the victim's dorm room in an on-campus student housing facility. Since the spring and fall Stalking incidents involved the same victim and the same perpetrator, the fall incidents should be considered a continuation of the Stalking course of conduct that started in the spring. Include this as one Stalking incident on public property.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p 3-41.

NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020

Effects of Sexual Violence

- **Depression.** There are many emotional and psychological reactions that victims of rape and sexual assault can experience. One of the most common of these is depression.
- **Flashbacks.** During a flashback, memories of past traumas feel as if they are taking place in the current moment.
- **Post-Traumatic Stress Disorder.** After a traumatic event, it is typical to have feelings of anxiety, stress, or fear, making it difficult to adjust or cope for some time afterwards.

Information provided by the Rape, Abuse, & Incest National Network, accessed September 7, 2018
https://www.rainn.org/effects-sexual-violence

Title IX Coordinator

Dear Colleague Letter April 24, 2015

- Reminded all schools to designate a Title IX Coordinator
- Contact information must be widely distributed on school's website and various publications
- Department began collecting information about school's Title IX Coordinators in 2015

Designation of Title IX Coordinator

- Each recipient must designate at least one employee as the “Title IX Coordinator.”
- Must notify applicants for admission and employment, students, and employees of the Title IX Coordinator’s name or title, office address, email address, and telephone number.
- Any person may report sex discrimination, including sexual harassment, in person, by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
- Report may be made at any time (including during non-business hours) by using the telephone number or email address, or by mail to the office address, listed for the Title IX Coordinator.

Title IX Coordinator

Title IX does not categorically exclude particular employees from serving as Title IX coordinators.

- However, when designating a Title IX coordinator, an institution should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest.
- A dedicated, full-time Title IX coordinator is the ideal.
- Designating a full-time Title IX coordinator will also minimize the risk of a conflict of interest.
- Some colleges and universities may not have the resources to support a full-time position.
- If this is the case, it is critical that the employee has all the qualifications, training, authority, and time to address all complaints raising the Title IX issues.

Title IX Coordinator Responsibilities

Responsible for monitoring and overseeing school's compliance with Title IX and prevention of sexual misconduct.

- Knowledgeable and trained in school's policies and procedures and relevant state and federal law.
- Available to advise individuals about school and community resources and reporting options.
- Available to provide assistance to school employees regarding how to respond appropriately to report of the Title IX-related prohibited conduct and related retaliation.

Title IX Coordinator Responsibilities

- Ensures effective implementation of school's sexual misconduct policies and procedures.
- Oversees training, prevention, and education efforts and annual reviews of climate and culture.
- Overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints.
- The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Training & Education

VAWA (Clery Act) Requirements

Institutional disciplinary hearings must 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 victims and promotes accountability"
>
> *20 USC 1092(f)(8)(iv)(I)(bb)*

Prevention and Education

Clery Act requires that an institution's annual security report include a statement of policy that addresses the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking.

- The statement must include
  i. A description of the institution's primary prevention and awareness programs for all incoming students and new employees, and
  ii. A description of the institution's ongoing prevention and awareness campaigns for students and employees

Primary Prevention Programs

Defined in regulations as programming, initiatives, and strategies that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through:

- The promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality,
- encourage safe bystander intervention, and
- seek to change behavior and social norms in healthy and safe directions

34 CFR 668.46(j)(2)(iv)

Prevention and Education

Prior OCR guidance (rescinded September 2017) recommended that the following topics (as appropriate) be covered as part of student training:

- Title IX and what constitutes sexual violence under the school's policies;
- school's definition of consent, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- school's grievance procedures
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;

Prevention and Education

Additional recommended student training topics (per prior OCR guidance):

- effects of trauma;
- the role alcohol and drugs often play in sexual violence incidents;
- strategies and skills for bystander intervention;
- how to report sexual violence to campus or local law enforcement;
- Title IX's protections against retaliation;
- encouraging students to report incidents of sexual violence;
- educating students about the persons on campus to whom they can confidentially report incidents of sexual violence.

When is a school obligated to respond to sex discrimination allegation?

General response to sexual harassment.

- A recipient with ***actual knowledge*** of ***sexual harassment*** in an ***education program or activity*** of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
  - A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
  - A recipient's response must treat complainants and respondents equitably.

When does a recipient have “actual knowledge”?

