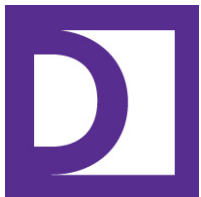


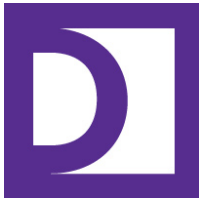
# Title IX & Clery Act Annual Training

REGIONS PCCS  
Dallas, TX

Sunday, June 9, 2019

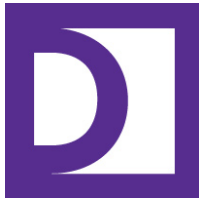


**DeLuca Law LLC /  
Rouse Frets White  
Goss Gentile  
Rhodes, P.C.**



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# Title IX - Clery Background: How did we get here?



# Timeline

- 1972 – Title IX
- 1990 – Clery Act
- 2001- OCR's Title IX Guidance
- 2011 – Title IX Dear Colleague Letter
- 2013 – Violence Against Women Act Reauthorization
- 2017 – New Interim Guidance on Campus Sexual Misconduct
- 2018 – Proposed Title IX Regulations



# 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.



# Clery Act:

## Every institution must:

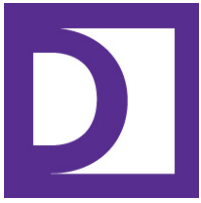
- **Collect, classify and count crime reports and crime statistics.**
- Issue a **timely warning** for any *Clery Act* crime that represents an ongoing threat to the safety of students or employees;
- Issue an **emergency notification** upon the confirmation of a significant emergency or dangerous situation 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.



# 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 Secretary DeVos in September 2017





Title  
IX



Clery  
Act

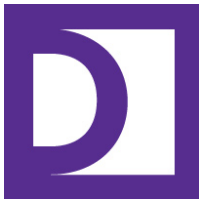


# Violence Against Women Reauthorization Act (2013)

Amended the Clery Act to require that schools 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 (2013)

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

- The school's **educational programs** to promote awareness of sexual misconduct;
- Possible **sanctions** school 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;



# Violence Against Women Reauthorization Act (2013)

School's Annual Security Report must also include:

- Information about how the school will protect **confidentiality** of a victim;
- Written notification to students and employees about **counseling, health, victim advocacy, legal assistance** and other services available for victims;
- Written notification to victims about available **accommodations** to academic and living arrangements if requested by the victim.



# VAWA Challenges - Non-Traditional Schools

The VAWA requirements present particular challenges to non-traditional 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.



# VAWA Challenges – Non-Traditional Schools

During the proposed regulations' public comment period, a number of commenters noted the significant compliance burden that the regulations place on small institutions.

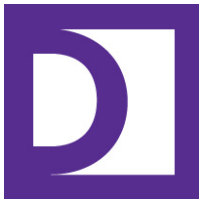
- For example, the commenters referenced the requirement for institutional disciplinary proceedings in the case of alleged dating violence, domestic violence, sexual assault or stalking.
- In response, the Department noted that institutions are not making determinations of criminal responsibility but 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.



## 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 December 5, 2017, <https://www.justice.gov/ovw/page/file/905942/download>

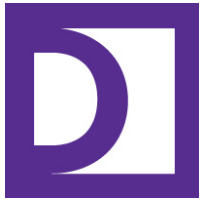


# BJS 2016 Campus Climate Survey

- The Bureau of Justice Statistics developed a pilot campus climate survey to address key Task Force goals and key 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/ccsvsfr.pdf>)



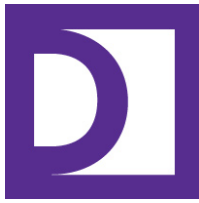


**The Second Report of the White House Task Force  
to Protect Students from Sexual Assault**

January 5, 2017



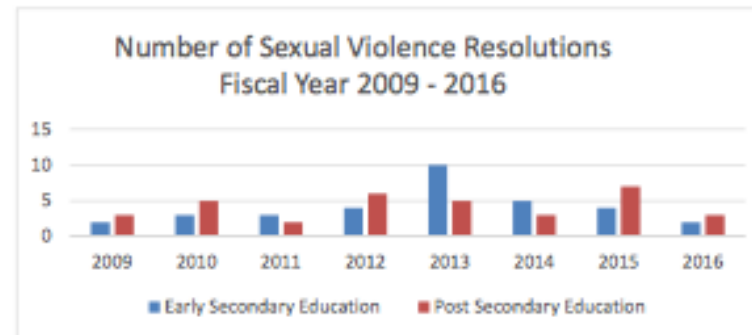
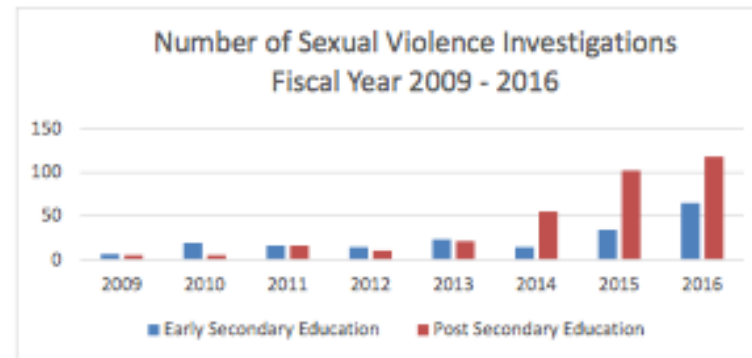
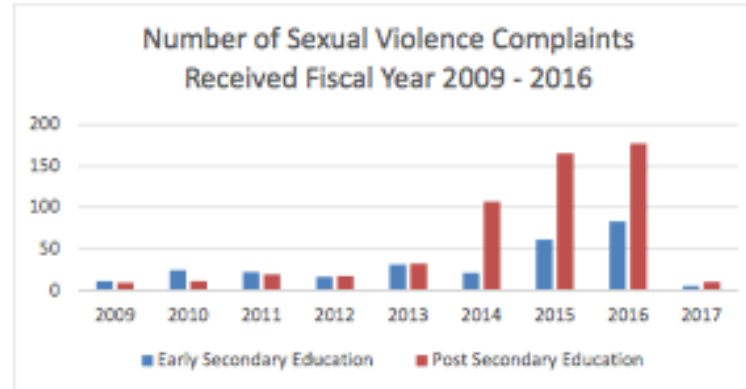
<https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF>



## Appendix D: Number of Title IX Complaints, Investigations, and Resolutions

2009-2016

Source: Department of Education, Office for Civil Rights



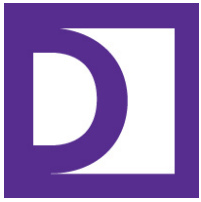
“The Second Report of the White House Task Force to Protect Students from Sexual Assault,” January 5, 2017, (retrieved from <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF>) [retrieved January 18, 2017]



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

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>

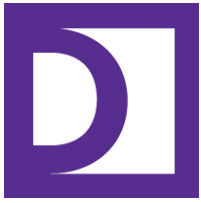


# 2018 Proposed Title IX Regulations

As stated in the Preamble:

*The proposed regulations are intended to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment.*

- Published in the Federal Register on November 29, 2018
- 60-day public comment period ended January 28, 2018
  - Extended two days to January 30, 2019
  - Added one single day in February



# Resources for School Officials

## **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](http://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](http://www.changingourcampus.org)



# Policy Checklist

- White House Task Force created checklist for sexual misconduct policies to highlight elements that are particularly important for institutions to consider when drafting sexual misconduct policies as part of their overall response to sexual misconduct.
- Schools cautioned not to adopt checklist without first engaging in a comprehensive drafting process that considers the unique aspects of the institution and its student body.
- Items in the checklist intended to be guidelines, neither exhaustive nor exclusive, to help a school cover the important bases

**<https://www.justice.gov/ovw/page/file/910271/download>**



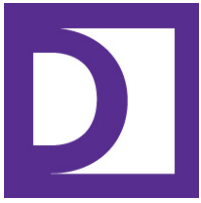
# Transgender Students

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

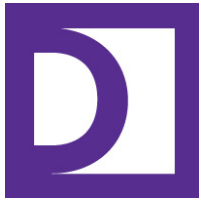


# State Policies

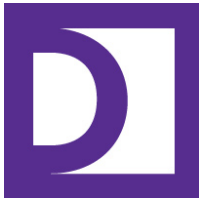
- The American Association of State Colleges and Universities published a report in December, 2015 regarding state law activity regarding campus sexual assault.
- According to the report, 26 states considered legislation related to campus sexual assault in 2015.
- Issues being addressed by state legislatures include:
  - Affirmative Consent
  - Transcript Notations
  - Mandatory Reporting
  - Access to Medical Attention
  - Memorandums of Understanding (MOU)
  - Climate Surveys
  - God Samaritan Provisions

Lebioda, Kati. (2015) State Policy Proposals to Combat Campus Sexual Assault, accessed January 20, 2016, <https://www.aascu.org/policy/publications/policy-matters/campussexualassault.pdf>



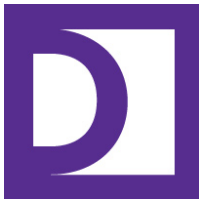


# Title IX Coordinator



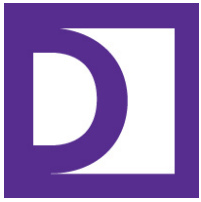
## Dear Colleague Letter April 24, 2015

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



# Title IX Coordinator

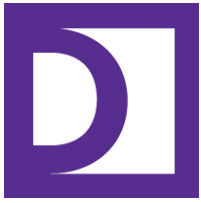
- Title IX does not categorically exclude particular employees from serving as Title IX coordinators.
  - However, when designating a Title IX coordinator, an institution should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest.
- A dedicated, 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 the qualifications, training, authority, and time to address all complaints raising 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 Title IX-related prohibited conduct and related retaliation.
- Ensures effective implementation of school's sexual misconduct policies and procedures.
- Oversees training, prevention, and education efforts and annual reviews of climate and culture.



