

# Title IX & Clery Act Annual Training

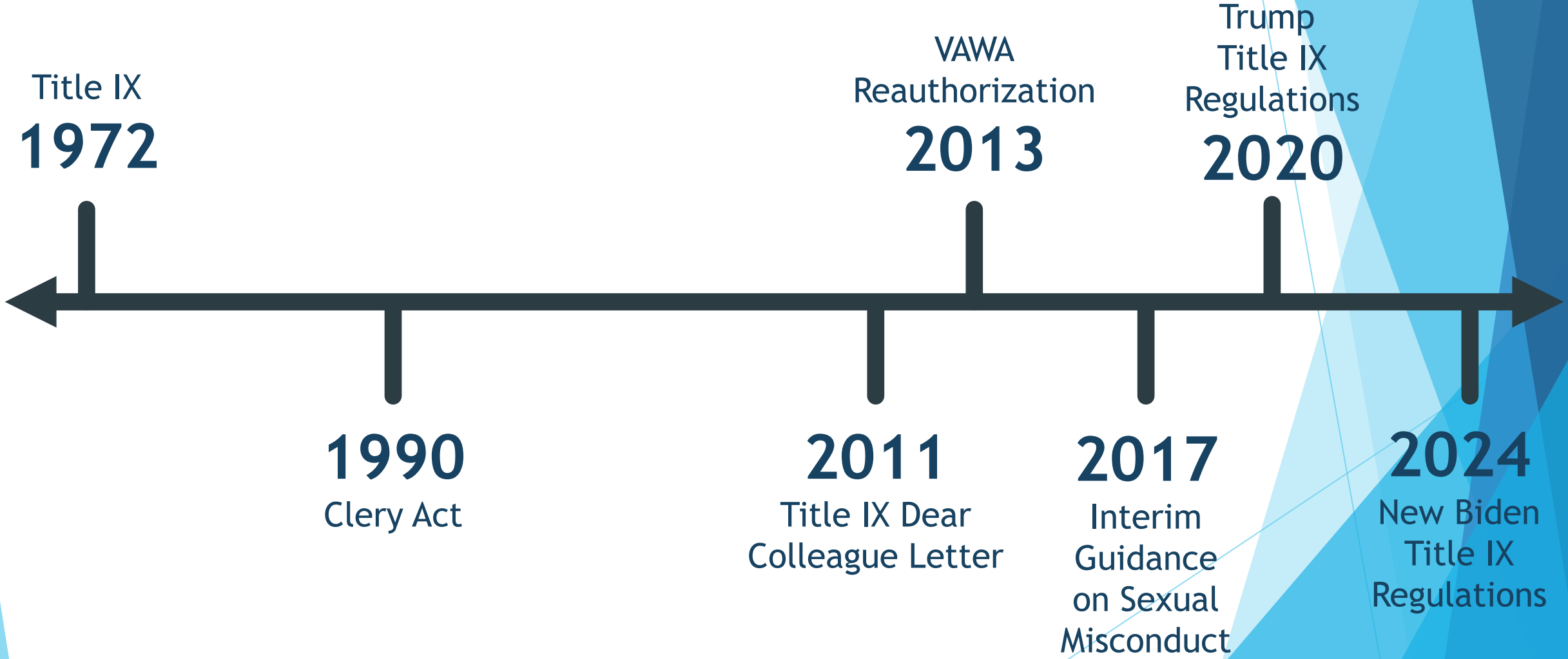
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**DL Training Solutions LLC**

July 11, 2024

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# Title IX - Clery Act 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 **fin**es of up to **\$69,733 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.

# 2001 OCR Title IX Guidance

Provides the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving federal financial assistance.

