

## CM142- Understanding Title IX, VAWA, and the Clery Act

### Course Learning Objectives

This course will review Title IX, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, and the Violence Against Women Act. In addition to the background of each topic, victim rights, support system implementation, and grievance policies will also be explored.

The goal of this course is to help develop a better understanding of the topic and produce tangible resources to help implement plans, strategies, and ideas at your school.

In addition to lecture videos, links to resources, and assessments, you will be able to utilize the Journal and Learning Activities. Take advantage of a method that works best for you.



- Recognize and analyze Title IX, the Clery Act, and VAWA
- Evaluate and explain the victim's rights and processes
- Recognize prevention opportunities and identify a safe learning environment

Explain and examine victim trauma and grievance policies and procedures

## **Introduction**

When talking about schools' responsibilities to respond to incidents of sexual violence on their campuses, it's important to understand that this area is ever-changing. As I mentioned before, the Violence Against Women Act was just recently enacted. Since that time there have been many court cases interpreting schools' responsibilities in connection with campus safety and security. The Department of Education and the Office for Civil Rights continues to provide guidance for schools and interpretations of schools' responsibilities; as well as state legislators have been looking into passing laws, adding additional requirements for schools that might be located within their jurisdictions.

Before we get into the requirements under the Violence Against Women Act and the Clery Act and Title IX, I think it's important to understand how we got to this point. Specifically, how did we get to a situation where colleges around the country are required to investigate and adjudicate instances of sexual misconduct on their campus? You may be thinking, "Isn't that the responsibility of the local police department?" Or, "Why are schools responsible for this when it seems like that's something that the judges and prosecutor's offices should be taking care of?"

First thing to understand is that the issue of sexual violence is not limited to college campuses. According to the Rape, Abuse, & Incest National Network, 293,000 persons were victimized with sexual violence in 2015. Of that, four out of five victims knew their assailant, and 47% of victims were in a relationship with the persons that attacked them. So, it's not just an issue on college campuses. At college campuses in specific, though, the issue is prevalent around the country. There are schools around the country, coast to coast, that are dealing with issues of sexual violence and sexual misconduct. It was based on the volume of cases and the volume of instances that led Congress to investigate and ultimately enact the Violence Against Women Act legislation to improve oversight, to add transparency, and to improve the response to these issues at schools around the country.

The Violence Against Women Act was signed into law by President Obama in March of 2013. In January of 2014, the president established a White House Task Force to Protect Students from Sexual Assault. In June of 2014, the Department of Education issued proposed regulations interpreting the Violence Against Women Act and detailing schools' responsibilities. Those regulations were published as final in October of 2014 and became effective in July of 2015. In June of 2016, the Department of Education published an updated handbook for campus safety and security that included new interpretations related to the changes made by the Violence Against Women Act. The White House Task Force made a number of findings related to the prevalence of sexual misconduct on college campuses. According to their findings, one in five women are sexually assaulted while they're in college, most often by someone she knows, and most often those crimes are not reported. Oftentimes the survivors feel isolated, ashamed, or that

they're to blame for what happened to them. And although less often, men are also victims of sexual assault on college campuses.

In 2016, the Bureau of Justice Statistics published a survey related to instances of sexual misconduct on college campuses. This data was collected during the period of March to May of 2015 and included responses from over 23,000 undergraduate students at nine schools. One of the challenges with this survey is that it was conducted only at large schools across the country. In order to be eligible to participate in the survey, the school had to have more than 1,176 students. Excluded from the survey were for-profit schools, non-degree-granting schools with less than two-year programs, and online schools. So, the challenge from a trade and career school perspective is that the survey results do not include responses from students who might be attending non-traditional schools. Nevertheless, the findings are important to understand the prevalence of these issues on college campuses.

The survey looked at results for one academic year. During that one single year, over 5% of female students reported that they had experienced completed sexual battery and over 4% of female students experienced a completed rape during that one year. So, in one year, 10% of the students reported that they had been victimized by sexual misconduct at their school. In response to the issue of sexual misconduct on college campuses, the Violence Against Women Act amended existing provisions to the Clery Act to require that schools compile statistics for incidents of domestic violence, dating violence, sexual assault, and stalking that occur on or near campuses. The Violence Against Women Act also added new requirements for schools in the publication of their annual security reports. Under existing law, schools were required to publish annual security reports that includes general safety and security information related to their campus.

For example, in your annual security report, a school would report their procedures for reporting crimes on campuses. They would discuss the jurisdiction if there is any police department on college campuses or the relationship that the school may have with local police authorities, and other safety measures at the school. Now with the Violence Against Women Act, schools are required to add additional policies and procedures to that annual security report. So, for example, the school must now include a description of the educational programs that they have to promote awareness of sexual misconduct. The annual security report needs to describe possible sanctions that a school may impose regarding sexual misconduct. It must also include the procedures the victim should follow if an incident of sexual misconduct has occurred. The school also needs to include procedures for conducting disciplinary proceedings in the cases of alleged sexual misconduct. The annual security report should also include information about how the school will protect the confidentiality of a victim, as well as written notification to students and employees about counseling, health, victim advocacy, legal assistance, and other services available for victims. The annual security report must also now include information to victims

about available accommodations to academic and living arrangements if they are requested by the victim.

The Department of Education has not created a sample or template policy for schools to use because the challenge is your policies and procedures are going to be different depending on the size of the school and the resources that you have available. For example, a four-year public university with a private police department, with a full-time Title IX office, is going to have different policies and procedures and ways of addressing complaints and accommodations at their school as compared to a small beauty school or massage school, for example. The law is clear that, whether you are the small beauty school or massage school or the large four-year public university, your policy still needs to contain the same elements, but the specific ways in which you address those issues are going to differ depending on the size of your school and your resources available.

So, you may be thinking, "How does Title IX tie in to all of this?" And a few years ago, if you had asked somebody about Title IX and if they knew anything about Title IX, most people would have said that it was a law that applied to college athletics. For example, if you had a college sports team, that you had to have the same number of scholarships available to male students at your school as compared to female students at your school. And Title IX certainly does apply to college athletics, but it's a lot more than just college athletics.

Title IX prohibits sex discrimination in education programs that receive federal funding. Over the years, that's been interpreted in such a way that sexual harassment, including sexual assault, is considered to be sex discrimination that is banned by Title IX. Under Title IX, 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. This is important to understand because you may be the director of a school or you may be the Title IX coordinator at your school and you may not have any knowledge about sexual harassment or sexual assault that's happened at your school. However, if a student has filed a complaint with somebody else at your school, then your school may be on notice and now you are obligated to take action in response to it.

The Title IX and Violence Against Women Act 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 coordinators at these schools are often directors or other administrators whose primary job functions pertain to school operations. Given the size of

the student body, the lack of residential housing, limited school-sponsored extracurricular activities, incidents of sexual misconduct may be infrequent at these types of institutions.

During the creation of the regulations implementing the Violence Against Women Act, many schools raised these issues. In response to those concerns, the Department of Education noted that the requirements placed on the schools are statutory. What that means is that the requirements for schools to investigate and have disciplinary proceedings and to have education programs for their students is required by the statute that Congress passed. And so, the Department of Education could not change those requirements.