## Title IX Coordinator Responsibilities

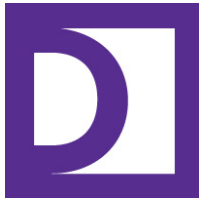
- Overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints.
- Must be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office.
- The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.



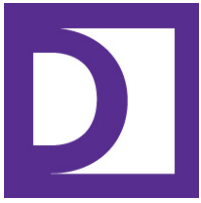
## Title IX Coordinator Responsibilities

School may decide to give its Title IX coordinator additional responsibilities, such as:

- providing training to students, faculty, and staff on Title IX issues;
- conducting Title IX investigations and determining appropriate sanctions against the perpetrator and remedies for the complainant;
- determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence;
- Ensuring appropriate policies and procedures for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers;



# Training & Education



# The Law:

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



# Primary Prevention Programs

- Defined in regulations as programming, initiatives, and strategies that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through:
  - the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality,
  - encourage safe bystander intervention, and
  - seek to change behavior and social norms in healthy and safe directions.

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



# Prevention and Education

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

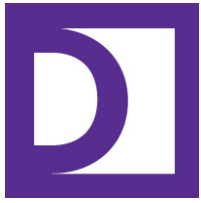
- Title IX and what constitutes sexual violence under the school's policies;
- school's definition of consent, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting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



# Prevention and Education

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

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



# Clery Reporting



# Reporting Clery Crimes

- The U.S. Department of Education published an updated ***Handbook for Campus Safety and Security Reporting, 2016 Edition***, in June, 2016.
- This report is available on the Department's website at <http://www.ed.gov/admins/lead/safety/campus.html>.



## 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.

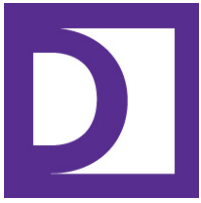
### Download Data

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 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.





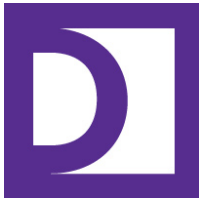
# Clery Geography: On-Campus

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 other retail vendor).*

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

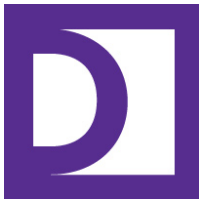
- Your institution owns or controls them;
- They are reasonably contiguous to one another; and
- They directly support or relate to the institution's educational purposes.



# 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.

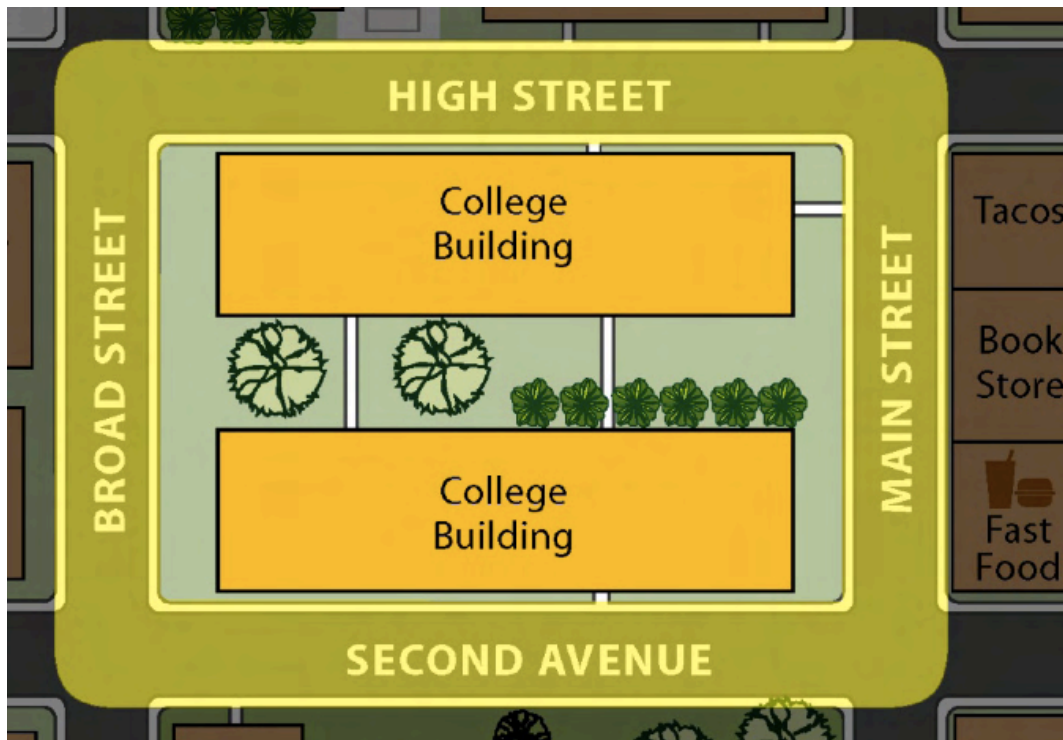


# Clery Geography: Public Property

- *All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.*
- Public property refers to property owned by a public entity, such as a city or state government.
  - An example of public property is a parking lot with a sign that reads, “City of Rockville Public Parking.”
  - A parking lot with a sign that reads, “Joe’s 24-Hour Parking” is not public property despite the fact that the public can park there.
- Clery geography includes public property that immediately borders *and* is accessible from the campus.
  - In many cases this property consists of a public sidewalk that borders the campus, the public street along the sidewalk and the public sidewalk on the other side of the street (i.e., sidewalk, street, sidewalk).
  - Only the portions of the sidewalk, street and sidewalk that are adjacent to your campus are included in your public property.



# Clery geography

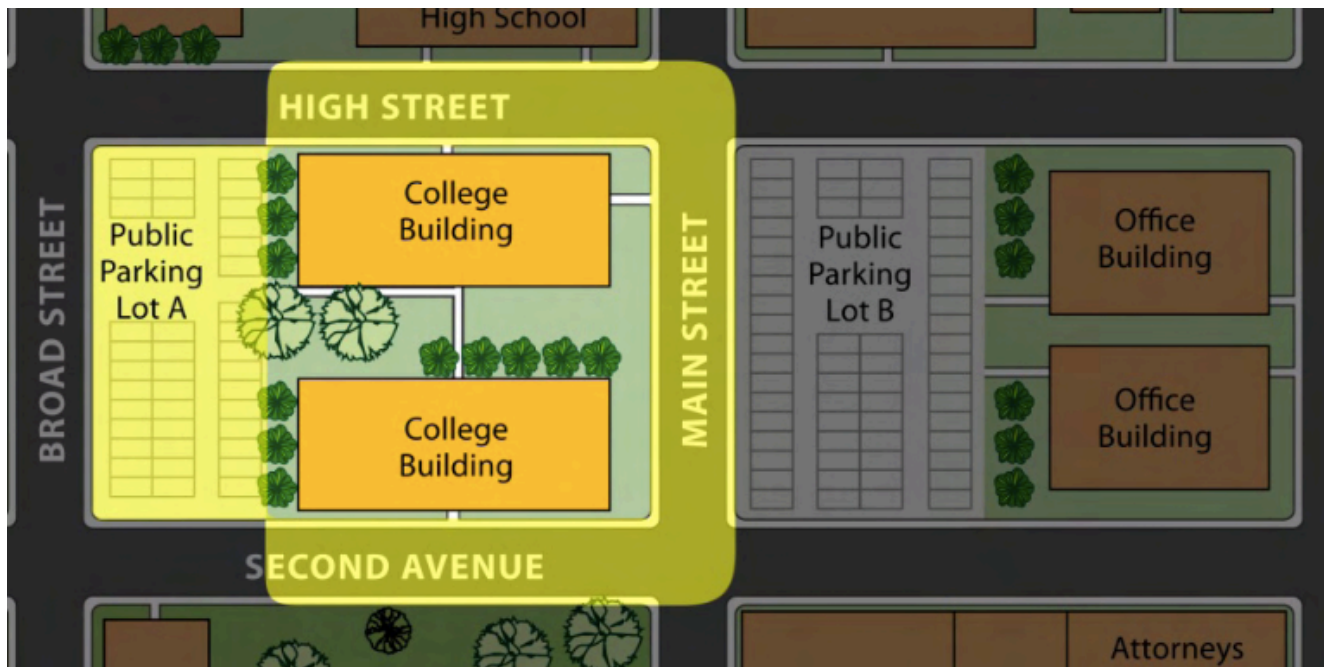


**Example of public property: sidewalk, street, sidewalk.** *In this illustration, the college's public property consists of the public sidewalk, street, and opposite sidewalk along all four borders of the campus. Nothing beyond the second sidewalk is included in the college's public property.*

U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2016 Edition, Washington, D.C., 2016, p 2-13.



