Sonoma County Office of Education

TITLE IX PART IV - ADDITIONAL TITLE IX CHALLENGES FOR COMMUNITY COLLEGES

January 29, 2019

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Areas of Expertise
General Education Code & Student Issues (including student discipline, interdistrict transfers; general student issues, student’s and parent’s rights); Governance (Brown Act, Public Record Acts, conflicts); Special Education/Section 504

Experience
Ms. Batanero has over 14 years of experience in administrative law; over 10 years of experience in education law. Ms. Batanero’s practice touches upon myriad legal issues relating to students and school personnel. She advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law, student discipline and anti-discrimination laws. In addition to regularly participating in IEP meetings, Ms. Batanero has represented clients before the Office of Administrative Hearings, the California Department of Education and the Office for Civil Rights. Ms. Batanero also assists school districts in negotiating agreements and reaching settlements with parents regarding special education issues. Ms. Batanero also assists school districts and County Boards of Education at all levels of the student discipline process and conducts investigations on behalf of her clients of allegations of discrimination. Prior to joining SCLS, Ms. Batanero worked in education law in Southern California representing school districts in special education matters as well as addressing various legal matters as they arose. Ms. Batanero is a Member of the California State Bar and the California Council of School Attorneys.

Education
Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
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Areas of Expertise  
Collective Bargaining  
Personnel  
Title IX & the Clery Act  
Website Accessibility

Experience  
Ms. Austin’s practice focuses on collective bargaining negotiations and personnel matters. She assists school districts, county offices of education, and community college districts in negotiating collective bargaining agreements, resolving grievances and unfair practice charges, and handling personnel matters. Ms. Austin also assists clients with Title IX and Clery Act compliance, as well as investigations of alleged discrimination or harassment.

Prior to joining SCLS, Ms. Austin practiced special education law representing public school districts at a law firm in Southern California for over 3 ½ years, where she worked extensively on matters pending before the California Office of Administrative Hearings. She developed expertise in analyzing special education documents, including IEPs, multidisciplinary assessments, and transition plans, for legal compliance. While in law school, she interned at a human rights NGO in Thailand teaching English to refugee women and Thai schoolchildren. Her capstone project for her M.P.A. degree involved a qualitative research study which identified common barriers facing community college students in Oregon as they transferred to four-year institutions.

Education  
B.A. Humboldt State University, Geography magna cum laude (2007)  
J.D. Drexel University School of Law (2011)  
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Title IX Part IV –
Additional Title IX Challenges for Community Colleges

January 29, 2019

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Title IX Part IV: Additional Title IX Challenges for Community Colleges

January 29, 2019

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Agenda

• Workshop series
• Brief overview of Title IX and the Clery Act
• Title IX’s intersection with Clery
• Coordination with campus and local law enforcement
• Respondents’ due process rights
• Title IX and Title 5 conflicts
• Case study
• Questions

Fall 2018
Title IX Workshop Series at SCOE

• Part 1 – Title IX Coordinator Essentials, September 19, 2018
• Part 2 – Conducting Title IX Investigations, October 2, 2018
• Part 3 – Nuts and Bolts of the Title IX Coordinator’s Role, November 14, 2018 & February 7, 2019
I. Brief Overview of Title IX

What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”


Title IX Regulatory Framework

- Federal statutes - 20 U.S.C. § 1681
- Implementing regulations - 34 C.F.R. Part 106
- OCR’s regulatory guidance
  - “Significant guidance document”
- Resolution Agreements and Letters with OCR and DOJ
- Trump Administration rescission of Transgender Dear Colleague Letter and new OCR investigatory guidance scaling back OCR’s oversight purview
- Overlapping and related California law
Enforcement of Title IX

- Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR).
- A possible penalty for violating Title IX is the loss of all federal funding.
- In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.
- OCR may seek to enter a Resolution Agreement with the district that requires the district to take various corrective measures.
- OCR may refer the case to the Department of Justice.

September 2017 Dear Colleague Letter

- Rescinded 2011 Dear Colleague Letter on Sexual Violence and 2014 Q&A on Title IX and Sexual Violence
- Refers schools to 2001 Revised Sexual Harassment Guidance and 2006 Dear Colleague Letter on Sexual Harassment to understand Title IX obligations
- Significant changes:
  - Removed 60-day investigatory time frame;
  - Allowed schools to choose between preponderance of the evidence and clear and convincing evidence standards;
  - Provided responding party explicit rights during investigation and before decisionmaking; and
  - Allowed schools to provide interim remedies to both parties.

II. Brief Overview of the Clery Act
Why the Clery Act?

• Jeanne Anne Clery was a 19 year old college student who was brutally raped and murdered in her dorm room at Lehigh University (Pennsylvania) in 1986.
• Ms. Clery’s parents believed that their daughter had died due to the campus’s lackadaisical security measures.
• They lobbied for the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”), which became law in 1990.
• The Clery Act aims to provide transparency around campus crime statistics and policies.

What is the Clery Act?

• Clery Act:
  • Requires colleges and universities participating in federal financial aid under Title IV of the Higher Education Act to maintain and disclose campus crime statistics and security information
  • Includes a number of policy, procedure, and training requirements within the crime statistics and security disclosure requirements
  • The Clery Act is set forth at 20 U.S.C § 1092(f) (Attachment 2); implementing regulations are at 34 C.F.R. § 668.46

2013 VAWA Amendments

• In 2013, the reauthorized Violence Against Women Act amended the Clery Act
• The changes require institutions to:
  • Disclose statistics, policies and programs related to dating violence, domestic violence, sexual assault, and stalking;
  • Have a policy statement that addresses the jurisdiction of security personnel;
  • Establish prevention programs to stop Clery crimes;
  • Address compliance with applicable confidentiality laws in recordkeeping and data sharing under Clery; and
  • Disclose statistics on new categories of hate crimes.
Clery Requirements

- The Clery Act requires institutions to:
  - Collect, classify, and count crime reports and crime statistics
  - Issue campus alerts: (1) timely warnings; and (2) emergency notifications
  - Provide educational programs and campaigns
  - Have procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault, and stalking
  - Publish an Annual Security Report
  - Submit crime statistics to the U.S. Department of Education
  - Maintain a daily crime log
  - Publish an Annual Fire Safety Report
  - Maintain a fire log
  - Submit fire statistics to the U.S. Department of Education
  - Have numerous safety and security-related policies in place

Clery Requirements

- Postsecondary institutions must develop and distribute a statement of policy that informs victims (of certain Clery crimes) of their options to:
  - Notify proper law enforcement authorities, including campus and local police; and
  - Be assisted by campus personnel in notifying such authorities.

  *Practice tip:* The policy must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community.

Clery Training

- Disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking must be conducted by officials who receive annual training on these issues.
  - *Practice Tip:* Consider this requirement in establishing student and employee discipline procedures.

  Officials must also be trained in how to conduct an investigation and hearing process that "protects the safety of victims and promotes accountability."
Clery Training & Programming

• Programs to prevent dating violence, domestic violence, sexual assault, and stalking:
  • Primary prevention programs offered to all new employees and incoming students
  • Ongoing prevention and awareness campaigns for students and employees
• For institutions with on-campus student housing, safety education programs and fire safety training
• Training for “campus security authorities” is recommended, but not required:
  • Practice tip: The role of the Clery Act, sample reporting materials, the importance of documentation, need for timely report submission

Clery Compliance Dream Team

• Take a few minutes to think about what positions at your institution would ideally be on your Clery Compliance Team

Clery Enforcement (Federal)

• U.S. DOE reviews and evaluates institutions’ compliance with Clery.
  • Federal Audits
    • DOE may conduct a review under four distinct circumstances.
    • Financial aid audits include Clery compliance review.
  • Fines
    • DOE may impose a fine of up to $54,789 per violation.
    • University of Montana was recently fined $966,614 for “inaccurate and misleading” crime statistics from 2012-2015.
    • In late 2016, Penn State was fined a record $2.4 M for Clery violations in 11 serious cases from 1998 to 2011.
    • Yale faced $165,000 in fines in 2013 for failing to report 4 forcible sex offenses in its campus crime statistics for 2001 and 2002.
Clery Enforcement (State)

- Education Code section 67382 requires the State Auditor, every 3 years, to report results of an audit of at least six institutions of postsecondary education that receive federal student aid.

- The audit is to:
  - Evaluate compliance with the Clery Act; and
  - Evaluate compliance with California law governing crime reporting and the development and implementation of policies and procedures under various Education Code sections.

III. Title IX’s Intersection with Clery

- WHO – Responsible Employees and Campus Security Authorities
- WHAT – Reporting Sexual Violence
- WHERE – “Geography”
- WHEN – Notification of the Outcome of Investigation
- WHY – Enforcement
Responsible Employees & Campus Security Authorities

Title IX
- "Responsible Employees"
- Any employee who:
  - Has the authority to take action to redress sexual violence,
  - Has a duty to report incidents of sexual violence, or
  - A student could reasonably believe has this authority or responsibility

Clery
- "Campus Security Authorities" include:
  - A campus police department or campus security department,
  - Other individual(s) with responsibility for campus security,
  - Individual(s) specified in college’s procedures, or
  - Officials with significant responsibility for student and campus activities

Reporting Sexual Violence
Title IX & Clery: Prohibited Acts

**Title IX**
- Sexual harassment
- Sex discrimination
- Sexual violence
  - Rape
  - Sexual assault
  - Sexual battery
  - Sexual abuse
  - Sexual coercion

**Clery**
- Criminal offenses
- Hate crimes
- Arrests and referrals for disciplinary action
- VAWA offenses
  - Dating violence
  - Domestic violence
  - Stalking
  - Sexual assault

Title IX & Clery: How to Report

**Title IX**
- All relevant details of the incident, including:
  - Date, time, location
  - Nature of incident
  - Alleged perpetrator
  - Other individuals involved
  - Report should include personally identifiable information (i.e., victim’s and others’ identities)

**Clery**
- 4 things:
  - Type of crime
  - Location of incident
  - When it happened
  - When it was reported
  - Should *not* include personally identifiable information

Clery “Geography”
**SCLS**

**Clery “Geography” (i.e., jurisdiction)**

**Title IX**
- In a school’s educational programs and activities
- Includes:
  - On campus
  - In programs, activities, or trips sponsored by the college at another location
  - Extracurricular activities
- Non-educational programs or activities if discrimination impacts victim in educational programs or activities or it creates a hostile environment in educational programs or activities

**Clery**
- Buildings or property owned or controlled by college that support college’s educational purposes:
  - In a reasonably contiguous area to campus
  - Not in a reasonably contiguous area to campus
- Buildings or property owned by a recognized student organization
- All public property in a reasonably contiguous area of the institution that is adjacent to or accessible from a facility owned by college

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**Notice of Outcome of Investigation**

**Title IX**
- Notice of the outcome of disciplinary proceedings, including:
  - Whether or not college found the conduct occurred
  - Individual remedies offered or provided to complainant
  - Sanctions imposed on accused that relate directly to complainant
  - Other steps college has taken to eliminate hostile environment and prevent recurrence
- OCR recommends notifying complainant and respondent concurrently
- For Clery crimes, may not require complainant to abide by nondisclosure agreement

**Clery**
- Results of institutional disciplinary proceedings
- Must simultaneously notify complainant and respondent of outcome
- For crimes of violence, or rape and other sexual assaults:
  - Final results of any disciplinary proceedings against respondent
  - “Final results” – name of student, findings, sanctions, rationale for findings and sanctions
  - Names of any other student may only be included with that student’s consent
  - May not require complainant to abide by nondisclosure agreement

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**SCLS**

**Notice of Outcome of Investigation**

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  - May not require complainant to abide by nondisclosure agreement
Enforcement of Title IX and Clery

Title IX
• US Department of Education, Office for Civil Rights
• Possible penalty for violating Title IX is loss of all federal funding
• Can enter into resolution agreements
• May refer cases to Department of Justice

Clery
• US Department of Education, Student Financial Aid Enforcement Unit
• Authorized to take fine, limitation, suspension, or termination action for violations
• Maximum penalty for violating Clery is fines of $55,907 for each violation

Review of Clery Data
• As part of its Title IX investigations, OCR may review colleges’ Clery Act statistics with regard to the offense(s) being investigated.
• OCR will consider the statistics alongside the number of reports filed using the Title IX grievance procedures.
• OCR may consider the statistics as part of the larger picture of whether there is a hostile environment on campus.
• In at least one case, OCR found that Clery data “raised concerns” that more prevention and training efforts focused on preventing sexual assault should be provided to students.
IV. Coordination with Law Enforcement

Education Code 67381.1

(b) The governing board of each community college district shall adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of Part 1 violent crimes occurring on each campus.

(c) Local law enforcement agencies shall enter into written agreements with community college campus law enforcement agencies if there are community college campuses located in the jurisdictions of the local law enforcement agencies.

(d) Each written agreement entered into pursuant to this section shall designate which law enforcement agency shall have operational responsibility for the investigation of each Part 1 violent crime and delineate the specific geographical boundaries of each agency’s operational responsibility, including maps as necessary.

Sexual Assault Investigations: Coordinating with Law Enforcement

• A district should coordinate with any other ongoing school or criminal investigations.
• Establish fact-finding roles for each investigator.
• Consider whether information can be shared among investigators to limit re-traumatizing victim.
• If applicable, consult with forensic expert to ensure evidence is correctly interpreted by school officials.
• Consider a memorandum of understanding with local law enforcement and local prosecutor’s office.
Sexual Assault Investigations: Parallel Criminal Investigations

- A criminal investigation does not alleviate districts of their duty to conduct an independent Title IX investigation.
- There may be circumstances in which a school’s fact-finding process may be delayed when police are gathering evidence.
  - During delay, consider interim remedies for complainant.
  - In that case, school must promptly resume its investigation once police have finished gathering evidence.
  - Under no circumstances should the school delay its investigation until the ultimate outcome of a criminal investigation or the filing of charges.

Recommended Provisions in MOU with Law Enforcement

- Law enforcement will advise individuals reporting incidents of sexual or gender-based harassment, assault, or violence of their right to pursue a criminal action with law enforcement and a Title IX complaint through the college simultaneously.
- Law enforcement will assist the college in obtaining relevant evidence.
- Clearly identify when the college will refer a matter to local law enforcement.
- Prompt notification of one another when either receives a complaint of sexual or gender-based harassment, assault, or violence.

Recommended Provisions in MOU with Law Enforcement, Cont’d.

- Protocols and procedures for:
  - How parties will conduct contemporaneous investigations
  - How investigation(s) will be documented
  - How information will be shared
- Police dept. will:
  - Appoint a specialized, trained investigator in matters of sexual or gender-based assault or violence
  - Help the complainant obtain a protection order against respondent if he/she wants one
  - Training for police staff who will respond to sexual or gender-based violence complaints
MOU with Law Enforcement: Lessons Learned from OCR

- Should specifically address the coordination of investigations of sexual harassment and sexual assault
- Under what conditions the college will temporarily suspend a Title IX investigation during a law enforcement investigation
- When the police department and/or DA’s office will share information with the college

V. Respondents’ Due Process Rights

Due Process

- Notice and an opportunity to be heard
- Your institution's grievance procedures should clearly lay out when a respondent will be afforded notice and the opportunity to be heard.
- A violation of due process can be found where the college does not follow its own procedures.
- Best practice is to provide the respondent with a copy of the grievance procedures by which the investigation will be completed at the outset of the investigation.
Respondents’ Due Process Rights

- Per 2017 guidance, written notice to respondent must include “sufficient details” of allegation(s) with “sufficient time” to prepare a response before an initial interview.
- Both complainant and respondent must have access to any information that will be used during disciplinary meetings and hearings.
- In cases involving dating violence, domestic violence, sexual assault, or stalking, districts must provide the parties the same opportunity to have advisors present during any disciplinary proceedings or meetings (Clery).
  - Practice tip: May not limit choice of advisor, but can limit their role.

Respondents Have Title IX Rights Too

- Parties must have an equal opportunity to present witnesses and other relevant evidence.
- Any school-imposed restrictions on parties’ ability to use attorneys must be applied equally to complainant and respondent.
- If school provides for an appeal, it may provide that right only to the responding party, or may provide the right to both parties.*
- Both parties must have the opportunity to respond to the investigation report in writing in advance of any decision of responsibility or the hearing to decide responsibility.
- School may use either the preponderance of the evidence standard or the clear and convincing evidence standard.

Pop Quiz

A college informed the accused only that he was being investigated for “numerous nonconsensual interactions with the victim” over a 2 year period.

What issues do you see?
Cross-Examination

- In sexual misconduct cases where the outcome depends on a credibility assessment, the respondent has the right to cross-examine the accuser and adverse witnesses.

- Burden on complainant can be lessened by:
  - Use of videoconference or similar technology (Cal. Ct. App.)
  - Decisionmaker asking complainant questions posed by respondent (Cal. Ct. App.)
  - Use of a witness screen or other physical separation of the parties (6th Circuit)

Blowback

- Respondents, often male students, are filing their own Title IX complaints against complainants and schools for subjecting them to investigation and/or disciplinary action.
- Male students allege that Title IX compliance efforts provide female students “preferential treatment,” and make it more difficult for the accused to defend themselves.
- Respondents are also filing federal lawsuits against their universities.
- Sometimes respondents sue to fight discipline imposed as a result of a Title IX investigation.

An Interesting Twist

- When respondents appeal sanctions, the college may determine in the interests of justice that those sanctions should be reduced.
- Before it does so, best practice is to notify the complainant and give them an opportunity to provide input.

- Districts should not reduce sanctions without an appropriate basis.
- Any sanctions that result from a reduction should also be within the college’s grievance procedures/code of conduct.
Pop Quiz

A school’s Title IX policy says that it uses the preponderance of the evidence standard in cases involving allegations of sexual assault. Are there any issues here?