The Department also stated that students at smaller schools should have the same protections as their counterparts at larger schools. Furthermore, and what I think is the most important distinction for schools to understand, is what they're being asked to do is not make a determination of whether a crime has been committed, but what schools are required to do is to investigate and make a determination of whether or not their school policy has been violated. So, you may have an incident occur at your school that is potentially a crime under state law. Schools are not responsible for determining whether or not a crime's been committed. That's the responsibility of the police to investigate, the prosecutor's office to prosecute, judges and juries and criminal process to determine whether or not there's been a crime committed and whether there should be legal sanctions. That's the criminal process. What schools are required to do is to investigate a complaint and determine whether or not, based upon their investigation and their school adjudication process, whether or not a school policy has been violated, and if a school policy has been violated, then to impose school sanctions. So, they're two separate issues. They may be parallel and they may all rise out of the same instance, but they're two separate considerations.

The Office for Civil Rights is responsible for enforcing Title IX at colleges and universities. In May of 2014, when the Civil Rights Office first publicly named the colleges under investigation, there were 55 schools on that list. As of January 2016, there were 197 open investigations at 161 schools across the country. As of September of 2016, that number had increased to 273 active investigations at 211 colleges across the country. In addition to the new requirements under the Violence Against Women Act and the regulations that were enacted in response to it, Congress continues to look at this issue and there's pending legislation that would add additional requirements and accountability to college campuses as it relates to issues of sexual misconduct. Furthermore, state legislatures are looking at what can be done to protect students on college campuses. California and New York have already enacted comprehensive legislation for their schools, and in 2015, 26 states considered legislation related to campus sexual assault.

That's a long introduction into how we got here and why schools are required to have policies and procedures related to sexual assault and sexual misconduct, but I think it's important to understand the 'why' before we get into the details and the specifics of what schools are required to do.

## **Helpful Title IX/VAWA/Clery Act Resources**

### **Bureau of Justice Statistics**

Campus Climate Survey Validation Study Final Technical Report, January 2016



### **Campus Safety and Security Data Analysis**

Data Tools You Need



### **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



### **Preventing and Addressing Campus Sexual Misconduct**

A Guide for University and College Presidents, Chancellors, and Senior Administrators



### **Questions and Answers on Campus Sexual Misconduct**

United States Department of Education, Office for Civil Rights, September 2017



### **The Clery Act by the Violence Against Women Reauthorization Act of 2013 (VAWA)**

A Rule by the Education Department - 79 FR 62751, October 20, 2014



### **The Task Force**

Not Alone Report: The First Report of the White House Task Force to Protect Students From Sexual Assault, April 2014



### **The Task Force**

The Second Report of the White House Task Force to Protect Students From Sexual Assault, January 2017



**U.S. Department of Education Campus Safety**

The Handbook for Campus Safety and Security Reporting, June 2016



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

Checklist for Campus Sexual Misconduct Policies, April 2014



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

Sample Language for Reporting and Confidentially Disclosing Sexual Violence, April 2014



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

Protecting Students From Sexual Assault

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





## **Training and Education and Prevention Programs**

The Violence Against Woman Act added training requirements for schools and there's really two elements to that. There's training for school officials who are responsible for implementing policies and responsible for responding to issues at the school and then there's a separate training requirement for all incoming students and new employees.

As it relates to training for school officials, any institutional disciplinary hearings at the school must be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, and sexual assault and stalking, and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability. What this means is that any school officials who might be involved in the disciplinary process at their school need to attend annual training on these issues. This is a requirement that was enacted as part of the law itself that was passed by Congress.

What should be included in that training for school officials includes information on working with and interviewing persons subjected to sexual violence, information on the particular types of conduct that would constitute sexual violence, and the proper standard of review for sexual violence complaints. In September of 2017, Secretary of Education Betsy DeVos issued guidance stating that under Title IX, schools can choose to utilize either a 'preponderance of the evidence' standard or a 'clear and convincing evidence' standard as their standard of review for sexual misconduct complaints.

The training should include information on consent and the role that drugs or alcohol could play in the ability to consent. Training should also include the need for remedial actions for the perpetrator, the complainant, and the school community. Training for school officials should also include information about determining credibility of witnesses, how to evaluate evidence, and how to conduct an investigation; it should include training and confidentiality, the effects of trauma on victims as well as cultural awareness training. The school must also have training programs for incoming students and new employees aimed at prevention and awareness as it relates to issues of sexual violence and sexual misconduct. A description of these programs needs to be included in your school's annual security report.

The school's annual security report must also include a statement of policy that addresses the school's programs to prevent dating violence, domestic violence, sexual assault, and stalking. And there's two elements of this. The first part is that the school needs to have a primary prevention and awareness program for all incoming students and new employees. The school also needs to have an ongoing prevention awareness campaigns for students and employees. So,

the first element of that is, for all of your incoming students and new employees, that you've got a training and awareness program as they enter school or enter employment. The second piece of that is the schools are required to have ongoing training programs. For example, you may have someone from a local law enforcement or a local victim's rights or a victim's advocacy organization coming and talking to your student body on a regular basis. So, the second element of that is an ongoing training program for your entire student body.

Your primary prevention and education program for incoming students and new employees should include the following topics. It should include a description of Title IX in what constitutes sexual violence under the school's policies. It should include your school's definition of consent, a description of how the school analyzes whether conduct was unwelcomed under Title IX, and whether it creates a hostile environment at your school. It should include the reporting options including formal reporting and confidential disclosure options in any timeframes that the school sets for reporting. It should include a description of the school's grievance procedures and the disciplinary code provisions relating to sexual violence and the consequence for violating your school's provisions. The training program should also include information about the effects of trauma, the role that alcohol and drugs often play in sexual violence incidents, and strategies and skills for safe bystander intervention. You should include information about how to report sexual violence to either campus or local law enforcement as well as Title IX's protections against retaliation. And part of the training should also be to encourage students to report incidents of sexual violence.

As we discuss the issues of sexual misconduct in college campuses and reporting incidences and responding to occurrences of sexual misconduct, I think it's important to have a basic understanding of school's responsibilities under the Clery Act in reporting crimes under the Clery Act. In June of 2016, the Department of Education published an updated handbook for campus safety and security reporting. And this is the first update to the Clery Handbook since the enactment of the Violence Against Women Act.

Generally, under the Clery Act, schools are required to collect, classify, and count crime reports and crime statistics. Schools have an obligation to issue timely warnings and do emergency notifications. If there are emergency situations occurring in their schools or on their campuses, schools are required to publish an annual security report with updated campus crime statistics. They're required to distribute that updated annual security report to all students and employees by October 1 each year. Schools are also required to submit their annual crime statistics to the Department of Education. It is important to note that the Department of Education can issue Civil Fines of up to \$54,789 per violation for substantial misrepresentation of the number, location, or nature of the crimes required to be reported or for violation of any of the other provisions of the safety- and security-related regulations under the Higher Education Act. So, it's critically

important for our schools to understand they're clearly reporting obligations and to make sure that they are in compliance.