**Public Parking:** If there is a public or municipal parking facility or lot bordering your campus, it is part of your public property. If the parking facility or lot that borders your campus is owned by an individual or a business, it is not. Your public property does not include a public parking facility or lot on the other side of the street across from your 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. 2-14.

**Example of public property: parking lot.** *In this illustration, Public Parking Lot A is included in the college's public property category because it's immediately adjacent to and accessible from the campus. Public Parking Lot B is not included in the college's public property category because it's not immediately adjacent to the campus. A sidewalk, street and sidewalk separate it from the campus.*



# 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.

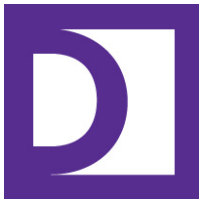


# Space versus Program Agreements

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

- 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 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.



# Space versus Program Agreements

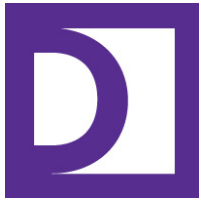
For example:

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 crimes that occur there.

- However, if you rent classroom space for your students within the same hospital, you are required to include crime statistics for that space, as well as for any other areas, such as a 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.





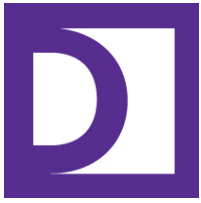
# Identification & Reporting Sexual Misconduct



# Prohibited Sexual Misconduct

- Sexual Harassment
- Domestic Violence
- Dating Violence
- Sexual Assault
- Stalking

These are elements of your School Code of Conduct. This is a separate consideration from their status as crimes under state law.



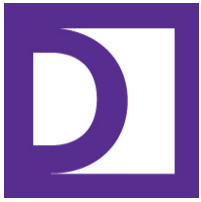
# Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
  - i. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's education or employment,
  - ii. submission to or rejection of such conduct by an individual is used as the basis for education or employment decisions affecting such individuals, or
  - iii. such conduct has the purpose or effect of unreasonably interfering with an individual's school or work performance or creating an intimidating, hostile, or offensive educational or working environment.



# Hostile Environment Harassment

- Refers to a situation where students and/or employees are subject to a pattern of exposure to unwanted sexual behavior that is so severe, persistent, or pervasive that it alters the conditions of education, employment, or participation in a school program or activity, thereby creating an environment that a reasonable person in similar circumstances and with similar identities would find hostile, intimidating, or abusive.
- An isolated incident, unless sufficiently severe, does not amount to a hostile environment caused by sexual harassment.



# Quid Pro Quo Harassment

- Refers to a situation where students and/or employees are subject to unwanted sexual behavior where submission or rejection of such conduct is used, explicitly or implicitly, as the basis for decisions affecting an individual's education, employment, or participation in a school program or activity.



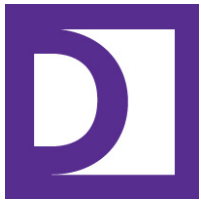
# Domestic Violence

*Domestic violence.* (i) A felony or misdemeanor crime of violence committed—

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

Any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.


34 CFR 668.46



### Examples of Domestic Violence

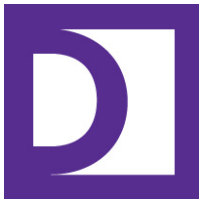
**Scenario 1:** A student's wife is waiting for her husband outside of his on-campus classroom building. She attacks her husband with a knife when he exits the building. Include this as one on-campus incident of Domestic Violence and one on-campus Aggravated Assault.

**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

*Dating violence.* Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

(i) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(ii) For the purposes of this definition—

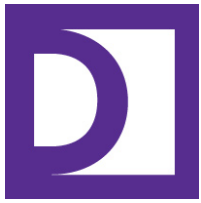
(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

(B) Dating violence does not include acts covered under the definition of domestic violence.

Any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.

34 CFR 668.46






### **Examples of Dating Violence**

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

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

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



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

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p 3-37.



# Sexual Assault

*Sexual assault.* An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Unified Crime Reporting ("UCR") program.

*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 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.



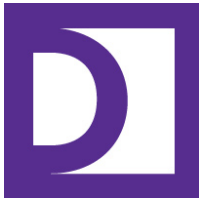
**Scenario 7:** A woman is walking on a public sidewalk in front of your campus and a man pinches her buttocks as he runs by her. Include this as one public property Fondling only if the victim reports that it was sexual in nature.

**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.



# Consent

Department of Education considered and **chose not** to define consent for VAWA purposes.

- 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”
  - ***This is the legal standard for consent in New York***
  - Also the standard in California and under consideration in other states



## New York – Affirmative Consent

### S 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.
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.



# Affirmative Consent

- DOE does not require schools to adopt an affirmative consent standard to determine whether a student has given consent to sexual activity.
- 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 sexual 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

Engaging in a **course of conduct** directed at a specific person that would cause a **reasonable person** to—

- (A) Fear for the person's 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 stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

**Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.

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

34 CFR 668.46





# Recording Stalking Reports

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

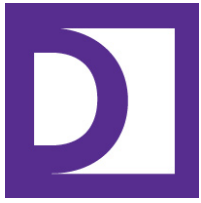
*Violence Against Women Act; Final Rule, 79 Fed. Reg. 62722 (October 20, 2014)*



# Recording Stalking Reports

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

*34 CFR 668.46(c)(6)*



**Examples of Stalking**

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

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

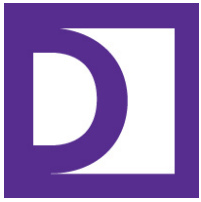
**Scenario 3:** A female student reported that she is afraid for her safety because her ex-boyfriend has been sending harassing emails to her private email account over the past several weeks. She opened the first five emails in her off-campus apartment. However, earlier that day she opened another email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

**Examples of Stalking (continued)**

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

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

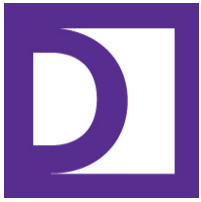
U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2016 Edition, Washington, D.C., 2016, p 3-41.



**For Clery reporting purposes, crimes committed outside the geographic locations specified by the *Clery Act* are *not* reported.**

- **Examples of Murder and Non-negligent Manslaughter**
- **Scenario:** Two students get into an argument at a popular off-campus bar. Bob attacks Brad with a broken bottle and Brad pulls out a gun and kills Bob. Do not include a statistic for this incident in your statistical disclosures, as the incident occurred at a private facility off campus.

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



## 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.

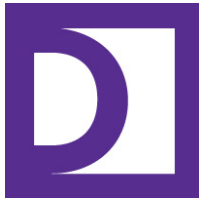
United States Department of Education, Office for Civil Rights, Q&A on Campus Sexual Misconduct, September 2017,  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>



# Effects of Sexual Violence

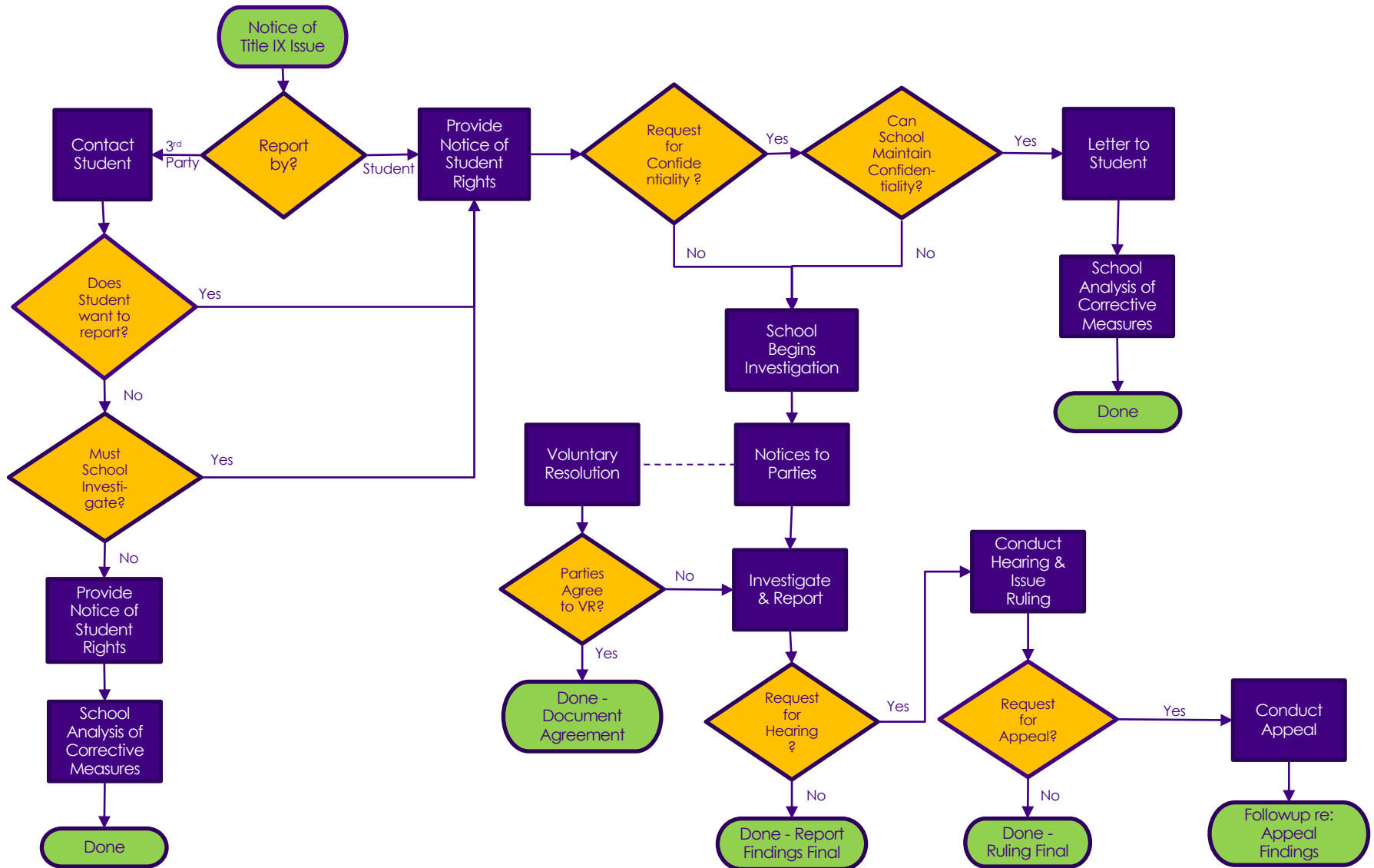
- **Depression.** There are many emotional and psychological reactions that victims of rape and sexual assault can experience. One of the most common of these is depression.
- **Flashbacks.** During a flashback, memories of past traumas feel as if they are taking place in the current moment.
- **Post-Traumatic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