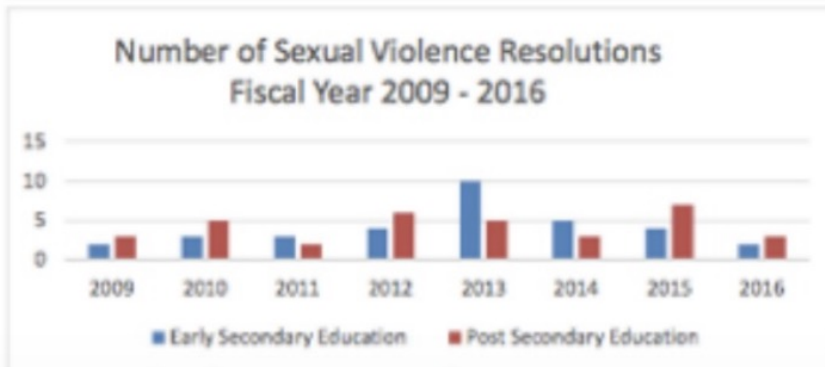
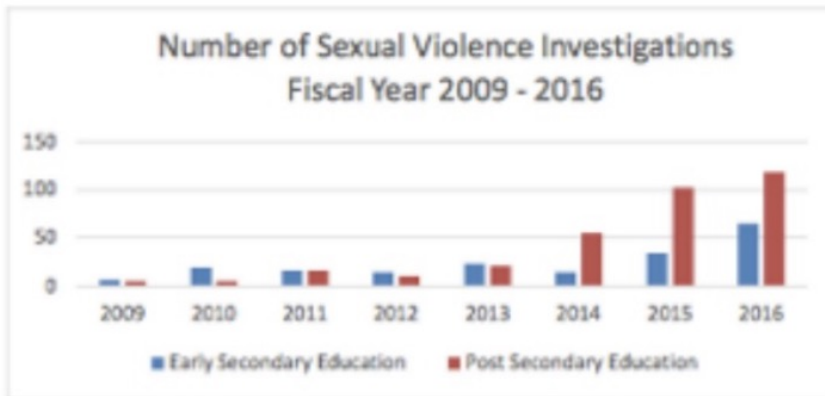
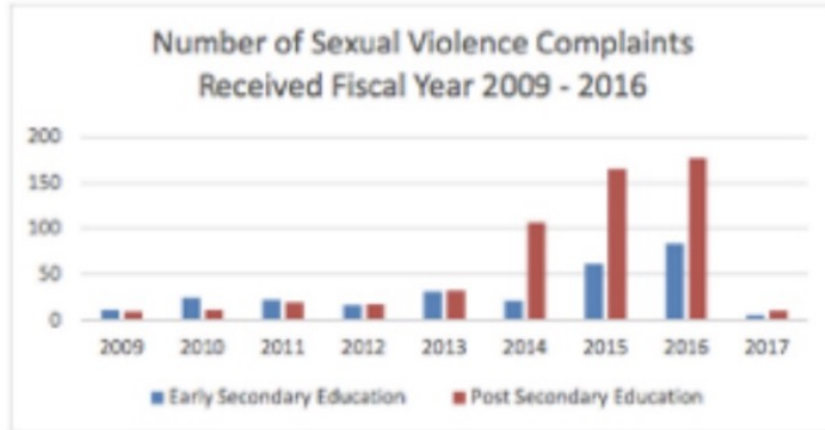
- ▶ Describes the regulatory basis for a school's compliance responsibilities under Title IX
- ▶ Outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations
- ▶ Provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur

# 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>)

# Challenges - Non-Traditional Higher 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.

# Challenges - Non-Traditional Higher 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 (including dating violence, domestic violence, sexual assault, or stalking under VAWA).
- ▶ 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.

# Challenges in Creating 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.”*

# General Response to Sexual Harassment (2017 Interim Rule)

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows *or reasonably should know* of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.

United States Department of Education, Office for Civil Rights, Q&A on  
Campus Sexual Misconduct, September 2017,  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>



# General Response to Sexual Harassment (2020 Rules)

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

# General Response to Sexual Harassment (2024 Rules)

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

# New Title IX Rule Released 4/19/24

- ▶ The unofficial version of the final regulations is available [here](#) (1,577 pages)
- ▶ In addition, the Department has released:
  - ▶ a [fact sheet](#),
  - ▶ a [summary](#) of the major provisions of the final regulations, and
  - ▶ a [resource](#) for drafting Title IX policies & procedures
- ▶ Official version published in the Federal Register on April 29, 2024
  - ▶ Official version available [here](#)

*Scheduled Effective Date 8/1/24*

# Legal Challenges to New Title IX Rules

- ▶ There are at least seven lawsuits involving 26 states seeking to block 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
- ▶ Most vocal challenges have been to new rules on sexual orientation and gender identity, but also challenging the definition of sex-based harassment and procedural safeguards for accused students.
- ▶ NOTE: Federal district courts have upheld legal challenges to 2020 Title IX regulations, with minor modification

# Legal Challenges to New Title IX Rules

- ▶ Preliminary injunctions have been issued in three separate cases covering 14 states
- ▶ ED Statement re: New Rules:

*As of July 2, 2024, the Department is currently enjoined by federal court orders from enforcing the 2024 Title IX regulations in the states of Alaska, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Tennessee, Utah, Virginia, West Virginia, and Wyoming, and the regulations and these resources therefore do not currently apply in those states.*

# Legal Challenges to New Title IX Rules

- ▶ While 26 states have challenged the new Title IX regulations, other states are supporting the new rules
- ▶ ED is appealing injunction rulings
  - ▶ Argue 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 on August 1<sup>st</sup>
- ▶ Where does this leave schools?
  - ▶ Will ED prevail on appeal?
  - ▶ Will we have two sets of rules in place on August 1<sup>st</sup>?
  - ▶ Will one of the courts issue a nationwide injunction?
  - ▶ Will ED voluntarily choose to defer effective date until court issues resolved?