Note that the campus crime survey statistics that are submitted to the Department of Education each year are publicly available online. If you're interested in reviewing your school's information or schools in your community, you can access this at the website [ope.ed.gov/campussafety](http://ope.ed.gov/campussafety). As it relates to the reporting of campus crime statistics, schools are required to disclose crimes that occur on their campus, on public property, within or immediately adjacent to their campus, and in or near non-campus buildings or property that the institution owns or controls. For Clery crime reporting purposes, the campus is any building or property that's owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of the educational purposes. This would include residence halls if your school has residence halls.

Many trade and career schools lease space in strip malls or office buildings. If that's the case, then your campus would consist of any space within the strip mall or office building that is covered by your written lease agreement. If the lease includes the use of parking lot or selected spaces in the lot, then you would include that lot or spaces as part of your campus. For example, if you own or operate a cosmetology school, cosmetology schools often have clinics that are open to the public in which their students perform services on members of the public. You may have a lease agreement that provides for certain parking spaces in front of the building or in front of your lease location that are dedicated for guests of your student clinic. If those parking spaces are identified in your lease agreement, then those parking spaces would be part of your campus. If your students need to use stairwells or elevators or hallways to access the space within your institution, that that becomes part of your campus as well.

You would not include any other office buildings or office space, restaurants, et cetera that may be part of the physical building or part of the strip mall or the office building that your campus doesn't control. For Clery reporting purposes, your campus would not include other businesses that might be located in the office building or strip mall. For example, if there's a restaurant at the opposite end of the strip mall in which your school is located, any crimes or any instances that occur in that restaurant would not be reported as part of your campus for crime reporting purposes because your school doesn't control that space. For Clery reporting purposes, public property includes any streets or sidewalks, parking facilities that are within your campus or that are immediately adjacent to and accessible from your campus. Public property means public property. So, if you've got a public parking lot that's immediately adjacent to your campus, that would be public property for Clery reporting purposes. However, if it's a privately-owned parking facility, even if the public can park there, it's not part of public property for Clery reporting purposes because it's not property owned by the public. It's a private facility. Generally,

the rule of thumb for public property for Clery reporting purposes is a sidewalk adjacent to the campus, the street next to the sidewalk, and the sidewalk on the opposite side of the street.

The 2016 updates to the Clery handbook include this example of public property. In this example you've got two college buildings that take up a city block. In this example, public property for Clery reporting purposes is the sidewalks that are adjacent to the college buildings. The streets, they're adjacent to that sidewalk and the sidewalk on the opposite side of the streets. Public property for Clery reporting purposes ends at the sidewalk on the opposite side of the street. So, for example, in this picture from the Clery handbook, there's a taco store, a bookstore, and a fast food restaurant on the opposite side of Main Street. Anything that might happen inside of those buildings or inside of those facilities would be excluded for Clery reporting purposes because that's outside Clery geography. That's not part of the school's public property for Clery reporting purposes.

Here's another example from the Clery handbook. There's a public parking lot A that's immediately adjacent to the college campus. And so that public parking lot would be part of this school's public property for Clery reporting purposes. On the opposite side of mainstream, you've got another public parking lot, parking lot B. But again, because the public property definition ends at the sidewalk and the opposite side of the street from the school, that public parking lot B is not included in this school's Clery geography.

The third category of reporting for Clery geography purposes is non-campus buildings or property. That would include any building or property that's owned or controlled by a student organization officially recognized by the school as well as any building or property that's owned or controlled by the school that's used in support of the school's educational purposes and is used by students but not within the reasonably contiguous geographic area of the school. For example, your school may have a lab facility that's offsite that's used occasionally by students but it's owned by the school. So even though it's not part of your main campus, it's used as part of the educational purposes and used by students, so it would be part of your non-campus property for Clery reporting purposes.

One of the issues that comes up oftentimes for trade and career schools is what happens or how do you classify for Clery reporting purposes any instances that might occur while a student is on a clinic assignment or an externship assignment. For example, you may have an agreement to send students to a privately-owned hospital for clinical training. If you don't have an agreement with that hospital for the use of any space within that hospital, then you do not include any statistics for crimes that occur there. That facility is outside of the school's ownership or control and so it's not part of their geography. However, if the school actually runs classroom space for

students within that hospital, then the school would be required to include crime statistics for any instances that occur in that space that they run as well as any other areas such as lobbies or hallways and elevators that are used by students to access that space for the time that it's being used by the school.

So, your school needs to have a policy prohibiting sexual misconduct at your college. As part of that, you need to define the types of conduct that are specifically prohibited. The policy should define and make it clear that sexual harassment, domestic violence, dating violence, sexual assault, and stalking are prohibited conduct at your school. Now remember that this is separate from the definitions under your state law. These may all be crimes under your state law but your school's not responsible for determining whether or not a crime has been committed. You have a policy that prohibits sexual harassment, domestic violence, dating violence, sexual assault and stalking. And your obligation is to investigate and to determine whether or not your school policy has been violated. And if so, what are the repercussions?

Sexual harassment is unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature when either submission to such conduct is made explicitly or implicitly a term or condition of an individual's education or employment, or the submission or rejection of such conduct is used as a basis for educational decisions or employment decisions affecting that individual. It is also sexual harassment if the conduct has the purpose or effect of creating a hostile environment or offensive educational working environment for the student or employee.

In defining sexual harassment, there's two types of sexual harassment. The first is hostile environment harassment, and that refers to a situation where a student or an employee is subject to a pattern of exposure to unwanted sexual behavior that's so severe or persistent or pervasive that it creates a hostile environment. An isolated incident unless sufficiently severe does not amount to a hostile environment caused by sexual harassment. The second is quid pro quo harassment, and that refers to a situation where students or employees are subject to unwanted sexual behavior where the submission or the rejection of such conduct is used as a basis for decisions affecting an individual's education, employment, or participation in school program or activity. In order to create a hostile sexual environment, there needs to be a pattern of behavior. However, with quid pro quo harassment, one time can be enough to create a sexual harassment situation.

Your school policy needs to include definitions for domestic violence, dating violence, sexual assault, and stalking. Domestic violence under the final Violence Against Women Act regulations is defined as a felony or misdemeanor crime of violence that's committed by a

current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim, or spouse, or an intimate partner. For example, suppose you have an employee who reports to the campus security authorities that her ex-husband has physically assaulted her four times. All four of those assaults occurred at the employee's private residence, however he has also recently showed up in a non-campus parking lot outside her office and threatened to hurt her. For Clery reporting purposes, you would include one non-campus domestic violence incident for the intimidation that occurred in the non-campus parking lot. However, you would not include the aggravated assaults in your Clery Act statistics because they did not occur on Clery Act geography. The employee in this circumstance reported four assaults that occurred at her private residence. While those assaults may be crimes under the Clery Act, they occurred outside of the school's Clery Act geography, so they are not reported as Clery Act crimes.

The final regulations defined dating violence as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship is determined based on the reporting party statement and consideration of the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship. In order to determine whether or not a crime of dating violence has occurred, you need to investigate and understand the nature of the relationship to determine whether or not the parties were in fact in a dating relationship.