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

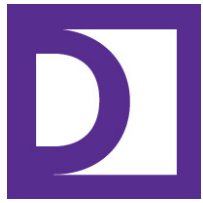


# Reporting Alleged Offenses

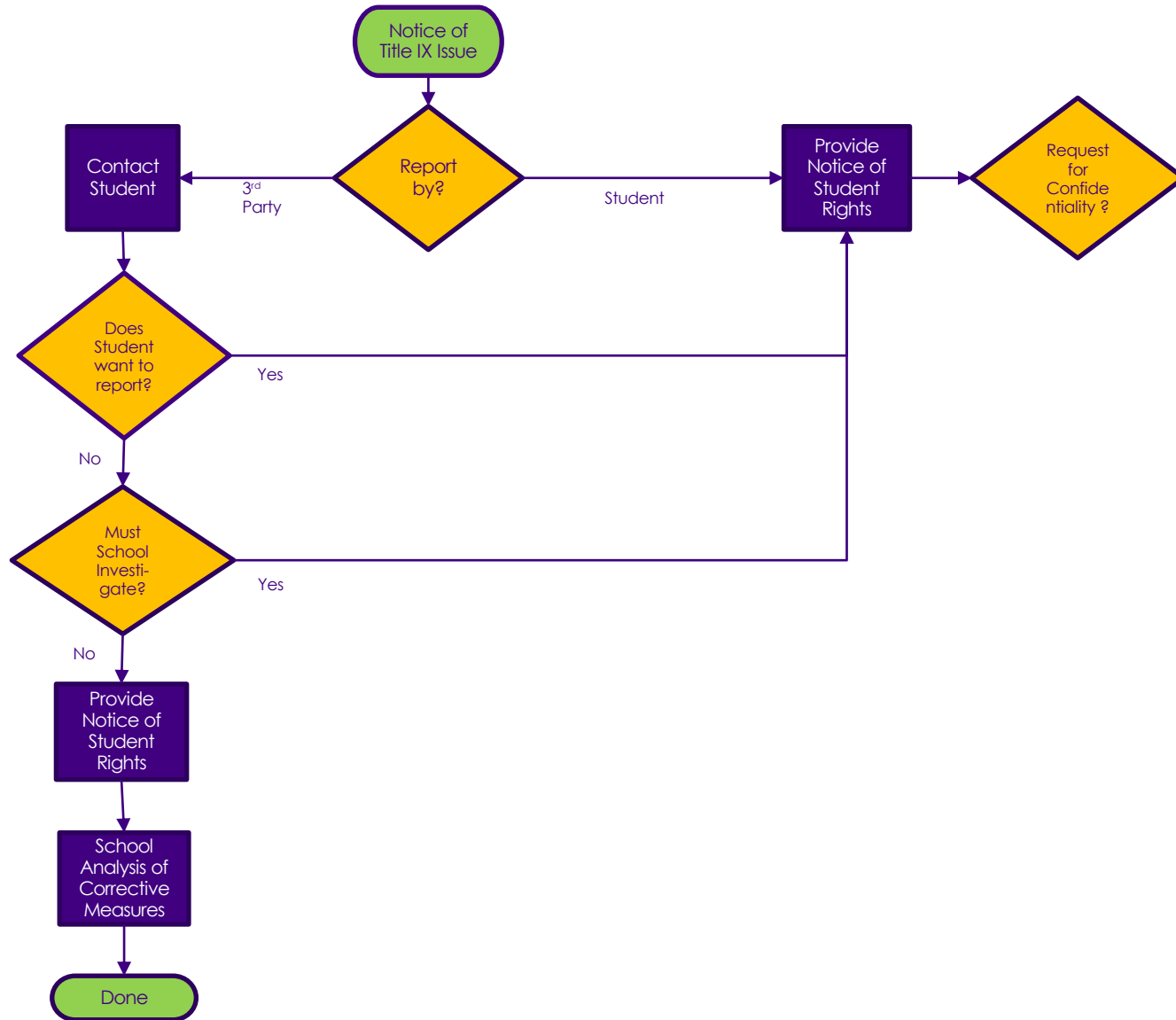
# Flow Chart of Response to Sexual Misconduct Allegations







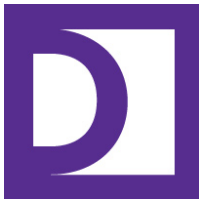
# Response to Sexual Misconduct Allegations





# Reporting Alleged Offenses

- An incident of sexual misconduct may be reported directly to the Institute's Title IX Coordinator.
  - If the Institute's Title IX Coordinator is the alleged perpetrator of the sexual misconduct, the school's policy should designate an alternate for reporting.
- Filing a report with an school official does not obligate the victim to prosecute.
- The Title IX Coordinator should not share information with law enforcement without the victim's consent or unless the victim has also reported the incident to law enforcement.
- Before a victim reveals any information to the Title IX Coordinator, the Coordinator should ensure that the victim understands the Coordinator's reporting obligations
- An individual who has experienced an incident of sexual misconduct may report the incident at any time, regardless of how much time has elapsed since the incident occurred.



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”?

- A responsible employee would include any employee
  - who has the authority to take action to redress the harassment,
  - who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or
  - an individual who a student could reasonably believe has this authority or responsibility.
- Accordingly, schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials.

Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>



Who is a “responsible employee”?

- **When a responsible employee knows or reasonably should know of possible sexual violence, the Office of 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



# Responsible Employees & CSAs

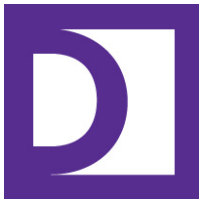
- Substantial cross-over between Responsible Employees for Title IX purposes and Campus Security Authorities (CSA) for Clery reporting purposes.
- CSA defined as a campus police department or campus security department of an institution as well as **any individuals who have significant responsibility 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**



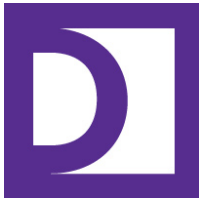


# Notice of Student's Rights

Your policy must include a statement that, 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 will provide the student or employee a written explanation of the student's or employee's rights and options.

What does this mean?

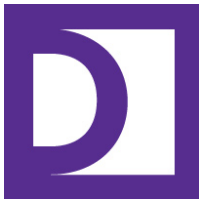
- State that you will provide victims of dating violence, domestic violence, sexual assault or stalking with written documentation of their rights and options.
- This documentation must be a prepared, standardized and written set of materials including detailed information regarding victims' rights and 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.



# No Retaliation

Title IX prohibits retaliation against those who file a complaint or third-party report, or otherwise participate in the investigative and/or disciplinary process (e.g., as a witness).

- The institution should take strong responsive action if retaliation occurs.
- Any incident of retaliation should be promptly reported to the Title IX Coordinator.



# 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 a 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, instant 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.



# 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



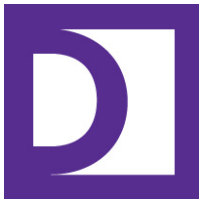
# Partnering with Local Crisis Centers

- Schools can strengthen sexual assault 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.



# Academic Accommodations and Interim Measures

- School must describe the **immediate steps** and interim measures that it can provide to ensure the safety and well-being of the victim, such as:
  - the ability to move dorms,
  - change work schedules,
  - alter academic schedules,
  - withdraw from/retake a class without penalty, and
  - access academic support (e.g., tutoring).
  
- School must describe additional **interim measures** that it may be able to provide for complainants while an investigation is pending such as:
  - no contact orders
  - changing the alleged perpetrator's living arrangements or course schedule.



# Academic Accommodations and Interim Measures

- Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of his or her education.
- The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs.