# Clery Act Basics

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# Clery Act Requirements - The Basics

<b>Clery Act Requirements – The Basics</b>	
<ul style="list-style-type: none"><li>• Collect, classify, and count crime reports and statistics</li></ul>	
<ul style="list-style-type: none"><li>• Issue campus alerts and warning notices</li></ul>	<ul style="list-style-type: none"><li>• Publish an Annual Security Report (Due date: October 1)</li></ul>
<ul style="list-style-type: none"><li>• Disclose missing student notification procedures, when applicable</li></ul>	<ul style="list-style-type: none"><li>• Submit crime and fire statistics to the Department, when applicable</li></ul>
<ul style="list-style-type: none"><li>• Disclose procedures for institutional disciplinary actions</li></ul>	<ul style="list-style-type: none"><li>• Provide educational programs and campaigns</li></ul>
<ul style="list-style-type: none"><li>• Keep a daily crime log, when applicable</li></ul>	<ul style="list-style-type: none"><li>• Disclose fire safety information, when applicable</li></ul>

Clery Act Appendix for FSA Handbook, p. 1



# Clery Crimes

## Criminal Offense

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

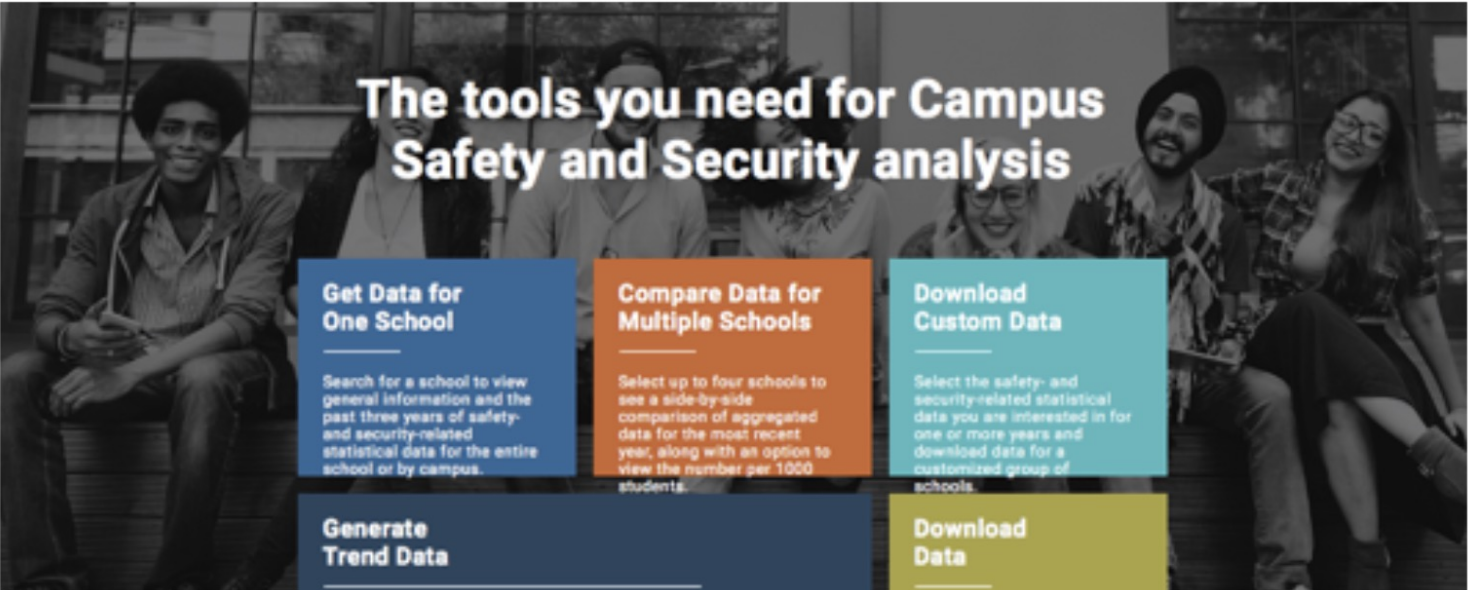
## VAWA Offenses

- ▶ Domestic Violence
- ▶ Dating Violence
- ▶ Stalking

## Arrests & Disciplinary Actions

- ▶ Weapons
- ▶ Drug abuse violations
- ▶ Liquor law violations

## Hate Crimes



## The tools you need for Campus Safety and Security analysis

### Get Data for One School

Search for a school to view general information and the past three years of safety- and security-related statistical data for the entire school or by campus.