One of the challenges with the definition of dating violence is that there may be a significant amount of overlap with the definition of domestic violence. For Clery reporting purposes, if you have an incident that occurs on your campus or is reported to your school, you would need to determine whether or not that incident falls under the definition of domestic violence or dating violence. It's either one or the other and schools are obligated to make a good faith determination of which category to report it under. They're not required to report it under both. It's either domestic violence or dating violence.

The updated Clery handbook provides a number of examples of dating violence. And recognize, again, for Clery reporting purposes that you may have a Clery crime that's reported in your crime statistics even though it does not occur between students or employees at your school. For example, one of the examples given in the updated Clery handbook is a dating couple that's arguing at a public sidewalk in front of a campus building. The male slaps the female, her face is red. In this circumstance, the school would include this as one public property incident of dating violence. So, again, even though it's by members of the public, it's not a crime that occurred between students or between members of your school community; if it's a crime that happens within your Clery geography, it's recorded for your Clery crime statistics.

Other final regulations, sexual assault is considered to be an offense that meets the definition of rape, fondling, incest, or statutory rape as defined under the FBI's unified crime reporting program. The challenge with sexual assault usually comes down to the definition of consent. The behavior itself may not be illegal or may not be problematic, the challenge is whether or not the parties consented to the behavior. So, the investigation into crimes of sexual assault or allegations of sexual assault often come down to whether or not there was valid consent by all parties to engage in the behavior.

Sexual assault encompasses a wide range of behavior and the updated Clery handbook contains a number of examples of sexual assault. For example, you may have a male student that reports that another male student fondled him in a campus building while telling him he was glad that they could finally be alone. This would be reportable as one incident of on-campus fondling. Another example, you may have a female student who 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. This would be included in your statistics as one public property rape.

Oftentimes when dealing with an allegation of sexual assault, there will need to be a determination of whether the parties consented to the behavior. The Department of Education under the final regulations for the Violence Against Women Act did not establish a federal definition of consent. Therefore, schools are generally allowed to provide their own definition of consent for purposes of their policies against sexual misconduct. However, the department did provide some general concepts that schools should use in developing their policy regarding consent. At a minimum, the definition of consent should recognize the consent is a voluntary agreement to engage in sexual activity. Someone who is incapacitated cannot consent, and 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.

The definition of stalking under the final regulations is a course of conduct that's directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress. There's a number of elements to that. First of all is course of conduct. So that means it needs to be two or more acts involved. When you look at the definition of reasonable persons. Based on that course of conduct, would it be reasonable for that person to suffer substantial emotional distress or for that person to fear for their safety or the safety of others? When you look at the definition of stalking and how it can be conducted with technology today, it's not just simply somebody following somebody or physically harassing them. You can stalk somebody by email, text messages, or social media. You can have somebody stalking somebody else from a different building, from a different city, from a

different state. So, it's important to do your investigation to determine whether or not it's reasonable for the victim to fear for their safety or to be suffering substantial emotional distress. And that's going to depend on the facts and circumstances.

For example, you may get a report that a student claims, for example, that I'm stalking her because I sent her four emails to go to a party on Saturday night. The question is, well, is that stalking? The response is it depends on the facts and circumstances. You need to know what was included in those text messages, what time were those text messages sent, what's the relationship among us. It may be something that's reasonable given the circumstances or it may be unreasonable. That's part of the investigation process to determine whether or not it rises to the level of stalking.

So, when reporting instances of stalking, the question is, how many instances do I report? What's the number? Going back to the example of sending four text messages to a fellow student asking her to come to a party, if that's determined to be stalking, does the school count it as four times or is there some other number? And the general rule is that you would count it only one time, you would count the course of conduct only once for each calendar year in which it occurred. For example, if those four text messages were sent in September of 2016, you would count those four text messages as one incident of stalking. However, if there were four text messages that were sent in December of 2016 and another four that were sent in January of 2017, you would have one reportable incident that occurs in 2016 and another reportable incident that occurs in calendar year 2017.

When reporting an incident of stalking, the school is required to record each report of stalking as occurring at the first location within the institution's Clery geography in which the perpetrator engaged in the stalking course of conduct or a victim first became aware of the stalking. So, you may have a circumstance in which you have a perpetrator within your Clery geography who is stalking somebody else. And again, with technology they may be stalking somebody else who's not on your campus, who's not in your city. They could be using it through text messages, emails, social media, or you could have a situation where the victim first becomes aware of the stalking on your campus, which becomes a reportable incident on your campus.

For example, you may have a female student who reports that she's afraid for her safety because an 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 security authorities to report the behavior. The location of the ex-boyfriend when he was sending the harassing messages is unknown. In this example, you would include this as



one on-campus stalking because the first incident in the course of conduct to occur on Clery Act geography. So even though we don't know where the ex-boyfriend's located, the student opened an email, harassing email, stalking email while on campus, so the school has a reportable incident of stalking on their campus. So, I want to emphasize again that it's important for Clery reporting purposes to remember that the crimes committed outside the geographic locations specified by the Clery Act are not reported.

The handbook contains an example of two students who get into argument at a popular off-campus bar. In this example, Bob attacks Brad with a broken bottle and Brad pulls out a gun and kills Bob. In this example the school would not include a statistic for this incident in their disclosures because the incident occurred at a private facility off campus. So as a school official, you may get reports from students about incidents that occur off campus. And again, with trade and career schools, non-traditional schools where the students leave at the end of the day where there's no on-campus housing, you may not have many incidents that occur on campus but you may be getting reports of things that happen off campus. And so, the question is, if something happens off campus, is my school required to process those complaints? And we just gave the example of an incident that occurred off-campus where you don't have to include those incidents in your campus crime disclosures under the Clery Act.

Under guidance issued by Secretary of Education DeVos in September of 2017, 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 school program or activity. However, that same guidance also states the schools are responsible for redressing a hostile environment that occurs on-campus even if it relates to off-campus activities. So, if you have a situation where an incident involving two students occurs off-campus, but then those two students returned to campus and it has the effect or potential effect of creating a hostile environment, then the school would have an obligation to process that complaint.

In April 2015, the Department of Education issued a 'dear colleague' letter reminding all schools to designate a Title IX coordinator. The contact information for your school's Title IX coordinator must be widely distributed, should be included on your school's website, and included in your school publications such as your school catalog. Note that in 2015 the Department of Education began collecting information about schools' Title IX coordinators, and that's now part of the annual campus crime survey information that schools submit to the Department of Education.

The Title IX coordinator is responsible for monitoring and overseeing the school's compliance with Title IX and for the prevention of sexual misconduct. The Title IX coordinator ensures

effective implementation of a school's sexual misconduct policies and procedures. It oversees the training and prevention programs at the school. The Title IX coordinator is also responsible for overseeing the school's response to any Title IX report. This means that the Title IX coordinator must be informed of all reports and complaints for raising Title IX issues even if the report or complaint was initially filed with another individual or office at the school. The school should ensure that the Title IX coordinator is given adequate training, authority, and visibility necessary to fulfill these responsibilities.