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Due Process Concerns with No Contact Orders

- Some schools have template no contact or “stay away” orders that they use in every Title IX case of harassment and/or sexual assault
- Due process concerns with one-size-fits-all approach
  - Practice tip: Stay away/no contact orders should only be as broad as necessary
  - If stay away orders are mutual, can have retaliatory effect on complainant/victim

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Recommendations

- Despite withdrawal of two major guidance documents, the majority of schools’ Title IX obligations remain intact.
- OCR has increased its focus on respondents’ due process rights.
- Schools should examine policies and practices to ensure they provide due process to those under investigation for sexual misconduct.
- Institutions should be fair, impartial, and follow their policies and procedures.
You Decide: Is There a Title IX Violation?

a) College uses clear and convincing evidence standard for all disciplinary cases except those involving sexual misconduct, which are subject to the preponderance of the evidence standard.

b) The respondent was given the wrong policies and procedures relating to the investigation process.

c) College provides the following details of the allegation to the respondent: “A fellow student has alleged that you engaged in sexual harassment from September 2016 to June 2017.”

d) The respondent was notified of the outcome of the disciplinary proceeding against him two weeks after the reporting party was notified.

VI. Conflicts Between Title 5 and Title IX

Appeals

• Under the 2017 Title IX guidance, districts can provide the right to appeal: (1) only to the responding party, or (2) to both the responding and reporting parties.

• Title 5 regulations provide for a right of appeal only to the complaining party. (5 C.C.R. § 59311(a).)

• At this time, many districts follow the Title 5 guidelines and only provide the complaining party the right to appeal in the context of a Title IX complaint.
Who Can File a Complaint

- Under Title IX, districts must investigate alleged sex discrimination when any responsible employee “knows or has reason to know”.
- Under Title IX, districts may learn of alleged discrimination indirectly.
- Title 5 regulations provide that only the following individuals may file a complaint (5 C.C.R. § 59328(a)):
  - Victim;
  - Faculty member who learned of the unlawful discrimination in his/her official capacity; or
  - Administrator who learned of the unlawful discrimination in his/her official capacity.

Standard of Evidence

- OCR’s 2017 Title IX guidance provides that a district’s findings of fact and conclusions should be reached applying either the preponderance of the evidence standard or a clear and convincing evidence standard.
- Under Title 5, the results of the district’s fact-finding investigation must be set forth in a written report that must include “a specific finding as to whether there is probable cause to believe that discrimination occurred…” (5 C.C.R. § 59334(d)).

VII. Case Study
Resources

- Clery Center, https://clerycenter.org/
- Know Your IX: Clery Act, https://www.knowyourix.org/college-resources/clery-act/

Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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LEGAL UPDATE 20-2017(CC):
OCR WITHDRAWS SIGNIFICANT TITLE IX GUIDANCE; ISSUES NEW DEAR COLLEAGUE LETTER AND Q&A ON TITLE IX
LEGAL UPDATE

October 4, 2017

To: Superintendents/Presidents/Chancellors, Member Community College Districts

From: Damara L. Moore, Senior Associate General Counsel
Ellie R. Austin, Schools Legal Counsel

Subject: OCR Withdraws Significant Title IX Guidance; Issues New Dear Colleague Letter and Q&A on Title IX
Memo No. 20-2017(CC)

On September 22, 2017, the Department of Education issued a Dear Colleague Letter which withdrew guidance on Title IX previously provided by the Office of Civil Rights (“OCR”) (“2017 Dear Colleague Letter”). OCR utilizes "Dear Colleague" letters to help clarify how OCR will apply existing laws to schools, districts, and educational institutions of higher learning (hereinafter “schools”). The withdrawn guidance addressed investigations of Title IX complaints of student-on-student sexual violence. Simultaneously, OCR issued a Question and Answer on Campus Sexual Misconduct (“2017 Q&A”) to provide information regarding how OCR will evaluate a school’s compliance with Title IX under the new guidance.

Title IX applies to public and private elementary and secondary schools, school districts, colleges and universities receiving federal financial assistance. It prohibits discrimination on the basis of sex, including sexual harassment, in federally funded education programs.

I. The Withdrawn Guidance

The 2017 Dear Colleague Letter withdraws two documents issued by OCR under the Obama Administration: the 2011 Dear Colleague Letter on Sexual Violence (“2011 Dear Colleague Letter”) and the 2014 Questions and Answers on Title IX and Sexual Violence (“2014 Q&A”). The former guidance was significant in that it specifically stated that sexual violence is a form of sexual harassment, and was thus prohibited under Title IX. OCR stated that the reason for the withdrawal of the 2011 and 2014 guidance documents was that they did not adequately ensure that the due process

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1 Available at [https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf)
2 In the 2017 Q&A, OCR defines sexual misconduct to include “peer-on-peer sexual harassment and sexual violence.”
3 References to the new guidance within this Legal Update are to the 2017 Q&A unless otherwise noted.
rights of the responding party were protected. Additionally, OCR took issue with the fact that the 2011 and 2014 guidance documents were adopted without notice and an opportunity for public comment.

II. **New Guidance**

The 2017 Dear Colleague Letter explicitly refers schools to OCR’s 2001 Revised Sexual Harassment Guidance (“2001 Guidance”) and 2006 Dear Colleague Letter on Sexual Harassment⁵ ("2006 Dear Colleague Letter") to understand their continuing obligations to address sexual misconduct in education programs and activities. The new guidance also discusses a number of other topics, including: interim measures, grievance procedures and investigations, informal resolutions of complaints, the decision-making process, notices of the outcome, the right to appeal, the Clery Act’s reporting requirements,⁶ and the effect of the rescission of the former guidance on previously-entered voluntary resolution agreements.

a. **What Is the Same**

Much remains the same under the new guidance. Schools continue to have a responsibility to promptly and effectively address sexual misconduct, prevent its recurrence, and remedy its effects.⁷ Schools continue to have an obligation to designate a Title IX coordinator to ensure they are meeting their Title IX obligations. The new guidance affirms that schools are deemed to have notice of sexual misconduct when a “responsible employee” knows or should know of such conduct.⁸ Schools must still adopt grievance procedures to address sexual misconduct. When conducting an investigation, schools have the burden to gather evidence and conduct a fair, impartial investigation. The current guidance, like the previous guidance, acknowledges that during the period of time that adjudication is pending, interim steps may be taken to separate the reporting and responding parties. The new guidance continues to recognize that schools may need to address issues which arise due to off-campus misconduct if it creates a hostile educational environment in educational programs or activities. When addressing allegations of dating violence, domestic violence, sexual assault, or stalking, community colleges must continue to comply with Title IX and the Clery Act.

As under the previous guidance, each party is entitled to access the same processes and information as the other party during the school’s investigation. In disciplinary proceedings relating to allegations of dating violence, domestic violence, sexual assault, or stalking, schools may not limit the presence of an advisor to either party during a hearing, although they may limit restrictions on advocates’ participation.

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⁵ Available at [https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html](https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html)
⁶ These reporting requirements are unaffected by the 2017 Dear Colleague Letter.
⁸ A “responsible employee” remains, as previously defined, “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees or an individual who a student could reasonably believe has this authority or responsibility.” 2001 Guidance V.C.
b. **What Is Different**

This Legal Update highlights many of the changes that are made by the new guidance, but is not a comprehensive list of all changes.

**Timeframe.** Title IX investigations no longer must be concluded within 60 calendar days. Instead, the guidance provides that “[t]here is no fixed time frame under which a school must complete” its investigation. OCR will now evaluate on a case-by-case basis a “school’s good faith effort to conduct a fair, impartial investigation in a timely manner.”

**Interim Remedies.** The 2017 Q&A provides that interim measures might be appropriate for either the reporting or the responding parties prior to an investigation or while an investigation is pending. This is a departure from previous OCR guidance, where interim measures were offered only to the reporting party.

**Standard of Evidence.** Significantly, the 2017 Q&A provides that schools may apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The clear and convincing evidence standard represents a higher standard of proof, somewhere in between preponderance of the evidence and beyond a reasonable doubt. Previous guidance provided that all Title IX investigations must proceed using the preponderance of the evidence standard. The new guidance also requires that the standard of proof utilized for evaluating a claim of sexual misconduct be consistent with the standard that applies in other student misconduct cases. In other words, a school cannot use the preponderance of the evidence standard in sexual misconduct cases but the clear and convincing evidence standard in plagiarism cases.

**Informal Resolution for Allegations of Sexual Assault.** Previous Title IX guidance provided that allegations of sexual assault could not be resolved using an informal mediation process, even if both the reporting and responding parties agreed. The new guidance allows schools to facilitate voluntary resolution processes, such as mediation, for any Title IX complaint, including those involving allegations of sexual assault.

**Rights During Decision Making Process.** The new guidance makes explicit the requirement that both the reporting and responding parties have access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report, and provides that the responding party must have the opportunity to respond to the report in writing in advance of any decision about responsibility and/or hearing.

**Notice of Outcome of Disciplinary Proceedings.** The new guidance provides that a “written notice of the outcome of disciplinary proceedings” must be provided to both the reporting and responding parties, and recommends that both parties be notified “concurrently.” For elementary and secondary schools and for allegations at the postsecondary level that do not involve Clery crimes, the notice must inform the reporting party whether the investigation found that the alleged conduct occurred, any individual remedies offered to the reporting party, any sanctions imposed on the responding party that relate directly to the reporting party, and other steps the school has taken to eliminate the hostile environment. In elementary and secondary schools, the notice should be provided to the parents of students under 18 and directly to students who are 18 or older.

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9 The 2017 Q&A also incorporates the requirements under the Clery Act with respect to this written notification.
Obligation to Produce Written Report. The 2017 guidance mandates that any investigation under Title IX that may lead to disciplinary action against the responding party must result in a written investigation report “summarizing the relevant exculpatory and inculpatory evidence.”

Right to Cross-Examine. The 2017 guidance makes clear that if one party is permitted to cross-examine the other party, that right must extend to the other party.

Right to Appeal. Under the former guidance, if a school granted a right to appeal investigation findings, the school was required to allow both parties the right to appeal. Under the new guidance, if a school chooses to allow appeals from either its decision regarding responsibility or its disciplinary sanctions, it may choose to allow an appeal only for the responding party or for both parties.

III. Impact

Despite the withdrawal of two major guidance documents, the majority of schools’ Title IX obligations remain intact. Many other advisory letters and guides related to sex discrimination and harassment remain in place,\(^\text{10}\) and can assist schools in understanding their continuing obligations under Title IX.

However, with the increased focus by OCR on the responding party’s due process rights, schools should examine their policies and practices to ensure they provide due process to those under investigation for sexual misconduct. Schools may also reconsider and heighten the standard of proof they believe is appropriate in such investigations. Counsel should be consulted to ensure any new policies are in alignment with the changes in the law.

Additionally, the 2017 Q&A provides that voluntary resolution agreements previously entered into between a school and OCR remain binding on the school.

OCR has indicated that it will engage in rulemaking after a public comment process. This will allow schools the ability to provide input into the development of new regulations related to Title IX’s requirements for investigating student-on-student sexual misconduct. The Department of Education has not released any dates for the public comment period as of the time of publication of this Legal Update; however, we will keep our clients updated on this developing issue.

Please contact our office with questions regarding this Legal Update or any other legal matter.

\(\text{The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.}

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\(^\text{10}\) Including the 2001 Revised Sexual Harassment guidance, the 2006 Dear Colleague Letter on Sexual Harassment Issues, the 2015 Dear Colleague Letter on Title IX Coordinators, and the 2015 Title IX Resource Guide.
Notice of Language Assistance

If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Notice of Language Assistance (Spanish) - Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

Notice of Language Assistance (Chinese) - 給英語能力有限人士的通知: 如果您不懂英語，或者使用英語有困難，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov.

Notice of Language Assistance (Japanese) - 彼女英語米未熟る者ための通知: ポピュラーの理解が難しい場合、英語を理解するための言語支援サービスを提供しています。この言語支援サービスは無料です。詳細については、1-800-USA-LEARN (1-800-872-5327) (TDD: 1-800-877-8339) へ電話または、Ed.Language.Assistance@ed.gov へメールにてお問い合わせください。
September 22, 2017

Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

• Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.

• Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard. The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students. The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis. The Letter provided that any due-process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them.

Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing “improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”¹ As a result, many schools have established procedures for resolving allegations that “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”²

The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have


² Rethink Harvard’s Sexual Harassment Policy, BOSTON GLOBE (Oct. 15, 2014) (statement of 28 members of the Harvard Law School faculty); see also ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017); AMERICAN COLLEGE OF TRIAL LAWYERS, TASK FORCE ON THE RESPONSE OF UNIVERSITIES AND COLLEGES TO ALLEGATIONS OF SEXUAL VIOLENCE, WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS (2017).
Q&A on Campus Sexual Misconduct

September 2017

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights1—provide information about how OCR will assess a school’s compliance with Title IX.

SCHOOLS’ RESPONSIBILITY TO ADDRESS SEXUAL MISCONDUCT

Question 1:

What is the nature of a school’s responsibility to address sexual misconduct?

Answer:

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.2 In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the school must respond.3

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2 2001 Guidance at (VII).

3 Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 631 (1999); 34 C.F.R. § 106.31(a); 2001 Guidance at (V)(A)(1). Title IX prohibits discrimination on the basis of sex “under any education program or activity” receiving federal financial assistance, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.1, meaning within the “operations” of a postsecondary institution or school district, 20 U.S.C. § 1687; 34 C.F.R. § 106.2(h). The Supreme Court has explained that the statute “confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.” Davis, 526 U.S. at 644. Accordingly, OCR has informed institutions that “[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.” Oklahoma State University Determination Letter at 2, OCR Complaint No. 06-03-2054 (June 10, 2004); see also University of Wisconsin-Madison Determination Letter, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) (“OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University.”). Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities. Under the Clery Act, postsecondary institutions are obliged to collect and report statistics on crimes that occur on campus, on noncampus properties controlled by the institution or an affiliated student organization and used for educational purposes, on public property within or immediately adjacent to campus, and in areas within the patrol jurisdiction of the campus police or the campus security department. 34 C.F.R. § 668.46(a); 34 C.F.R. § 668.46(c).
Each recipient must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.4 Other employees may be considered “responsible employees” and will help the student to connect to the Title IX Coordinator.5

In regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.6

THE CLERY ACT AND TITLE IX

Question 2:

What is the Clery Act and how does it relate to a school’s obligations under Title IX?

Answer:

Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX.7 Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs. The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports. In October 2014, following a negotiated rulemaking process, the Department issued amended regulations to implement these statutory changes.8 Accordingly, when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.

INTERIM MEASURES

Question 3:

What are interim measures and is a school required to provide such measures?

Answer:

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.9 Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

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4 34 C.F.R. § 106.8(a).
5 2001 Guidance at (V)(C).
8 See 34 C.F.R. § 668.46.
9 See 2001 Guidance at (VII)(A).
It may be appropriate for a school to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.

**GRIEVANCE PROCEDURES AND INVESTIGATIONS**

**Question 4:**

What are the school’s obligations with regard to complaints of sexual misconduct?

**Answer:**

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct. OCR has identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school’s grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.

**Question 5:**

What time frame constitutes a “prompt” investigation?

**Answer:**

There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

**Question 6:**

What constitutes an “equitable” investigation?

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10 2001 Guidance at (VII)(A). In cases covered by the Clery Act, a school must provide interim measures upon the request of a reporting party if such measures are reasonably available. 34 C.F.R. § 668.46(b)(11)(v).
11 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); see also 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must “[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result”).
12 2001 Guidance at (IX); see also 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking, 34 C.F.R. § 668.46 (k)(1)(i), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay, 34 C.F.R. § 668.46 (k)(3)(i)(A).
13 2001 Guidance at (IX); see also 34 C.F.R. § 668.46(k)(3)(i)(A).
Answer:

In every investigation conducted under the school’s grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.14

Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.15 Restricting the ability of either party to discuss the investigation (e.g., through “gag orders”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.16

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.17 Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.18

INFORMAL RESOLUTIONS OF COMPLAINTS

Question 7:

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer:

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

14 2001 Guidance at (V)(A)(1)-(2); see also 34 C.F.R. § 668.46(k)(2)(ii).
15 2001 Guidance at (X).
16 34 C.F.R. § 106.31(a).
DECISION-MAKING AS TO RESPONSIBILITY

Question 8:

What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?

Answer:

The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.19

The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.20 The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).21 When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must “[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”22 In such disciplinary proceedings and any related meetings, the institution may “[n]ot limit the choice of advisor or presence for either the accuser or the accused” but “may establish restrictions regarding the extent to which the advisor may participate in the proceedings.”23

Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

19 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. In a recent decision, a court concluded that a school denied “basic fairness” to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (“[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused.”). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution’s annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).
21 A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns, as noted in Question 11.
22 34 C.F.R. § 668.46(k)(2)(iii).
23 34 C.F.R. § 668.46(k)(2)(iv).
DECISION-MAKING AS TO DISCIPLINARY SANCTIONS

Question 9:

What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?

Answer:

The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school’s code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation. In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.

NOTICE OF OUTCOME AND APPEALS

Question 10:

What information should be provided to the parties to notify them of the outcome?

Answer:

OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently. The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students. Under the Clery Act, postsecondary institutions must provide simultaneous written notification to both parties of the results of the disciplinary proceeding along with notification of the institution’s procedures to appeal the result if such procedures are available, and any changes to the result when it becomes final. This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions. For proceedings not covered by the Clery Act, such as those arising from allegations of harassment, and for all proceedings in elementary and secondary schools, the school should inform the reporting party whether it found that the alleged conduct occurred, any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and other steps the school has taken to eliminate the hostile environment, if the school found one to exist. In an elementary or secondary school, the notice should be provided to the parents of students under the age of 18 and directly to students who are 18 years of age or older.

