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How the Internet Revolutionized Campus Anti-Rape Activism

Slate

College Sexual Assault Survivors Form Underground Network To Reform Campus Policies

The Huffington Post

These Ladies Tattooed Their Causes on Their Bodies...Literally

Glamour Magazine

How the Internet Impacts Rape Culture

Campus Progress

Challenge of college rape persists, despite directive

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Colleges Must Promote Personal Responsibility, Not 'He Said, She Said' Trials

Forbes

College Groups Connect to Fight Sexual Assault

The New York Times
SEXUAL MISCONDUCT AND COMPLIANCE WITH TITLE IX:
MANAGING RISK WITH INTEGRATED AND COORDINATED SEXUAL MISCONDUCT POLICIES AND PROCEDURES

Moderator: JuHwon Lee, Associate General Counsel & Chief Litigation Services, Drexel University
Speakers:
Howard Kallem, Chief Regional Attorney, DC Enforcement Office, OCR, U.S. Dept. of Ed.
Carolyn Martin, President Amherst College
Lisa Rutherford, Chief Policy Officer and General Counsel, Amherst College
Gina Maisto Smith, Pepper Hamilton

2013 Annual Conference
National Association of College and University Attorneys
Overview

• The Context: Sexual Misconduct Response on College Campuses
• Analyzing the Labyrinth of Intersecting Laws and Guidance and Title IX audits
• Preferred Practices for Policy and Procedure
• Changing Culture
The Context:

Sexual Misconduct Response on College Campuses
The Paradigm Shift

• April 4, 2011 Dear Colleague Letter
  – A “call to action”
• High profile civil, criminal and regulatory actions at colleges and universities nationwide
• Courage of complainant/victim/survivors to speak publicly
• Coordinated activism
• Social media
• Evolving legislation
  – Reauthorization of VAWA and Campus SAVE Act
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The Student Perspective

- Don’t know how to find information
- Don’t know what to expect in process
- Lack of clarity in policy
- Not being informed of all available options
- Not being treated fairly
- Feeling judged or isolated
- Inadequate support during and after the process
- Lack of transparency in the process
- Dissatisfaction with outcomes
The Student Perspective

• Failure to warn/log/report
• Complainants discouraged from Reporting
• Parties Not Informed of Rights in Process
• Failure to Provide an Adequate, Reliable, and Impartial Investigations
• Adjudications lack fair, informed process
• Harassment During the Adjudication Process
  – Inadequate Training of Implementers
  – Inadequate Training of Hearing Panels
The Student Perspective

- The Complaint Process not Prompt and Equitable
- Failure to Accommodate Documented Disabilities
- Inadequate Sanctions
- Inconsistent Granting of Appeals
- Unequal Access to Appeals
- Retaliation Concerns
- Inadequate Education and Prevention Programs
- Rape myths perpetrated by administration
- Lack of communication and coordination that compound the impact on students
The Student Perspective

- Faced with an overly legalistic process with no one to translate policy into terms the student can understand

- Feeling like have to be your own attorney (or get one) and prove your own case, rather than the college or university having the responsibility to ask the questions and gather whatever evidence is necessary to figure out what happened.
College and University Concerns

- Personal/Emotional Concerns
- Resources
- Policy Concerns
- Implementation and Process Concerns
- Reporting
- Training
- Getting It Right

- Confidentiality & Complainant/No Consent
- Investigations
- Evaluating Credibility
- Coordination of Constituencies
- Legal Concerns
- Press impact on future reporting
The Dynamics of Sexual Assault

- Nature of victimization
- Counter-intuitive victim behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature
Institutional Context

• Myriad of laws, regulations, and policies
• Complex organizational structure
• Educational and academic focus
• Coordination of constituencies
• Limited capacity/resources
Consequences

For the individual, the stakeholders, the community, and the institution:

- Legal
- Financial
- Emotional
- Physical
- Educational
- Reputational
- Operational
- Behavioral
Risk, Likelihood, Controls, Velocity

- **Risk**: 1
- **Likelihood**: 2
- **Controls**: 1
- **Velocity**: 3
Constituencies of Concern

