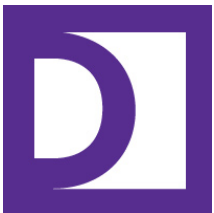


Implementing Title IX, Clery & the VAWA Regulations

Private Career Colleges & Schools
Regions I, II & III

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Timeline

- 1972 – Title IX
- 1990 – Clery Act
- 2011 – Title IX Dear Colleague Letter
- 2013 – Violence Against Women Act Reauthorization
- 2017 – New Interim Guidance on Campus Sexual Misconduct



Title IX of the Education Amendments of 1972

Prohibits sex discrimination in education programs that receive federal funding.

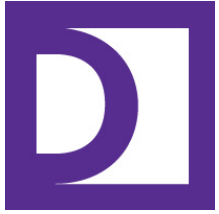
- Sexual harassment, including sexual assault, is a type of sex discrimination that is banned by Title IX.
- Sexual harassment creates a hostile environment when it is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from an education program.



General Clery Act Requirements:

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 \$54,789 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 Title IX Dear Colleague Letter

If a school knows, **or reasonably should know**, about sexual harassment, including sexual assault, that creates a hostile environment, Title IX requires that the school take immediate action to:

- eliminate the harassment,
- prevent its recurrence, and
- address its effects.

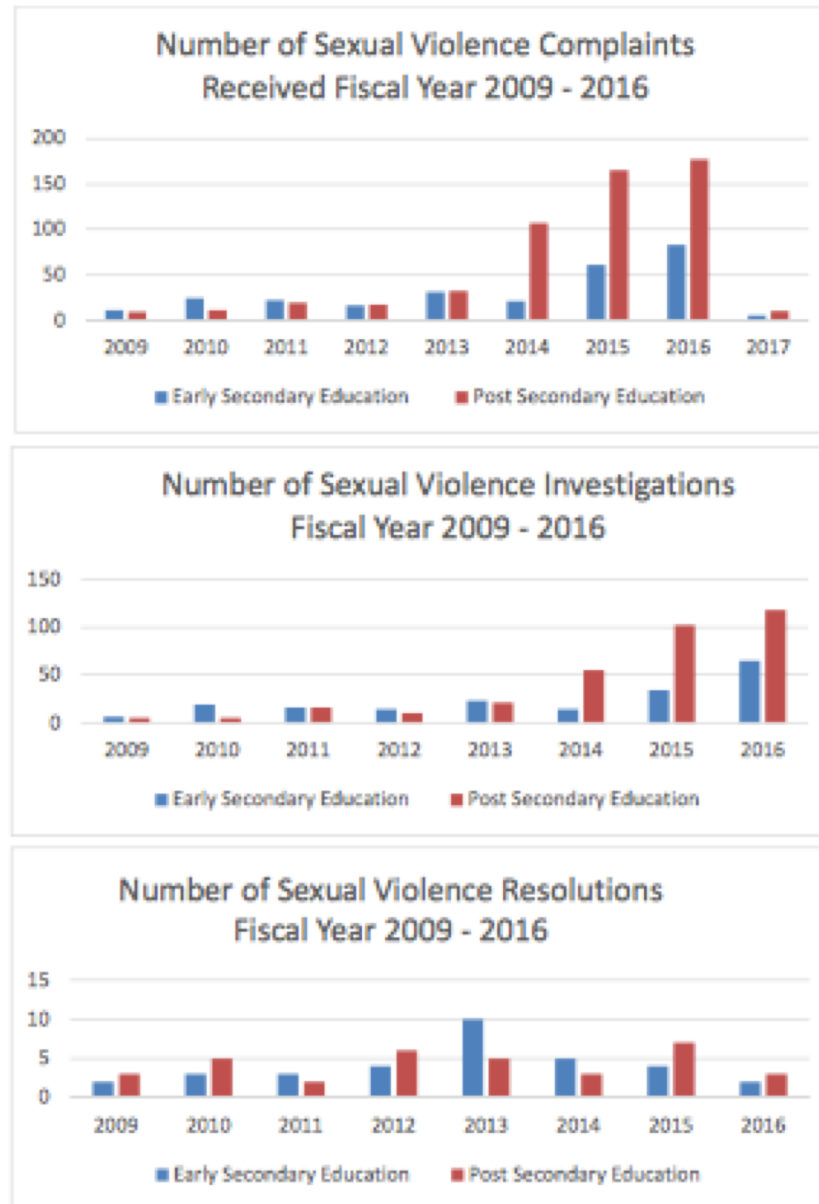
This guidance rescinded September 2017



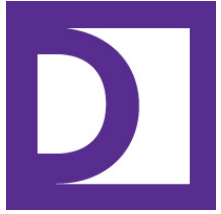
Appendix D: Number of Title IX Complaints, Investigations, and Resolutions 2009-2016