- Actual knowledge means 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 or to any employee of an elementary and secondary school.
  - This standard is not met when the only official recipient with actual knowledge is the respondent.
- Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Receipt of Notice of Sexual Harassment

The Title IX Coordinator and officials with authority to institute corrective measures on behalf of the recipient may receive notice through:

- an oral report of sexual harassment by a complainant or anyone else,
- a written report,
- through personal observation,
- through a newspaper article,
- through anonymous report, or
- through various other means.

The Department will not permit a recipient to ignore sexual harassment if the recipient has actual knowledge of such sexual harassment in its education program or activity against a person in the U.S., and such a recipient is required to respond to sexual harassment

Education Program or Activity

"**Education program or activity**" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- Every Title IX Coordinator, investigator, decision-maker, and person who facilitates an informal resolution process, must be trained on (among other things) "the scope of the recipient's education program or activity."
- Nothing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.
  - May offer supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions

Education Program or Activity

Scope of ”Education program or activity:”

A teacher’s sexual harassment of a student is likely to constitute sexual harassment “in the program” of the school even if the harassment occurs off campus.

Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

May include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.

Retaliation Prohibited

No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.

Except as otherwise noted in the regulations, the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness.

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Preservation of Evidence

Victims of sexual assault, domestic violence, or dating violence should consider seeking medical attention as soon as possible.

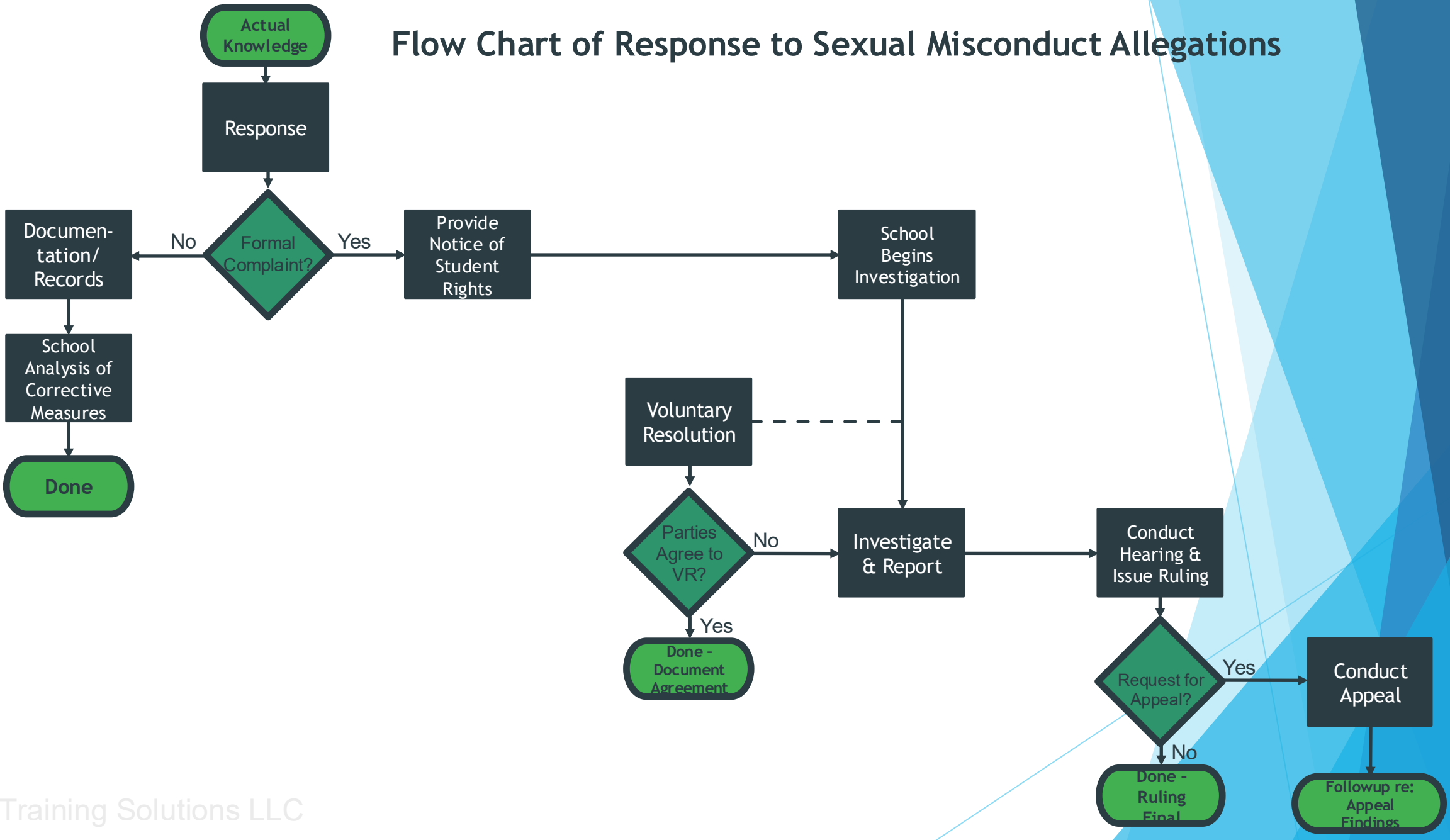
- It is important that the victim of sexual assault not bathe, douche, smoke, change clothing, or clean the bed/linen where hey were assaulted so that evidence necessary to prove criminal activity may be preserved.
- In circumstances where the victims do not opt for forensic evidence collection, health care providers can still treat injuries and take steps to address health concerns.
- Victims of sexual misconduct are encouraged to also preserve evidence by saving text messages, social networking pages, other communications, and keeping pictures, logs, or other copies of documents, if they have any, that would be useful in connection with a school or police investigation.