There are a number of important considerations for schools in designating a Title IX coordinator. If your school organization has multiple campuses, it is important that each campus have their own designated Title IX coordinator. The Title IX coordinator is responsible for overseeing the school's response to Title IX issues that are raised on campus. It's important to have somebody on campus to be able to identify issues, to work with students, to help with the education programs, and to understand to be a resource to the community and to be available locally. So even if you have multiple locations, you may have a central office. You may have somebody designated in your central office to work with your schools on these issues. Nevertheless, you need to have somebody on site who is the Title IX coordinator for that local campus.

It's also important to make sure that the person who's designated to be your Title IX coordinator be trained and have the ability to manage these issues as they may be presented at your school. The issues raised with Title IX complaints are often very emotional. And so it's very important that the person who's designated as a Title IX coordinator and who's responsible for the school's response to the complaint and making sure that there's a fair process for both the complainant and the respondent has got the training and the ability to manage that process effectively. A school may decide to give its Title IX coordinator additional responsibility such as providing training to students and faculty, conducting Title IX investigations, determining sanctions for violating your school's Title IX policies, determining appropriate interim measures for students who have filed complaints and for working with local law enforcement and local victim advocacy organizations.

### **Victim's Rights and Processes**

School sexual misconduct policies and procedures should include the process for reporting alleged offenses. This should direct students and employees to report an incident of sexual misconduct to the school's Title IX coordinator or you may designate other campus safety officers to whom students could file reports as well.

It's important to note that filing a complaint with a school official does not require that the student also file a complaint with the police or prosecutor's office. Title IX coordinator should not share information with local law enforcement without the victim's consent or unless the victim has also reported the incident to local law enforcement. Recognize that depending on what state you're located in there may be state laws that apply to this issue as well, but based on federal guidance, the school should not report to local law enforcement without the victim's consent. Before a victim reveals any information to the Title IX coordinator, the coordinator should ensure that the victim understands the school's confidentiality policy and any reporting obligations that the coordinator might have. It's also important to understand that 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. So even if the incident occurred three days ago, three weeks ago, three months ago, the student still has the opportunity to file a report and the school still has an obligation to investigate.

Upon receiving a complaint, the school should be prepared to provide the student with a notice of rights. A notice of rights is not simply providing the student with a copy of the school's annual security report or the school's sexual misconduct policies and procedures. Rather, it should be a specific statement providing information to the student about their rights, such as the right to file a complaint with local law enforcement or any available accommodations that might be offered to the student (whether they're academic or schedule changes, for example). It should also include information about support organizations and healthcare options that are available to the student within your community.

Part of the education program and information that should be provided to students is the importance of preserving evidence. This is something that should be included as part of your education in prevention awareness programs for incoming students and new employees. It's important to preserve available evidence as part of any investigation. Victims of sexual assault, domestic violence, or dating violence should consider seeking medical attention as soon as possible. This may help with the preservation of any evidence for an investigation, but even more importantly, will provide necessary medical treatment and support to address any healthcare concerns. Victims of sexual misconduct are also encouraged to preserve evidence by saving text messages, instant messages, social networking pages, other communications, and by keeping pictures or logs, and copies of documents, if they have them, that would be useful in connection with a school or police investigation.

One of the challenging issues in reporting instances of sexual misconduct is the coordination with the school's drug-free school policy. Students may be reluctant to report instances of sexual misconduct because they fear being disciplined pursuant to the school's alcohol or drug policies. Oftentimes, when we talk about instances of sexual misconduct on college campuses, drugs and alcohol play a big part in that. Students may be afraid of reporting because they're afraid of being

punished. In consideration of that, policy-makers have placed an emphasis on encouraging students to report, and seeking to protect the students from being punished under the school's drug-free school policy. The states of California and New York have passed laws protecting students from being disciplined under school drug policies and alcohol policies if they report an incident of sexual misconduct in connection with that. In guidance from the Department of Education, they request that whenever possible schools respond educationally, rather than punitively, to student alcohol or drug policy violations associated with reported sexual misconduct.

The school's policies, as well as training for incoming students and new employees should include information about options for assistance following an incident. It should include information about immediate assistance that's available, such as resources in your community for healthcare and counseling. It should also include information available for ongoing assistance such as counseling, advocacy, and support groups, whether on or off campus. Your school may not have these resources available on campus, and if that's the case, you need to explain in your policy and in your education to students that you do not provide those services on campus, but you need to be able to educate and inform students of what resources are available in your community and where they can go in your community if they need healthcare or counseling support.

Your policy and education to students also needs to include information about academic accommodations and interim measures that may be available after filing a report. This can be a challenge for small schools. The 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, to change work schedules, to alter academic schedules, to withdraw from or retake a class without penalty, and to access academic support such as tutoring. The 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, or changing the alleged perpetrator's living arrangements or course schedules.

The provision of academic accommodations and interim measures can be a challenge for small trade and career schools. For example, say you have a massage school, or a massage therapy program, and one of the students in that program files a complaint alleging sexual misconduct against another student. You would not want to keep both of those students in the same classroom next to each other while an investigation going on. So, the question is, what do you do? Now you may have another program offering where you could move the alleged perpetrator into that program pending an investigation to allow him or her to continue their education while the investigation is pending. Maybe you don't have any other options, so you need to think about how you are going to accommodate students and what type of measures you're going take if the situation happens at your school. And this is one of those things where it's important to be

prepared and to think about it ahead of time to know how you will address this situation, so that you're not caught flat-footed in having to respond to this in the heat of the moment.

One of the challenges, too, when you're looking at this if you've got two students in the same classroom, in the same program, and there's not an alternative to move one of the students, you may think, well, I'll put both of those students on a leave of absence while we do an investigation, so that we're being fair to both the complainant as well as the respondent. And in theory, that may look good on paper. The challenge is that if a student who files a complaint is then put on a leave of absence pending the investigation of the complaint, that may very well be viewed as an encumbrance or a burden being placed on somebody to file a complaint. The goal with the Violence Against Women Act and the renewed emphasis on these issues is to encourage students to file complaints and to hold respondents accountable. So, putting any restriction or anything that might be viewed as a punishment upon a student for filing a complaint is going to be viewed as impermissible under Title IX.

So, again, thinking through how are you going to accommodate students? How are you going to create a process that's fair at your school, while recognizing that your options may be limited if you've got a small school or a small program requires that you think about these things and have a plan in place before the situation might occur at your school. The challenge with small schools and small programs is that you may not have the resources on campus to provide these services. In these cases, schools are encouraged to partner with local crisis centers. There are resources within your community that could provide 24-hour crisis intervention, that might offer medical legal advocacy, counseling, professional training, community education, and may also be available to help you develop prevention programming for your school.

The NotAlone.gov (URL changed to [ChangingOurCampus.org](http://ChangingOurCampus.org)) website provides a sample *Memorandum of Understanding* which is a contract that your school can enter into with a local support organization. The *Memorandum of Understanding* formalizes the commitment of the parties to work together to provide services to students and employee victims of sexual assault and to improve a school's overall response to sexual assault. The school's policies must include provisions governing confidentiality. Students may seek to file a report but ask that it remain confidential. The challenge for school officials is that generally they cannot promise to keep a report confidential. The big reason for that is that the school has an obligation to protect all its students, not just the student who's filing the report, but also the campus community as a whole, and depending on the information being provided as part of the report, the school, or the school officials, may have other obligations that make it impossible for them to keep the report confidential.