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24 34 C.F.R. § 106.8(b); 2001 Guidance at (VII)(A).
25 34 C.F.R. § 668.46(k)(1)(iii).
26 34 C.F.R. § 668.46(k)(2)(v). The Clery Act applies to proceedings arising from allegations of dating violence, domestic violence, sexual assault, and stalking.
27 34 C.F.R. § 668.46(k)(3)(iv).
28 A sanction that directly relates to the reporting party would include, for example, an order that the responding party stay away from the reporting party. See 2001 Guidance at vii n.3. This limitation allows the notice of outcome to comply with the requirements of the Family Educational Rights and Privacy Act. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 99.12(a). FERPA provides an exception to its requirements only for a postsecondary institution to communicate the results of a disciplinary proceeding to the reporting party in cases of alleged crimes of violence or specific nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13).
29 20 U.S.C. § 1232g(d).
Question 11:

How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?

Answer:

If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.30

EXISTING RESOLUTION AGREEMENTS

Question 12:

In light of the rescission of OCR's 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

Answer:

Yes. Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact-specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

Note: The Department has determined that this Q&A is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This document does not add requirements to applicable law. If you have questions or are interested in commenting on this document, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

30 2001 Guidance at (IX). Under the Clery Act, a postsecondary institution must provide simultaneous notification of the appellate procedure, if one is available, to both parties. 34 C.F.R. § 668.46(k)(2)(v)(B). OCR has previously informed schools that it is permissible to allow an appeal only for the responding party because “he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation.” Skidmore College Determination Letter at 5, OCR Complaint No. 02-95-2136 (Feb. 12, 1996); see also Suffolk University Law School Determination Letter at 11, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“[A]ppeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University.”); University of Cincinnati Determination Letter at 6, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (“[T]here is no requirement under Title IX that a recipient provide a victim’s right of appeal.”).
20 U.S.C. § 1092
(TEXT OF CLERY ACT)

ATTACHMENT 2
Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

20 U.S.C.A. § 1092

…

(f) Disclosure of campus security policy and campus crime statistics

(1) Each eligible institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, shall on August 1, 1991, begin to collect the following information with respect to campus crime statistics and campus security policies of that institution, and beginning September 1, 1992, and each year thereafter, prepare, publish, and distribute, through appropriate publications or mailings, to all current students and employees, and to any applicant for enrollment or employment upon request, an annual security report containing at least the following information with respect to the campus security policies and campus crime statistics of that institution:

(A) A statement of current campus policies regarding procedures and facilities for students and others to report criminal actions or other emergencies occurring on campus and policies concerning the institution's response to such reports.

(B) A statement of current policies concerning security and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities.

(C) A statement of current policies concerning campus law enforcement, including--

(i) the law enforcement authority of campus security personnel;

(ii) the working relationship of campus security personnel with State and local law enforcement agencies, including whether the institution has agreements with such agencies, such as written memoranda of understanding, for the investigation of alleged criminal offenses; and

(iii) policies which encourage accurate and prompt reporting of all crimes to the campus police and the appropriate law enforcement agencies, when the victim of such crime elects or is unable to make such a report.

(D) A description of the type and frequency of programs designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others.

(E) A description of programs designed to inform students and employees about the prevention of crimes.

(F) Statistics concerning the occurrence on campus, in or on noncampus buildings or property, and on public property during the most recent calendar year, and during the 2 preceding calendar years for which data are available--
(i) of the following criminal offenses reported to campus security authorities or local police agencies:

(I) murder;

(II) sex offenses, forcible or nonforcible;

(III) robbery;

(IV) aggravated assault;

(V) burglary;

(VI) motor vehicle theft;

(VII) manslaughter;

(VIII) arson;

(IX) arrests or persons referred for campus disciplinary action for liquor law violations, drug-related violations, and weapons possession; and

(ii) of the crimes described in subclauses (I) through (VIII) of clause (i), of larceny-theft, simple assault, intimidation, and destruction, damage, or vandalism of property, and of other crimes involving bodily injury to any person, in which the victim is intentionally selected because of the actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, [FN1] ethnicity, or disability of the victim that are reported to campus security authorities or local police agencies, which data shall be collected and reported according to category of prejudice; and

(iii) of domestic violence, dating violence, and stalking incidents that were reported to campus security authorities or local police agencies.

(G) A statement of policy concerning the monitoring and recording through local police agencies of criminal activity at off-campus student organizations which are recognized by the institution and that are engaged in by students attending the institution, including those student organizations with off-campus housing facilities.

(H) A statement of policy regarding the possession, use, and sale of alcoholic beverages and enforcement of State underage drinking laws and a statement of policy regarding the possession, use, and sale of illegal drugs and enforcement of Federal and State drug laws and a description of any drug or alcohol abuse education programs as required under section 1011i of this title.

(I) A statement advising the campus community where law enforcement agency information provided by a State under section 14071(j) of Title 42, concerning registered sex offenders may be obtained, such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus, or a computer network address.
A statement of current campus policies regarding immediate emergency response and evacuation procedures, including the use of electronic and cellular communication (if appropriate), which policies shall include procedures to--

(i) immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, as defined in paragraph (6), unless issuing a notification will compromise efforts to contain the emergency;

(ii) publicize emergency response and evacuation procedures on an annual basis in a manner designed to reach students and staff; and

(iii) test emergency response and evacuation procedures on an annual basis.

(2) Nothing in this subsection shall be construed to authorize the Secretary to require particular policies, procedures, or practices by institutions of higher education with respect to campus crimes or campus security.

(3) Each institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, shall make timely reports to the campus community on crimes considered to be a threat to other students and employees described in paragraph (1)(F) that are reported to campus security or local law police agencies. Such reports shall be provided to students and employees in a manner that is timely, that withholds the names of victims as confidential, and that will aid in the prevention of similar occurrences.

(4)(A) Each institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, that maintains a police or security department of any kind shall make, keep, and maintain a daily log, written in a form that can be easily understood, recording all crimes reported to such police or security department, including--

(i) the nature, date, time, and general location of each crime; and

(ii) the disposition of the complaint, if known.

(B) All entries that are required pursuant to this paragraph shall, except where disclosure of such information is prohibited by law or such disclosure would jeopardize the confidentiality of the victim, be open to public inspection within two business days of the initial report being made to the department or a campus security authority.

(ii) If new information about an entry into a log becomes available to a police or security department, then the new information shall be recorded in the log not later than two business days after the information becomes available to the police or security department.

(iii) If there is clear and convincing evidence that the release of such information would jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until that damage is no longer likely to occur from the
(5) On an annual basis, each institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, other than a foreign institution of higher education, shall submit to the Secretary a copy of the statistics required to be made available under paragraph (1)(F). The Secretary shall--

(A) review such statistics and report to the authorizing committees on campus crime statistics by September 1, 2000;

(B) make copies of the statistics submitted to the Secretary available to the public; and

(C) in coordination with representatives of institutions of higher education, identify exemplary campus security policies, procedures, and practices and disseminate information concerning those policies, procedures, and practices that have proven effective in the reduction of campus crime.

(6)(A) In this subsection:

(i) The terms “dating violence”, “domestic violence”, and “stalking” have the meaning given such terms in section 13925(a) of Title 42.

(ii) The term “campus” means--

(1) any building or property owned or controlled by an institution of higher education within the same reasonably contiguous geographic area of the institution and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and

(II) property within the same reasonably contiguous geographic area of the institution that is owned by the institution but controlled by another person, is used by students, and supports institutional purposes (such as a food or other retail vendor).

(iii) The term “noncampus building or property” means--

(1) any building or property owned or controlled by a student organization recognized by the institution; and

(II) any building or property (other than a branch campus) owned or controlled by an institution of higher education that is used in direct support of, or in relation to, the institution's educational purposes, is used by students, and is not within the same reasonably contiguous geographic area of the institution.

(iv) The term “public property” means all public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution's educational purposes.

(v) The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the
uniform crime reporting system of the Federal Bureau of Investigation.

(B) In cases where branch campuses of an institution of higher education, schools within an institution of higher education, or administrative divisions within an institution are not within a reasonably contiguous geographic area, such entities shall be considered separate campuses for purposes of the reporting requirements of this section.

(7) The statistics described in clauses (i) and (ii) of paragraph (1)(F) shall be compiled in accordance with the definitions used in the uniform crime reporting system of the Department of Justice, Federal Bureau of Investigation, and the modifications in such definitions as implemented pursuant to the Hate Crime Statistics Act. For the offenses of domestic violence, dating violence, and stalking, such statistics shall be compiled in accordance with the definitions used in section 13925(a) of Title 42. Such statistics shall not identify victims of crimes or persons accused of crimes.

(8)(A) Each institution of higher education participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 and title IV of the Economic Opportunity Act of 1964, other than a foreign institution of higher education, shall develop and distribute as part of the report described in paragraph (1) a statement of policy regarding--

(i) such institution's programs to prevent domestic violence, dating violence, sexual assault, and stalking; and

(ii) the procedures that such institution will follow once an incident of domestic violence, dating violence, sexual assault, or stalking has been reported, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such a report.

(B) The policy described in subparagraph (A) shall address the following areas:

(i) Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking, which shall include--

(I) primary prevention and awareness programs for all incoming students and new employees, which shall include--

(aa) a statement that the institution of higher education prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking;

(bb) the definition of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction;

(cc) the definition of consent, in reference to sexual activity, in the applicable jurisdiction;

(dd) safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual;
(ee) information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and

(ff) the information described in clauses (ii) through (vii); and

(II) ongoing prevention and awareness campaigns for students and faculty, including information described in items (aa) through (ff) of subclause (I).

(ii) Possible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking.

(iii) Procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about--

(I) the importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protection order;

(II) to whom the alleged offense should be reported;

(III) options regarding law enforcement and campus authorities, including notification of the victim's option to-

   (aa) notify proper law enforcement authorities, including on-campus and local police;

   (bb) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and

   (cc) decline to notify such authorities; and

(IV) where applicable, the rights of victims and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court.

(iv) Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that--

(I) such proceedings shall--

   (aa) provide a prompt, fair, and impartial investigation and resolution; and

   (bb) be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;
(II) the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice; and

(III) both the accuser and the accused shall be simultaneously informed, in writing, of--

(aa) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking;

(bb) the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding;

(cc) of any change to the results that occurs prior to the time that such results become final; and

(dd) when such results become final.

(v) Information about how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.

(vi) Written notification of students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community.

(vii) Written notification of victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if so requested by the victim and if such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.

(C) A student or employee who reports to an institution of higher education that the student or employee has been a victim of domestic violence, dating violence, sexual assault, or stalking, whether the offense occurred on or off campus, shall be provided with a written explanation of the student or employee's rights and options, as described in clauses (ii) through (vii) of subparagraph (B).

(9) The Secretary, in consultation with the Attorney General of the United States, shall provide technical assistance in complying with the provisions of this section to an institution of higher education who requests such assistance.

(10) Nothing in this section shall be construed to require the reporting or disclosure of privileged information.

(11) The Secretary shall report to the appropriate committees of Congress each institution of higher education that the Secretary determines is not in compliance with the reporting requirements of this subsection.

(12) For purposes of reporting the statistics with respect to crimes described in paragraph (1)(F), an institution of higher education shall distinguish, by means of separate categories, any criminal offenses that occur--

(A) on campus;
(B) in or on a noncampus building or property;

(C) on public property; and

(D) in dormitories or other residential facilities for students on campus.

(13) Upon a determination pursuant to section 1094(c)(3)(B) of this title that an institution of higher education has substantially misrepresented the number, location, or nature of the crimes required to be reported under this subsection, the Secretary shall impose a civil penalty upon the institution in the same amount and pursuant to the same procedures as a civil penalty is imposed under section 1094(c)(3)(B) of this title.

(14)(A) Nothing in this subsection may be construed to--

(i) create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or

(ii) establish any standard of care.

(B) Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with this subsection shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action to enforce this subsection.

(15) The Secretary shall annually report to the authorizing committees regarding compliance with this subsection by institutions of higher education, including an up-to-date report on the Secretary's monitoring of such compliance.

(16)(A) The Secretary shall seek the advice and counsel of the Attorney General of the United States concerning the development, and dissemination to institutions of higher education, of best practices information about campus safety and emergencies.

(B) The Secretary shall seek the advice and counsel of the Attorney General of the United States and the Secretary of Health and Human Services concerning the development, and dissemination to institutions of higher education, of best practices information about preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking, including elements of institutional policies that have proven successful based on evidence-based outcome measurements.

(17) No officer, employee, or agent of an institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under any provision of this subsection.

(18) This subsection may be cited as the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act”.

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WHITE HOUSE TASK FORCE’S CHART: INTERSECTION OF TITLE IX AND THE CLERY ACT,
APRIL 2014
## Intersection of Title IX and the Clery Act

The purpose of this chart is to clarify the reporting requirements of Title IX and the Clery Act in cases of sexual violence and to resolve any concerns about apparent conflicts between the two laws. To date, the Department of Education has not identified any specific conflicts between Title IX and the Clery Act.

<table>
<thead>
<tr>
<th>Title IX</th>
<th>The Clery Act</th>
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<tbody>
<tr>
<td><strong>What types of incidents must be reported to school officials under Title IX and the Clery Act?</strong></td>
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<tr>
<td><strong>Overview:</strong> Title IX promotes equal opportunity by providing that no person may be subjected to discrimination on the basis of sex under any educational program or activity receiving federal financial assistance. A school must respond promptly and effectively to sexual harassment, including sexual violence, that creates a hostile environment. When responsible employees know or should know about possible sexual harassment or sexual violence they must report it to the Title IX coordinator or other school designee.</td>
<td><strong>Overview:</strong> The Clery Act promotes campus safety by ensuring that students, employees, parents, and the broader community are well-informed about important public safety and crime prevention matters. Institutions that receive Title IV funds must disclose accurate and complete crime statistics for incidents that are reported to Campus Security Authorities (CSAs) and local law enforcement as having occurred on or near the campus. Schools must also disclose campus safety policies and procedures that specifically address topics such as sexual assault prevention, drug and alcohol abuse prevention, and emergency response and evacuation. The Clery Act also promotes transparency and ongoing communication about campus crimes and other threats to health and safety and empowers members to take a more active role in their own safety and security.</td>
</tr>
<tr>
<td>➢ <strong>Sexual Harassment:</strong> Sexual harassment is unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.</td>
<td>➢ <strong>Criminal Offenses:</strong> Criminal homicide; rape and other sexual assaults; robbery; aggravated assault; burglary; motor vehicle theft; and, arson as well as arrests and disciplinary referrals for violations of drug, liquor, and weapons laws.</td>
</tr>
<tr>
<td>➢ <strong>Sexual Violence:</strong> Sexual violence is a form of sexual harassment. Sexual violence refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol or an intellectual or other disability that prevents the student from having the capacity to give consent). Sexual violence includes rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.</td>
<td>➢ <strong>Hate Crimes:</strong> Any of the above-mentioned offenses against persons and property and incidents of larceny-theft, simple assault, intimidation or destruction/damage/vandalism of property, in which an individual or group is intentionally targeted because of their actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, ethnicity, or disability. 20 U.S.C. §1092(f)(1)(F)(ii). Use FBI definitions, and the</td>
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**Occurring where? (geography/jurisdiction)**

**Recipients must respond to sexual violence that occurs:**
- **In the context of a school’s education programs and activities:** This includes academic, educational, extracurricular, athletic, and any other school programs, whether those programs take place in a school’s facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. Additional examples include school-sponsored field trips, school-recognized fraternity or sorority houses, and athletic team travel; and events for school clubs that occur off campus.
- **Off-campus:** Even if the sexual violence did not occur in the context of an educational program or activity, a school must process such complaints and consider the effects of the sexual violence when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.

**Institutions must disclose crime statistics for Clery-reportable offenses that occur on its so-called “Clery Geography.” Clery Geography includes three general categories:**
- **Campus:** Any building or property that an institution owns or controls within a reasonably contiguous area that directly supports or relates to the institution’s educational purposes. On campus also includes residence halls and properties the institution owns and students use for educational purposes that are controlled by another person (such as a food or retail vendor). The definition of “controlled” includes all such properties that are leased or borrowed and used for educational purposes. 20 U.S.C. §1092(f)(6)(ii)
- **Non-campus building or property:** Any building or property that is owned or controlled by a recognized student organization. And, any building or property that is owned or controlled by the institution that is used in support of its educational purposes but is not located within a reasonably contiguous area to the campus. 20 U.S.C. §1092(f)(6)(iii).
- **Public property:** All public property within the reasonably contiguous geographic area of the institution that is adjacent to or accessible from a facility the institution owns or controls and that is used for educational purposes. Examples include sidewalks, streets, and parking facilities. 20 U.S.C. §1092(f)(6)(iv).
<table>
<thead>
<tr>
<th>Responsible employees</th>
<th>Campus law enforcement officers, non-law enforcement campus safety officers, and local law enforcement officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ A responsible employee is any employee who has the authority to take action to redress sexual violence, who has been given the duty to report to appropriate school officials about incidents of sexual violence or any other misconduct by students, or who a student could reasonably believe has this authority or responsibility.</td>
<td>➢ These individuals are normally required to fully document all operative facts of an incident that are reported or that are developed throughout the course of a criminal investigation. The information collected during such an investigation will normally include personally-identifiable information (PII).</td>
</tr>
<tr>
<td>➢ Schools must make clear to all of its employees and students which staff members are responsible employees.</td>
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<table>
<thead>
<tr>
<th>Who can provide completely confidential support services to victims of sexual violence?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional and pastoral counselors</td>
</tr>
<tr>
<td>➢ A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution’s community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.</td>
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<tr>
<td>➢ A pastoral counselor is a person who is associated with a religious order or</td>
</tr>
<tr>
<td>CSAs other than law enforcement/campus safety officers</td>
</tr>
<tr>
<td>➢ Most of these CSAs are not typically required to disclose PII as part of their normal reporting obligations. (see CSA definition below)</td>
</tr>
</tbody>
</table>
Who can provide services and keep personally identifiable information about incidents of sexual violence confidential?