Source: Department of Education, Office for Civil Rights

7



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



Title
IX



Clery
Act



Violence Against Women Reauthorization Act (20 U.S.C. 1092)

Amended the Clery Act to require schools to compile statistics for incidents of

- domestic violence,
- dating violence,
- sexual assault; and
- stalking

(collectively referred to as "sexual misconduct") that occur on or near campus.



Violence Against Women Reauthorization Act (20 U.S.C. 1092)

Each Title IV institution shall develop and distribute a statement of policy regarding :

- i. educational programs to promote awareness of sexual misconduct issues;***
- ii. Possible sanctions for violating policy;***
- iii. Procedures to report allegations of sexual misconduct;***
- iv. Procedures for institutional disciplinary proceedings;***
- v. Confidentiality policy;***
- vi. Notification of available support services;***
- vii. Accommodations available to victims.***



Training for School Officials

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 safety of victims and promotes accountability”

20 USC 1092(f)(8)(iv)(I)(bb)



Prevention and Education

- An institution's annual security report must 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



Notice of Student's Rights

When a student or employee reports to the institution that the student or employee has been a victim of sexual misconduct, whether the offense occurred on or off campus, the institution must provide the student or employee a written explanation of the student's or employee's rights and options.

What does this mean?

- State that you will provide victims of dating violence, domestic violence, sexual assault or stalking with written documentation of their rights and options.
- This documentation must be a prepared, standardized and written set of materials including detailed information regarding victims' rights and options. This does not mean that you hand the student a copy of the annual security report or the policy statements contained in the annual security report.



September 2017 Interim Guidance

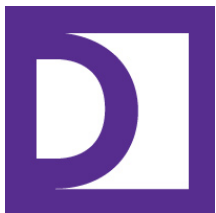
- Withdrew the Dear Colleague Letter on Sexual Violence dated April 4, 2011, and the Questions and Answers on Title IX Sexual Violence dated April 29, 2014
- Statements from Secretary DeVos:
 - "This interim guidance will help schools as they work to combat sexual misconduct and will treat all students fairly."
 - "Schools must continue to confront these horrific crimes and behaviors head-on. There will be no more sweeping them under the rug. But the process also must be fair and impartial, giving everyone more confidence in its outcomes."



FAQs on Updated Campus Sexual Misconduct Guidance

What are a school's obligations under Title IX regarding sexual misconduct?

- Schools must address sexual misconduct that is severe, persistent or pervasive.
- Schools must conduct a fair and impartial investigation in a timely manner.
- Title IX investigations must be led by a person free of actual or reasonably perceived conflicts of interest and biases.
- Schools must designate a Title IX Coordinator.



FAQs on Updated Campus Sexual Misconduct Guidance

Do schools have flexibility to establish fair procedures?

- Schools have the discretion to apply either the preponderance of the evidence standard or the clear and convincing evidence standard.
- Schools are not required to allow appeals; however, a school may choose to allow appeals solely by the responding party or by both parties.
- Schools may permit an informal resolution, such as mediation, if it is appropriate and if all parties voluntarily agree.
- Schools should provide written notice to the responding party of the allegations, including sufficient details and with adequate time to prepare a response before any initial interview.
- OCR recommends schools provide concurrent, written notice of the outcome of disciplinary proceedings to the reporting and responding parties.



What is the Nature of a School's Responsibility to Address Sexual Misconduct?

CURRENT GUIDANCE: 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>



Is a school required to process complaints of alleged sexual violence that occurred off campus?

- A school does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.
- BUT: Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.

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>



Which school employees are obligated to report incidents of possible sexual violence to school officials?

- Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school.
- A responsible employee must generally report all incidents of sexual violence to the Title IX coordinator or other appropriate school designee.
 - This is because a school is obligated to address sexual violence about which a responsible employee knew or should have known.

The Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office.