- Students
- Parents
- President
- Staff and administrators
- Faculty
- Community (University/At-Large)
- Boards
- Law Enforcement
- Child Protective Services
- Media
- Administrative authorities (DOE, OCR, DOJ)
Analyzing the Labyrinth of Intersecting Laws and Guidance
The Regulatory Framework

• Title IX
  – 1997 Guidance
  – 2001 Guidance
  – Dear Colleague Letters
  – Voluntary Resolution Agreements
• The Clery Act
• The Campus SaVE Act
• FERPA
• Federal/State criminal, child protection and sex offender statutes
Integration and Coordination

- Regulatory Framework
- Dynamics of Sexual Misconduct
The Regulatory Implications

The diagram illustrates the incident reporting process and regulatory implications for sexual assault cases at universities. The process involves reporting to various university offices and external authorities, including:

- Faculty
- Athletics
- Administrator
- Student Life
- Campus Security
- General Counsel
- Counselor
- Central Process to Uniformly Vet all Complaints of Sexual Assault
- University's Response / Policies / Procedures Informed by
- Clery Act
- Title IX, IV, VII
- FERPA
- Criminal Law
- Negligence
- Clery Act
- State Law
- Schools Disciplinary Policy
- Victim Rights/Services/Procedures
- Offender Rights/Services
- General

The diagram also highlights the involvement of local/state authorities, DOJ, OCR, DHS, NCAA, and privacy exceptions. The regulatory aspects include:

- Comply with Subpoena Requests of Law Enforcement
- Federal/State Statutes
- Log
- Report
- Warn
- Policy Requirements
- Investigate
- Remedial Response
- Consult Policy
- Mandated Reporting Obligations
- Investigative Information prohibition
- Criminal History Records Act
- Privacy Rights of Sexual Assault Victims

This flowchart is useful for understanding the complexities of handling sexual assault complaints at educational institutions and the legal frameworks that govern such cases.
### Title IX

<table>
<thead>
<tr>
<th>Statute</th>
<th>Overview</th>
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</table>
| 20 USCA § 1681   | • Provides that “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 education program or activity receiving Federal financial assistance.”  
• Sexual harassment is a form of “discrimination” under Title IX  
• Protects students and employees from sexual harassment by any school employee, another student or a non-employee third party |
Once a school has notice of possible sexual harassment of students -- whether carried out by employees, other students, or third parties -- it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.
2001 Guidance Checklist

- Comply with Title IX and Title IX regulations as a condition for receiving Federal financial assistance. p. 3.
- Agree that education programs or activities will be operated in compliance with the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its programs. p. 3.
- Provide for prompt and equitable resolution of complaints of discrimination on the basis of sex. p. 19.
- Have a policy and grievance procedures that provide effective means for preventing and responding to sexual harassment. p. 19.
- Not hesitate to respond to sexual harassment in the same reasonable, commonsense manner as it would to other types of serious misconduct. p. iii.
- Designate at least one employee to coordinate efforts to comply with and carry out Title IX responsibilities and to ensure consistent practices and standards in handling complaints. p. 21.
- Make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment, where to report it, and how the grievance procedures operate. p. 21.
- Ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. p. 13.
- Provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it occurs and know how to respond. p. 17.
2001 Guidance

- Good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX
- Doing nothing is always the wrong response
- Depending on the circumstances, there may be more than one right way to respond
- OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation
- Effectiveness is based on a reasonableness standard
October 26, 2010 Dear Colleague Letter

• Emphasized "that some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR)... by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment."

• “Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.”
  – “Schools are responsible for addressing harassment incidents that it knows or reasonably should have known.”
  – “A school has notice of harassment if a reasonable employee knew, or in the exercise of reasonable care should have known, about the harassment.”