So, it's important, as part of the training and education for your students and for your employees, that they understand your school's confidentiality policy, and that that's included in your annual security report. It's important that the students understand the school officials' reporting obligations before the student reveals any information. Policies should describe what information will be kept confidential, and what information may be disclosed, to whom it will be disclosed, and why. It's important that a victim not be pressured to request confidentiality, nor make a full report if the victim's not ready to do so. Your policies should include provisions and information as to where students can make confidential reports and engage in confidential communication regarding incidents of sexual misconduct.

Most career schools will not have the resources to provide this type of counseling on site. In that case your policy must state the school does not provide professional or pastoral counseling. The school must still be able to assist a victim of sexual misconduct in obtaining support services from local groups or agencies where they can discuss these issues in a confidential manner, and the school must publicize this contact information for these support organizations. 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. If the school determines that the alleged perpetrators 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. If a victim discloses an incident to the Title IX coordinator, or wishes to maintain confidentiality, or requests that no investigation into a particular incident be conducted, the school must weigh that request against its obligation to provide a safe, non-discriminatory environment for all students, including the victim.

In this case, the Title IX coordinator will weigh the victim's request against the facts and circumstances, look at the situation, look at the information being reported by the student, whether the alleged perpetrator has been engaged in a pattern of behavior, whether this is the first incident that's being reported against the perpetrator, or if this is a series of reports against the perpetrator, the nature of the alleged crimes. Depending on the circumstances, it's up to the Title IX coordinator to determine whether to accept the student's request for confidentiality. 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 may be limited. If the school determines that it cannot maintain the 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 will also need to take steps to protect the victim from any retaliation or harm, and work with the victim to create safety plan. The school should not require the victim to participate in any investigation or disciplinary proceeding. If the school determines that it can respect a victim's request for confidentiality, the school must still take immediate action as necessary to protect and assist the victim.

A school's policies and procedures will inform students and employees to report incidents of sexual misconduct to the Title IX coordinator. The challenge is, what if a student or an employee files a report or discloses an incident of sexual violence to somebody other than the Title IX coordinator? Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is considered a responsible employee of the school. 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. A responsible employee must generally report all incidents of sexual violence to the Title IX coordinator. This is because a school is obligated to address sexual violence about which a responsible employee knew or should have known.

So that leads to the question of who is a responsible employee? A responsible employee includes any employee who has the authority to take action to redress sexual violence, but it also includes any employee whom a student could reasonably believe has this authority. 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. Whether an employee is a responsible employee will vary depending on the factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school policies and procedures.

For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has the same authority. It's important to remember that when a responsible employee knows or reasonably should know of possible sexual violence, the Office of Civil Rights deems the school to have notice of sexual violence.

## Violence Against Women Act Challenges

As it relates to trade and career schools, the Violence Against Women Act can pose some difficult challenges because of the following:

- 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 institutions.

Despite some of these difficulties, it was determined that students at smaller institutions should have the same protections as their counterparts at larger institutions.

It is important to realize that all schools have to treat their students appropriately under this Act and all schools hold a responsibility to ensure their students are safe and feel protected. While incidents of sexual misconduct may be less prevalent at these types of schools, that does not mean they do not occur, and students who are victims of these crimes still need protections in place.

Imagine you are the director for a trade or career school that has recently started. Your enrollment is beginning to increase to the expected numbers and you are looking to expand the institution further. One of your administrators just brought to your attention the fact that your institution is currently non-compliant with respect to VAWA and Title IX as those procedures have not been put in place. This is very concerning to you as, on the one hand, this is a legal requirement, but, on the other, as a start-up, there are few additional resources you can expend.



## Victim Trauma

In conducting investigations and particularly in interviews with victims of sexual misconduct, it's important to recognize the issues of trauma as well as some of the challenges and biases that affect the assessment of credibility. A March 2015 study funded by the National Institute of Justice underscores the challenges faced by sexual assault victims. In that study it was found that 11,219 rape kits in the city of Detroit went untested for years. As part of the investigation in trying to figure out why these rape kits went untested for so long, the study indicated a number of victim-blaming beliefs about sexual assault victims.

For example, rape survivors were often assumed to be prostitutes and therefore what had happened to them was considered to be their own fault. Adolescents were assumed to be lying, trying to avoid getting into trouble by concocting a false story about being raped. Police said that those who had been assaulted by friends and acquaintances had got what they got because they had chosen to associate with the perpetrator. The challenge for this is that perpetrators who are allowed to get away with their crime are likely to continue to engage in that type of behavior. And the sad thing in looking at a situation such as this, is questioning how many persons were unnecessarily victimized because perpetrators weren't taken off the streets sooner.

One of the credibility challenges in investigating these types of cases is the lack of physical resistance. The stereotype of 'real rape' suggests that genuine victims will resist their assailant to their utmost capacity. After all, "if she didn't resist then maybe she really wanted it". The reality is that most sexual assault victims exhibit little or no physical resistance. This can be 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 the 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 disassociation or are frozen in fright, or because they are under the influence of drugs or alcohol.

To overcome the stereotype, an investigator must carefully elicit from the victim exactly how they responded to the situation and what they were thinking and feeling while doing so. It is important to use open-ended questions that allow the victim to describe the experience in their own words. For example, the interviewer 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's a correct response to rape. 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. Instead, the interviewer 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 their thoughts, feelings, and experiences during the assault.

Another credibility challenge is delayed reporting. There may be many reasons why victims delay reporting, but this typical reaction is nonetheless seen as a cause for suspicion. Delayed reporting is also a factor that often differs between victims of stranger and non-stranger sexual assault. Victims will often delay reporting because they are afraid that no one will believe them. They are afraid that family members and friends will side with the offender, rather than themselves. They're afraid for what will happen to the offender if the abuse is reported. Or they're afraid for what will happen to their own lives after disclosing such a secret. 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 may also believe the myth 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 the perpetrator into their home. To overcome this issue is a challenge to the victim's credibility and investigators should provide the victim with open-ended prompts to elicit their thoughts and actions during and after the incident.

Investigators should also reassure the victim that delayed reporting is common and understandable given the circumstances of rape victimization. It is also important, if possible, to interview any others with whom the victim has discussed the assault, especially the first person to whom they disclosed. These statements, especially to the outcry witness (that is 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 the reasons for not reporting immediately.

Another challenge to victim credibility is inconsistent or untrue statements. There are a number of reasons why victims sometimes make statements to police or investigators that are inconsistent or untrue. This may be due to the effects of trauma and the disorganization of memory as a result of experiencing the traumatic incident. The victim may have discomfort with talking about sexual details, or they may be afraid that they're going to be punished or blamed for what happened. 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 their behavior will be used to be judged the seriousness of the incident or the validity of the claim.