### Compare Data for Multiple Schools

Select up to four schools to see a side-by-side comparison of aggregated data for the most recent year, along with an option to view the number per 1000 students.

### Download Custom Data

Select the safety- and security-related statistical data you are interested in for one or more years and download data for a customized group of schools.

### Generate Trend Data

Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as public or private, 2-year or 4-year, or state.

### Download Data

Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

## What is the Campus Safety and Security Data Analysis Cutting Tool?

The Campus Safety and Security Data Analysis Cutting Tool is brought to you by the Office of Postsecondary Education of the U.S. Department of Education. This analysis cutting tool was designed to provide rapid customized reports for public inquiries relating to campus crime and fire data. The data are drawn from the OPE Campus Safety and Security Statistics website database to which crime statistics and fire statistics (as of the 2010 data collection) are submitted annually, via a web-based data collection, by all postsecondary institutions that receive Title IV funding (i.e., those that participate in federal student aid programs). This data collection is required by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act.

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

# Clery Reporting

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# 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.



# 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

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# Common Elements of 2020 & 2024 Rules

## Definition of Sexual Harassment

### Definition of sex-based harassment includes:

- ▶ Quid Pro Quo harassment (*no change from 2020 Rules*)
- ▶ VAWA Offenses (*no change from 2020 Rules*)
  - ▶ Domestic Violence
  - ▶ Dating Violence
  - ▶ Sexual Assault
  - ▶ Stalking

# 2024 Title IX Rules - Definition of Sexual Harassment

- ▶ *Hostile environment harassment*
  - ▶ Hostile Environment: unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity

# 2024 Title IX Rules

## Hostile Environment

- ▶ Regulations apply to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. This includes:
  - ▶ Conduct that occurs in a building owned or controlled by approved student organization
  - ▶ Conduct subject to recipient's disciplinary authority

A recipient has an obligation to address a sex-based *hostile environment* under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

# 2024 Title IX Rules

## Hostile Environment

### Factors in considering whether a Hostile Environment exists:

- i. The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- ii. The type, frequency, and duration of the conduct;
- iii. The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- iv. The location of the conduct and the context in which the conduct occurred; and
- v. Other sex-based harassment in the recipient's education program or activity

# 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 Rules use the standard of "limits or denies"*



# 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

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# 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.

# 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.

# 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 final 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.

# 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.

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**

### 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.

# 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.

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# New Title IX Regulations (scheduled effective date August 1, 2024)

# Title IX Rule Released 4/19/24

## New Regulations Effective 8/1/24

- ▶ The unofficial version of the final regulations is available [here](#) (1,577 pages)
- ▶ In addition, the Department has released:
  - ▶ a [fact sheet](#),
  - ▶ a [summary](#) of the major provisions of the final regulations, and
  - ▶ a [resource](#) for drafting Title IX policies & procedures
- ▶ Official version published in the Federal Register on April 29, 2024
  - ▶ Official version available [here](#)

Title IX Coordinator

# Title IX Coordinator

Every postsecondary institution must designate a 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.



# Notice of Non-Discrimination

Institutions must provide Notice of Non-Discrimination to students, applicants, etc. Must include:

- a) Statement school does not discriminate on basis of sex and prohibits sex discrimination
- b) Statement that inquiries about Title IX can be made to Title IX Coordinator, OCR, or both
- c) Contact information for Title IX Coordinator
- d) How to locate nondiscrimination policy & grievance procedures
- e) How to report and make complaints of sex discrimination

Notice of non-discrimination must be included on school's website, handbook, catalog, announcement, bulletin, & application forms

# Title IX Training Requirements

- ▶ *All employees* must be trained on school's obligation to address sex discrimination and the scope of conduct that constitutes sex discrimination
- ▶ *Investigators, decisionmakers, etc.* must also be trained on school's grievance procedures, how serve impartially and w/o bias, and understanding meanings of "relevant" evidence and types of impermissible evidence
- ▶ *Facilitators of informal resolutions* must be trained on school's informal resolution process and how to serve impartially w/o bias
- ▶ *Title IX Coordinators* must be trained in understanding their responsibilities as Title IX coordinators, school's recordkeeping policies & obligations, and any other training necessary for their role

*All must receive training related to their responsibilities promptly upon hiring or change of position, and annually thereafter.*