• Provides a road map as to what a school should do once it is aware of harassment incidents.
A “significant guidance document” issued by the Department of Education’s Office of Civil Rights (OCR) on April 4, 2011

Expands upon 2001 Revised Sexual Harassment Guidance

OCR advises recipients to:
– examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in the DCL and the Revised Sexual Harassment Guidance issued in 2001; and
– implement changes as needed (DCL, p. 6)

Provides a road map as to how OCR will evaluate whether a school is in compliance
April 24, 2013 Dear Colleague Letter

– **Retaliation** against individuals who complain formally or informally to a college about potential civil rights violations or participate in an Office of Civil Rights ("OCR") investigation and/or proceeding is a violation of Federal civil rights laws.
  
  • Retaliation includes intimidating, threatening, coercing, or in any way discriminating against the individual.

– If the OCR finds that a recipient of Federal financial assistance (recipient) retaliated in violation of Federal civil rights laws the OCR will seek the recipient’s voluntary commitment through a resolution agreement to take specific measures to remedy the violation.
  
  • The resolution must ensure that the individual who was retaliated against receives redress and ensure that the recipient complies with the prohibition against retaliation in the future.
  
  • Monetary relief may be appropriate based on the facts of the case.
April 24, 2013 Dear Colleague Letter

• To ensure compliance in the future, the OCR could require the recipient to:
  – **Train employees** about the prohibition against retaliation and ways to avoid engaging in retaliation.
  – **Adopt a communications strategy** for ensuring that information concerning retaliation is continually being conveyed to employees.
  – **Include incorporating the prohibition against retaliation** into relevant policies and procedures.
  – **Implement a public outreach strategy** to reassure the public that the recipient is committed to complying with the prohibition against retaliation.
– If the OCR finds that a recipient engaged in retaliation and the recipient refuses to voluntarily resolve violation or fails to live up to its commitments in the resolution agreement the OCR will take enforcement action by:

• **Initiating administrative proceedings** to suspend, terminate, or refuse to grant or continue financial assistance made available through the Department to the recipient; or

• **Referring the case to the U.S. Department of Justice for judicial proceedings.**
The Voluntary Resolution Agreements
<table>
<thead>
<tr>
<th>Date</th>
<th>Institution</th>
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<tbody>
<tr>
<td>September 2010</td>
<td>Notre Dame College</td>
</tr>
<tr>
<td>November 2010</td>
<td>Eastern Michigan University</td>
</tr>
<tr>
<td>July 2011</td>
<td>University of Notre Dame</td>
</tr>
<tr>
<td>June 2012</td>
<td>Yale University</td>
</tr>
<tr>
<td>July 2012</td>
<td>Xavier University</td>
</tr>
<tr>
<td>May 2013</td>
<td>University of Montana</td>
</tr>
</tbody>
</table>
Key Themes:
Voluntary Resolution Agreements

- Student-focused remedies:
  - Include in task force membership
- Remedial measures in:
  - Title IX procedural requirements
  - Reporting/implementation
  - Education and Prevention
- Annual “climate checks” of student body to gauge effectiveness of remedial measures
- Title IX Coordinator to review campus police records for violations of Title IX and respond
- Coordinate with local law enforcement to ensure Title IX compliance in instances of reported criminal conduct
- Provide participants with Title IX rights and resources and take any necessary steps to ensure their safety and safety of campus community
- College to pay for complainant’s counseling expenses
- Use of informal processes for resolution
- Training – entire campus, implementers, adjudicators, “responsible employees”
Combined Elements

- To adopt a “preponderance of the evidence” standard
- To clarify a Complainant’s option to pursue a criminal complaint and require a written confirmation of Complainant’s choice
- To allow, in extraordinary circumstances, to proceed despite a law enforcement investigation where a threat to the safety of the Complainant and/or other students exists
- To advise Complainants that the University will investigate allegations of sexual harassment, and take appropriate action, even if the complainant does not wish to pursue the disciplinary process, but that any response by the University may be hindered by the complainant’s wishes for anonymity and/or inaction
- To issue “No contact” orders to all parties to an alleged sexual assault promptly after the University receives notice of a complaint
- To initiate discussions with the complainant about academic, extracurricular activities, housing and on-campus dining arrangements of the parties to determine if adjustments in schedules or housing are necessary with minimal the burden on the complainant’s educational program
- To provide both parties the opportunity to present witnesses and other evidence, and equivalent notice of the process, access to peer support, information about procedures and written notice of the outcome
- To include a reference to cyber harassment in the University’s IT Policy
- To prohibit actual or threatened retaliation or any act of intimidation by third parties as well as accused students
- To make the medical, counseling and pastoral resources available to complainants also available to accused students and witnesses
To provide for alternative arrangements for complainants who do not want to be present in the same room as the accused during the disciplinary hearing.