- A religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.
- Professional and pastoral counselors are not required to report any information regarding an incident of alleged sexual violence. The exemption from reporting obligations for professional and pastoral counselors under Title IX is consistent with the Clery Act.
- Crimes reported to a pastoral or professional counselor are not required to be reported by an institution under the Clery Act; however, institutions are strongly encouraged to establish voluntary, confidential reporting processes so that incidents of crime that are reported exclusively to professional and pastoral counselors will be included in the annual crime statistics. 34 C.F.R. §668.46(b)(2)(iii).
Non-professional counselors or advocates

- Individuals who are not professional or pastoral counselors, but work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers, including front desk staff and students, and provide assistance to students who experience sexual violence, should report aggregate data, but are not required to report, without the student’s consent, incidents of sexual violence to the school in a way that identifies the student.

Most non-law enforcement/campus safety officers who are CSAs because of they have significant responsibilities for student and campus activities.

- The definition of campus security authority includes campus police and/or security personnel; any individual who has responsibility for campus security but is not part of a campus police or security department; an individual or organization specified in an institution’s statement of campus security policy as one to which students and employees should report criminal offenses; and an official of an institution who has a significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. Most of these mandatory reporters are specifically not required by the Clery Act to disclose PII. 34 C.F.R. §668.46(a).

- Because specific occupational titles, descriptions and statements of duties vary so significantly, each institution must conduct a substantive review of all of its officials, including students with official duties for example, resident assistants, and evaluate whether the Clery Act designates the individual a CSA and thereby confers reporting obligations. CSAs must be identified, notified of their reporting obligations, be properly training, and provided with a mechanism for communicating reported incidents to the appropriate officials. (Handbook, 75).

What should non-professional counselors, advocates, and CSAs report about incidents of sexual violence?
### Aggregate Data

- In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers.
- Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting information that would personally identify a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

<table>
<thead>
<tr>
<th>Aggregate Data</th>
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<tbody>
<tr>
<td>Typically, most non-law enforcement/campus safety officer CSAs must only report the nature, date, time, general location, and the current disposition of the incident, if known.</td>
</tr>
<tr>
<td>Most non-law enforcement/campus safety officer CSAs typically are not required to disclose PII or other information that would have the effect of identifying the victim.</td>
</tr>
</tbody>
</table>

### Notice of the Outcome

- Title IX requires a school to tell the complainant whether or not it found that the sexual violence occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, and prevent recurrence.
- Sanctions that directly relate to the complainant include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending

### Results of Institutional Disciplinary Proceedings

- FERPA includes a provision that specifically allows schools to disclose to alleged victims of any crime of violence or rape and other sexual assaults, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator of the offense. 20 U.S.C.

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1 This chart also addresses how the Family Educational Rights and Privacy Act (FERPA) applies to Title IX and the Clery Act. Once again, the Department of Education has not identified any specific situations where compliance with Title IX or the Clery Act will cause an institution to violate FERPA.
school for a period of time or transferring the perpetrator to another residence hall, other classes, or another school.

The Department of Education interprets FERPA as not conflicting with the Title IX requirement that the school notify the complainant of the outcome of its investigation, i.e., whether or not the sexual violence was found to have occurred, because this information directly relates to the victim. FERPA also permits the school to notify a complainant of sanctions imposed upon a student who was found to have engaged in sexual violence when the sanction directly relates to the complainant.

The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act. 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information.

### How does FERPA apply to other obligations under Title IX and the Clery Act?

<table>
<thead>
<tr>
<th>All Other Title IX Obligations</th>
<th>Timely Warnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.</td>
<td>➢ The Clery Act requires institutions to issue timely warnings to the campus community about crimes that have already occurred but may continue to pose a serious or ongoing threat to students and employees. Timely warnings are only required for Clery-reportable crimes that occur on Clery Geography although institutions are encouraged to issue appropriate warnings regarding other criminal activity that may pose a serious threat as well. 20 U.S.C. §485f(1)(J)(3); Handbook, 118.</td>
</tr>
<tr>
<td>➢ The “final results” of any proceeding are defined as: the name of the student, the findings of the proceeding board/official, any sanctions imposed by the institution, and the rationale for the findings and sanctions (if any). The presence of names of any other student, such as a victim or witnesses, may be included only with the consent of that student. 20 U.S.C. §1232g(c).</td>
<td>➢ FERPA does not preclude an institution’s compliance with the timely warning provision of the Clery Act. FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a). Further, if</td>
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</table>
institutions utilize information from the records of campus law enforcement to issue a timely warning, those records are not protected by FERPA. 20 U.S.C. §1232g(a)(4)(B)(ii).

- However, timely warning reports must withhold the names and other identifying information about victims as confidential. 34 C.F.R. §668.46(e).

**Emergency Response Procedures**

- The Clery Act requires institutions to have and disclose emergency response and procedures. As part of these procedures, institutions must immediately notify the campus community about any significant emergency or dangerous condition that may pose an immediate threat to the health or safety of students or employees occurring on the campus. 20 U.S.C. §485f(1)(J)(1)(i).

- An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed. 34 C.F.R. §668.46(e)(3).

- FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a).
OFFICE OF ATTORNEY GENERAL’S HOW-TO GUIDE MODEL MEMORANDUM OF UNDERSTANDING
HOW-TO GUIDE
MODEL MEMORANDUM OF UNDERSTANDING

The How-To Guide is a step-by-step guide for stakeholders to create an MOU that reflects local needs and capacity. It is intended to provide context, suggested supplemental content, and points of discussion to assist parties as they tailor the Template MOU to their unique circumstances. The How-To Guide is organized in the same structure as the Template MOU.

I. PARTIES

Communities may choose to have representatives from several agencies and organizations as Parties to the MOU depending on local needs, resources, and personnel. Initial suggestions are included in the Template.

At a minimum, Parties should include the institution of higher education, one or more local law enforcement agencies, and partner organizations required under Education Code section 67386(c). Parties are encouraged to include, as appropriate, both on-campus and off-campus resources, including Rape Crisis Centers, as Parties to the MOU.

For purposes of this MOU, we use [Campus] to refer to the college or university’s administration, with the understanding that the institution as a whole is a party to the MOU and should designate the appropriate point(s) of contact for law enforcement collaboration. Depending on the unique circumstances of each campus and on local administrative needs, more than one department within a college or university may need or wish to be represented in this MOU. For example, campuses with sworn police officers might simply designate someone in the police department as the sole point of contact. If a campus contracts with an external security firm, that firm might also be included as a Party along with the campus administration, assuming the campus resolves any legal questions regarding information-sharing between sworn and non-sworn officers or other security personnel. Campuses may also want to include the Title IX officer or other designated individual. Campuses should make these decisions based on local needs to ensure that the appropriate parties necessary to fully implement their agreement are included in this MOU.

Parties may wish to attach a contact list as an addendum to their MOU.

1 "In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall, to the extent feasible, enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.” (Ed. Code, § 67386, subd. (c).)

http://oag.ca.gov/campus-sexual-assault
II. PURPOSE

The Template MOU describes three purposes of this agreement between law enforcement and campuses:

- To meet the statutory requirements established by AB 1433 (Gatto, 2014);
- To promote collaboration between the Parties to enhance the reporting, investigation, and appropriate response to sexual assault and other covered crimes; and
- To comply with other state and federal laws.

Parties may have additional purposes to address as part of an MOU, which might warrant supplemental sections to the Template MOU.

III. STATEMENT OF PRINCIPLES

A joint Statement of Principles is recommended to memorialize the Parties’ common goals and spark discussion amongst stakeholders about the outcomes expected from their agreement. Each component of the Statement should be discussed by Parties before signing, and local communities may choose to incorporate some or all of the proposed language into their MOU based on local needs and preferences.

In addition to the language proposed in the Template MOU, we recommend discussing the following additional details for possible inclusion:

A. Improving Communication, Coordination, and Collaboration: The MOU is designed to help parties enhance communication, coordination, and collaboration to respond efficiently and effectively to sexual assault and violence. Parties should use the MOU and accompanying efforts to improve coordination regarding crime reporting, victim engagement and support, investigative processes, and general campus and community safety. Such coordination should include:

- Clear lines of communication and points of contact between each entity to ensure effective coordination and communication in the prevention of—and response to—sexual assault and violence;
- Clarified roles for campus police and their local law enforcement counterparts to ensure the effective investigation and prosecution of criminal behavior and avoid any jurisdictional confusion or miscommunication;
- Use of cross-reporting for each incident of violent crime, sexual misconduct, and hate crime to avoid communication gaps or inconsistent responses;
- Collaboration with victim advocates throughout the reporting and investigative processes, including partnerships as required by Education Code section 67386 (SB 967, De León, 2014); and
- Shared understanding of the needs and means to protect confidential and privileged communications.
B. **Championing Campus and Community Safety:** Parties should strive to establish a culture of trust and safety across the entire campus community by increasing community participation and securing community support and engagement in the prevention of sexual violence. Such community engagement and support should include:

- Community education about the procedures and protocols in place to address sexual violence, in order to ensure that students know how to report a violation and understand the subsequent steps that will be taken in response to each violation;
- Use of transparency to demystify the reporting and response processes in order to encourage reporting by victims, bystanders, and other community members and reiterate the critical importance reporting plays on the overall health of the campus community; and
- Collaborative disseminations of public safety threat notifications, when required, following instances of sexual assault or violence, in order to achieve consistency in response protocols.

C. **Upholding Civil Rights, Civil Liberties, and Victims’ Rights:** Parties should commit to the enforcement of both civil rights and criminal law protections. To realize both goals, Parties should:

- Explicitly recognize the distinctions between criminal law and civil law in the handling of sexual assault and violence that arise under both state and federal statutory frameworks;
- Work collaboratively and in compliance with state and federal law to achieve the best possibilities for prosecution in the criminal context and adjudication in the campus administrative process;
- Share information in a manner that complies with confidentiality and privacy obligations, and ensure that information will be used only for authorized purposes and in ways that protect the privacy, civil liberties, and civil rights of students consistent with state and federal laws;
- Coordinate investigations to preserve evidence and improve prosecution; and
- Ensure institutional adjudications do not interrupt criminal prosecutions and vice-versa.

D. **Centering the Victim’s Needs in Responses to Sexual Assault:** The MOU promotes trauma-informed responses developed in consultation with victim advocates. This response is intended to increase the likelihood of victim engagement with law enforcement, improve the investigation and reporting experience for victims, and thereby strengthen sexual assault investigations. Parties should:

- Design and implement a first responder plan for all instances of sexual misconduct that preserves evidence and ensures access to the appropriate resources that foster healing and includes victims’ advocates when possible as stated in Penal Code section 679.04.²
- Ensure that each of their relevant stakeholders receives initial and follow-up training on trauma-informed responses to sexual assault victims, which should include educational materials from victim advocates and Rape Crisis experts; and

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² Penal Code section 679.04 entitles victims of sexual assault to a victim advocate as described in Evidence Code section 1035.2 (the section of the code that defines a sexual assault counselor).

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● Enforce clear lines of communication between each other, so that victims are able to engage in the reporting and adjudication process in a way that fosters healing. For example, where possible, Parties should conduct comprehensive victim interviews to decrease the need for the victim to recount the sexual assault incident repeatedly.

E. Ensuring Accountability and Auditing: This MOU is designed to promote greater transparency and accountability in the reporting of sexual assault and other violent crimes. Parties should:

● Implement a means to monitor, record, and accurately maintain all reports of Part 1 violent crimes, hate crimes, and campus sexual assaults, their outcomes, and processes while maintaining confidentiality where the law provides; and

● To the extent permissible by law, share reports of sexual assault and violence with the public, the campus community, the local community, and other partners, without disclosing protected information such as the identity of the sexual assault victim.

F. Specialized Training and Knowledge: Adequate training reduces the likelihood that explicit and implicit biases, including stereotypes regarding women and sexual assault reporters, will permeate. For this reason, the Parties should:

● Provide in-depth training on sexual assault and investigations to all personnel who conduct such investigations;

● Provide training to all campus and law enforcement supervising personnel and command-level staff on the review of sexual assault prevention, response, and investigations to detect and address indications of bias; and

● Ensure that any trainings provided to peace officers are POST-certified or provided by a trauma and sexual violence expert.

G. Respecting the Unique Needs of Undocumented Individuals: Parties should strive to promote policies and practices that address the unique needs of undocumented individuals, including implementing culturally and linguistically appropriate campus- and law enforcement services. Nationally, undocumented individuals encounter sexual violence at the same rate as other victims, but are significantly less likely to seek out help after a sexual assault. A few reasons for an undocumented individual’s reluctance to seek help include: 1) the threat of deportation or other immigration action; 2) lack of documentation to access medical care; 3) distrust of law enforcement; and more. To ensure undocumented individuals’ unique needs are addressed, Parties should:

● Maintain the confidentiality of an individual’s immigration status, inclusive of any law enforcement actions, where appropriate;³

● Ensure staff have the requisite knowledge and skills to create safe spaces for undocumented individuals through specialized trainings and skill development;

● Designate an individual liaison, as appropriate, for the undocumented community. These

³ For more information on the legal responsibilities of local law enforcement agencies in dealing with undocumented individuals under state law and federal regulations, please see: Attorney General Kamala D. Harris, California Department of Justice Information Bulletin No. 14-01 (June 25, 2014), available at:
http://oag.ca.gov/campus-sexual-assault
designated points of contact should be able to answer questions, provide guidance, and provide assistance on victim services to members of the undocumented campus community;

- Engage in partnerships with local legal aid providers or immigration attorney associations to provide additional resources for undocumented individuals seeking relief, as their legal considerations vary considerably because of their immigration status; and

- Ensure adequate translation and interpreter services that reflect their jurisdiction’s composition of linguistic needs.

IV. DEFINITIONS

The MOU should include relevant definitions. Below are suggested terms and definitions Parties should consider.

**Affirmative Consent**: Affirmative, conscious, and voluntary agreement to engage in sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent. (Ed. Code, § 67386, subd. (a)(1)).

**Campus Security Authorities (CSAs)**: A CSA is defined as: (1) an institution’s campus police or campus security department, (2) an individual who has responsibility for campus security, (3) an individual specified in an institution’s statement of campus security policy to receive reports of criminal offenses, or (4) an institution’s official who has significant responsibility for student and campus activities (e.g., student housing, discipline). (34 C.F.R. § 668.46(a); see also Ed. Code, § 67383, subd. (a) (incorporating the federal law definition of CSAs).)

**Clergy Member and Pastoral Counselor**: For state evidentiary code purposes, a clergy member “means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.” Evid. Code, § 1030. Communications made in confidence with a clergy member may be privileged under the “clergy-penitent privilege” described in Evidence Code sections 1032-1034. A person who meets this statutory definition may also meet the definition of a pastoral counselor for purposes of Title IX and Clery Act, which dictate various campus officials’ obligations to report sexual assault to campus authorities. A pastoral counselor is defined as a person who is associated with a religious order or denomination, is recognized by that religious order or denominations as someone who provides confidential counseling, and is functioning within the scope of that recognition. 34 C.F.R. §§ 668.46(a). In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations under Clery and Title IX. (See U.S. Dept. of Education, Handbook for Campus Safety and Security Reporting (February 2011) pp. 77–78; U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence (April 2014) pp. 22–23 n. 26.)
Concurrent Jurisdiction: Statutory jurisdiction for performance of peace officer functions. For example, if campus property is located within a municipality, the city police department has concurrent jurisdiction with the campus police department.

Confidential Resources: Confidential resources are counselors, advocates, and other staff such as ombudspersons, explicitly designated as such by the campus. Confidential resources may not meet the definitions of professional or pastoral counselor, but nonetheless provide assistance to victims of sexual assault and may not be protected by legal privilege. They may work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers (including front desk staff and students). Conversations with confidential resources do not trigger a Campus Title IX investigation. (See U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence (April 2014) E-3.)

First Responder: The law enforcement agency that will respond to 911 calls and other emergency calls and notify the law enforcement agency with operational responsibility. The First Responder may make the initial report for further investigation when the circumstances do not require the immediate involvement of the law enforcement agency with operational responsibility. When appropriate, the First Responder will be responsible for documenting the agency’s involvement in conducting investigations or enforcing the law.

Hate Crime: A criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

1. Disability;
2. Gender;
3. Nationality;
4. Race or ethnicity;
5. Religion;
6. Sexual orientation;
7. Association with a person or group with one or more of these actual or perceived characteristics.
(Penal Code, §§ 422.55, 422.6.)

Holder of the Privilege: The holder of the Sexual Assault Counselor or Psychotherapist privilege is:

(a) The victim/patient when such person has no guardian or conservator;
(b) A guardian or conservator of the victim/patient when the victim/patient has a guardian or conservator; or
(c) The personal representative of the victim/patient if the victim/patient is dead.
(Evid. Code §§ 1013, 1035.6.)

The holder of the Clergy-Penitent Privilege can be either the penitent or the clergy member. (Evid. Code, §§ 1033, 1034.)

Only the holder of the privilege can give voluntary, informed, and time-limited consent to the disclosure of privileged communications.

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Implicit Bias: An implicit bias is a positive or negative mental attitude towards a person, thing, or group that a person holds at an unconscious level. In contrast, an explicit bias is an attitude that a person is consciously aware of having.

Medical Evidentiary Examination: To "perform a medical evidentiary examination" means to evaluate, collect, preserve, and document evidence, interpret findings, and document examination results. (Penal Code, § 13823.93, subd. (a)(2).)