# VAWA (Clery Act) Training 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)*

# VAWA 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

# VAWA 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)*

# VAWA 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;

# VAWA 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?



# Responding Under 2024 Title IX Rules

## Ensuring Schools Learn of Possible Sex Discrimination:

- ▶ Employees at a postsecondary institutions who either have authority to take corrective action on behalf of the school or have responsibility for administrative leadership, teaching, or advising are obligated to notify the Title IX Coordinator.
- ▶ *All others* are obligated to either notify the Title IX Coordinator or provide the contact information of the Title IX Coordinator and information about how to make a complaint
- ▶ Title IX Coordinator must monitor the school's program or activity for barriers to reporting and take steps reasonably calculated to address such barriers

# Responding Under 2020 Title IX Rules

- ▶ *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.

# 2020 Title IX Rules: 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.

# Title IX Coordinator Response to Sex Discrimination (2024 Rules)

- ▶ Treat the complainant and respondent equitably
- ▶ Offer and coordinate supportive measures, as appropriate, for the complainant.
- ▶ Notify the complainant, or if the complainant is unknown, the individual who reported the conduct, of the grievance procedures and the informal resolution process, if available and appropriate.
- ▶ If a complaint is made, notify the respondent of the grievance procedures and the informal resolution process (if applicable)
- ▶ In response to a complaint, initiate the school's grievance procedures or informal resolution process

# Title IX Coordinator Response to Sex Discrimination (2024 Rules)

- ▶ In the absence of a complaint or a withdrawal, make a fact-specific determination that, based on factors listed in the regulation, the Title IX Coordinator may/should initiate a complaint
- ▶ If the Title IX Coordinator initiates a complaint, notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others.
- ▶ Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps to ensure that sex discrimination does not continue, in addition to providing remedies to an individual complainant

# 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

- Must not unreasonably burden either party
- Recipient must provide complainant or respondent with timely opportunity to seek modification or reversal of any decision to provide, modify, or terminate supportive measures applicable to them
- Generally - must not disclose information about any supportive measures unless necessary to provide the supportive measures
  - If complainant or respondent is a student with a disability, Title IX Coordinator may consult with Section 504 Coordinator

# Supportive Measures

Supportive measures may include (but are not limited to):

- ▶ counseling,
- ▶ extensions of deadlines or other course-related adjustments,
- ▶ campus escort services,
- ▶ increased security and monitoring of certain areas of the campus,
- ▶ restrictions on contact applied to one or more parties,
- ▶ leaves of absence,
- ▶ changes in class, work, housing, or extracurricular or other activity, and
- ▶ training and education programs related to sex-based harassment

# 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.

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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.



# Things to Consider During Investigation & Adjudication

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# No Bias or Conflict of Interest

Regulatory safeguards in 2024 Rules intended to maintain integrity and protect against investigator or decisionmaker misconduct.

- ▶ § 106.45(b)(1) requires a recipient to treat complainants and respondents equitably;
- ▶ § 106.45(b)(3) requires the grievance procedures to, among other things, include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures;
- ▶ § 106.45(b)(5) requires a recipient to take reasonable steps to protect the privacy of the parties and witnesses during the grievance procedures (subject to certain;
- ▶ § 106.45(b)(6) requires an objective evaluation of all relevant and not otherwise impermissible evidence and provides that credibility determinations will not be based on a person's status as a complainant, respondent, or witness.
- ▶ Recipients are required to train investigators on how to serve impartially
- ▶ Recipients must offer an appeal process

# No Bias or Conflict of Interest

The Department recognizes that a Title IX Coordinator, investigator, or decisionmaker may sometimes have relationships with students, particularly at smaller institutions, which could create a conflict of interest or bias for or against an individual complainant or respondent.

- ▶ Schools must still ensure that the investigator or decisionmaker for any particular complaint be free of conflicts of interest or bias. A school has flexibility in how it ensures its personnel are unbiased, which could include:
  - ▶ restricting Title IX personnel from pursuing close relationships with students,
  - ▶ training more than one employee to perform Title IX roles so they can step in when conflicts of interest arise, or
  - ▶ hiring outside personnel when conflicts of interest arise

# 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 they 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.

# 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 imminent and serious threat to the physical health or safety of any student or other individual arising from the allegations of sex discrimination justifies removal, and
- ▶ provides the respondent with notice and opportunity to challenge the decision immediately following the removal.

Administrative leave: Recipient may place an employee on administrative leave during the pendency of a grievance process.