*from OCR's September 2017 Q&A on Campus Sexual Misconduct*





# Confidentiality

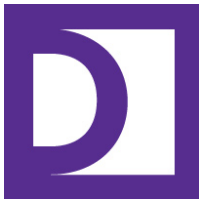
- Annual security report must describe policies governing confidentiality
  - Specify those employees to whom a student can disclose in confidence and those “responsible employees” who must report incidents (including personally identifying details ) to the Title IX Coordinator.
  - Consider particularly how a school will ensure that a student understands an employee’s reporting obligation before he or she reveals any information to that employee.
  - Describe what information will be kept confidential and what information may be disclosed, to whom it will be disclosed, and why.
  - Explain when the school may not be able to honor a student’s request that his or her name not be disclosed to the alleged perpetrator or that no investigatory or disciplinary action be taken.
  - Important that victim not be pressured to request confidentiality, nor make a full report if the victim is not ready to do so.



# Privileged & Confidential Communications

## ■ Professional & Pastoral Counselors –

- Professional, licensed counselors and pastoral counselors who provide mental-health counseling to members of the community are not required to report any information about an incident to the Title IX coordinator without a victim's permission.
- Most career schools will not have the resources to provide this type of counseling on site
  - Policy must state that the school does not provide professional or pastoral counseling,
  - School must be able to assist a victim of sexual misconduct in obtaining support services from local groups or agencies.
  - School must publicize contact information for these support organizations



# Privileged & Confidential Communications

- A victim who at first requests confidentiality may later decide to file a complaint with the school or report the incident to local law enforcement, and thus have the incident fully investigated.
- While these professional and pastoral counselors and advocates may maintain a victim's confidentiality vis-à-vis the school, they may have reporting or other obligations under state law.
- If the school determines that the alleged perpetrator(s) pose a serious and immediate threat to the school community, the school will need to issue a timely warning .
  - Any such warning should not include any information that identifies the victim.



# Evaluating A Request for Confidentiality

- If a victim discloses an incident to the Title IX Coordinator but wishes to maintain confidentiality or requests that no investigation into a particular incident be conducted or disciplinary action taken, the school must weigh that request against its obligation to provide a safe, non-discriminatory environment for all students, including the victim.
  - School will evaluate a range of factors in making this determination
- If the school honors the request for confidentiality, a victim must understand that the school's ability to meaningfully investigate the incident and pursue disciplinary action against the alleged perpetrator(s) may be limited.
- Although rare, there are times when the school may not be able to honor a victim's request in order to provide a safe, non-discriminatory environment for all students.
- Sample Confidentiality Policy is available at:  
<https://www.justice.gov/file/910281/download>



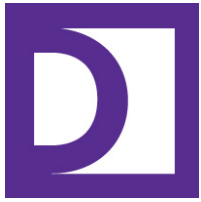
# Evaluating A Request for Confidentiality

- **If the school determines that it cannot maintain a victim's confidentiality,**
  - The school should inform the victim prior to starting an investigation, and only share information with people responsible for handling the school's response.
  - The school should take steps to protect the victim from retaliation or harm and work with the victim to create a safety plan.
  - The school should also:
    - assist the victim in accessing other available victim assistance and support;
    - inform the victim of the right to report a crime to local law enforcement – and provide the victim with assistance if the victim wishes to do so.
- The school should not require a victim to participate in any investigation or disciplinary proceeding.
- Reports of sexual violence should also prompt the school to consider broader remedial action – such as increased monitoring, supervision or security; increasing education and prevention efforts; conducting climate assessments/ victimization surveys; and/or revisiting its policies and practices.

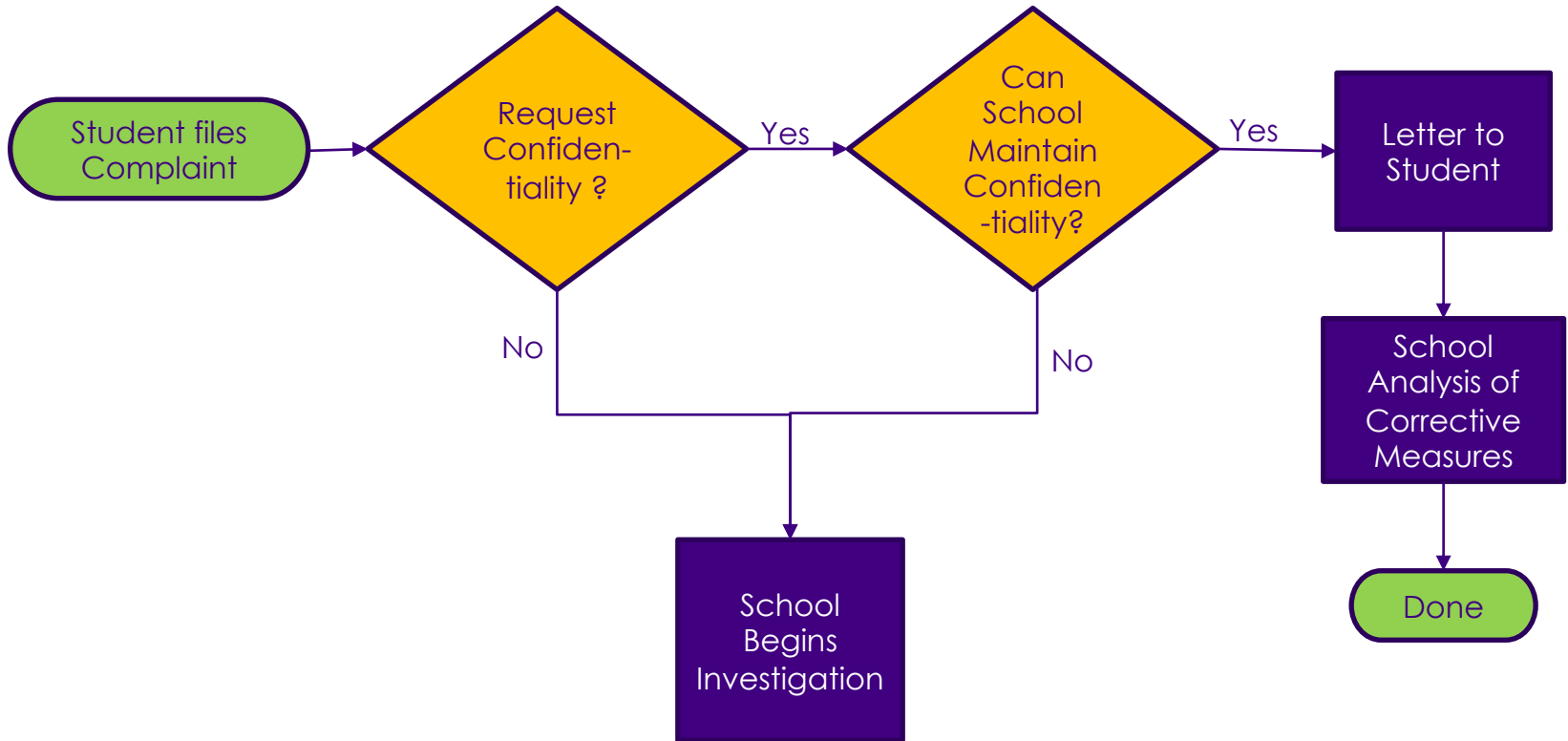


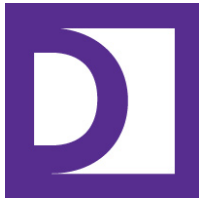
# Evaluating A Request for Confidentiality

- **If the school determines that it can respect a victim's request for confidentiality**, the school must take immediate action as necessary to protect and assist the victim.
- A victim's request for confidentiality will likely limit the Institute's ability to investigate a particular matter.
- The Institute may take steps to limit the effects of the alleged sexual misconduct and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant.



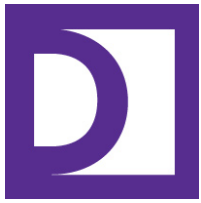
# Response to Sexual Misconduct Allegations