To allow the complainant to initiate a case review upon the completion of the Disciplinary Hearing process.

To use standardized, detailed and complete investigation reports.

To develop written materials summarizing the rights, under Title IX and the University’s policies and procedures, of all victims of sexual harassment.

To provide such materials to anyone alleging sexual harassment within 24 hours of receiving the complaint.

To provide an adequate, reliable, and impartial investigation of all complaints, including the opportunity for the parties to present witnesses and other evidence.

To designate Title IX Coordinator(s) and clearly publish the individual(s) name or title, office address, telephone number and define their responsibilities.

To thoroughly train all who will be directly involved in processing, investigating, and/or resolving complaints.

To develop and widely publish detailed grievance procedures that include:

- How the procedures apply
- How to file a complaint
- With whom a complaint is filed
- Definitions
- Timeframes
- Information on confidentiality
- Information on retaliation
<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>To widely publish a notice of nondiscrimination</td>
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<tr>
<td>To establish a <strong>committee of students</strong> to identify strategies for broader compliance</td>
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<tr>
<td>To include <strong>programs on Title IX</strong> in student orientations</td>
<td></td>
</tr>
<tr>
<td>To designate an “<strong>on-call</strong>” contact for victims of sexual assault</td>
<td></td>
</tr>
<tr>
<td>To develop and <strong>widely publish a document for victims of sexual assault</strong> providing support information including the “on-call” contact</td>
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<tr>
<td>To develop and <strong>widely publish a second document on the definitions of sexual harassment and assault and the grievance procedure</strong></td>
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<tr>
<td>To conduct <strong>climate checks with students</strong> to assess the effectiveness of remedial measures</td>
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<tr>
<td>To review matters handled solely by law enforcement for violations of Title IX requiring further remedies</td>
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<tr>
<td>To provide the <strong>Title IX Coordinator</strong> with access to law enforcement records of its investigation and findings regarding Title IX investigations, so long as it does not significantly compromise any pending criminal proceeding</td>
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<tr>
<td>To hold <strong>campus events</strong> raising awareness for Title IX</td>
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<tr>
<td>To clarify that the University should not use mediation and other informal mechanisms for resolving allegations of sexual assault</td>
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<tr>
<td>To provide both parties notice of the opportunity to appeal the findings</td>
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<tr>
<td>To assure both parties that the appeal will be conducted in an impartial manner by an impartial decision-maker.</td>
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Combined Elements

- To continue educational efforts to promote responsible drinking
- To continue efforts to expand student leadership councils to promote norms of responsible conduct
- To study and address issues related to hazing and initiations by student organizations.
- To develop a monitoring program to assess the effectiveness of its anti-harassment efforts
- To provide complainants information about their Title IX rights and available resources, such as counseling, the local rape crisis center; and their right to file a complaint with a local law enforcement agency
- If informal process(es) are available, the option for complainants to bypass an informal process for a formal process at any point, per the complainants’ discretion;
- To develop a monitoring program to assess the effectiveness of its anti-harassment efforts
- To conduct a semiannual review of all formal and informal Title IX complaints brought to the University Title IX Coordinator and deputy Title IX coordinators, before the University-Wide Committee on Sexual Misconduct, any other grievance procedures, and/or independently investigated by the University in order to identify and address any patterns or systemic problems
- To launch, and continue to widely publicize on an annual basis, a website specific to the University-Wide Committee on Sexual Misconduct to raise awareness about its function and availability
- To strengthen students’ understanding, through education and enforcement, that they are subject to the Undergraduate Regulations both on and off campus
To hold trainings for sophomore students, including on bystander intervention, and reaffirm the topics presented to freshman students