Coordination with Drug Free School Policy

Federal Guidance:

- Students may be reluctant to report instances of sexual misconduct because they fear being disciplined pursuant to the school's alcohol or drug policies.
- The school should encourage students to report all instances of sexual misconduct, taking into consideration the importance of reporting sexual misconduct in addressing violations of the School's alcohol and drug policies.
- This means that, whenever possible, the school should respond educationally rather than punitively to student alcohol or drug policy violations associated with reported sexual misconduct.

Flow Chart of Response to Sexual Misconduct Allegations



DL Training Solutions LLC

General response to sexual harassment.

Upon actual knowledge the Title IX Coordinator must promptly contact the complainant to discuss:

- the availability of supportive measures,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- explain to the complainant the process for filing a formal complaint.

Confidentiality

School's Title IX/VAWA policies should include policy on how the school will address requests for confidentiality. Policy could include:

- **Encouragement to Report:** Complainants of sexual harassment are urged to seek support and report incidents so school can respond appropriately.
- **Disclosure Options:** Policy outlines both reporting and confidential disclosure options to help complainants make informed choices.
- **Reporting to School Officials:** Designated school officials must report incidents to the Title IX Coordinator but will respect requests for confidentiality when possible. Officials inform victims about their obligations before disclosure.

Confidentiality (cont.)

- **Title IX Coordinator:** Information shared with the Title IX Coordinator is kept confidential and only shared with those managing the response. Victims are not pressured to file formal complaints or investigations.
- **Requesting Confidentiality:** School weighs confidentiality requests against its duty to maintain campus safety. If honored, investigations and disciplinary actions may be limited. If not honored, school informs and protects the complainant.
- **Supportive Measures:** School offers advocacy, academic support, counseling, security adjustments, and assistance regardless of the investigation outcome.
- **Broader Actions:** Reports (even non-identifying) may lead to campus-wide preventive measures, including increased security, training, surveys, and policy review.
- **Off-Campus Resources:** External counselors and advocates generally maintain confidentiality unless the victim authorizes disclosure.

Supportive Measures

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Supportive Measures

Supportive measures may include:

- counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work or housing locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus, and
- other similar measures

Supportive Measures

The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Options for Assistance Following an Incident

Immediate Assistance

- School should identify and provide contact information for the trained on- and off-campus advocates and counselors who can provide an immediate confidential response in a crisis situation
  - obtain needed resources
  - explain reporting options
  - and help navigate the reporting process
- Provide emergency numbers for on- and off- campus safety, law enforcement, and other first responders
- Identify health care options, both on- and off- campus

Ongoing Assistance

- Counseling, Advocacy, and Support – On and Off Campus

Partnering with Local Crisis Centers

- Schools can strengthen sexual prevention and response programs by developing partnerships with local rape crisis centers.
- These partnerships can be formalized through a Memorandum of Understanding (MOU) or other agreement between the parties.
- Rape crisis center services generally include:
  - 24-hour crisis intervention
  - medical and legal advocacy, and
  - counseling for survivors.
  - professional training about sexual violence,
  - community education,
  - develop prevention programming, and
  - Assistance in developing policies to address sexual violence.