Equally important, investigators should emphasize to victims that they must tell the truth, or their credibility will later be questioned. Making the environment safe and non-judgmental is important in removing the incentive to be untruthful. Open-ended prompts can be used to elicit the whole story, including those behaviors by the victim that might be seen as unflattering or illegal. It is important to remember in conducting an investigation that there is no typical profile of a sex offender. No two sex offenders are exactly alike. They come in all shapes, all sizes, all sexes, all sexual orientations. As we've seen too often in the press, they can be members of the clergy, they can be Hollywood actors and actresses, they can be coaches, teachers. So, it is important to keep in mind that there are no stereotypes or typical characteristics of a sexual predator.

In developing your policies for your school, as well as your education programs for your students and staff, it is important to be mindful of cultural issues that may come into play. It's important to understand the makeup of your student body as well as your employees and recognize that cultural issues may come into play as far as a student or an employee's ability or willingness to report an incident or participate in an investigation. You need to be mindful of these considerations as you develop policies and work to create an inclusive environment in your school to encourage all people to participate, to report incidents so that an investigation can be conducted, so that the school can take corrective measures, so that victims can be protected, and so that violations can be punished.

## Grievance and Adjudication Procedures

Schools are required to have written policies and procedures regarding the investigation and adjudication of complaints alleging sexual misconduct. It's essential that the entire grievance and adjudication process to be fair, prompt, and impartial. Schools open themselves up for liability if they're not careful to uphold the rights of both parties in the adjudication process, and if the disciplinary procedures do not properly balance student due process rights with the need to address allegations of sexual misconduct. When we talk about due process, that essentially boils down to being fair to both parties, having a fair and impartial procedure for everybody involved. It is important for your school to follow your policies. Your written policies create a contractual relationship with your students. It's not enough simply to have policies and procedures in place. School officials must be trained in those policies. And again, your school will be held liable if it does not follow its published policies and procedures.

This concept of providing a fair proceeding for all the parties involved can be seen in a recent federal district court case involving Brandeis University. This case involved a student who was found guilty of violating the university's policies against sexual misconduct. Brandeis is a private university located in Massachusetts. In its ruling, the federal court noted that Brandeis is not a governmental entity. It's not bound by the requirements of the Sixth Amendment, and that this proceeding was not involving a criminal proceeding, and therefore a lot of the procedural protections offered to defendants in a criminal case were not applicable, because this dealt with school policy, not criminal law. The court also made a comment that it is not generally the role of the federal courts to tell a private university how to conduct its affairs. Nonetheless, the court found that Brandeis' authority to discipline its students was not entirely without limits. Essentially, Brandeis argued that it was simply following its published policies when it disciplined the student. And whether or not that policy was fair, the student agreed to that policy when he enrolled at the university. The court, however, said that the university's policy still needed to provide basic fairness to the student.

That leads to the question: what is basic fairness? The court said that there is no one-size-fits-all answer to the question of what constitutes basic fairness that a student is due. The answer may vary depending on the competing interests at stake, including 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.

In the court's analysis, there are two principal threads to the fairness inquiry. First is the concept of procedural fairness. That is whether the process used to adjudicate the matter was sufficient to provide the accused student a fair and reasonable opportunity to defend himself. Next is substantive fairness. That is, even if the procedure was fair, whether the decision was unduly arbitrary, or irrational, or tainted by bias or other unfairness.

In this particular case involving Brandeis University, the federal court determined that the school's process for adjudicating complaints of sexual misconduct was not fair to the accused student. The court also found that Brandeis University violated the concept of substantive fairness because the university's initial finding of guilt was based to a substantial degree on unfair generalizations, stereotypes, or logical fallacies, and that the basic fairness of the proceeding was affected by those facts.

Once a school receives a notice of alleged sexual misconduct, it must immediately conduct a thorough and impartial fact-finding investigation. This is not optional. The school has an obligation to conduct its own investigation, regardless of whether law enforcement is involved. The entire grievance and adjudication process should not take more than 60 days, not including any appeal rights that you might have under your policies. The 60-day rule is not a hard and fast rule. There may be reasons why it takes more than 60 days to resolve a complaint. It may be a complicated complaint; you may need more time. You may find yourself in a situation where there's a parallel police investigation, and the police have asked your school to hold off with your investigation until they're completed. If there's a reason why you need to hold off on the complaint or it's going to take longer than the expectations set forth in your policy, it's important that you notify both parties so that you can manage expectations throughout the proceeding.

The school's policies will designate the person responsible for overseeing the school's investigation, response to, and resolution of all reports of prohibited sexual misconduct. The investigator may be somebody from the school who's trained in these procedures. It may be somebody that the school hires to help them with this process. The complainant may request an investigation not be undertaken. Remember, however, that ultimately, the determination of whether an investigation proceeds is the school's determination. The school still has an obligation to protect the student complainant, as well as the other students and employees at the school, and therefore notwithstanding a student's request to not have an investigation. The school may still be obligated to do so. The investigator should direct the complainant, the respondent, the witnesses, and any 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.

It is important throughout this process that the school keep and maintain a complete written record. Part of that will be a written statement of the complainant. That will include notification to the respondent that a complaint has been filed and the nature of the allegations. It will include a written statement from the respondent, as well as any statements of witnesses. The school should be prepared to work with the parties involved to make sure that the written statements are

complete and accurate and properly describe the circumstances and reflect the complaints and the responses to the complaints.

At the completion of the investigation, the investigator should prepare a report detailing the relevant content from the interviews and the documentation gathered. The report should include the assessment of individual credibility and recommended findings or responsibility. Both the respondent and the complainant should have the opportunity to review a copy of the investigative report and any other information that will be used during the disciplinary proceeding.

So, in connection with the investigation, some do's and don'ts. **Do** notify the respondent of the allegations. Immediately conduct a thorough and impartial investigation. Ensure the complainant's safety throughout the investigation process. Determine whether interim measures are necessary. Maintain all information in a secure manner. Coordinate with criminal investigations 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 the respondent and any witnesses). Keep a written record of all statements in your findings. Do update the parties throughout the process.

**Do NOT** ignore the complaint and wait for the police to investigate; leave the complainant in the same class and facilities as the respondent; reach conclusions without documenting them and/or why they were reached. Do not delay.

Once the school's completed its investigation, question is, does the school have to hold a hearing in furtherance of its adjudication process? Schools are not required under Title IX to hold a hearing. However, it may be a helpful process to ensure that you're able to implement a fair and impartial proceeding, giving due consideration in providing due process to all the parties who are involved. Some incidents can be resolved by voluntary resolution. For example, if after the results of the investigation and the review of possible repercussions, the accused student wants to admit the infraction and accept the sanction without a hearing, that is an efficient way to address the incident, so long as the voluntary resolution decision is agreeable to the complainant as well.

If your policies allow for hearings, they should describe the makeup of the hearing panel. One of the issues is how many members will be participating in a hearing panel. Will there be simply one adjudicator, or you'll have multiple members? One of the advantages of having multiple members is that, ultimately, the decision does not rest on one person's shoulders. It can be shared by the group. However, based on your school's resources, you may not have the ability to have

more than one member available for hearings. Also think about who will be hearing panel members. Are you going to limit it to representatives from your school? Or, given the complexities of the situation, will it be necessary, will it be advisable for the school to seek outside assistance, such as lawyers or other third-party individuals with relevant experience and training on these issues? Think about how hearing panel members will participate. Is everybody going to be available to participate in-person in the hearing, or will you need to use technology to allow remote participation?