To maintain all records of informal and formal complaints, consistent with the University’s procedures

To invite staff and faculty to participate in one or more offered in-depth training sessions and to participate in refresher sessions on an annual basis thereafter

To submit to OCR copies of the complete documentation of all sexual harassment investigations that the University conducted during the 2012-2013 and 2013-2014 academic years respectively, including but not limited to interview memoranda, investigation notes, evidentiary documents such as transcripts and records, written findings of fact and other conclusions, and appeal decisions

To add additional representative leaders from the student community to the Title IX Committee

To provide sessions that cover the University’s grievance procedures for Title IX complaints as part of the annual student orientation for new students, annual refresher sessions for returning students, and annual residence life orientation for students residing in campus housing
University of Montana Investigation

- May 9, 2013
- Joint Investigation - DOJ and OCR
- Definition of “Sexual Harassment” and “Hostile Environment” and Related Disciplinary Considerations
- Interim Measures
  - May include “taking disciplinary action against the harasser” before the resolution of the complaint.
– Sexual Harassment Training for Students
  • “At a minimum, these sessions will be provided as part of the annual student orientation for new students . . . the class registration process for returning students, and annual residence life orientation for students residing in campus housing.”
  – Grievance process and procedures
  – Conduct prohibited; how and to who reports should be made
  – Different process options from reporting prohibited conduct
  – Link between alcohol and drug use and sexual assault
  – Title IX rights
  – Available Resources
  – OCR enforcement
– Employee Reporting and Training

• Reporting is required from any university employee “who [is] not statutorily barred from reporting.”

• “All university staff and faculty” must receive Title IX training

• Employees “who will be directly involved in processing, investigating, and/or resolving complaints of sex discrimination or who will otherwise assist in the coordination of the University’s compliance with Title IX” must have training on how to “coordinate and cooperate with law enforcement during parallel criminal and Title IX proceedings.”
- Reporting Tracking System
  - Electronic Database that will contain “The date and nature of the complaint or other report . . .; the name of the complainant or that the complaint was anonymous; the name of the person(s) who received the complaint or made the report; the name(s) of the accused; the name(s) of the person(s) assigned to investigate the complaint, take any interim measures, and bring disciplinary charges (where relevant); the interim measures taken, if any; the date of the findings; the date of any hearing; the date of any appeals; and a summary of the findings at the initial hearing and appeals stages.
OCR’s regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.

The May 9 resolution agreement and letter to the University of Montana are entirely consistent with the First Amendment, and did not create any new or broader definition of unlawful sexual harassment under Title IX or Title IV.

Defined sexual harassment and hostile environment

Encouraged students to bring complaints

Encouraged schools to apply their rules in a manner that respects the legal rights of students and faculty, including the First Amendment.
Clery Requirements, 20 U.S.C. § 1092(f), and Sexual Misconduct

- Develop educational programs to promote awareness of rape, acquaintance rape and other forcible and non-forcible offenses
- Develop procedures students should follow if a sex offense occurs, including:
  - Reporting procedures
  - The importance of preserving evidence
- Provide information on a student’s option to notify appropriate law enforcement authorities including information so that students know what notifying law enforcement authorities entails
- Provide notification to students that the university will assist them in notifying these authorities
- Provide notification to students of existing on and off campus counseling, mental health or other student services for victims of sex offenses
- Provide notification to students that the university will consider changing a victim’s academic and living situation after an alleged sex offense, and the options for those changes if those changes are requested by the victim and are reasonably available
- Develop procedures for campus disciplinary action in cases of an alleged sex offense
- Make clear that the accuser and accused are entitled to the same opportunities during a disciplinary proceeding
- Inform the accuser and the accused of the outcome of any institutional disciplinary proceeding that is brought alleging a sex offense (Not precluded by FERPA)
- Develop sanctions the university may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape or other forcible or non-forcible sex offenses
- Duty to warn/Timely warnings (Not precluded by FERPA)
Campus Sexual Violence Elimination Act (SaVE ACT)

On March 7, 2013, President Barack Obama signed a bill to reauthorize the Violence Against Women Act. Included in the bill was the Campus Sexual Violence Elimination Act.