Formal Complaint

If an investigation is an action the complainant desires, the complainant must file a ***written document*** requesting an investigation.

- Note: No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the recipient's response obligations

There is no time limit on a complainant's decision to file a formal complaint

- Note: 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.

Formal Complaint

When a Title IX Coordinator believes that with or without the complainant's desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator has the discretion to initiate a grievance process.

The grievance process can proceed without the complainant's participation; however, the complainant will still be treated as a party in such a grievance process.

- Department notes in Preamble to final regulations that a decision by the Title IX Coordinator to file a formal complaint should be reached thoughtfully and intentionally, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment.

Dismissal of a formal complaint

The recipient must dismiss a formal complaint if:

- the conduct alleged in the formal complaint would not constitute sexual harassment under Title IX even if proved,
- did not occur in the recipient's education program or activity, or
- did not occur against a person in the United States, then the recipient must dismiss the formal complaint;
- such a dismissal does not preclude action under another provision of the recipient's code of conduct.

The recipient may dismiss the formal complaint if:

- a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint;
- the respondent is no longer enrolled or employed by the recipient; or
- specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Recordkeeping

A recipient must maintain for a period of seven years records of:

- Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required, any disciplinary sanctions imposed on the respondent, and any remedies provided;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom; and
- All materials used to train Title IX Coordinators, et. al.
  - These materials used to train Title IX Coordinators must be publicly available on the recipient's website, or if the recipient does not maintain a website then upon request.

In response to receipt of actual knowledge of sexual harassment, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

Notice of allegations upon receipt of formal complaint.

(A) Notice of the recipient's grievance process.

(B) Notice of the allegations of sexual harassment, including:

- sufficient details with sufficient time to prepare a response before any initial interview.
- a statement that the respondent is presumed not responsible and that a determination regarding responsibility is made at the conclusion of the grievance process.
- Notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
- Notice must 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.

Basic requirements for grievance process.

(i) Treat complainants and respondents equitably;

(ii) Require an objective evaluation of all relevant evidence;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process, not have a conflict of interest or bias. Title IX Coordinators, et. al. must receive proper training;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process;

Basic requirements for grievance process.

(vi) Describe the range of possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State the standard of evidence to be used to determine responsibility (preponderance of the evidence or clear and convincing evidence);

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such prividege has waived the privilege.

Emergency Removal

Recipient may remove a respondent from the recipient's education program or activity on an emergency basis, provided that:

- the recipient undertakes an individualized safety and risk analysis,
- determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
- provides the respondent with notice and opportunity to challenge the decision immediately following the removal.

Administrative leave. Recipient may place a non-student employee respondent on administrative leave during the pendency of a grievance process.

Be Fair
Be Prompt
Be Impartial

Basic Fairness

John Doe v. Brandeis University, (U.S. DC Mass.), March 31, 2016

Case was brought by a student who was found guilty of violating the university's policies against sexual misconduct.

Brandeis University is a private university located in Massachusetts. In its ruling, the court noted that:

- Brandeis is not a governmental entity, or even a public university.
- It is not bound by the requirements of the Sixth Amendment.
- Its proceeding was not a criminal prosecution.
- It is not generally the role of the federal courts to tell a private university how to conduct its affairs.

Basic Fairness

Nonetheless, the Court found that Brandeis's authority to discipline its students is not entirely without limits.

- Although the relationship between the university and its students is essentially contractual, the university's disciplinary actions may also be reviewed by the courts to determine whether it provided "basic fairness" to the student.
- ***Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion.***

Basic Fairness

- In this case, the Court concluded that the accused student plausibly alleged that the school did not provide him with “basic fairness.”
- There is no one-size-fits-all answer to the question of what constitutes the “basic fairness” that a student is due.
- The answer may vary depending upon the competing interests at stake, include such factors as:
  - The magnitude of the alleged violation,
  - The likely sanctions and other consequences of a finding of guilt, and
  - The school’s experience and aptitude in resolving disputes of that nature.

Basic Fairness

There are two principal threads to the “fairness” inquiry:

- Procedural Fairness – whether the process used to adjudicate the matter was sufficient to provide the accused student a fair and reasonable opportunity to defend himself.
- Substantive Fairness – even if the procedure was fair, whether the decision was unduly arbitrary or irrational, or tainted by bias or other unfairness.