# Prohibited Disclosures of Personally Identifiable Information

A recipient must not disclose personally identifiable information obtained in the course of complying with Title IX except in the following circumstances:

- ▶ When the recipient has obtained prior written consent
- ▶ When the information is disclosed to a parent, guardian, or other authorized legal representative
- ▶ To carry out the purposes Title IX
- ▶ As required by Federal law, Federal regulations, or the terms and conditions of a Federal award; or
- ▶ To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA

# Informal Resolution

The final regulations permit a recipient to offer an informal resolution process if appropriate whenever it receives a complaint of sex discrimination or has information about conduct that reasonably may constitute sex discrimination.

- ▶ Participation in informal resolution must be voluntary.
- ▶ Informal resolution is not permitted in situations in which an employee allegedly engaged in sex-based harassment of an elementary school or secondary school student or if such a process would conflict with Federal, State, or local law



# 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.

# Cultural Awareness

When investigating sexual misconduct, be aware of particular issues that may face certain populations (i.e. age, culture, disabilities, gender, language) and how this might affect the way a person makes decisions and responds.

Examples of vulnerable populations include:

- ▶ Native Americans
- ▶ Immigrants, documented and undocumented
- ▶ Individuals in prostitution
- ▶ Individuals with disabilities
- ▶ individuals with substance addictions
- ▶ Individuals with limited English proficiency
- ▶ Individuals who have previously been sexually assaulted
- ▶ Lesbian, gay, bisexual, transgender individuals
- ▶ Minors
- ▶ Senior citizens

# Grievance Procedures (2024 Title IX Rules)

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# Grievance Procedures

## Grievance Procedures for All Sex Discrimination Complaints:

- ▶ General requirements:
  - ▶ Equitable treatment of complainants and respondents
  - ▶ Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias.
    - ▶ *a decisionmaker may be the same person as the Title IX Coordinator or investigator*
  - ▶ Presumption that respondent is not responsible for the alleged conduct until a final determination is made
  - ▶ Reasonably prompt timeframes for all major stages.
  - ▶ Reasonable steps to protect privacy of parties and witnesses
  - ▶ Objective evaluation of all relevant and not otherwise impermissible evidence
  - ▶ Exclusion of certain types of evidence (privileged, medical, past sexual history)

# Grievance Procedures

## Grievance Procedures for All Sex Discrimination Complaints:

- ▶ Notice of allegations to the parties
- ▶ Dismissals permitted in certain circumstances as long as the recipient offers an appeal and, as appropriate, supportive measures and remedial steps
- ▶ Consolidation permitted for complaints arising out of the same facts or circumstances
- ▶ *A process that enables the decisionmaker to question parties and witnesses to adequately assess credibility*
- ▶ Clear processes for the determination of whether sex discrimination occurred
- ▶ Use of preponderance of evidence standard, unless other standard used in comparable proceedings
- ▶ An appeal process
- ▶ Parties permitted to participate in an informal resolution process if school has one
- ▶ Describe range of possible supportive measures and disciplinary sanctions & remedies



# Title IX Coordinator Complainants

In the absence of a complaint or the withdrawal of a complaint, the Title IX Coordinator has the authority to initiate a complaint under the school's grievance procedures. To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:

- ▶ The complainant's request not to proceed with initiation of a complaint;
- ▶ The complainant's reasonable safety concerns regarding initiation of a complaint;
- ▶ The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
- ▶ The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
- ▶ The age and relationship of the parties, including whether the respondent is an employee of the recipient;
- ▶ The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
- ▶ The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
- ▶ Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures

# Title IX Coordinator Complaints

- ▶ If, after considering these and other relevant factors, the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint.
- ▶ If initiating a complaint, the Title IX Coordinator must notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others, including by providing supportive measures.
- ▶ Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

# Notice of Allegations

Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties. The notice must include:

- ▶ The recipient's grievance procedures and any informal resolution process;
- ▶ Sufficient information to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination, and the date(s) and location(s) of the alleged incident(s);
- ▶ A statement that retaliation is prohibited; and
- ▶ A statement that the parties are entitled to an equal opportunity to access evidence or an accurate description of this evidence
  - ▶ if the recipient provides a description of the evidence, the parties are entitled to an equal opportunity to access the evidence upon request.

# Dismissal of a Complaint

A recipient may dismiss a complaint of sex discrimination for any of the following reasons:

- ▶ The recipient is unable to identify the respondent after taking reasonable steps to do so;
- ▶ The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;
- ▶ The complainant voluntarily withdraws the complaint, the Title IX Coordinator declines to initiate a complaint, and the recipient determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven; or
- ▶ The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or this part.

# Consolidation of Complaints

- ▶ A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances.