- Requires incidents of domestic violence, dating violence, sexual assault, and stalking be disclosed in annual campus crime statistic reports.
- Students or employees reporting victimization will be provided with their written rights to:
  - Be assisted by campus authorities if reporting a crime to law enforcement;
  - Change academic, living, transportation, or working situations to avoid a hostile environment;
  - Obtain or enforce a no contact directive or restraining order;
  - Have a clear description of their institution’s disciplinary process and know the range of possible sanctions; and
  - Receive contact information about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available both on-campus and in the community.
The minimum standards for institutional disciplinary procedures covering domestic violence, dating violence, sexual assault, and stalking ensure:

- Disciplinary proceedings will have a **prompt, fair, and impartial investigation and resolution** and will be conducted by officials receiving annual training on domestic violence, sexual assault, and stalking;

- Both parties may have **others present** during the disciplinary proceeding and any related meeting, including **an advisor of their choice**; and

- Both parties will receive **written outcomes** of all disciplinary proceedings at the same time.
Campus Sexual Violence Elimination Act (SaVE ACT)

- Instructs colleges and universities to provide **programming** for students and employees addressing the issues of domestic violence, dating violence, sexual assault and stalking. Education programs should include:
  - Primary **prevention and awareness** programs for all incoming students and new employees;
  - Safe and positive options for bystander intervention;
  - Information on **risk reduction** to recognize warning signs of abusive behavior; and
  - **Ongoing prevention and awareness** programs for students and faculty.

- Established **collaboration** between the U.S. Departments of Justice, Education, and Health and Human Services to collect and disseminate **best practices for preventing and responding to domestic violence, dating violence, sexual assault, and stalking.**
April 4, 2011 - Dear Colleague Letter

After a college’s judicial process concludes, FERPA influences how colleges can relay the outcome to the complainant and the public.

- Both parties must be notified, in writing, about the outcome.
- FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student.
- Colleges cannot require a complainant to abide by a nondisclosure agreement.
- A postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense.
Practical Realities of Sexual Misconduct Under Title IX
Challenges in Compliance

• Coordination with Law Enforcement
• Investigation
• Prompt Response/Remedies
• Grievance Procedures
• Consent & Confidentiality
• Training/Education/Prevention
• Monitoring/Tracking
• Intersection with Clery
• Responsible Employees
Dear Colleague Letter: Coordination with Law Enforcement

• “A law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct” and “resolve complaints promptly and equitably”

• “Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”

DCL, p. 4, 10
Dear Colleague Letter: Coordination with Law Enforcement

• “Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.”

• “In one recent OCR sexual violence case, the prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances.”

DCL, p. 10
Dear Colleague Letter: Coordination with Law Enforcement

MUST

• Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably.” (DCL, p. 10)
Dear Colleague Letter: Coordination with Law Enforcement

SHOULD

• School should instruct law enforcement employees:
  – To notify complainants of their right to file a Title IX complaint in addition to the filing of a criminal complaint
  – To report incidents of sexual violence to the Title IX Coordinator if the complainant consents

• Law enforcement should be trained on the school’s grievance procedures & any other procedures used for investigating reports of sexual violence

• Law enforcement should receive copies of the school’s Title IX policies
Dear Colleague Letter:  
Coordination with Law Enforcement

SHOULD

• MOU should include clear policies on when a school should refer a matter to local law enforcement

• MOU should not prevent a school from notifying complainants of their Title IX rights, the school’s grievance procedures, or taking interim steps to ensure safety and well-being while the law enforcement fact gathering is in progress
Dear Colleague Letter:  
Coordination with Law Enforcement

SHOULD

• Title IX Coordinator should be given access to school law enforcement unit investigation notes and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

• Title IX Coordinator should be available to provide assistance to school law enforcement employees regarding how to respond appropriately to reports of sexual violence.