Operational Responsibility: A term referring to the law enforcement agency with responsibility for preventing crime; preserving peace and order; enforcing laws and ordinances; receiving citizens' arrests; evaluating persons who may be subject to Welfare and Institutions Code section 5150; investigating and collecting evidence; investigating reportable traffic accidents; reporting and accounting criminal offenses; and providing such other police services as the statutes and standard operating procedures of the respective departments may require.


Pastoral Counselor: See definition of Clergy Member.

Privilege: A victim of a sexual assault has a privilege to refuse to disclose a confidential communication between the victim and a Sexual Assault Counselor, Psychotherapist, or Clergy Member. For communications with a Sexual Assault Counselor, Psychotherapist or Clergy Member, the privilege may be claimed by any of the following:
(a) The holder of the privilege;
(b) A person who is authorized to claim the privilege by the holder of the privilege; or
(c) The person who was the Sexual Assault Counselor or Psychotherapist at the time of the confidential communication.
(Evid. Code, §§ 1014, 1035.8, 1036.)
A privilege applies to prevent disclosure of confidential information not only in state judicial proceedings, but in “all proceedings of any nature in which testimony can be compelled by law.” (Evid. Code, § 910 & Comment.) This includes “any action, hearing, investigation, inquest, or inquiry” conducted by administrative agencies, hearing officers, arbitrators, legislative bodies, or “any other person authorized by law.” (Id. at § 901.)

Psychotherapist and Professional Counselor: For state evidentiary code purposes, a psychotherapist generally means a licensed psychologist, psychiatrist, clinical social worker, professional clinical counselor, psychiatric-mental health nurse, family or marriage therapist, or a credentialed school psychologist. (Evid. Code, § 1010, subds. (a)–(e), (n) (providing specific definitions).) It also may include a trainee, psychological assistant or intern, associate clinical
social worker, family therapist intern, or clinical counselor intern or trainee, provided that he or she is supervised by certain licensed practitioners. (Evid. Code, § 1010, subds. (f), (g), (o), (p).) Communications made in confidence with a Psychotherapist may be privileged under Evidence Code section 1014. A person who meets this statutory definition may also meet the definition of a Professional Counselor for purposes of Title IX and Clery Act, which dictate various campus officials’ obligations to report sexual assault to campus authorities. A Professional Counselor is defined as a person whose official responsibilities include providing mental health counseling to members of the institution’s community and who is functioning within the scope of his or her license or certification. (34 C.F.R. § 668.46(a).) This definition applies even to Professional Counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a licensed or certified counselor. (See Title IX and Clery Act; see also U.S. Dept. of Education, Handbook for Campus Safety and Security Reporting (February 2011) pp. 77–78; U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence (April 2014) pp. 22–23 n. 26, https://www.notalone.gov/assets/ferpa-clerychart.pdf.)

Rape Crisis Counseling Center (RCC): A center commonly known as a rape crisis center that provides, among other services: crisis intervention; follow-up and in-person counseling services; accompaniment and advocacy services; and information and referrals to victims and the general public. (See generally Penal Code, § 13837.)

Responsible Employee: Any employee who (1) has authority to redress sexual violence, (2) has been given the duty to report sexual violence or other covered misconduct, or (3) a student could reasonably believe has this authority or duty. (U.S. Dept. of Education, Office for Civil Rights, Revised Sexual Harassment Guidance (January 2001) p. 13.) Reportable incidents of sexual violence known by a Responsible Employee must be disclosed to [Campus’s] Title IX Coordinator with all relevant information, including personally identifiable information about the victim, the accused, or other witnesses. (See U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 2014) D-3.)

Sexual Assault: See, e.g., Ed. Code, § 67380 et seq.; see also Penal Code, §§ 243.4 (sexual battery), 261 (rape).

Sexual Assault Counselor: A Sexual Assault Counselor is a certified counselor who is authorized under the California Evidence Code to assert the privilege against disclosing any confidential communications between a victim and the counselor. Section 1035 of the Evidence Code defines a Sexual Assault Counselor as a person engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is to give advice or assistance to sexual assault victims, who has completed training by a rape crisis counseling center (as defined in Penal Code section 13837), and who meets either of the following: (1) is a
psychotherapist, has a master’s degree in counseling, or one year of counseling experience with six months of rape crisis experience; or (2) has 40 hours of training and is supervised by a qualified counselor. (Evid. Code, § 1035.2.) It also includes a person employed to counsel or assist sexual assault victims by a public or nonprofit agency that provides assistance to victims and witnesses of crimes (as specified by Penal Code section 13835.2), and who: (1) is a psychotherapist, has a master’s degree in counseling or a related field, or has one year of counseling experience, at least six months of which is in rape assault counseling; or (2) has the minimum training for sexual assault counseling set for victim-witness services organizations, and is supervised by a qualified counselor. (Evid. Code, § 1035.2, subd. (b).)

**Sexual Assault Forensic Examination (SAFE Examination):** A SAFE exam is an exam, commonly referred to as a rape kit, conducted at a qualified health facility to collect forensic evidence from a sexual assault victim that can be used to identify the perpetrator of that crime as well as other crimes to the extent the perpetrator is a repeat offender. (See, e.g., Penal Code, §§ 13823.5, 13823.7.) California protocol for SAFE exams is available at: [http://www.calema.ca.gov/PublicSafetyandVictimServices/Documents/Forms%202013/Medical%20Forms/2-923-2-950_Protocol.pdf](http://www.calema.ca.gov/PublicSafetyandVictimServices/Documents/Forms%202013/Medical%20Forms/2-923-2-950_Protocol.pdf).

Additional information about SAFE exams and victims’ rights are available at: [http://www.calema.ca.gov/PublicSafetyandVictimServices/Pages/Medical-Forms.aspx](http://www.calema.ca.gov/PublicSafetyandVictimServices/Pages/Medical-Forms.aspx).

**Trauma-Informed:** Trauma-informed services are not specifically designed to treat symptoms or syndromes related to sexual violence, but they are informed about and sensitive to trauma-related issues present in survivors. A trauma-informed organization—whether a hospital, community mental health agency, rape crisis center, or dual/multi-service advocacy agency—is one which all components have been reconsidered and evaluated in light of a basic understanding of the role violence and exposure to trauma plays in the lives of survivors. (Harris & Fallot, 2001.) A trauma-informed approach also integrates an understanding of a survivor’s history and the entire context of his or her experience. The attributes of the community to which the survivor belongs also can influence how a survivor is affected by trauma. The individual, the event, and the environmental factors can shape a survivor’s reaction to trauma and the healing process. In practice, trauma-informed services involve striving to be culturally competent and to understand survivors within their familial, social, and community contexts and life experiences. (Proffitt, 2010, p. 3; See National Sexual Violence Resource Center, Building Cultures of Care: A Guide for Sexual Assault Services Programs (2013), [http://www.nsvrc.org/publications/nsvrc-publications-guides/building-cultures-care-guide-sexual-assault-services-programs](http://www.nsvrc.org/publications/nsvrc-publications-guides/building-cultures-care-guide-sexual-assault-services-programs).) Additional information about trauma-informed practices is available from the National Substance Abuse and Mental Health Services Administration (SAMHSA) at: [http://www.samhsa.gov/nctic/trauma-interventions](http://www.samhsa.gov/nctic/trauma-interventions).

**Undocumented Individual:** An undocumented individual is a foreign-national who (1) entered the United States unlawfully, without the proper authorization and documents; or (2) entered the United States legally as a nonimmigrant but has since violated the terms of his or her status and remained in the United States without authorization.

[http://oag.ca.gov/campus-sexual-assault](http://oag.ca.gov/campus-sexual-assault)
Victim: As used in the MOU, someone who is observed to or who states that a Part 1 violent crime, hate crime, or sexual assault has been committed against him or her. Parties may elect to also or instead use the term Survivor.

Victim Advocate: A Sexual Assault Counselor, as defined in section 1035.2 of the Evidence Code, or a victim advocate working in a center established under Article 2 (commencing with section 13835) of Chapter 4 of Title 6 of Part 4. (Penal Code, § 679.04, subd. (a).)

Victim Support Person: Under California law, a victim of sexual assault has the right to have a support person of the victim’s choosing present at any interview by law enforcement authorities, district attorneys, or defense attorneys. However, the support person may be excluded from an interview by law enforcement or the district attorney if the law enforcement authority or the district attorney determines that the presence of that individual would be detrimental to the purpose of the interview. (Penal Code, § 679.04, subd. (a).)

Victims of Crime Fund: This refers to the state Victim-Witness Assistance Fund created by Penal Code section 13835.7. The fund is held in the state treasury and dispensed by “the Office of Emergency Services exclusively for the purposes specified in [sections 13835 to 13835.10 of the Penal Code], and for the support of the centers specified in section 13837.” (Penal Code, § 13835.7.)

Victim-Witness Assistance Program: Any public or private nonprofit agency that provides assistance to victims and witnesses of crimes and meets the requirements set out by Penal Code section 13835.2. This includes: (1) providing comprehensive services to victims and witnesses of all types of crime; (2) recognition by the county board of supervisors as the major provider of comprehensive services to victims and witnesses in the county; (3) selection by the board of supervisors as the agency to receive funds pursuant to this article; (4) assistance to victims of crime in the preparation, verification, and presentation of their claims to the California Victim Compensation and Government Claims Board; and (5) cooperation with the California Victim Compensation and Government Claims Board in verifying the data required for these claims. (Penal Code, § 13835.2, subd. (a).)

V. JURISDICTION FOR LAW ENFORCEMENT SERVICES

A. Maps

We recommend including a copy of each map as Appendices to the MOU.
B. Operational Responsibility & First Responders

Under California law, the jurisdictional boundaries and operational responsibilities of campuses and law enforcement are designated by geographic and jurisdictional maps. Campus law enforcement jurisdiction is shared with local law enforcement agencies. The county sheriff’s department has concurrent jurisdiction on all campuses and upon all properties owned or controlled by the campus located within the county. If the campus or property is located within a municipality, the city police department has concurrent jurisdiction. Parties should review the suggested language in the Template MOU carefully and tailor it to their unique circumstances.

For example, some campuses have a Department of Campus Security (non-peace officers) or contract with non-law enforcement agencies. Campus Safety Officers who are non-sworn, non-peace officers, can arrest for any misdemeanor or felony committed within their presence, but must use California Penal Code section 837—arrest by a private person—to accomplish the arrest. Campuses that do not have sworn peace officers may need to adapt the Template MOU with local law enforcement partners to further define their respective responsibilities relating to crimes committed on the campus.

C. Collaboration

For campuses that employ non-sworn or non-peace officers, or contract with non-law enforcement agencies, this section may need to account for scenarios in which non-sworn or non-law enforcement personnel are first responders to a scene. Note that only sworn law enforcement officers have authority to secure evidence to maintain chain of custody, and to authorize a forensic sexual assault examination. However, non-law enforcement personnel can assist in preserving evidence in many circumstances (e.g., keeping people away from a location before law enforcement arrives, etc.). Parties should discuss any additional protocols that may be warranted in order to promote effective preservation of evidence and investigation of an incident.

D. Disputes Over Responsibility

Parties should describe how they will resolve any disputes over responsibility for investigating or responding to a case.

VI. REPORTING OBLIGATIONS

Accurate, timely reporting between Parties is important to coordinate resources in responding to sexual assault and other crimes, to minimize or prevent further victimization, to trigger appropriate institutional investigative action, and to adequately inform the campus community of serious immediate or serious ongoing threats to health and safety. Parties should ensure all

Parties may wish to attach addenda to their MOU with contact information for any additional relevant personnel, including the Clery Act Official, Title IX Officer, Campus Security Authorities, etc.

A. [Campus] Reports to [Agency]

Describe all incident reports the campus will make to other Parties, including describing the content and timeliness expected for these reports. Under AB 1433, a campus’s policies and procedures must provide for reporting to both Campus Security Authorities and local law enforcement.5

B. [Agency] Reports to [Campus]

Describe all incident reports other Parties will make to the campus or others who are party to the MOU, including describing the content and timeliness expected for these reports. Additional categories or content may be necessary to the extent you wish to describe expected reports to/from the DA’s office, to/from rape crisis centers, etc.

C. Clery Warnings

This section facilitates compliance with the Clery Act which requires campuses to issue timely warnings for Clery crimes on- and off-campus that pose a serious threat to students and employees and emergency notifications for a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees on campus.

Parties should explore ways in which they can optimize Clery and other notifications according to students’ preferred methods of receiving information, including the use of mobile-compatible technology, text messaging, and other methods similar to those used for AMBER Alerts.

VII. CONFIDENTIALITY & PRIVILEGE REQUIREMENTS

This section describes how Parties can set clear expectations regarding requests for confidentiality and the limitations on those requests depending on who is communicating with the victim. It also suggests information Parties should share with each other and with victims

5 (See Ed. Code, §§ 67380, subd. (a)(6)(A), 67383, subd. (d)(2); see also Attorney General’s campus sexual assault bulletin, p. 3, for additional information:  http://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/info-bulletin-dle-2015-01.pdf.)
regarding levels of confidentiality and privilege available under state and federal law and campus policies.

A. Communications Between Parties

This section describes how Parties can navigate the confidentiality and privilege protections that accompany certain sources of victim assistance, so that victims can receive accurate information about the implications of their decisions and parties can understand what kind of information they should or should not expect from certain personnel.

B. Privileged & Confidential Resources for Victims

California law identifies who can assert the privilege (as defined in Section IV) of confidential communication between a sexual assault victim and a Sexual Assault Counselor, Clergy Member, or Psychotherapist. These privileged resources can assert legal privilege on behalf of the victim. This privilege covers all confidential communications with the counselors and psychotherapists, and those who work or volunteer in their offices when the communications are reasonably necessary for the accomplishment of the purpose for which the counselor was consulted. Under Title IX, and for administrative purposes only, a campus may designate non-professional or non-pastoral counselors as “Confidential Resources” to address incidents of sexual violence, such as staff or volunteers at a women’s center. Confidential Resources may be required to disclose information about reportable incidents of sexual violence, but they cannot disclose personally identifiable information about the victim without the victim’s voluntary and informed consent and may disclose only general information about a reportable incident. In a criminal proceeding, Confidential Resources may be required to disclose such information unless they qualify as a privileged resource. Victims should be informed about the limitations of confidential communications.

If the campus does not employ privileged resources, Parties should include qualified CBOs and/or RCCs as parties to this MOU so that privileged resources are provided. Campuses that do offer privileged resources are also encouraged to include in this MOU or otherwise partner with qualified CBOs and/or RCCs to provide multiple options for victims to access privileged resources if they choose.

Parties should consider the following specific notifications to victims as additional components of the MOU:

- Provide the victim with a list of points of contact on- and off-campus where the victim can obtain:
  - Privileged services of Sexual Assault Counselors and Professional and/or Pastoral counselors;

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6 While non-professional counselors may have responsibilities that would qualify them as “Responsible Employees” for Title IX purposes, if the IHE designates them as “Confidential Resources,” they need report only general, non-personally identifiable information to the Title IX Coordinator. (U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 2014) E-3.)
Campus-designated Confidential Resources; and
Resources and assistance from Responsible Employees (making clear that communication with these employees would trigger certain reporting requirements).

- Inform the victim that
  - The Confidential Resource will need to report only general, non-personally identifiable information to the Title IX Officer; and
  - In a criminal proceeding, the Confidential Resource may be required to disclose the content of communications with the victim unless that resource is a qualified Sexual Assault Counselor or Professional or Pastoral Counselor.

Parties will identify the specific circumstances when shared communications are not privileged or confidential. For example, mandatory reporting to law enforcement is required where a health care provider suspects a physical injury may have resulted from sexual assault or a firearm or reasonable suspicion of child abuse.

VIII. COMMUNICATION AND COORDINATION

The purpose of the information-sharing described in this section is to ensure the delivery of appropriate services, to facilitate full and fair investigations, to prevent acts of retaliation against the victim or witnesses, and to assess special threats posed by offenders within the respective jurisdictions as part of an overall effort to prevent the occurrence of similar crimes. Parties should seek to improve processes and protocols in a collaborative atmosphere that seeks to improve systems without assigning blame for conduct.

A. General

Describe planned meetings, frequency and timeliness of reporting. We recommend meeting at least once per quarter, but parties should adjust frequency based on local needs.

B. Victim Response and Evidence Collection/Preservation

Depending on local circumstances and needs, Parties may wish to include additional detail or addenda to this section regarding the division of responsibility for victim services in the immediate aftermath of a sexual assault, including transportation to a health center that can conduct an examination and referral to other needed services. In addition, campuses with non-sworn or non-peace officers may need to adapt the Template MOU to ensure proper collection of evidence and maintenance of chain of custody.

http://oag.ca.gov/campus-sexual-assault
1. **SAFE Exams and Evidence Collection/Preservation**

This section describes potential agreements among Parties to arrange for victims to get rape kits and to take measures to ensure rape kits are created, stored, tested, and processed for use in the criminal justice system.