Procedural Fairness

In the Brandeis case, the Court found that the university failed to provide a variety of procedural protections to the accused student, many of which, in the criminal context, are the most basic and fundamental components of due process of law.

1. No Right to Notice of Charges
2. No Right to Counsel
3. No Right to Confront Accuser
4. No Right to Cross-Examine Witness
5. No Right to Examine Evidence or Witness Statements
6. Impairment of Right to Call Witnesses and Present Evidence
7. No Access to Special Examiner's Report
8. No Separation of Investigatory, Prosecution, and Adjudication Functions
9. No Right to Effective Appeal
10. Burden of Proof

Substantive Fairness

The court stated that one of the most basic components of fairness is an unbiased and neutral fact-finder.

- Accused students are entitled to have their cases decided on the merits – on the particular facts of the case, set in the proper context - and not according to the application of unfair generalizations or stereotypes or because of social or other pressures to reach a certain result.
- Here, however, the Court found that there was reason to believe that the university's Special Examiner decided the accused student's guilt to a substantial degree on unfair generalizations, stereotypes, or logical fallacies, and that the basic fairness of the proceeding was affected by that fact.

Investigation of a formal complaint.

When investigating a formal complaint and throughout the grievance process, a recipient must –

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice;

Investigation of a formal complaint.

When investigating a formal complaint and throughout the grievance process, a recipient must –

- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint; and
- Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report, for their review and written response.

The Neurobiology of Sexual Assault

- Victim often describes the attack multiple times in excruciating detail
  - usually 24-48-72 ours after attack
  - emotionally very difficult
- Story can come out very disorganized
- Reliving the assault described as “Secondary Victimization”
- PTSD is a gateway to physical health problems.

The Neurobiology of Sexual Assault

- Neurobiology of trauma will cause victims to have unstable emotions
  - Does not mean that the victim is lying
- Neurobiology of Memory
  - Difficult for victims to recall events of assault because of the way memory of the assault has been stored in the brain
  - When victim's story seems disjointed, it does not mean that the victim is lying
  - Rather, sign that the victim is having difficulty piecing things together based on how the event is stored in their memory

Victim Credibility Challenges

- Lack of Physical Resistance
- Delayed Reporting
- Inconsistent or Untrue Statements

Perpetrator Characteristics

No two sex offenders are exactly alike.

Recent high profile cases include:

- School teachers, coaches, & officials
- Clergy
- Community leaders
- Family members
- Popular entertainers

Offenders can be the same or different sex as the victim.

There is no “typical profile” of a perpetrator of sexual harassment.

Informal Resolution

At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient:

- Provides to the parties a written notice disclosing the allegations and the requirements of the informal requirements of the informal resolution process;
- Notifies parties that any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint;
- Obtains the parties' voluntary, written consent to the informal resolution process; and
- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Report Writing

Investigators should be aware that reports are used for more than mere documentation of incidents.

Reports may be used by:

- Respondent's attorneys to develop defense
- Police as part of investigation
- Prosecutor and others in criminal proceeding
- Evidence in civil trial
- State board, Accrediting Agency, and/or OCR in complaint proceeding
- Media

Investigation Report

Prior to issuing an investigation report, a recipient must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint

Recipient must create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report, for their review and written response.

Hearings

For postsecondary institutions, the recipient's grievance process must provide for a live hearing.

- At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- 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.
- 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

Only relevant cross-examination and other questions may be asked of a party or witness.

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- 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.

Relevant Evidence

The recipient's grievance process must provide for objective evaluation of all relevant evidence, including evidence that is inculpatory and exculpatory

- A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.
- However, there is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.

Relevant Evidence

The Title IX regulations deem certain evidence and information to be not relevant or otherwise precludes the recipient from using it:

- a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)];
- information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
- questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and,

Hearings

Only relevant cross-examination and other questions may be asked of a party or witness.

- 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.

Hearings

- Live 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.
- Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

Adjudication Procedures

Evidentiary Standard:

- The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.
- **Clear and convincing evidence** means that the party must present evidence that leaves one with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true.
- **Preponderance of the evidence** is a lower standard of proof, which means that a panel must find based on the evidence that the respondent is more likely than not to have violated school policy.

Adjudication Procedures

- The standard of proof in criminal proceedings is higher than the standard of proof used in campus disciplinary proceedings.
  - In criminal proceedings, there must be evidence that proves beyond a reasonable doubt that unlawful sexual activity took place.
  - In contrast, campus disciplinary proceedings may use either a preponderance of the evidence or clear and convincing evidence standard.