• School should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school’s internal Title IX investigation.
Coordination with Law Enforcement

• Eastern Michigan University Voluntary Resolution Agreement
  – The University will review its campus police records for a prior “school year and, for any complaint of sexual assault that was treated solely as a criminal matter and/or where the Title IX Coordinator was not involved, the University’s Title IX Coordinator will review the matter to determine whether sexual harassment occurred in violation of Title IX and whether the remedies provided were effective. If not, the University will promptly take measures, should the victim or the perpetrator still be enrolled as a student, to ensure the sexual harassment was fully and effectively addressed.”

• Notre Dame College Voluntary Resolution Agreement
  – The College will review its campus police records for previous years for “for any complaint of sexual assault/sexual violence that was treated solely as a criminal matter and/or where the Title IX Coordinator was not involved, the College’s Title IX Coordinator will review the matter to determine whether sexual harassment occurred in violation of Title IX and whether the remedies were effective in making the victim whole. If not, the College will promptly take measures, should the victim still be enrolled as a student, to ensure the sexual harassment was fully and effectively addressed.”
Coordination with Law Enforcement

• University of Montana MOA Regarding University of Montana Office of Public Safety’s Response to Sexual Assault
  – Take affirmative steps to clarify, through policies, procedures, and/or training, the respective roles and responsibilities of MPD and OPS pursuant to the MOU between those two agencies.
  – Take affirmative steps to ensure effective communication and coordination between OPS and UM and MPD

• Xavier University Voluntary Resolution Agreement
  – The University will review its campus police records for previous years for “complaints of sexual assault/sexual violence that were treated solely as a criminal or disciplinary matter and/or where the Title IX Coordinator was not involved, the University's Title IX Coordinator will review the matter to determine whether the victim or the alleged perpetrator is still enrolled as a student and, if the incident(s) in question raise possible sexual harassment, take appropriate steps to address the harassment.”
Coordination with Law Enforcement: Practical Considerations

- Who is responsible for carrying out Title IX notifications?
- Who in your community is best positioned/suited to conduct fact-finding?
- How do you coordinate the sharing of information?
- How do you ensure that you thoroughly capture and integrate all necessary information?
- What are the FERPA considerations?
- What are the local laws that impact this coordination?
A critical element to achieve compliance with Title IX’s prompt and **equitable** requirement:

– “Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence.”

– “As noted in the 2001 Guidance, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences.” (DCL, p. 9)
**Dear Colleague Letter: Investigation**

**MUST**
- Promptly investigate to determine what occurred and then take appropriate steps to resolve the situation
- Determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified
- Promptly resume and complete its fact-finding for the Title IX investigation once notified that the police department has completed its gathering of evidence
- Process off-campus complaints in accordance with its established procedures.
  - Consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus

**SHOULD**
- Notify a complainant of the right to file a criminal complaint, and not dissuade a victim from doing so either during or after the school’s internal Title IX investigation
- Not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation
- Follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred
- If an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner
Investigation

- University of Notre Dame Resolution Agreement
  - All written investigative reports should contain:
    - The name and sex of the alleged victim and, if different, the name and sex of the person reporting the allegation;
    - A statement of the allegation, a description of the incident(s), and the date(s) and time(s) (if known) of the alleged incident(s);
    - The date that the complaint or other report was made;
    - The date the accused was interviewed;
    - The names and sex of all persons alleged to have committed the alleged harassment;
    - The names and sex of all known witnesses to the alleged incident(s);
    - The dates that any relevant documentary evidence (including cell phone and other records as appropriate) was obtained;
    - Any written statements of the complainant (or victim, if different from the complainant);
    - The date on which the University deferred its investigation and disciplinary process because the complainant filed a law enforcement complaint and, as applicable, the date on which the University resumed its investigation and disciplinary process;
    - The outcome of the investigation and, if any, disciplinary process;
    - The response of University personnel and, if applicable, University-level officials, including any interim and permanent steps taken with respect to the complainant and the accused; and
    - A narrative of all action taken to prevent recurrence of any harassing incident(s), including any written documentation.
Investigation: Practical Considerations

• Who conducts investigation?
• How is investigation conducted?
• How far should an investigation go?
• Who bears the cost of gathering physical evidence?
• How is evidence gathered, recorded, and maintained?
• Is medical evidence collected?
• Are experts consulted?
Dear Colleague Letter: Prompt Response