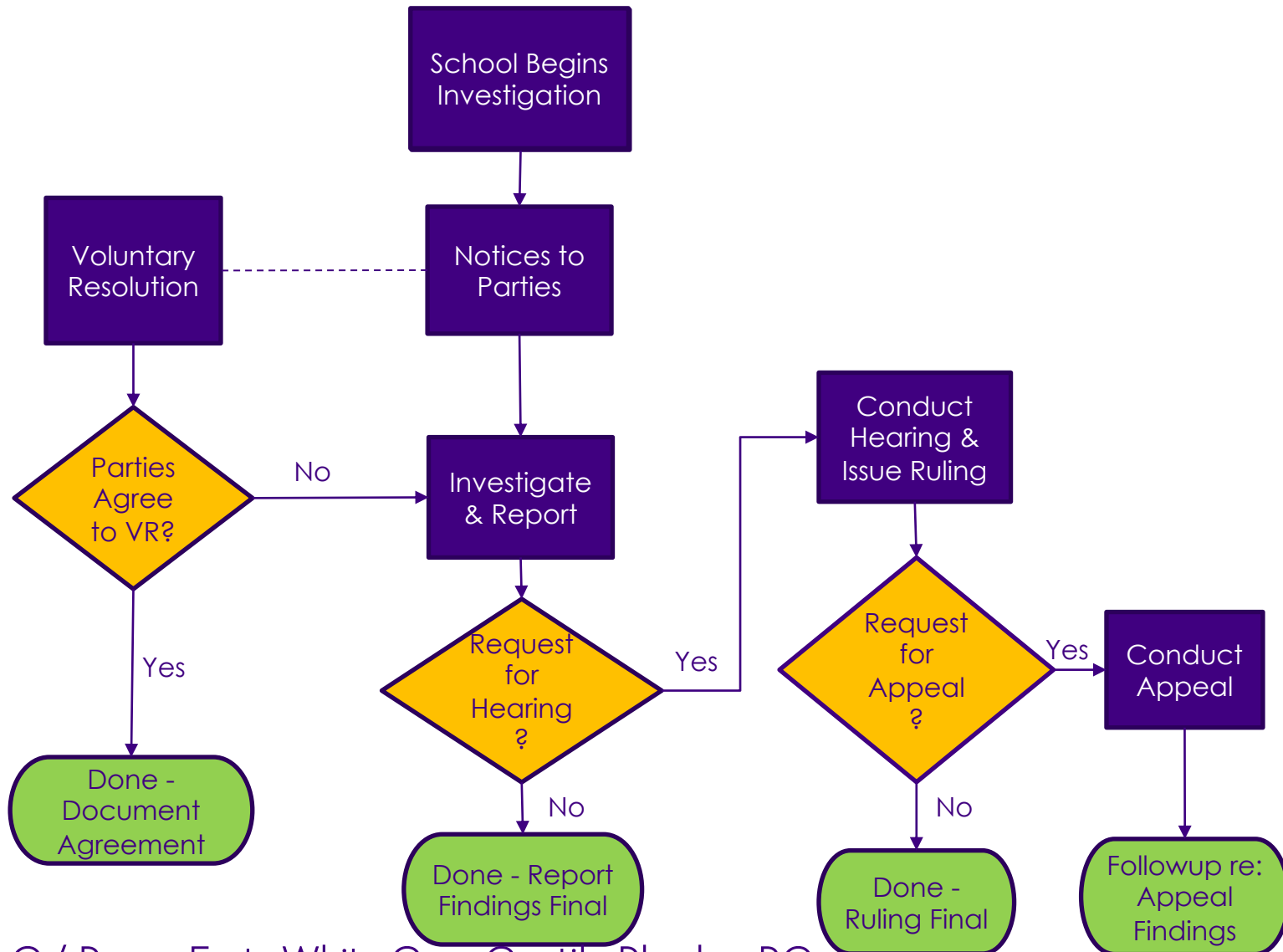


# Grievance Investigation & Adjudication Procedures



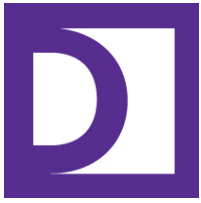


# Response to Sexual Misconduct Allegations



# BE FAIR, PROMPT AND 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

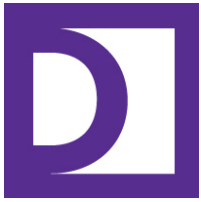
- In this case, the Court concludes that the accused student plausibly alleged that the school did not provide him with “basic fairness.”
- There is no one-size-fits-all answer to the question what of constitutes the “basic fairness” that a student is due.
- The answer may vary depending upon the competing 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:

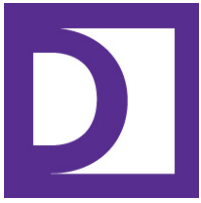
- Procedural Fairness—whether the process used to adjudicate the matter was sufficient to provide the accused student a fair and reasonable opportunity to defend himself.
- Substantive Fairness—even if the procedure was fair, whether the decision was unduly arbitrary or irrational, or tainted by bias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

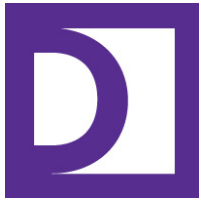


# Substantive Fairness

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.





# Victim Trauma



# The Neurobiology of Sexual Assault

<http://nij.ncjrs.gov/multimedia/video-campbell.htm>



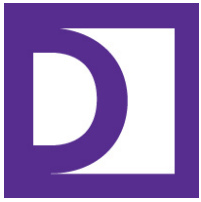
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*DeLuca Law LLC gratefully acknowledges the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, for allowing us to reproduce, in part or in whole, the video **Interview with Dr. Rebecca Campbell on the Neurobiology of Sexual Assault**. The opinions, findings, and conclusions or recommendations expressed in this video are those of the speaker(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.*



# The Neurobiology of Sexual Assault

- Victim often describes the attack multiple times in excruciating detail
  - Usually 24-48-72 hours 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 she is lying
  - Rather, sign that she is having difficulty piecing things together based on how the event is stored in her memory



# Victim Credibility Challenges/Myths

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



# Credibility Challenge: Lack of Physical Resistance

- The stereotype of "real rape" suggests that "genuine victims" will resist their assailant to their utmost capacity.
  - Because of this stereotype, victims who report little or no physical resistance are often viewed by police and society with suspicion.
  - After all, "If she didn't resist, maybe she really wanted it."
- Reality is that most sexual assault victims exhibit little or no physical resistance. This is true for a variety of reasons.
  - Victims may not resist because they are too surprised or confused to do so, or because they fear resistance will anger the rapist and increase their risk of injury or death.
  - Other victims do not resist because the man's greater size and strength are sufficiently threatening to induce compliance - even in the absence of actual force or threats.
  - Victims may not resist because they are experiencing dissociation or frozen fright, or because they are under the influence of drugs or alcohol.

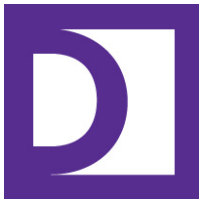
The National Center for Women and Policing, (2001). "Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement" (retrieved from <http://www.mincava.umn.edu/documents/acquaintsa/participant/participant.html#idp40490112>) [March 27, 2015]



# Credibility Challenge: Lack of Physical Resistance

- To overcome stereotype, an investigator must carefully elicit from the victim exactly how she responded to the situation and what she was thinking and feeling while she did so.
- It is important to use open ended questions that allow the victim to describe the experience in her own words.
- For example, interviewers should never ask the victim questions like:
  - Did you fight the suspect?
  - Why didn't you try to run or escape?
  - Did you scream for help?
- Questions like this imply to the victim that there is a correct response to rape - because we all know that victims of "real rape" try to run, scream, or fight their assailant.
  - However, for the majority of victims who demonstrate little or no physical resistance, this type of question can make them feel that they are being judged and/or that their claim is viewed with suspicion.

The National Center for Women and Policing, (2001). "Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement" (retrieved from <http://www.mincava.umn.edu/documents/acquaintsa/participant/participant.html#idp40490112>) [March 27, 2015]



## Credibility Challenge: Lack of Physical Resistance

- Instead, interviewers should provide the victim with open-ended prompts such as:
  - What did you do next?
  - Tell me what you were thinking at that point.
  - Tell me what you were feeling when he did that.
- This type of questioning will provide the victim with the opportunity to talk about her thoughts, feelings, and experiences during the assault.

The National Center for Women and Policing, (2001). "Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement" (retrieved from <http://www.mincava.umn.edu/documents/acquaintsa/participant/participant.html#idp40490112>) [March 27, 2015]





# Credibility Challenge: Delayed Reporting

- There are many reasons why victims delay reporting but this typical reaction is nonetheless seen as cause for suspicion.
- Delayed reporting is also a factor that often differs between victims of stranger and non-stranger sexual assault.
  - Adult victims of non-stranger sexual assault are likely to be frozen with fear, paralyzed by the concern that they are to blame, and confused by the friendship, love, or trust that they feel for their assailant.
- They will often delay reporting because:
  - they are afraid that no one will believe them,
  - afraid that family members and friends will side with the offender rather than themselves,
  - afraid for what will happen to the offender if the abuse is reported,
  - afraid for what will happen to their own lives after disclosing such a secret.

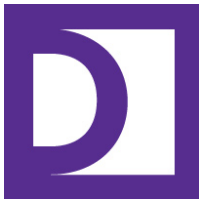
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## Credibility Challenge: Delayed Reporting

- Many victims also do not report their assault if it is committed by someone they know, either because they do not label it as a crime or because they have not yet had time to process the information themselves.
- Victims also often believe that sexual assault can only happen between strangers, involving physical force, weapons, and injury.
  - They often believe the societal myth that sexual assault cannot happen if the victim knew the offender, drank or took drugs, or invited him into her home.
  - Victims have also often internalized the victim blaming attitudes of our society, which further decreases the likelihood of disclosure.

The National Center for Women and Policing, (2001). "Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement" (retrieved from <http://www.mincava.umn.edu/documents/acquaintsa/participant/participant.html#idp40490112>) [March 27, 2015]



## Credibility Challenge: Delayed Reporting

- To overcome this issue as a challenge to the victim's credibility, investigator should provide the victim with open-ended prompts to elicit her thoughts and actions during and after the rape.
  - These thoughts and actions will often explain why the report was delayed, given the trauma of victimization and the stigma associated with disclosure.
- Document these thoughts and actions very thoroughly. They will be used to explain why the victim's behavior was understandable and reasonable, again given the trauma of rape victimization and the stigma of disclosing.
- Reassure the victim that delayed reporting is common and understandable given the circumstances of rape victimization.

The National Center for Women and Policing, (2001). "Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement" (retrieved from <http://www.mincava.umn.edu/documents/acquaintsa/participant/participant.html#idp40490112>) [March 27, 2015]



## Credibility Challenge: Delayed Reporting

- Interview any others with whom the victim has discussed the assault, especially the first person to whom she disclosed.
  - These statements, especially to the "outcry witness" (the first person told of the assault) can be critically important in both documenting the victim's behavior in the aftermath of the assault and explaining her reasons for not reporting immediately.
- When understanding the victim's experience - in its entirety and from the victim's perspective – one can begin to understand responses that first appear to be unreasonable or suspicious (e.g., not physically resisting or not reporting immediately to police).