2. **Victim Communication and Interviews**

In addition to the basic components included in the Template MOU on victim and witness interviews, Parties should consider additional commitments described below:

- Inform the victim that under California law, he or she is entitled to a SAFE, at no cost to the victim, irrespective of whether the victim engages with law enforcement or participates in the investigation;
- Encourage the victim to provide whatever time-sensitive, case-related information the victim is able to provide;
- Advise the victim of how the investigation and charging process will proceed generally and inform the victim of his or her options with respect to participation in that process;
- Inform the victim that under California law, Penal Code section 679.04, a sexual assault victim is entitled to have an advocate and support person during contact with law enforcement, the prosecutor and defense attorney and any representatives of the same;
- Not coerce the victim into making any immediate decisions with respect to future participation in any investigative process;
- Not require a victim who decides not to engage with law enforcement or participate in the investigation or prosecution to sign a waiver form, as this decision can be documented in police reports and case files;
- Inform a victim who decides not to participate that his or her case can be reopened at his or her request, and give the victim appropriate information about the timing and process for doing so. A victim will be recontacted within 48 hours if he or she has initially stated he or she does not want to make a report to law enforcement;
- Provide the victim with information about confidentiality and privilege as described in Section VII of this How-To Guide above;
- Discuss the services provided by RCCs or other qualified third parties on sexual assault, including contact information, location, and distinct services that they can provide, and offer to refer the victim to a local RCC or other qualified community resource; and
- Provide the victim with a written document at the time of the report that contains the victim’s rights under the California Constitution, article 1, section b, otherwise known as “Marsy’s Law.” This document will include information on available services (including contact information such as specific contacts, addresses, phone numbers and websites), options for pursuing an investigation or prosecution, and the extent to which and with whom information (including personally identifiable information) provided by the victim will be shared. Copies of this document will be provided to the victim at the time of report and maintained in the case file.
Parties should commit that the campus will provide certain information to students, including:

- Ensuring victims know of the right to report the sexual assault to law enforcement
- Assisting victims who wish to report to do so promptly, in order to facilitate preservation of evidence and an effective response by trained criminal investigators.
- Providing victims with information about how to file Title IX complaints, criminal complaints, and/or initiate a campus disciplinary proceeding.

C. Victim Services

Parties may wish to use this section to coordinate referrals for support services for sexual assault victims, including the Victim-Witness Assistance Program and the Victims of Crime Fund.

D. Sexual Assault Response Team (SART)

In the context of this MOU, the term “SART” refers to an interdisciplinary team responsible for reviewing and assessing the community’s response to sexual assault in general, but not for discussing individual cases. If a similar interdisciplinary team is used to review specific cases, the campus should, to the extent possible, include the Title IX coordinator and law enforcement to be involved in such reviews. In cases where a victim seeks confidentiality and does not wish to have the campus investigate the sexual assault, the campus may consider whether the team should be reformatted to accommodate the request of the victim.

E. Coordination During Investigation

Parties should use this section to describe any bilateral or multilateral information-sharing during the course of an active campus or law enforcement investigation.

IX. SEXUAL ASSAULT PREVENTION AND TRAINING

This section offers suggested training arrangements between Parties to the MOU. Parties may tailor this section to account for the frequency of trainings, types of personnel to be included, any cost-sharing arrangements, types of curricula to be used, etc. Parties may wish to consult with a sexual assault community expert, and may wish to adapt or add to this section to include additional cross-agency training opportunities, including multi-disciplinary trainings with the California District Attorneys Association (CDAA), the California Coalition Against Sexual Assault (CalCASA), and the California Medical Training Center, among others.

A. Training Offered by [Agency], [Campus], and [Qualified CBOs/RCCs]

Parties should list any training law enforcement, campuses, or other Parties agree to provide to their fellow Parties, and the data that will be collected to determine its effectiveness.
B. Campus Community Training and Collaboration

Parties should describe any outreach or other efforts on which they might be able to collaborate to the benefit of student and community awareness of rights and responsibilities to prevent and respond to sexual assault.

Additional potential agreements for Parties to consider include:

- Agree to engage in outreach and collaboration with the campus community to promote positive working relationships between law enforcement and students, faculty, staff, and other stakeholders;
- Agree to collaborate in the conduct of meetings with students, victim advocates, and other stakeholders, to discuss ways in which Parties can better respond to and prevent crime with special attention to campus sexual assault;
- Agree to work with internal and external individuals and organizations with expertise in sexual assault prevention and response efforts within their respective jurisdictions, and to hold at least one annual public meeting to solicit feedback on the effectiveness of their prevention and response policies, procedures and efforts;
- Agree to hold annual trainings that include students and staff actively involved in student life activities, including security, counselors, medical, resident advisors, Greek system officials, sporting event coaches and executive administration. Training will include information on Title IX rights as well as victims’ rights under the California Penal Code and Constitution (Marsy’s Law), and requirements under the Education Code section 67386;
- Agree that all incoming students should complete an awareness class, orientation, or training specifically to address sexual assault and what to do if one is a victim or witness. Information on how to report a sexual assault—whether on or off campus—should be made clear and available to all students, including, for example, on the back of student ID cards. The Parties agree to provide [Campus] with information needed for these classes and disclosures, including, for example, points of contact for students who wish to contact local law enforcement; and
- Agree to provide training to the campus community at least annually to address alcohol and drug use and its relation to sexual assault and other violent crimes, including how intoxication relates to culpability in campus and criminal proceedings.7

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7 In both the criminal and campus disciplinary contexts, a victim’s intoxication may render him or her unable to consent to the conduct, and the accused’s intoxication is generally not a defense. (Ed. Code, § 67386, subd. (a)(2); Pen. Code, § 29.4; CALCRIM No. 3426.) For a more detailed analysis of these issues, please see: Attorney General Kamala D. Harris, California Department of Justice Information Bulletin No. 15-01 (January 27, 2015) p. 5, available at: http://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/info-bulletin-dle-2015-01.pdf.
X. ACCOUNTABILITY

This section addresses the data and analysis Parties can use to determine the effectiveness of their efforts and ways they can improve. Parties should consider the data available to them to collect or analyze as they consider this section.

XI. MISCELLANEOUS

Parties should include any additional provisions here that do not fit in the above sections.
The Template MOU provides sample language for parties to incorporate into their local agreement. Parties may wish to adapt the Template to ensure consistency with other agreements already in place between some or all of the Parties, and to revisit any preexisting agreements to reconcile any changes in law or practice. Please consult the How-To Guide for context and additional suggestions Parties may wish to use to supplement various sections of the Template.

I. PARTIES

This Memorandum of Understanding is between [Campus], [Local Law Enforcement Agency, or “Agency”], [Sheriff], [District Attorney], [Qualified Community-Based Organizations (“CBOs”) or Rape Crisis Centers (“RCCs”)], and [Local Medical Facility and/or Sexual Assault Response Team associated with a Medical Facility (“Medical”)] (“the Parties”).

The Parties agree to each identify a central point of contact for the other with respect to this MOU. [Insert or attach points of contact for each Party].

Unless otherwise agreed to, all information-sharing between the Parties described in this MOU will flow between these points of contact. The Parties agree to share a contact list with their point of contact for implementation of this MOU, and to notify the Parties of any changes to their points of contact as soon as practicable.

II. PURPOSE

The purpose of this MOU is to meet the statutory requirements established by AB 1433 (Gatto, 2014), specified in the California Education Code (Ed. Code, § 67383, subd. (a) and Ed. Code, § 67381), and requiring covered institutions to adopt and implement written policies and

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1 For purposes of this MOU, we use [Campus] to refer to the college or university’s administration, with the understanding that the institution as a whole is a party to the MOU and should designate the appropriate point of contact for law enforcement collaboration. Depending on the unique circumstances of each Campus, more than one department within a college or university may need or wish to be represented in this MOU, depending on local administrative needs. For example, for those institutions with sworn police officers, the institution might simply designate someone in the police department as the sole point of contact. If a campus contracts with an external security firm, that firm might also be included as a Party, assuming the campus resolves any legal questions regarding information-sharing between sworn and non-sworn officers or other security personnel. Institutions may also want to include the Title IX officer or other designated individual. Institutions should make these decisions based on local needs to ensure that the appropriate parties are included in this MOU to fully implement the agreement.

2 The Sheriff’s Department has concurrent jurisdiction over any campus located within its county boundaries.

3 Based on local needs, the parties may or may not need or desire to include all the Parties listed above, e.g., the local medical facility where sexual assault forensic exams are conducted, as they may already have an MOU or Agreement with local law enforcement to conduct exams.

http://oag.ca.gov/campus-sexual-assault

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procedures to ensure that reports of Part 1 violent crimes, hate crimes, or sexual assaults are immediately, or as soon as practicably possible, disclosed to local law enforcement.

It is further the purpose of this MOU to promote collaboration between the Parties to enhance the reporting, investigation, and appropriate response to sexual assault and other covered crimes.

Finally, it is the purpose of this MOU to promote compliance with the numerous state and federal laws that provide specific requirements related to these issues, as outlined in California Education Code sections 67380, 67381 (the Kristin Smart Campus Safety Act of 1998) and 67383; SB 967 (de León, 2014), specified in California Education Code section 67386; the federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"); and Title IX of the Higher Education Amendments of 1972 ("Title IX"); as well as the California Penal Code and applicable state laws related to health and confidentiality/privacy.

III. STATEMENT OF PRINCIPLES

The Parties agree to the following set of principles:

A. Improving Communication, Coordination, and Collaboration: The Parties agree to enhance communication, coordination, and collaboration to remedy sexual assault and violence and hate crimes, and protect the victim’s confidential information.

B. Championing Campus and Community Safety: The Parties will receive training to assist in the recognition that any allegation regarding sexual misconduct requires sensitive treatment and also directly impacts the real and perceived safety of all members of a campus community.

C. Upholding Civil Rights, Civil Liberties, and Victims’ Rights: The Parties agree to comply with state and federal laws in a manner that protects individuals’ civil rights and liberties, while prosecuting crimes and championing justice for survivors. The Parties explicitly recognize the distinctions between criminal law and civil law in the handling of sexual assault and violence that arise under both state and federal statutory frameworks.

D. Centering the Victim’s Needs in Responses to Sexual Assault: The Parties agree to institute specialized, trauma-informed responses developed in consultation with campus and community-based victim advocates and delineated in this agreement.

E. Ensuring Accountability & Auditing: In an effort to promote greater transparency, the Parties have, or will implement a means to monitor, record, and accurately maintain all reports of Part 1 violent crimes, hate crimes, and sexual assaults, their outcomes, and processes, while maintaining confidentiality where the law provides.
F. Specialized Training and Knowledge: The Parties agree that sexual assault and hate crimes require specialized, trauma-informed training for the Parties and other potential first responders.

G. Respecting the Unique Needs of Undocumented Individuals: Parties should strive to promote policies and practices that address the unique needs of undocumented individuals, including implementing culturally and linguistically appropriate campus and law enforcement services.

IV. DEFINITIONS

Parties should include all relevant definitions in this section. The How-To Guide includes suggested terms and definitions for the Parties to use based on local needs.

V. JURISDICTION FOR LAW ENFORCEMENT SERVICES

A. Maps

The Parties agree to share patrol and sector maps to clarify jurisdictional boundaries. Such maps will depict all buildings and properties that are owned or controlled by the [Campus], as well as all buildings and properties that are owned or controlled by recognized student and alumni organizations. All maps will be reviewed and updated on an annual basis or when a significant change is made to [Campus] property or local law enforcement reporting sectors. All modified maps will be shared with all Parties to this MOU. In addition, all maps will indicate any federal or tribal lands that are included in the jurisdictional boundaries, and if any such lands are present, all maps and action plans will be shared with those federal and tribal authorities. A copy of each map will be attached as Appendices to this MOU.

B. Operational Responsibility & First Responders

*Parties should review the suggested language below carefully and tailor it to their unique circumstances. Additional considerations are included in the Guidance Document.*

[Campus] has operational responsibility for any crimes, including Part 1 violent crimes, hate crimes, and sexual assault, occurring on [Campus] (Appendix A) as well as any [Campus] facilities that are identified in Appendix B. [Agency] has operational responsibility for any crimes, including Part 1 violent crimes, hate crimes, and sexual assault, that occur within the municipality in which [Agency] serves as the Police Department (Appendix C).

[Sheriff] shall have concurrent jurisdiction over [Campus] property and facilities, as well as municipalities within the County in which [Sheriff] has jurisdictional authority and operational responsibilities (Appendix D).

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C. Collaboration

The Parties recognize that regardless of which law enforcement agency ultimately has operational responsibility in responding to a sexual assault, hate crime or other Part 1 violent crime, other Parties may be the first responder to the report of the crime. Thus each of the Parties has a responsibility to act in a manner that facilitates an effective law enforcement and institutional response, as well as appropriate treatment of the individual reporting the sexual assault or other violent crime. This includes ensuring the appropriate preservation of evidence and coordination with law enforcement to maintain chain of custody and authorize forensic sexual assault examinations.

D. Disputes Over Responsibility

If a dispute arises between the Parties regarding administrative, geographic or operational responsibility, and it cannot be resolved by referring to this MOU, the Party with jurisdictional responsibility for the incident will retain investigative responsibility. Other Parties will provide cooperation and resources in support of the investigation or resolution of the incident. The Party with responsibility for the incident will reasonably accommodate any requests from other Parties to conduct a parallel or joint response and/or criminal investigation.

VI. REPORTING OBLIGATIONS

The Parties agree to the following procedures through which each Party will transmit reports it receives to the other Parties. These reports shall comply with the confidentiality requirements
described in Section VII below, and shall not identify the victim or the alleged assailant unless the victim has consented to being identified.

A. [Campus] Reports to [Agency]

Pursuant to California Education Code sections 67380(a)(6)(A) and 67383(a), [Campus] will report immediately or as soon as practicably possible to [Agency] all reports received by a Campus Security Authority of any Part 1 violent crime, sexual assault, or hate crime, committed on or off campus. This includes reports victims make directly to Campus Security Authorities as well as reports victims make to other [Campus] employees that are then conveyed to [Campus] security authorities. Such reports will include, where authorized:

- The name and characteristics of the victim;
- The name and characteristics of the perpetrator if known;
- Description of the incident, including location and date and time; and
- Any report number assigned to the police incident report documenting the investigation being conducted by the jurisdictional agency.

All such notifications to [Agency] will be documented in [Campus] records. In addition, [Campus] will maintain a public crime log documenting the "nature, date, time, and general location of each crime" and its disposition, if known. The log should be accessible to the public during normal business hours.

B. [Agency] Reports to [Campus]

Pursuant to the Clery Act, [Campus] must report aggregate data concerning certain enumerated crimes. To enable [Campus] to fulfill this requirement, [Agency] and [Sheriff] shall provide statistics on at least an annual basis to [Campus] on all crimes listed in 20 U.S.C. § 1092(f)(1)(F) for which [Agency] or [Sheriff] acted as a first responder or had operational responsibility.

[Agency] and [Sheriff] will promptly notify [Campus] when students or employees are identified as the victims or suspects of any Part 1 violent crime, sexual assault, or hate crime that occurs within [Agency’s] or [Sheriff’s] jurisdiction, and/or when [Agency] or [Sheriff] acts as first responder to an incident. Such reports will include, where authorized:

- The name and characteristics of the victim;
- The name and characteristics of the perpetrator if known;
- Description of the incident, including location and date and time; and
- Any report number assigned to the police incident report documenting the investigation being conducted by the jurisdictional agency.

All such notifications to [Campus] will be documented in [Agency] incident reports.

[Agency] will promptly notify [Campus] if it has referred the incident to [District Attorney] for charges to be filed, and of any charging decisions made by [District Attorney].
C. Clery Warnings

The Clery Act requires [Campus] to issue timely warnings for Clery crimes on- and off-campus that pose a serious threat to students and employees and emergency notifications for a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees on campus.

To facilitate the issuance of Clery Act-required timely warnings and emergency notifications, the Parties agree to coordinate the sharing of information as described above. The Parties acknowledge that [Campus] need not obtain the approval of an outside law enforcement agency to issue any warnings/notifications, nor is [Campus] required to seek preclearance of the content of any warning/notification. However, [Campus] will inform [Agency] about such warnings as soon as practicable through the points of contact listed in this MOU.

VII. CONFIDENTIALITY & PRIVILEGE REQUIREMENTS

The Parties will comply with applicable law and guidance regarding anonymous and confidential reporting of sexual violence, including when, how, and what information can or must be disclosed to local law enforcement officials or designated [Campus] officials.4

A. Communications Between Parties

The Parties agree that if a victim requests confidentiality regarding a reportable incident, the Parties will take all reasonable steps to comply with the victim’s request or inform the victim when the Parties cannot ensure confidentiality.5 A Party will not disclose the name of the victim to other Parties unless the victim provides written consent to being identified after being informed of his or her right to have identifying information withheld.6

Prior to obtaining consent from the victim to share personally identifying information, Parties will inform the victim of sexual assault that notification to [Campus] - including the confidential resources described in subsection B below - likely will also result in notice to the campus Title IX coordinator, but that notification to confidential resources will not result in disclosure of personally identifiable information to the Title IX coordinator.7 Parties will also inform the victim that he or she can agree to engage with local law enforcement and participate in the investigation and prosecution using a pseudonym (i.e., Jane or John Doe) instead of his or her

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4 Given the multiple entities that may need to respond to a reported instance of sexual violence, and the differing responsibilities of each entity, effective communication and coordination are critical.
6 Ed. Code, § 67380, subd. (a)(6)(A) and Penal Code, § 293, subd. (d).
7 While non-professional counselors may have responsibilities that would qualify them as “responsible employees” for Title IX purposes, if the IHE designates them as “confidential resources,” they need only report general, non-personal identifying information to the Title IX Coordinator. (U.S. Dept. of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 2014) E-3.)
http://oag.ca.gov/campus-sexual-assault
true name. In that case, [Campus] may disclose the name of the alleged perpetrator to law enforcement (if known) while protecting the identity of the victim from public disclosure.

B. Privileged & Confidential Resources for Victims

The Parties acknowledge that communications between victims and Sexual Assault Counselors, Psychotherapists, or Clergy Members are privileged communications. The privilege covers all confidential communications with the Counselors or Psychotherapists, and those who work or volunteer in their offices when the communications are reasonably necessary for the accomplishment of the purpose for which the counselor was consulted. Such counselors generally are under no obligation to report incidents of sexual violence, unless the victim is a minor, and can generally claim the privilege in a criminal proceeding.