Who is a “responsible employee”?

- **When a responsible employee knows or reasonably should know of possible sexual violence, the Office for Civil Rights deems a school to have notice of the sexual violence.**
- A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees



Who is a “responsible employee”?

Guidance from Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, April 29, 2014, rescinded in September 2017:

- A responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; **or whom a student could reasonably believe has this authority or duty.**
- Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures.
 - For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.



Responsible Employees & CSAs

- Substantial cross-over between Responsible Employees for Title IX purposes and Campus Security Authorities (CSA) for Clery reporting purposes.
- CSA defined as a campus police department or campus security department of an institution as well as **any individuals who have significant responsibility for student and campus activities including but not limited to athletics, student housing, student conduct, and programming offices.** 34 C.F.R. § 668.46(a).
- CSA can be a campus law enforcement unit and any official of an institution who has significant responsibility for student and campus activities, including but not limited to student housing, student conduct, athletics, Greek affairs, etc.



CSA – Penn State Program Review

U.S. Department of Education published Pennsylvania State University Final Program Review Determination Letter on November 3, 2016.

- Among the many findings, the Department found that the University failed to establish a systematic process for collection of Clery-reportable crime data from all required CSAs, which led to a failure to include all Clery-reportable crime data in the University's crime statistics for the period of 2007 to 2011.
- Penn State admitted that, prior to the Department's investigation, responsible officials had identified no more than a couple hundred individuals or positions that met the definition of a CSA.
 - As of the publication of the FPR Determination Letter, the University's most recent reported CSA tally stood at 4,024.
- Department found that Penn State failed to identify CSAs and put them on notice about the reporting obligations that CSA status confers upon them.



Penn State Clery Program Review

As part of its Clery program review, the Department cited numerous failures in Penn State's administrative capabilities, including that the University:

- Failed to properly record and compile accurate crime statistics for the Annual Security Report (ASR);
- Failed to provided adequate compliance training to campus police;
- Failed to properly identify and train CSAs;
- Failed to develop and implement required crime reporting and security policies and procedures and include them in the ASR;
- Failed to provide vital and timely security information to the campus community and the Department;
- Failed to exercise sufficient oversight, governance or coordination of University officials and departments responsible for the *Clery Act*; and,
- Failed to develop and implement a compliant drug and alcohol abuse prevention program.

Penn State assessed Clery fine of **\$2,397,500**



Policies & Procedures: 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 concludes 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 what of 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 Witnesses
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.



Additional Title IX Developments



Transgender Students

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

- The Departments treat a student's gender identity as the student's sex for Title IX purposes
- School must not treat a transgender student differently from the way it treats other students of the same gender identity
- A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX

WITHDRAWN BY TRUMP ADMINISTRATION 02/17/17

FEBRUARY 2018 – ED states that it is no longer investigating civil rights complaints from transgender students banned from using bathrooms conforming with their gender identity



New Proprietary School Audit Guide

Effective for fiscal years beginning after June 30, 2016

- Inspect annual security report for each campus, and ascertain if each report contains all required crime statistics and policy statements;
- Review emergency response and evacuation procedures;
- Determine whether the school's policies on programs to prevent dating violence, domestic violence, sexual assault, and stalking are compliant;
- Determine whether the school's procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking are compliant;
- Verify the compilation of crime statistics and fire safety information to source documents;
- Confirm publication and distribution of the annual security report; and
- Confirm school submitted the crime statistics to ED via the web.



Plans for Additional Guidance

The Trump administration has said it plans to issue new Title IX rules after going through a formal notice-and-comment period.

- Any new Title IX guidance will need to conform to the VAWA requirements related to sexual misconduct.



Resources for School Officials

The U.S. Department of Education published an updated ***Handbook for Campus Safety and Security Reporting, 2016 Edition***, in June, 2016.

U.S. Department of Justice, Office on Violence Against Women

- Campus Climate Surveys
- Sexual Misconduct Policies: Sample Language for Colleges & Universities
- Prevention Resources
- Other Resources

www.justice.gov/ovw/protecting-students-sexual-assault#campus

The Center for Changing Our Campus Culture

- Comprehensive online resource clearinghouse created to provide important resources for colleges and universities on sexual assault, domestic violence, dating violence, and stalking.

www.changingourcampus.org



QUESTIONS?



Thank You!

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