The National Center for Women and Policing, (2001). "Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement" (retrieved from <http://www.mincava.umn.edu/documents/acquaintsa/participant/participant.html#idp40490112>) [March 27, 2015]



## Credibility Challenge: Inconsistent or Untrue Statements

- There are a number of reasons why victims sometimes make statements to police that are inconsistent or untrue.
  - **Trauma and disorganization**
  - **Discomfort with sexual details**
  - **Fear of doubt or blame**
- In these cases, it is important to reassure victims that nothing they did could have given permission for someone to sexually assault them.
- This will hopefully alleviate the victim's concern that her behavior will be used to judge the seriousness of the incident or the validity of her claim.

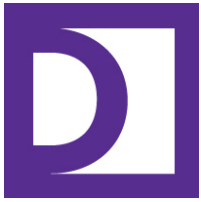
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## Credibility Challenge: Inconsistent or Untrue Statements

- Equally important, investigators should emphasize to victims that they must tell the truth or their credibility will be later be questioned.
- Making the environment safe and nonjudgmental is important in removing the incentive to be untruthful.
- Investigators should explicitly state that they are not there to judge the victim's behavior but to find out exactly what happened.
- Open-ended prompts can then be used to elicit the whole story - including those behaviors by the victim that might be seen as unflattering or illegal.

The National Center for Women and Policing, (2001). "Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement" (retrieved from <http://www.mincava.umn.edu/documents/acquaintsa/participant/participant.html#idp40490112>) [March 27, 2015]

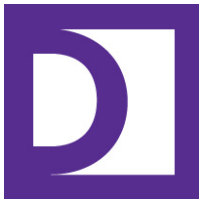


# Perpetrator Characteristics

No two sex offenders are exactly alike. However, sex offenders often exhibit some similar characteristics:

- Sex offenders are overwhelmingly white males.
- Most sex offenders were not sexually or physically abused as children.
- Men are more likely to commit sexual violence in communities where sexual violence goes unpunished.
- Sex offenders minimize their number of victims.
- Sex offenders are experts in rationalizing their behavior.
- There is no “typical profile” of a rapist.

Striving for Justice: A Toolkit for Judicial Resolution Officers on College Campuses, Anne K. Handeyside, M.S.W. and Samara L. Wickliffe, B.A., University of Michigan Division of Student Affairs, Sexual Assault Prevention and Awareness Center, <http://sapac.umich.edu/files/sapac/StrivingForJustice.pdf>



# 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 victim makes decisions and responds.

Examples of vulnerable populations include:

- American Indians
- 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

International Association of Chiefs of Police, (2015). "Sexual Assault Response Policy and Training Content Guidelines" (retrieved from [http://www.iacp.org/Portals/0/documents/pdfs/IACP\\_Sexual\\_Assault\\_Response\\_Policy\\_and\\_Training\\_Content\\_Guidelines.pdf](http://www.iacp.org/Portals/0/documents/pdfs/IACP_Sexual_Assault_Response_Policy_and_Training_Content_Guidelines.pdf) [retrieved October 18, 2016])





# Cultural Awareness

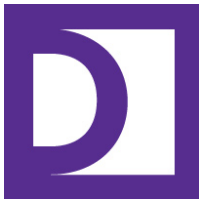
## A few tips to keep in mind:

- Not all disabilities are visible. Victims may have physical, sensory, or mental disabilities, or a combination of disabilities.
- Culture can influence how people view or understand “sexual assault” and feel about law enforcement. Be aware that beliefs about gender, sexuality, sexual orientation, race, religion, etc. may vary greatly between cultures.
- Questions about sexual assault are very intimate and may be difficult to discuss. Such a personal violation may create feelings of embarrassment and shame. These feelings may be intensified in some cultures such as those where the loss of virginity prior to marriage can be socially devastating.
- American Indian communities may have their own laws regarding sexual assault in addition to or in place of relevant state or federal laws.
- If English is not the victim's first language, offer to arrange unbiased, independent translation. Do not rely on family members, children, the suspect, or any other associated parties to serve as an interpreter.
- Those who are lesbian, gay, bisexual and transgender identified may have specific privacy needs depending on whether the individual is “out” to others in their lives. Sensitivity and awareness about the particular obstacles and barriers victims of same-sex sexual assault face in reporting is of critical importance.

International Association of Chiefs of Police, (2015). “Sexual Assault Response Policy and Training Content Guidelines” (retrieved from <http://www.iacp.org/Portals/0/documents/pdfs/IACPSexualAssaultResponsePolicyandTrainingContentGuidelines.pdf> [retrieved October 18, 2016])

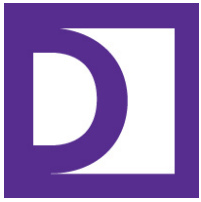
# INVESTIGATE IMMEDIATELY AND THOROUGHLY





## INVESTIGATE IMMEDIATELY AND THOROUGHLY

- Once you receive notice of alleged sexual misconduct, you must immediately conduct a thorough and impartial fact finding investigation.
- This is not optional - you have an obligation to conduct your own investigation regardless of whether law enforcement is involved.
- There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.



# Notice of Investigation

- The Institute's sexual misconduct policy must designate the person responsible for overseeing the school's investigation, response to, and resolution of all reports of prohibited sexual misconduct,
- The investigator should inform the complainant before starting an investigation.
  - The complainant may request that an investigation not be undertaken.
  - At the complainant's request, the investigator may also notify the respondent in writing, including that the complainant asked the Institute not to investigate.
- The investigator should direct the complainant, respondent, witnesses and other interested individuals to preserve any relevant evidence.
- If an investigation proceeds, the school should notify the respondent in writing that a report has been filed and describe the allegations.

# KEEP A WRITTEN RECORD





## **KEEP A WRITTEN RECORD**

- Prepare written statement of the Complainant
- Notify Respondent in writing
- Prepare written statement of Respondent
- Prepare written statement of corroborating witnesses, if any

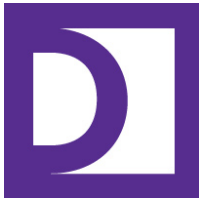
Prepare a written statement of the alleged incident and have the Complainant sign it. The same goes for statement made by the Respondent and any witnesses.





## **MAY A SCHOOL FACILITATE AN INFORMAL RESOLUTION OF THE COMPLAINT?**

- If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.
- Mediation is NEVER appropriate in sexual assault cases.



# Formal Investigation Process

If voluntary resolution is inappropriate, unsuccessful or not agreed to by either party, the institution should proceed with a formal investigation process.

- The Title IX Coordinator will designate a specially trained investigator (or team of investigators) to interview the complainant, respondent and any witnesses.
- The investigator will also gather pertinent documentary materials (if any) and other information.
- In general, an investigation may last up to 30 days, from the date that written notice of the investigation was sent to the complainant and respondent.
- Adjudication through the hearing panel, if applicable, will generally take up to 30 days from the date the investigative report is provided to both the complainant and the respondent.





# Formal Investigation Process

The investigator will prepare a report that includes:

- a statement of the allegations and issues,
- the positions of the complainant and respondent,
- a summary of the evidence (including from interviews and documentation gathered),
- an explanation why any proffered evidence was not investigated, assessment of individual credibility, and
- findings of fact and an analysis of whether a violation of the Policy has occurred.



# Formal Investigation Process

- The complainant and respondent should be simultaneously notified of the completion of the investigation and provided with the investigator's report.
- Upon receipt of the investigative report, the complainant and respondent each have the opportunity to request a hearing be conducted.
- If neither party requests a hearing within 10 calendar days from their receipt of the investigative report, then the recommended findings of responsibility set forth in the investigative report are final.



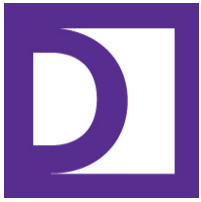
# Investigation Report

The respondent and complainant will each have the opportunity to review a copy of the investigative report and any other information that will be used during the disciplinary proceedings.

- The names and other identifying information of other students should be redacted in accordance FERPA, except to the extent that doing so would interfere with the purpose of Title IX to eliminate sex-based discrimination.
- Ensure that reasonable time is afforded for review prior to the hearing.

# IS A HEARING NECESSARY?





## ADJUDICATION PROCEDURES

- If voluntary resolution is not available or appropriate, the school may convene a hearing panel following the end of the investigation.
- The hearing panel is responsible for determining whether the respondent is responsible or not responsible for a violation of the school's policy.
  - A complainant and/or respondent should have opportunity to challenge the participation of a panel member because of perceived conflict of interest, bias, or prejudice.
- If the respondent is determined to be responsible, then the matter proceeds to the sanctions stage.

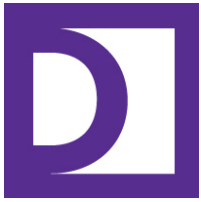


## ADJUDICATION PROCEDURES

### The right to be heard and to respond:

Both parties should have an opportunity to present witnesses and other evidence. Your policies should include:

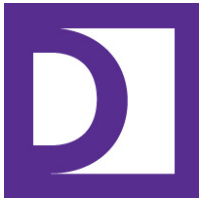
- A description of the types of evidence that may or may not be presented, including but not limited to:
  - Prohibiting questioning or evidence about the complainant's prior sexual conduct with anyone other than the alleged perpetrator.
  - Clarifying that evidence of a prior consensual dating or sexual relationship between the parties by itself does not imply consent or preclude a finding of sexual misconduct.