# Grievance Procedures

## Investigation Requirements

- ▶ Burden on the recipient to gather evidence and decide what is relevant or impermissible
- ▶ Equal opportunity for the parties to present fact witnesses and other evidence.
- ▶ Equal opportunity for the parties to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence; a reasonable opportunity to respond; and a requirement that the recipient take reasonable steps to prevent and address unauthorized disclosures

# Grievance Procedures

## Additional Requirements for Grievance Procedures Involving Postsecondary Students:

- ▶ Written notice of allegations, dismissals, delays, meetings, and proceedings
- ▶ Equal opportunity to have an advisor of the party's choice at any meeting or proceeding
- ▶ Same opportunities, if any, to have persons other than the advisor present at any meeting or proceeding.
- ▶ Permitting, but not requiring, an institution to allow expert witnesses, as long as the determination applies equally to the parties
- ▶ Reasonable extension of timeframes on a case-by-case basis for good cause with written notice to the parties, including the reason for the delay

# Grievance Procedures

## Additional Requirements for Grievance Procedures Involving Postsecondary Students:

- ▶ Equal opportunity to access relevant and not otherwise impermissible evidence or a written report summarizing the evidence
- ▶ *A process enabling the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility when credibility is in dispute and relevant*
- ▶ *Permitting, but not requiring, a live hearing*
- ▶ Permitting a decisionmaker to weigh the credibility of a party or witness, including when party or witness refuses to respond
- ▶ Simultaneous written notice of determination to parties
- ▶ Appeal opportunity



# Relevant & Permissible Evidence

- ▶ Relevant evidence and relevant questions in grievance procedures must first be related to the allegations of sex discrimination under investigation as part of the grievance procedures
- ▶ Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.
- ▶ The evaluation of whether questions are relevant under the definition of “relevant” includes consideration of whether the question is both related to the allegations of sex discrimination under investigation and will aid in showing whether the alleged sex discrimination occurred
- ▶ Recipient must exclude questions or evidence that are not relevant

# Relevant & Permissible Evidence

The following types of evidence are impermissible, regardless of whether they are relevant:

- ▶ Evidence protected under a legal privilege, unless the person to whom the privileged is owed waives the privilege;
- ▶ Treatment records maintained by a physician, psychologist, or other recognized profession, unless written consent is provided for their use
- ▶ Evidence related to the complainant's sexual interests or prior sexual conduct, unless offered to prove someone other than the respondent committed the alleged conduct or is offered to prove consent

# Relevant & Permissible Evidence

- ▶ Recipient must provide the parties with an equal opportunity to access either the relevant and not otherwise impermissible evidence or the same written investigative report that accurately summarizes this evidence
- ▶ If the postsecondary institution provides access to an investigative report, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.

# Assessing Credibility & Due Process

- ▶ 2020 Regulations require live hearings with advisor-conducted cross-examination
- ▶ **New regulations provide greater flexibility and options for schools to consider:**
  - ▶ Single-investigator model with no live hearing
    - ▶ Still need process for evaluating credibility of witnesses and parties
  - ▶ Live hearing with questioning from decisionmaker
  - ▶ Live hearing with questioning by an advisor
  - ▶ Combination of different methods based on circumstances described in school's grievance procedures

# Assessing Credibility & Due Process

If a postsecondary institution chooses not to conduct a live hearing:

- ▶ Must allow the investigator or decisionmaker to ask questions during individual meetings with a party or witness;
- ▶ Must allow each party to propose questions that the party wants asked of any party or witness and have those questions asked by the decisionmaker or investigator during individual meetings, including follow-up meetings; and
- ▶ Must provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions

# Assessing Credibility & Due Process

If a postsecondary institution chooses to conduct a live hearing:

- ▶ Must allow the decisionmaker to ask questions during the live hearing
- ▶ Must allow each party to propose questions that the party wants asked of any party or witness and have those questions asked during the live hearing by the decisionmaker or allow an advisor for each party to ask questions of other parties and any witnesses during the live hearing
- ▶ Must allow the parties, on request, to participate from separate locations using technology and create an audio or audiovisual recording, or transcript of any live hearing and make it available to the parties

# Assessing Credibility & Due Process

Notwithstanding the flexibility provided in the new Title IX regulations, there are still some questions about whether the use of a single-investigator model satisfies Due Process.