The Parties further acknowledge that communications between campus-designated “confidential resources” and victims are generally protected from disclosure of personally identifying information except in limited circumstances, including potentially in a criminal proceeding unless they qualify as privileged.

Finally, the Parties acknowledge that communications between victims and any Responsible Employees on [Campus] who are NOT designated “confidential resources” are not confidential and are subject to the reporting requirements described in Section VI above (in addition to other requirements under state and federal law).

The Parties agree to develop materials to share with each other, with victims, and with the campus community listing appropriate points of contact on- and off-campus within the above three categories, and including information about the levels of confidentiality and privilege applicable to resources in each category.

VIII. COMMUNICATION AND COORDINATION

A. General

The Parties will meet regularly – at least once per quarter – to:

- Share data and analysis about current trends and patterns in sexual assaults both on and off campus; and
- Share additional relevant crime data in furtherance of crime prevention goals.

[Agency] understands that once [Campus] becomes aware of an incident of sexual assault, it has obligations to take prompt and appropriate action to investigate, independent of any investigation by [Agency]. [Campus] understands that [Agency] may initiate an investigation and prosecution of an incident of sexual assault independent of any campus administrative proceeding.

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B. Immediate Aftermath of an Incident - Victim Response and Evidence Collection/Preservation

1. SAFE Exams and Evidence Collection/Preservation

The Parties agree that in the immediate aftermath of a sexual assault, a victim should be directed to, and receive assistance (including transportation where appropriate) to access services, including referrals to counseling, a health examination and with the victim’s consent, a sexual assault forensic examination (SAFE), at no cost to the victim and irrespective of whether the victim engages with law enforcement. If a victim does engage with law enforcement and is transported to a hospital for a medical evidentiary or physical examination, the Parties acknowledge the law enforcement officer or agency must notify an RCC immediately.

The Parties agree that under all circumstances in which the victim consents to a medical examination and a SAFE exam, [Agency]8 will provide transportation to the local medical facility where SAFE exams are conducted. If the victim declines [Agency] transportation or if the victim reports to the medical facility, [Agency] will respond to the medical facility and will contact the local Rape Crisis Center to respond to the medical facility as well. With the consent of the victim, the medical facility can contact the local Rape Crisis Center to respond to the medical facility to provide support to and advocacy for the victim. [Agency] will pay for the SAFE exam, and the Parties agree that [Agency] will not directly or indirectly pressure the victim to report the offense.

The Parties agree to ensure the timely and proper collection of evidence, including that from the crime scene or from a SAFE exam, when the victim has made a report to a law enforcement Party and collection of evidence will not violate a victim’s request for confidentiality. The victim can be encouraged to report in order to permit the Party with operational responsibility to make a timely seizure of evidence even if the victim later chooses not to proceed with criminal charges. The Party with operational responsibility also agrees to collect, properly package, and maintain evidence by booking it into the property room of the Party to preserve the chain of custody and to take appropriate steps to preserve fragile or biological evidence or other evidence at risk of destruction.

When a SAFE exam is completed, [Agency] will collect the SAFE kit, submit it to the appropriate crime lab for analysis pursuant to California law, and ensure the proper handling, proper custody and proper control of all collected evidence, with particular attention paid to collecting evidence regarding drug-facilitated assaults.

2. Victim Communication and Interviews

Consistent with trauma-informed interview and investigatory practices, Parties will develop materials to inform the victim of his or her rights and options in both the short- and long-term,

8 Based on local needs and agreements, [Campus] police may also provide such transportation.

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provide access to any necessary health or safety resources, and encourage the victim to engage with [Campus] personnel, [Agency] and privileged counseling services.

In no circumstances will [Campus] directly or indirectly discourage (or, alternatively, require) the victim from making a Title IX or criminal complaint.

Similarly, in no circumstances will [Agency] directly or indirectly discourage (or, alternatively, require) the victim from pursuing criminal charges or campus disciplinary action.

C. Victim Services

The Parties agree, with the victim’s consent, to coordinate referrals for support services for sexual assault victims that are made available by municipal and other governmental agencies, [Agency], [Sheriff], [Campus], [District Attorney], [Qualified CBOs/RCCs]. The Parties agree to have and share policies setting out their respective responsibilities related to victim support from the time of the report through resolution of the investigation, including prosecution or disciplinary proceedings, as applicable.

The Parties agree to notify the local Victim-Witness Assistance Program of the sexual assault when a police report is generated. The Victim-Witness Assistance professionals can support the victim during any criminal or campus disciplinary proceeding, including providing the appropriate referrals and resources, and can assist the victim with financial resources through the Victims of Crime Fund.

D. Sexual Assault Response Team (SART)

The Parties agree to support and participate in the existing interdisciplinary Sexual Assault Response Team (SART) within their jurisdictions or support the development of a SART that includes [Campus] representatives, the Title IX Coordinator or designee, advocates, counselors, medical providers (ideally to include a Sexual Assault Forensic Examiner or a Sexual Assault Nurse Examiner), law enforcement support, and other competencies that may be needed to adequately deliver essential support services.

The Parties agree to be part of the SART’s system-wide review and discussion of the community’s response to sexual assault. The Parties also agree to publicize information about SART resources to the campus community and to train SART members on all applicable confidentiality and victim privacy safeguards.

E. Coordination During Ongoing Investigation

The Parties will regularly confer on the status of an active investigation to ensure [Campus]’s compliance with federal requirements while maintaining the integrity of an active [Agency] criminal investigation.

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The Parties agree, as soon as is practicable and as allowable by federal and state law, to share relevant documentation and other information created and/or maintained during [Campus] or [Agency] investigations (such as records of interviews and physical evidence gathered) when a victim of sexual assault and/or an alleged suspect are students or employees of [Campus].

Where possible and appropriate, [Campus] and [Agency] agree to conduct joint victim and witness interviews to avoid the need for duplicative interviews.

[Campus] will disclose to [Agency] when it has initiated a disciplinary proceeding against the alleged perpetrator, to the extent allowable by state and federal law. [Campus] will disclose the final results of a disciplinary proceeding to the Parties if it determines that: 1) a student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and 2) with respect to the allegation made against him or her, the student has committed a violation of the institution’s rules or policies. In these circumstances, the disclosure may be made with or without the consent of the victim, and regardless of whether the victim pursues criminal charges.

[Agency] and [District Attorney] will share with [Campus] the result of a criminal investigation, whether any charges have been filed, and the outcome of any criminal proceeding, as soon as is practicable and as allowable by federal and state law.

IX. SEXUAL ASSAULT PREVENTION AND TRAINING

A. Training Offered by [Agency], [Campus] and [Qualified CBOs/RCCs]

[Campus] agrees to offer training to [Agency] regarding:

• The federal and state requirements regarding sexual assault prevention and response with which they must comply, including the Clery Act, Title IX, Title IV, the Safe Streets Act, Section 14141, FERPA, and other confidentiality and privacy statutes and policies; and

• The differing status of conduct offenses as defined and investigated by [Campus] as compared to similar criminal offenses.

[Agency] agrees to offer training and technical assistance to [Campus] security personnel and any personnel involved in a campus disciplinary investigation or proceeding regarding:

• [Agency]-based resources, reporting options for victims, the investigation process used in criminal cases, and the accommodations that [Agency] can provide or arrange for sexual assault victims.

• Investigative methods and best practices relating to evidence collection and preservation, victim and suspect interviewing, witness interviewing and preparation, review of sexual assault response and investigations to detect and address indications of explicit or implicit bias, and other matters as requested.
[Qualified CBO or RCC] agrees to offer training and technical assistance to [Campus] and [Agency] involved in campus disciplinary investigation or proceeding regarding:

- Services for survivors in the community.
- Overview of survivors’ rights.
- Dynamics and trauma associated with sexual assault from a trauma-informed lens.
- Strategies and practices in the prevention of sexual assault and shifting social norms that perpetuate sexual violence.
- Compliance with California Education Code section 67386.

[Agency] agrees to provide its officers and command-level staff with trauma-informed sexual assault training. Training provided by [Agency] will be Peace Officer Standards and Training (“POST”) certified or provided by a trauma and sexual assault expert.

The Parties agree that training should occur regularly, on at least an annual basis, [Insert Frequency] and be reinforced at management meetings, roll calls, and other gatherings periodically.

The Parties agree to collect data regarding the number and types of trainings provided pursuant to this section, to conduct regular evaluation of these trainings, and to include such evaluation in their data collection and management reviews to look for trends and areas that will need to be revised in future trainings.

B. Campus Community Training and Collaboration

[Agency] agrees to collaborate with [Campus] to provide outreach and training for the campus community about the awareness, prevention, intervention, investigation, and response to sexual assaults and other crimes of violence and to work with community-based resources and experts, including victim advocates, to provide these programs.

X. ACCOUNTABILITY

The Parties agree to collect data, including a baseline number of reports of Part 1 violent crimes, hate crimes, and sexual assault from the year prior to entering into the MOU, comparison of baseline numbers to current numbers of cases reported, and for each individual case:

- Whether the Parties met the MOU requirements and if not, why;
- Whether the case was successfully prosecuted and if not prosecuted, identification of the reason why the case was not pursued; and
- Feedback from the victim of his or her view of the process.

The Parties agree to collect data regarding the number and types of training each Party provides each year, to conduct regular evaluations of the efficacy of those trainings, and to include such evaluation in their data collection and management reviews to look for trends and areas that will need to be revised in future trainings. The Parties agree to determine common definitions to ensure a valid comparison of data collected.
Data collection related to the Parties’ actions according to this MOU will be reviewed directly between the Parties on at least an annual basis and, for sexual assault data, through the SART on a quarterly basis. Parties will evaluate changes in the number of reports each year and discuss whether any increases or decreases in reporting are due to changes in actual crime levels or changes in levels of reporting. Performance improvement areas, including strategies to increase levels of reporting and decrease instances of crime, will be identified through review of the data and the responsible party will develop action steps to improve those areas.

Each Party representative responsible for implementation of this MOU will meet at least annually to discuss and evaluate effectiveness of the MOU to determine areas for improvement and discuss appropriate next steps.

XI. MISCELLANEOUS

This MOU is effective upon signature by each Party.

This MOU may be terminated upon 30 days’ notice by any Party. This MOU may be amended or terminated by mutual agreement of the Parties. An amendment or termination should be done in writing.

This MOU may be executed in counterparts.

The Parties agree that any costs associated with this MOU will be covered as follows [insert any necessary language].

Each Party agrees to act in good faith to observe the terms of this MOU; however, nothing in this MOU is intended to require any unlawful or unauthorized act by any Party. Nothing in this MOU shall be interpreted to limit or restrict each of the Parties’ legal, jurisdictional, or other rights or obligations with respect to the subject matter of this MOU.

No provision of this MOU shall form the basis of a cause of action at law or equity by any Party against any other Party, nor shall any provision of this MOU form the basis of a cause of action at law or equity by any third party.
CHANCELLOR’S OFFICE LEGAL OPINION 16-03, MAY 2016

ATTACHMENT 6
Date: May 18, 2016

To: District Officers for Unlawful Discrimination Complaints
   Chief Human Resources Officers
   Equal Employment Opportunity Officers
   Community College Attorneys

From: Thuy Thi Nguyen
       Interim General Counsel/Vice Chancellor

Re: Student and Employment Discrimination Complaint Procedures
   Legal Opinion 16-03

The Chancellor’s Office handles appeals of unlawful discrimination complaints under California Code of Regulations, title 5 sections 59300 et seq. The purpose of this legal opinion is to explain the discrimination process and describe how the Chancellor’s Office handles appeals. This legal opinion will serve as a guide on the steps that local districts need to follow to ensure compliance with the pertinent regulations. The opinion will point out the differences between employment and non-employment (student) matters and provide clarity on the role of the district, local governing board, and the Chancellor’s Office throughout the process.

This legal opinion incorporates the previous advisory, Legal Advisory 11-01 on certain discrimination complaint issues, but addresses the unlawful discrimination process in chronological order and opines on certain legal areas. The opinion is organized in the following manner:

I. General Overview (page 2)
II. Investigation, Extension Requests, and Administrative Determination (page 5)
III. Appeal Rights in Employment and Student Matters (page 8)
IV. Student Appeals to the Chancellor’s Office (page 10)
V. Resolution (page 11)
VI. Frequently Asked Questions (page 12)

1 All regulatory references are to Title 5 of the California Code of Regulations unless otherwise noted.
I. General Overview

Under state regulations, California community college districts must follow the procedures outlined in Sections 59300 et seq. when responding to both student and employment discrimination complaints on the basis of actual or perceived ethnic group identification, national origin, religion, age, sex or gender, race, color, ancestry, sexual orientation, or physical or mental disability, or on the basis of an individual’s association with a person or group with one or more of these actual or perceived characteristics.

Responsible district officer’s role and informal resolution

Section 59324 requires that each district identify a single person serving as the district officer responsible for receiving complaints. The responsible district officer’s information shall be made public on the college and district’s website. Additionally, Section 59324 charges the responsible district officer with the duty of overseeing the informal resolution process.

The informal resolution regulations are set forth in Section 59327. This section requires that the district officer attempt to informally resolve matters and advise the complainant of its right to file with other agencies if the unlawful discrimination allegations are brought informally - that is, not filed on the unlawful discrimination form created by the Chancellor’s Office. This situation can arise when the complainant verbally tells the responsible officer about a problem and seeks a quick resolution.

One important distinction to note is that the effect of informally resolving complaints that lack a prescribed form is contrary to the requirements of the Office of Civil Rights (OCR). OCR does not require that complainants file a complaint on a specific form as required by Section 59328(c). OCR advises that any complaint of unlawful discrimination shall be investigated pursuant to federal law. This would effectively rule out the informal resolution requirements of the responsible district officer to resolve matters informally if the complaint is not on the prescribed form.

Complaints filed with the district or Chancellor’s Office

Student and employee complainants may file an unlawful discrimination complaint with the Chancellor’s Office and/or the responsible district officer (Cal. Code Regs., tit. 5 § 59328(b)). The Complainant has the option. The regulations require that the Chancellor’s Office and the district immediately forward a copy of the complaint to the other upon receipt. Thus, districts must send a copy of the complaint along with an acknowledgement letter to the Chancellor’s Office immediately. If a complaint is filed with the Chancellor’s Office, the same procedure will take place – that is, an acknowledgment letter and copy of the complaint will be forwarded to the district’s responsible officer.
When forwarding the complaint, the Chancellor’s Office recommends sending a corresponding copy of the acknowledgement letter and complaint to the complainant for record keeping purposes, and to notify the complainant that the complaint has been received.

Complainants may also send the same complaint to both the Chancellor’s Office and the district at the same time. When this occurs, the Chancellor’s Office and the district should continue to forward a copy of the complaint as required under the regulations.

A unique situation may arise when complainants send an initial complaint to the district and a second amended complaint regarding the same matter, but with additional information, to the Chancellor’s Office, or vice versa. In such situations, following the forwarding procedures set forth in the regulations ensures that both the district and Chancellor’s Office are in possession of the most recent correspondence and any important amendments. Additionally, the district and Chancellor’s Office should send a corresponding copy of any forwarded letter to the complainant.

Advising complainant of his/her right to file with other entities

Districts are required to notify the complainant of the right to file an additional complaint with certain entities, depending on the type of complaint. The district should send an acknowledgement letter to the complainant upon receipt of a new complaint, notifying the complainant the receipt, that a copy of the complaint was forwarded to the Chancellor’s Office, an investigation and determination will be rendered within the given time period, and that the complainant has rights to pursue other claims.

Under Section 59328(f), any complainant alleging employment discrimination shall be notified that he or she may file the same complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing (DFEH). If the complainant has filed such a complaint with the EEOC or DFEH, the district should forward a copy of the complaint to the Chancellor’s Office immediately.

For student matters, Section 59327(4) requires that the complainant be advised that he or she may file the same complaint with the Office of Civil Rights (OCR) where such a complaint is within the jurisdiction of that agency.

Regulatory timeline

The regulatory timelines for discrimination complaints differ depending on the type of alleged discrimination. The timelines for filing are set forth in Section 59328.

Section 59328(e) requires that employment complaints “shall be filed within 180 days of the date the alleged unlawful discrimination occurred.” This period shall be extended by 90 days following the expiration of the 180 days if the complainant first obtained knowledge of the facts of the alleged discrimination after the 180 days. It is important to note that employment
complaints are not limited to discriminatory practices in hiring, but include all facets of employment, including but not limited to: harassment by a supervisor or fellow employee, failure to provide reasonable accommodations, or discrimination in awarding compensation and benefits.

For student complaints, Section 59328(d) requires that complaints “shall be filed within one year of the date of alleged unlawful discrimination or within one year of the date on which the complainant knew or should have known of the facts...”

A complainant may often file more than one complaint regarding the same matter which may pose procedural issues. For example, a complainant may file an initial complaint, then file a second amended complaint with additional information two months later. In such situations, all subsequent or amended complaints involving the same matter must be filed within the timelines set forth above unless the subsequent complaints involve new allegations.

3rd party standing

Section 59328(a) requires that the complaint be filed by the person who suffered unlawful discrimination or by a faculty member or administrator who has learned of such discrimination through his or her official capacity.

It is important to note that Legal Advisory 11-01 also clarifies OCR’s stance on complaints filed by individuals who have not personally suffered unlawful discrimination. OCR requires districts to investigate 3rd party complaints under federal regulations and allows the district to follow the Title 5 procedures and timelines. However, complainants that lack standing under Title 5 do not have appeal rights to the Chancellor’s Office.

Defective complaints

In light of the procedural timelines set forth in the regulations, Section 59332 requires the district to immediately notify the complainant and the Chancellor’s Office of any complaint that was not filed within the applicable regulatory timelines.