## ADJUDICATION PROCEDURES

### **The right to be heard and to respond:**

- In the event that one party chooses not to appear at the hearing, the panel may still hear from the other party.
- If either party is unable to appear at the hearing, participation can be made via alternate means.
- Both parties should be allowed to bring an advisor to the hearing. The advisor may be an attorney.
- The Title IX Coordinator may set reasonable time limits for each of the segments of the hearing.



## ADJUDICATION PROCEDURES

### Evidentiary Standard:

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





- 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, under current Federal guidance, campus disciplinary proceedings may use either a preponderance of the evidence or clear and convincing evidence standard.
- The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases.



# Notice of Outcome

Must provide simultaneous notification, in writing, to both the accuser and the accused of:

- the result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault or stalking;
- the institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available;
  - If the school provides for an appeal, it must do so equally for both parties. Both parties must be notified of an appeal in writing and must be given an opportunity to respond.
- any change to the result; and
- when such results become final.



# Notice of Outcome

- In explaining the rationale for the result and sanctions, the official or entity must explain how it weighted the evidence and information presented during the proceeding, and explain how the evidence and information support the result and sanctions.
  - You must describe how the institution's standard of evidence was applied. It is not sufficient to say only that the evidence presented either met or did not meet the institution's standard of evidence.
- This means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.



# Notice of Outcome

- The Department of Education interprets FERPA as not conflicting with the Title IX requirement that the school notify the complainant of the outcome of its investigation because this information directly relates to the victim.
- Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information in any Title IX complaint that involves a Clery Act offense, such as sexual violence.
- If there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.

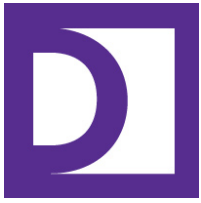


# Report Writing

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
- Media



## INVESTIGATION DO'S AND DON'TS

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### DO'S

Notify the respondent of the allegations

Immediately conduct a thorough and impartial investigation

Ensure the complainant's safety

Determine whether interim measures are necessary

Maintain all information in a secure manner

Coordinate with criminal investigation – if necessary

Conduct interviews with the complainant, respondent and witnesses

Prepare a statement of the alleged incident and have the complainant sign it. The same goes for respondent and witnesses

Keep a written record of all statements and your findings

Update the parties throughout the process

### DON'TS

Ignore complaint & wait for police investigation

Leave the complainant in the same class and facilities as the respondent

Reach conclusions without documenting them and/or why they were reached

Delay



## HEARING DO'S AND DON'TS

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### DO'S

Respect the integrity of the process and the parties

Be impartial

Give both parties equal opportunity to present witnesses and other evidence

Notify both parties of witnesses

Always keep a record

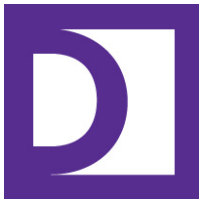
### DON'TS

Rely on evidence outside the hearing

Require a complainant to be present at the hearing as a prerequisite to proceed

Assume “guilt” or “innocence” – keep an open mind

Allow questions about the complainant’s sexual history with anyone other than the respondent



# Sanctions & Other Remedies

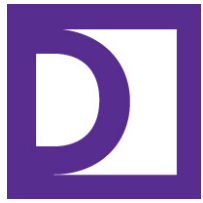
- Sanctions should be:
  - Fair and appropriate given the facts of the particular case;
  - Consistent with the school's handling of similar cases;
  - Adequate to protect the safety of the campus community; and
  - Reflective of the seriousness of sexual misconduct.
- The sanctioning decision must be 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.



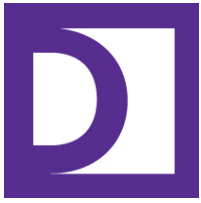


# Sanctions & Other Remedies

- 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



# 2018 Proposed Title IX Regulations



# 2018 Proposed Title IX Regulations

## ***Schools must:***

- Designate Title IX coordinator and provide all students and staff with contact information
- Establish and disseminate policy prohibiting discrimination based on sex
- Adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination



# 2018 Proposed Title IX Regulations

***Proposed § 106.44(a): a school with actual knowledge of sexual harassment in an education program or activity of the school must respond in a manner that is not deliberately indifferent.***

- Proposed § 106.44(a) would also state that a school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
- A school is not deliberately indifferent when in the absence of a formal complaint the school offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the school's education program or activity.



# 2018 Proposed Title IX Regulations

## ***Proposed definitions for “sexual harassment”***

- either an employee of the school conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or
- unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- sexual assault as defined in the Clery Act.

## ***Proposed definition of “actual knowledge”***

- notice of sexual harassment or allegations of sexual harassment to a school's Title IX Coordinator or any school official who has authority to institute corrective measures on behalf of the recipient,
- imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge



# 2018 Proposed Title IX Regulations

## ***Grievance procedures for formal complaints of sexual harassment:***

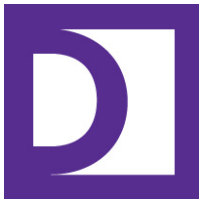
- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Coordinator, investigator, and decision-maker must receive training and not have any conflict of interest or bias
- Presumption that the respondent is not responsible for the alleged conduct until a final determination is made
- Include reasonably prompt timeframes for conclusion of the grievance process
- Describe the range of possible sanctions and remedies
- Describe the standard of evidence to be used
- Include appeal procedures (if the school offers an appeal)
- Describe the range of supportive measures available



# 2018 Proposed Title IX Regulations

***Schools must investigate the allegations in a formal complaint. The investigation must:***

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties;
- Provide equal opportunity for the parties to present witnesses and evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the advisor of their choice;
- Provide proper notice to parties whose participation is invited or expected
- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the complaint allegations;
- Create an investigative report and provide parties with a copy at least 10 days prior to a hearing.

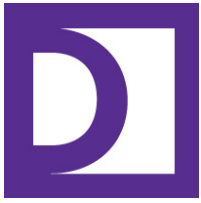


# 2018 Proposed Title IX Regulations

***For institutions of higher education, the school's grievance procedure must provide for a live hearing.***

- Each party must be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Such cross-examination must be conducted by the party's advisor of choice.
- If a party does not have an advisor present at the hearing, the school must provide that party an advisor aligned with that party to conduct cross-examination.
- All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless relevant to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent.
- At the request of either party, the school must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.
- If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;





# 2018 Proposed Title IX Regulations

- The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Must issue a written determination regarding responsibility.
- Must apply either the preponderance of the evidence standard or the clear and convincing evidence standard.
  - Can use the preponderance of the evidence standard only if the school uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.



# 2018 Proposed Title IX Regulations

At any time prior to reaching a determination regarding responsibility the school may facilitate an informal resolution process, such as mediation, provided that the school:

- Provides to the parties a written notice disclosing—
  - The allegations;
  - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
- Obtains the parties' voluntary, written consent to the informal resolution process.



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ED-2018-OCR-0064

### Title IX of the Education Amendments of 1972

**Docket Folder Summary** [View all documents and comments in this Docket](#)

**Docket ID:** ED-2018-OCR-0064 **Agency:** Department of Education (ED)

**Summary:**  
The Secretary plans to issue a notice of proposed rulemaking to clarify the obligations of recipients of Federal financial assistance in redressing sex discrimination, including complaints of sexual misconduct, and the procedures by which they must do so.

**RIN:** 1870-AA14 **Impacts and Effects:** None **CFR Citation:** 34 CFR 106 **Priority:** Other Significant

[+ View More UA and Regulatory Plan Information and Docket Details](#)

**Primary Documents** [View All \(3\)](#)

<b>PR</b>	<a href="#">Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal...</a>	Comment Period Closed Feb 15, 2019 11:59 PM ET
<b>Proposed Rule</b>	<b>Posted:</b> 02/14/2019 <b>ID:</b> ED-2018-OCR-0064-11187	
<b>PR</b>	<a href="#">Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal...</a>	Comment Period Closed Feb 15, 2019 11:59 PM ET
<b>Proposed Rule</b>	<b>Posted:</b> 01/28/2019 <b>ID:</b> ED-2018-OCR-0064-7922	
<b>PR</b>	<a href="#">Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal...</a>	Comment Period Closed Feb 15, 2019 11:59 PM ET

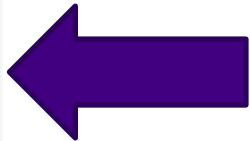
**Regulatory Timeline**

- Pre Rule
- Proposed Rule** (Current Stage)
- Final Rule

**105,842 Comments Received\***

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## ***What if:***

Student in your day-time program tells his instructor that his partner physically assaulted him at their home the night before?

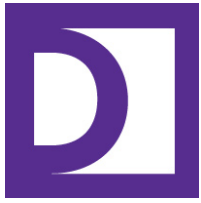
## ***Then:***

The partner, who is a student in your evening program, tells his instructor that he was actually the one physically assaulted at their home the night before.

Both students say to their instructors that they don't want to "make a big deal" about it

# Issues presented in this example:

- Clery Geography
- Duty to Investigate
- School policy
- Responsible employees
- Confidentiality
- Training & Education
- Reporting Options
- Available support services
- Student Accommodations
- School's corrective measures
- Cultural Awareness
- Documentation



QUESTIONS?



# Thank You!

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