United States Sixth Circuit Court of Appeals held that colleges and universities must allow for some form of live questioning in front of a neutral fact-finder. [Doe v. Baum, et al.](#), Case No. 17-2213 (6th Cir. Sept. 7, 2018)

- Court said that written statements cannot substitute for cross-examination
- Court also said that an accused student does not have the right to personally confront their accuser or other witnesses (Advisor conducted questioning OK)

USDOE maintains that 2024 Title IX rules are consistent with Due Process requirements

- ▶ However, Baum decision calls into question the single-investigator model, at least for public schools in the Sixth Circuit (Michigan, Ohio, Kentucky, & Tennessee)
- ▶ Single-investigator model challenged in pending lawsuits
- ▶ Unclear whether a live hearing with questions from decisionmaker (rather than party advisors) would satisfy Due Process under Baum

# Adjudication Procedures

## Evidentiary Standard:

- ▶ In evaluating the parties' evidence, a school must use the preponderance of the evidence standard of proof unless the school uses the clear and convincing evidence standard in all other comparable proceedings.
  - ▶ **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 will use a preponderance of the evidence (unless the clear and convincing evidence standard is used in other comparable proceedings).

# 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

# Written Determination

The postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties simultaneously. The written determination must include:

- i. A description of the alleged sex-based harassment;
- ii. Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;
- iii. The decisionmaker's evaluation of the evidence and determination whether sex-based harassment occurred;
- iv. When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions the postsecondary institution will impose on the respondent and whether other remedies will be provided to the complainant and any other affected students; and
- v. The postsecondary institution's appeal procedures

# 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 whether sex-based harassment occurred, and from a recipient's dismissal of a complaint or any allegations therein, on the following bases:

- ▶ Procedural irregularity that affected the outcome;
- ▶ New evidence that would change the outcome and that was not reasonably available at the time the determination was made; and
- ▶ The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias that would change the outcome.

# Key Grievance Procedure Differences From 2020 Title IX Rules

- ▶ Complainant must file a formal written complaint if the complainant wants the school to conduct an investigation
- ▶ Investigation separate from adjudication process
  - ▶ Parties must receive written investigation report at least 10 days prior to live hearing
- ▶ Requires a live-hearing for postsecondary institutions
  - ▶ Cannot use a single-investigator model
  - ▶ Decisionmaker must be someone other than Title IX Coordinator and investigator
    - ▶ Title IX Coordinator allowed to be the investigator under 2020 Rules
  - ▶ Live cross-examination required
    - ▶ Party advisors conduct cross-examination
    - ▶ Parties not allowed to personally cross-examine each other

# Recordkeeping Requirements

Institutions must retain records for seven years:

- ▶ Documentation of each complaint
- ▶ Documentation of actions school took to respond to notices of sex discrimination
- ▶ Title IX training materials
  - ▶ Must be made available upon request
  - ▶ NOTE: 2020 Title IX Rules require schools to post their Title IX training materials on their websites



# Retaliation Prohibited

- ▶ **Retaliation** is defined as intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or the regulations, or because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated or refused to participate in any way in a recipient's Title IX process.
- ▶ **Peer retaliation**, which is defined as retaliation by one student against another student, is also prohibited

*2020 Rule prohibited retaliation but did not define it.*

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# Other Changes Under 2024 Title IX Rules

# Pregnancy & Related Conditions

## Schools must:

- ▶ 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
- ▶ Must also provide employees with reasonable break time for lactation and ensure they can access a clean and private lactation space

# 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 Department issued this Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity.

# Sexual Orientation & Gender

Final regulations prohibit 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)

Final regulations clarify 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.

# State Policies

State legislatures have also addressed the issues of sexual misconduct on college campuses, including:

- ▶ Affirmative Consent
- ▶ Transcript Notations
- ▶ Mandatory Reporting
- ▶ Access to Medical Attention
- ▶ Memorandums of Understanding (MOU)
- ▶ Climate Surveys
- ▶ Good Samaritan Provisions

*To the extent of a conflict between State or local law and Title IX, the obligation to comply with Title IX takes priority*

# New Title IX Rules

## Scheduled Effective Date: August 1, 2024

- ▶ Legislation introduced under the Congressional Review Act to overturn the new Title IX Rules
  - ▶ Realistically - unlikely to get signed into law even if it passes both houses
- ▶ At least 26 states suing the federal government over the final rules
  - ▶ USDOE has warned schools that they must comply with Title IX regulations as a condition of receiving federal funds
  - ▶ Federal District Courts covering 14 states have already issued injunctions
- ▶ The Supreme Court's decision to overturn the Chevron doctrine could change everything



# New Title IX Rules

## Scheduled Effective Date: August 1, 2024

### Things to Consider:

- ▶ Review Non-Discrimination Policy
- ▶ Update Notice of Non-Discrimination
  - ▶ Publication in catalog, website, applications, etc.
- ▶ Training
  - ▶ All need some, some need more
- ▶ Update Grievance Policies & Procedures
  - ▶ Consider VAWA overlap



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