Determination regarding responsibility.

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.

The written determination must include –

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation; and
- The recipient's procedures and permissible bases for the complaint and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. The Title IX Coordinator is responsible for effective implementation of any remedies.

Sanctions & Other Remedies

- Sanctions should be:
  - Fair and appropriate given the facts of the particular case;
  - Consistent with the school's handling of similar cases;
  - Adequate to protect the safety of the campus community; and
  - Reflective of the seriousness of sexual misconduct.
- The sanctioning decision must be communicated in writing to both the complainant and the respondent.
- List of possible sanctions for a student determined to have violated the school's policies must be included in the school's policies.
- The school may also require any student determined to be responsible for a violation of its policy to receive appropriate education and/or training related to the sexual misconduct violation at issue. The school may also recommend counseling or other support services for the student.

Sanctions & Other Remedies

- Whatever the outcome of the hearing process, a complainant may request ongoing or additional accommodations and the Title IX Coordinator should determine whether such measures are appropriate.
- The school may also determine that additional measures are appropriate to respond to the effects of the incident on the school community. Additional responses for the benefit of the school community may include:
  - Increased monitoring, supervision, or security at locations or activities where the misconduct occurred
  - Additional training and educational materials for students and employees
  - Revision of the school's policies relating to sexual misconduct
- Climate surveys regarding sexual misconduct

Appeals

A recipient must offer both 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:

- Procedural irregularity that affected the outcome of the matter;
- 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
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias that affected the outcome.

Additional Resources:

- ED Campus Safety Resources
  www2.ed.gov/admins/lead/safety/campus.html

- Sex Discrimination: Overview of the Law
  www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law

- Sex Discrimination and Title IX FAQs
  www.ed.gov/laws-and-policy/civil-rights-laws/frequently-asked-questions-sex-discrimination

- Civil Rights Reading Room
  www.ed.gov/laws-and-policy/civil-rights-laws/office-civil-rights-ocr-reading-room

Issues Related to Vacated 2024 Title IX Rules

Pregnancy & Related Conditions

2024 Rule required schools to:

- Provide reasonable modifications for students
- Allow student a voluntary LOA for the medically necessary time and reinstatement upon return
- Ensure access to clean, private space for lactation
- Provide employees with reasonable break time for lactation and ensure they can access a clean and private lactation space

VACATED

BUT: Pregnancy & Related Conditions continue to be protected under ADA & Section 504

Transgender Students

Joint Dear Colleague Letter issued by DOJ & ED on 5/13/16

- Treated a student's gender identity as the student's sex for Title IX purposes
- School could not treat a transgender student differently from the way it treated other students of the same gender identity
- A school's failure to treat students consistent with their gender identity may have created or contributed to a hostile environment in violation of Title IX

JOINT DOJ & ED LETTER WITHDRAWN BY TRUMP ADMINISTRATION 2/17/17

EXECUTIVE ORDER 14021, 86 Fed. Reg. 13,803 (March 11, 2021)

[A]ll students should be guaranteed an educational environment free from discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.

Transgender Students

OCR Notice of Interpretation – Published in Federal Register June 22, 2021

In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. 644 (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex.

- It reached this conclusion in the context of Title VII of the Civil Rights Act, which prohibits sex discrimination in employment.

The Biden Administration interpreted Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity.

Sexual Orientation & Gender

2024 Rule prohibited separating or treating any person differently based on sex in a manner that subjects that person to more than de minimis harm (except in very limited circumstances)

2024 Rule stated that policies and practices that prevent a student from participating in a school's education program or activity consistent with their gender identity impose more than de minimis harm on that student on the basis of sex, and therefore generally violate Title IX's nondiscrimination mandate.

VACATED

In January 2025 Dear Colleague Letter the Department announced that it will return to enforcing Title IX protections on the basis of biological sex in schools and on campuses.



Thank You!

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Chris has over 30 years of experience providing legal, financial, and management services to owners and career school operators. In addition to being a licensed attorney, Chris is a Certified Public Accountant (inactive status). He spent nine years as in-house legal counsel and CFO for a multi-state cosmetology school group, overseeing Title IV compliance and accreditation. A frequent speaker on higher education issues, Chris served as the alternate negotiator representing for-profit schools at the U.S. Department of Education's negotiated rule making sessions regarding the borrower defense to repayment regulations.