It's important that the complainant and the respondent are both informed of the panel members' composition before the hearing process begins. Both parties should have the opportunity to challenge the participation of a particular panel member, because of any perceived conflicts of interest, bias, or prejudice.

In conducting a hearing, logistics is important and should be considered. Due to the sensitive nature of the subject matter, you may want to conduct hearings off campus and recognize that a hearing should always be closed to the public. Witnesses should be kept in separate rooms and should not have contact with one another outside of the hearing. It's important that you keep a complete record of the entire hearing. This record may be needed by the board during deliberations and any appeal if your policy allows for student appeal, or for the school's defense of any lawsuit if necessary.

So again, consider who is going to be participating as hearing panel members. It may include school administrators or officers. You may bring outside lawyers or other individuals with relevant experience and training to serve as your school's hearing panel. Both parties should be present at the hearing. Your policy should allow the parties to bring an advisor to any hearings. Witnesses may be present during the hearing, but only during that portion of the hearing in which they will be providing their testimony. And if necessary, school personnel may be required to attend as well. Your hearing procedures may allow both the complainant and the respondent the opportunity to submit written responses to the investigation report and other relevant information to the hearing panel. The complainant and the respondent should both have the opportunity to review any written submissions by the other. The hearing panel can review the investigation report and these written submissions in preparation for the actual hearing.

A school's policy should include a description of the types of evidence that may or may not be presented. This includes but is not limited to prohibiting questioning or evidence about the complainant's prior sexual conduct with anyone other than the alleged perpetrator. It should also clarify that evidence of a prior consensual dating or sexual relationship between the parties by itself does not imply consent or preclude defining of sexual misconduct.

One of the challenges in hearings involving sexual misconduct is protecting the rights of the victim. Often times, victims are reluctant to come forward and to file complaints about sexual misconduct because of their fear of being cross-examined and having their past personal history become part of the hearing process. In order to encourage victims of sexual misconduct to come forward, it is recommended that if your school conducts a hearing and generally allows for cross-examination, your policy should describe alternative methods that preclude the respondent from personally cross-examining the complainant. Due to the sensitive nature of the allegations, the parties should not be allowed to question or cross-examine each other. Instead, the parties may provide the hearing panel with written questions and the panel will ask the questions that are determined to be relevant. When in doubt, the hearing panel should err on the side of including the question posed by the parties.

A few other considerations regarding hearings. 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 could be made via alternative means. Both parties should be allowed to bring an advisor of their choice to the hearing.

So, once you completed the investigation, you've completed an adjudication hearing, the question becomes, how do you make a final determination of whether there's been a policy violation at your school? How do you weigh the evidence? In September of 2017, the US Department of Education published updated campus sexual misconduct guidance that addressed this question. Under this updated guidance, schools have the discretion to apply either the 'preponderance of evidence' standard or the 'clear-and-convincing evidence' standard when evaluating evidence to determine whether or not there has been a violation of the school's sexual misconduct policies. 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.

For example, if a school applies a clear-and-convincing evidence standard in disciplinary actions involving theft, then it should consistently apply clear-and-convincing evidence standard to other disciplinary actions including cases involving sexual misconduct. Note that whether a school applies the preponderance of evidence standard or clear-and-convincing evidence standard to cases involving sexual misconduct, both are a lower evidentiary standard than is required for purposes of determining guilt in a criminal case. That is, in a context of a criminal prosecution, the evidence must show beyond a reasonable doubt that a crime has been committed. In the context of campus sexual misconduct cases, the school will apply either the preponderance of evidence standard or a higher clear-and-convincing evidence standard.



Note also that the school's annual security report must describe the standard of evidence that will be used during the institution's disciplinary proceedings arising from allegation of sexual misconduct. In these cases, the panel will have to determine which party is more credible and look for inconsistencies on whether there's any corroborating evidence. Demeanor and non-verbal clues should be observed as well. The use of the preponderance of evidence standard is a substantial deviation from the way in which criminal complaints are decided. 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 reasonable doubt that unlawful sexual activity took place.

In contrast, in campus disciplinary proceedings, a complaint is substantiated if a preponderance of evidence shows that the respondent engaged in the prohibited conduct. In the course of enacting final regulations under the Violence Against Women Act, the Department of Education defined sexual assault, domestic violence, dating violence, and stalking. The Department of Education did not define consent for violent purposes. Schools have the discretion of defining consent for purposes of their sexual misconduct policies. Recognize though that at a minimum, the school's 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.

Some schools have chosen to use an affirmative consent standard in defining consent for purposes of their school's sexual misconduct policies. Affirmative consent is defined as an affirmative, conscious, and voluntary agreement to engage in sexual activity. This is often referred to as 'yes means yes.' Both California and New York require the schools in their states use an affirmative consent standard in their standard conduct policies. Affirmative consent standard is under consideration in other states as well. The New York law provides a good illustration of how affirmative consent is defined. Under New York law, every institution is required to use an affirmative consent standard as part of its code of conduct. Under this law 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 a sexual activity. Silence or lack of resistance in and of itself does not demonstrate consent.

Recognize that the Department of Education does not require that schools adopt an affirmative consent standard to determine whether a student has given consent to sexual activity. Recognize also that the affirmative consent standard is very distinguishable from the standards that are applicable to criminal proceedings. Your school's policies must describe possible sanctions that

will be imposed if a student is found to violate your sexual misconduct policies. If there is a determination that a student violated the school's policies, any applicable sanctions should be fair and appropriate given the facts of the particular case. It should be consistent with the school's handling of similar cases, sanction should be adequate to protect the safety of the campus community, and reflective of the seriousness of sexual misconduct. Any sanctioning decision must be communicated in writing to both the complainant and the respondent.

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. Whatever the outcome of the hearing process, the school should also determine whether 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, or climate surveys regarding sexual misconduct.

At the completion of the hearing, the panel must issue a written decision as to whether the respondent violated the policy, and if so, what sanctions will be applied. This decision must be thorough and specific. Both parties must be simultaneously notified in writing of the hearing panel's decision. 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. In explaining the rationale for the result and sanctions, the school must explain how it weighted the evidence and information presented during the proceeding, and explain how the evidence and information support the result and the 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 standards. This means there cannot be 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.

Do's and don'ts in connection with the hearing process. **Do** respect integrity of the process and the parties. Be impartial. Give both equal opportunity to present witnesses and other evidence. Notify both parties of witnesses. Apply a preponderance of evidence standard or the clear-and-convincing evidence standard. And do always keep a record.

**Do NOT** require the complainant to be present at the hearing as a prerequisite to proceeding; assume guilt or innocence, keep an open mind; allow questions about the complainant's sexual history with anyone other than the respondent. Do not rely on evidence outside the hearing.

Thank you for participating in this education program. Title IX, the Clery Act, the Violence Against Women Act cover important topics and issues facing our school communities. It's important to understand the obligations under these acts, but also to take advantage of the opportunities available to protect our students and our school communities.