As previously mentioned, 3rd party complaints (except for discrimination complaints made by faculty or administrators) and complaints lacking a prescribed form may be deemed defective; however, OCR still requires the district to investigate the matter under federal regulations.
II. Investigation, Extension Requests, and Administrative Determination

This aspect of the unlawful discrimination process requires the most attention, as districts often fail to follow these regulations after a complaint has been filed.

District investigation

A properly filed complaint triggers a district investigation under Section 59334. This section requires the district to commence an impartial fact-finding investigation and the completion of an investigative report that includes all of the following elements:

1. A factual description of the matter,
2. A summary of the testimony provided by each witness, including testimony made by the complainant, respondent, and any “viable witnesses,”
3. An analysis of the data or evidence collected during the investigation,
4. A probable cause determination on whether the alleged discrimination occurred with respect to each allegation in the complaint, and
5. Any other appropriate information.

A common question regarding this section is whether the Title 5 regulations require an outside investigator to meet the “impartial fact finding investigation” standard. The regulations do not require that the district hire an outside investigator; thus a district employee may be designated to investigate, so long as the investigation is impartial and fair, and all parties are interviewed pursuant to Section 59334(b).

Since the regulations require that all parties and witnesses be interviewed, a best practice is to document every attempt to interview throughout the investigation and highlighting the failed attempts in the investigative report. This is essential because investigations may involve witnesses that are protected by Family Education Rights and Privacy Act (FERPA), collective bargaining laws or witnesses bound by rules of non-disclosure such as the Health Insurance Portability and Accountability Act (HIPAA). In such situations, witnesses may be unavailable. Nonetheless, at the onset, if the witness is deemed “viable,” the investigator must make an effort to interview and document every attempt. When conducting interviews, the investigator must afford each witness the opportunity to present their testimony and/or any evidence regarding the allegations.

In addition to interviews, an investigation should properly document and analyze any correspondence regarding the matter. This documentation should include the original complaint, any corresponding documents such as letters and e-mails to and from the district and the complainant and/or the respondent, and any investigative notes. Such documentation is critical in formulating a complete administrative determination, and allows for a thorough review of the record in the event of an appeal.
Lastly, Section 59334 requires that the district complete its investigation within ninety (90) days of receiving a complaint unless the district is granted an extension. Completion of the investigation requires that the district issue an administrative determination along with an investigative report to both the complainant and the Chancellor’s Office within 90 calendar days.

Title IX investigations

Title IX of the Education Amendments of 1972 ("Title IX") is a federal civil rights law that prohibits sex/gender discrimination in federally funded education programs and activities. The Office of Civil Rights at the U.S. Department of Education has issued guidelines on the requirements and standards of such claims. For purposes of our Title 5 discrimination process, there may be situations when a Title 5 investigation overlaps with a Title IX investigation. This situation can occur when a district encounters a sex/gender discrimination, harassment or sexual violence claim that falls under both sets of laws.

The U.S. Department of Education has made it clear that when investigating incidents that fall within Title IX, districts should coordinate with other ongoing school or criminal investigations, including any unlawful discrimination claims. In doing so, districts should consider whether certain information may be shared to expedite the process and to prevent complainants from unnecessarily providing multiple statements about the allegations.

The U.S. Department of Education emphasizes that a district does not need to conduct two separate investigations – that is, a Title 5 investigation and a Title IX investigation, if a district’s own procedures to resolve sex/gender discrimination complaints meets all of the Title IX obligations. These obligations include: responding promptly and effectively to the discrimination, ending the discrimination, eliminating any hostile environment, and preventing future discrimination.

In regards to timeliness of the investigation, the Office of Civil Rights has indicated in their “Dear Colleague Letter” and “Questions and Answers on Title IX and Sexual Violence” that a typical Title IX investigation should be concluded within 60 calendar days. This is shorter than the 90-day requirement under Title 5 because Title IX claims, especially sexual violence allegations, may require immediate attention and resolution for the safety and protection of the complainants. The Chancellor’s Office does not evaluate whether a Title 5 investigation meets the requirements of Title IX on appeal.

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2 This Legal Opinion does not discuss every requirement of Title IX in detail. Districts should consult with legal counsel and/or Title IX coordinator regarding the requirements not mentioned in this opinion.

3 The U.S. Department of Education’s “Revised Sexual Harassment Guidance” can be found at: http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

4 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

5 http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
Extension requests

A district may request up to a 90-day extension from the Chancellor’s Office to submit an administrative determination (Cal. Code Regs., tit. 5 § 59342). The district must send a written request to the Chancellor’s Office no later than ten (10) days prior to the expiration of the original deadline. Additionally, the extension request must contain the following:

1. The reason why an extension is necessary,
2. The date by which the district expects the determination to be completed,
3. Notice that a corresponding copy was sent to the complainant,
4. Notice to the complainant that he or she has the right to send a written objection to the Chancellor’s Office within five (5) days of receipt.

Failure to include any of the four aspects above will result in a denial of the extension. The Chancellor’s Office may grant the extension unless any delay would be prejudicial to the investigation (Cal. Code Regs., tit. 5 § 59342(c)). Examples of prejudice may include loss of witness testimony through delay or utilizing an extension to prevent the complainant from seeking remedies through other outlets in a timely manner.

Administrative determination

Within 90 days of the complaint (unless an extension has been granted), a copy or summary of the investigative report and an administrative determination must be forwarded to the complainant and the Chancellor’s Office. The administrative determination letter should attach the investigative report (or a summary of the report) and both documents are required to be sent by the district within 90 days.

The administrative determination letter shall include all the pertinent information listed in Section 59336, including:

1. The ultimate determination on probable cause,
2. A description of any actions taken to prevent similar allegations in the future (if applicable),
3. The proposed resolution of the complaint (if any), and
4. The complainant’s right to appeal.

The complainant’s right to appeal hinges on whether the matter involves employment or non-employment allegations. Both are discussed in detail below.
III. Appeal Rights in Employment and Student Matters

Every administrative determination letter, regardless of the alleged discrimination, must contain the information mentioned above. However, Section 59336 requires that the determination must also advise the complainant of certain appeal rights. The appeal rights of employment versus student matters differ and districts must correctly advise complainants of their appeal options.

Employment complaints

Section 59336(b) requires that in cases involving alleged employment discrimination, the district shall notify the complainant of its right to appeal to the district’s local governing board and/or to file the same complaint with the Department of Fair Employment and Housing (DFEH). This notice must be in the administrative determination letter.

Any appeal to the local governing board must be filed within fifteen (15) days from the date of the district’s administrative determination. The governing board shall review the original complaint, the investigative report, the administrative determination and the appeal, before issuing a final district decision within forty-five (45) days of receiving the appeal.

Additionally, the district is required to promptly forward a copy of the final district decision rendered by the local governing board to the complainant and notify the complainant of his or her right to file a complaint with DFEH. Please be aware that the Title 5 regulations do not afford employment complainants the right to appeal to the Chancellor’s Office. Section 59339 (“Appeal to the Chancellor”) explicitly states that cases involving employment discrimination may be filed with DFEH where the complaint is within the jurisdiction of that agency, but does not grant appeal rights to the Chancellor’s Office.

Appeals to the Chancellor’s Office are strictly reserved for student complaints. As such, the Chancellor’s Office is not in a position to render any decisions on employment appeals. When an employment appeal is sent to the Chancellor’s Office, the appeal will be sent back to the complainant with instructions to file with the appropriate federal entities.

Student complaints

For student complaints, the district is required to apprise the complainant that he or she may appeal the administrative determination to the local governing board and the Chancellor’s Office (Cal. Code Regs., tit. 5 § 59336(a)). The time limitation for student appeals to the local governing board is the same as in employment matters. The complainant is allowed fifteen (15) days from the date of the determination to appeal to the local governing board, and the board shall review all pertinent documents and render a final decision within forty-five (45) days after receiving an appeal.
After the board’s final decision, a copy of the decision shall be forwarded to the complainant and the Chancellor, along with notice that the complainant may now directly appeal the district’s decision to the Chancellor’s Office within thirty (30) days from the date the governing board issues the final decision or from the date the district provides notice to the complainant of such a decision (Cal. Code Regs., tit. 5 § 59339(a)).

An appeal to the Chancellor’s Office must be accompanied by a copy of the local governing board’s decision or evidence that the complainant filed an appeal with the governing board and that no response was received within forty-five (45) days.
IV. Student Appeals to the Chancellor’s Office

The Title 5 regulations only authorize the Chancellor’s Office to review student (non-employment) matters. Pursuant to Section 59350, once a student appeal reaches the Chancellor’s Office, the appeal will be reviewed to determine if there is reasonable cause to believe the district has violated any requirements of Title 5. If there is evidence of a violation, then the Chancellor’s Office will launch its own probable cause investigation to determine the validity of the allegations.

Reasonable cause review

A timely appeal to the Chancellor’s Office initiates a reasonable cause review to examine the complainant’s issues raised on appeal. This review is limited to an examination of the district’s actions to determine if the procedures were adequately followed. Such a review does not look at the substance of the allegations, but instead focuses on the district’s role throughout the process. In the event the complainant raises new facts or issues on appeal, Section 59351 allows the Chancellor’s Office to remand new issues to the district to provide the district a reasonable opportunity to respond.

The Chancellor’s Office will provide a reasonable cause determination after reviewing all the pertinent documents. The determination will provide a review of the applicable Title 5 requirements and an analysis of the district’s actions, along with an ultimate decision on whether every applicable regulation was followed. If a violation of a procedure occurred, then the Chancellor’s Office will launch its own probable cause investigation to determine the validity and merits of the allegations.

Probable cause investigation

Section 59352 requires that “if the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred.” A probable cause investigation requires the Chancellor’s Office to look at the allegations and interview all parties, including the complainant, respondent(s), and any witnesses concerning the matter. The Chancellor’s Office will reach out to the responsible district officer to gather any information regard the parties before conducting separate interviews.
V. Resolution

A probable cause violation may be resolved through informal resolution with a written conciliation agreement or through formal resolution via a probable cause determination.

Informal resolution

Section 59354 allows the Chancellor’s Office the option of informally resolving the alleged violation(s) if possible. When attempting to informally resolve the matter, the “resolution shall be set forth in a written conciliation agreement” and “a copy of the written agreement shall be sent to the complainant.”

Informal resolution may occur when there is a probable cause violation (i.e. a finding that the discrimination allegations did occur) and the proposed remedy may be easily awarded without contest. Such situations may include providing confirmation of a violation to a student who has already obtained what they initially sought in the complaint, or allowing the district an opportunity to resolve the complaint if the factual circumstances have changed since the original filing.

Formal resolution

If informal resolution is not an option, then Section 59356 requires that the Chancellor’s Office complete its probable cause investigation within 120 days of the reasonable cause finding by notifying the district and the complainant.

Section 59356(a) allows the district to acquiesce to the findings prior to the Chancellor’s Office filing an accusation against the district, should the complainant’s allegations be found to have merit. In such situations, the Chancellor’s Office will send a written notice to the district that it has violated certain regulations and allow the district a reasonable time to respond to the findings. Should the district fail to acquiesce to the probable cause finding, the Title 5 regulations provide the Chancellor’s Office with the authority to hold a hearing pursuant to the Government Code to determine if the violation did occur (Cal. Code Regs., tit. 5 § 59358).

Enforcement

Section 59360 provides the Chancellor’s Office with enforcement tools to ensure that the districts follow the Title 5 regulations. These means to effect compliance include:

1. Withholding all or part of the district’s state support;
2. Making eligibility for future state support conditioned on compliance with specific conditions regarding the violations; or
3. Proceeding in a court of competent jurisdiction for an appropriate order to compel compliance.
VI. Frequently Asked Questions

Multiple complaints

Q: A Complainant has filed numerous complaints regarding the same matter, but different incidents. Typically, the latter complaints just provide new facts and allegations. Should I treat all the complaints as one complaint? Or should every complaint be treated as its own separate complaint?

A: Generally, if all the complaints involve the same matter — that is, facts that relate to the same underlying type of discrimination or facts that stem from the initial allegation, then the complaints may be treated as one complaint. This may occur when a complainant files subsequent complaints due to ongoing discrimination from the first incident.

However, if the subsequent complaints involve a different type of discrimination that is separate from the initial allegation, then the complaints should be treated separately. The key here is whether an investigation of the complaints as one matter would be appropriate. If the answer is no, then the complaints should be separated so each matter should be properly investigated and resolved individually.

Employee v. non-employee/student complaints

Q: An employee has filed an unlawful discrimination complaint against another fellow employee. Would this be a non-employment complaint since it doesn’t involve discrimination in the hiring, compensation/benefits or post-hiring process?

A: No, any employment complaint, including those brought by employees against a fellow employee, should be treated as an employment complaint. The Title 5 regulations require that the district notify employment complainants of the right to file the same complaint with the Department of Fair Employment and Housing (DFEH). If the complaint is a matter that the DFEH would normally handle, such as workplace hostility or harassment, then the matter should be considered as an employment complaint.

Multiple extension requests

Q: Can a district request multiple extensions to complete an investigation and render the administrative determination?

A: Yes, a district may request for multiple extensions because the Title 5 regulations do not expressly limit the number of extension requests a district may make. However, when presented with a second 90-day extension request, the Chancellor’s Office must review the
reasoning for the request to determine if a second extension would be prejudicial to the investigation.

**Interviewing witnesses**

**Q:** Will the Chancellor’s Office find a reasonable cause violation if a witness is not interviewed?

**A:** Possibly, depending on whether the witness is viable. The regulations require that a district interview all “viable witnesses” during its investigation. In determining whether this requirement is met, the Chancellor’s Office will look at the witnesses mentioned in the complaint and determine whether each witnesses would be deemed viable – that is, would the witness be able available and willing to provide substantive and valuable information on the matter, and would it be practical to interview the witness?

The viability analysis is threefold. First, the district must ask whether a witness is available to provide testimony. Is the district privy to the witness’ information and can the witness be located to give testimony? If a witness cannot be located, then the witness is unavailable and thus not viable.

Secondly, if the witness is available, would the witness be able to provide relevant and material information? If the answer is no, then districts should not be required to interview the witness because investigations should be prompt and help promote resolution.

Lastly, investigators need to determine if it is practical to interview the witness. As previously mentioned, witnesses may be protected by certain employment or non-disclosure laws. When dealing with a protected witness, the Title 5 regulations do not grant districts subpoena power, nor do the regulations require districts to invoke the judicial process to comply with this requirement.

Districts should list all witnesses in their investigative report and notate if the witnesses were interviewed or not, along with the justification for not interviewing a particular witness.

**Local governing board’s decision**

**Q:** Does the local governing board need to give a justification for its acceptance or denial of the district’s administrative determination?

**A:** No, the local governing board’s role is to review all the necessary documents regarding the matter and render a decision to either uphold or reverse the district’s determination. Title 5 does not require the board to provide its justification or reasoning.
CASE STUDY
Case Study

On September 26, 2014, respondent and complainant, students at your college, met at a party. They consumed some alcohol, but were not impaired. They went to Respondent's room, began kissing, and by mutual consent, removed their clothing. Complainant said she did not want to have penetrative intercourse. By mutual consent, they performed oral sex on each other. At some point, Complainant said she did not want to continue, and Respondent stopped.

According to Respondent, he asked Complainant to “finish him off” so that he would not be left with “blue balls.” Complainant then masturbated him to ejaculation. According to Complainant, Respondent said, “Now you have to finish me off,” placed her hand on his penis, and held it there until he ejaculated. It is undisputed that complainant never explicitly said “no” or tried to pull her hand away.

Based on this incident, the college informed respondent that he was being charged with two violations of the 2014–2015 Handbook's Student Code of Conduct. Respondent prepared his defense to the charges based on the information in the Handbook. The letter enclosed and referred respondent to the college’s “Title IX Discrimination Policy,” which was updated and implemented in November 2014, for the “applicable procedures,” including his entitlement to an advisor in a limited role. However, respondent was also directed to consult the Student Code of Conduct in the Handbook for details of his “specific rights.”

At the hearing, which commenced in October 2015 (after the Title IX policy was in place), respondent submitted a written statement and orally presented his version of events. The college’s Conduct Review Board (CRB or Board) did not pose many of respondent’s proposed questions to witnesses, while it asked most of complainant’s proposed questions.

After the hearing, the CRB found that respondent had committed the alleged violations, and suspended him for two years. In its letter to respondent, the CRB referenced the two standards within the Handbook, and stated its finding that, more likely than not (the preponderance of the evidence standard), respondent violated “both of the standards of the Student Code of Conduct [in the Handbook] under which he was charged.”

In issuing its November 2015 sanction letter, the CRB did not rely on the provisions of the 2014–2015 Handbook, but on language contained in its Title IX policy (which it had provided to respondent when it notified him of the allegations against him and the investigation). This policy was not in effect in September 2014 when the parties had their sexual encounter.
According to the 2014-15 Handbook, the following definitions applied:

- **Consent:** “Sexual behavior without effective consent can lead to sexual misconduct, sexual assault, and/or sexual harassment. Consent is effective when it has been clearly communicated. Consent may never occur if a person is unconscious, unaware, or otherwise physically helpless.”

- **Sexual misconduct:** “Sexual misconduct refers to any form of physical contact or exploitation of another person of a sexual nature that is made without effective consent.”

According to the college’s Title IX Policy, the following definitions applied:

- **Coercion:** “Coercing someone into sexual activity violates this policy in the same way as physically forcing someone into sex. Coercion occurs when someone is pressured for sex.”

- **Consent:** “Anything but a clear, knowing and voluntary consent to any sexual activity is equivalent to a ‘no.’”

- **Sexual assault:** “The term ‘sexual assault’ means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent. Sexual assault includes, but is not limited to: Coercing, forcing, or attempting to coerce or force a person to touch another person’s intimate parts without that person’s consent.”

**What issues do you see?**

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