• Grievance procedures should specify the time frame within which:
  1) the school will conduct a full investigation of the complaint;
  2) both parties receive a response regarding the outcome of the complaint; and,
  3) the parties may file an appeal, if applicable

• Both parties should be given periodic status updates

• Consider suggested remedies to protect the complainant as soon as possible

DCL, p. 12
• “Designated and reasonably prompt time frames for the major stages of the complaint process” (DCL, p. 9)

• “Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint” (DCL, p. 12)

• “Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment” (DCL, p. 12)"
Dear Colleague Letter: Prompt Response

- Is 60 days a hard and fast rule?
  - Good cause
  - Communication with both parties
  - Estimated completion date
- How do we handle breaks?
Dear Colleague Letter: Grievance Procedures

• Separate grievance procedures are not required...
  – So long as they comply with the prompt and equitable requirements of Title IX (DC, p. 8)
• A school’s investigation and hearing processes cannot be equitable unless they are impartial (DCL, p. 12)
• Any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed (DCL, p. 12)
  – Is your fact-finder/decision-maker separate and independent from your investigation?
Grievance Procedures: Practical Considerations

- Who presents the evidence?
- What form is it presented in?
- Is medical and forensic evidence considered?
- If so, who interprets and presents it?
- Are expert witnesses presented?
- How are hearing records maintained?
- What are the appeal procedures?
- Can conduct hearings and Title IX hearings be consolidated?
What if the complainant requests confidentiality?
Dear Colleague Letter: Consent and Confidentiality

- “Schools also should inform and obtain consent from the complainant ... before beginning an investigation.” (DCL, p. 5)
- “If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.” (DCL, p. 5)
- If victim requests confidentiality, school should inform complainant:
  - Ability to respond may be limited
  - School will take steps to prevent retaliation and take strong responsive action if it occurs
Dear Colleague Letter: Consent and Confidentiality

- Evaluate a request for anonymity in the context of its responsibility to provide a safe and nondiscriminatory environment for all students
- Inform the complainant if it cannot ensure confidentiality
- Pursue other steps to limit the effects of the alleged harassment and prevent its recurrence
Dear Colleague Letter: Consent and Confidentiality

• “Thus, the school may weigh the request for confidentiality against ...:
  – the seriousness of the alleged harassment;
  – the complainant’s age;
  – whether there have been other harassment complaints about the same individual; and
  – the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an “education record” under FERPA” (DCL, p. 5)
Requests by the Harassed Student for Confidentiality

• The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student's name not be disclosed to the harasser or that nothing be done about the alleged harassment.
• In all cases a school should discuss confidentiality standards and concerns with the complainant initially.
• The school should inform the student that the request may limit the school's ability to respond.
• The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to try to prevent retaliation and will take strong responsive actions if retaliation occurs.
• If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with that request as long as doing so does not preclude the school from responding effectively to the harassment and preventing harassment of other students.
• Thus, for example, a reasonable response would not require disciplinary action against an alleged harasser if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information.
• At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students.
• The factors a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.
• Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment.
• There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant.
• Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.
• In addition, by investigating the complaint to the extent possible -- including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX -- the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual.
• In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action.
• In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.
Consent and Confidentiality: Practical Considerations

• Creates a new class of investigations for most schools
• Advocacy community concerns
• What does this process look like?
  – What do we say?
  – What do we do?
  – What is put in writing?
  – How many times should we meet?
• How do we strike an appropriate balance?
Dear Colleague Letter:

Training/Education/Prevention

- Students, faculty and staff must be trained on policy and grievance procedures: who, what, when, how, where
- Persons involved in implementing grievance procedures and in handling complaints must have experience or be trained
- Fact-finders / Decision-makers
- Training must include applicable confidentiality requirements ("confidentiality-light")
- Prevention efforts
Dear Colleague Letter:
Training/Education/Prevention

Practical Considerations:
• What does the training look like?
• What are the components of the training?
• How often should it occur?
• What do the education and prevention programs look like?
• How are the procedures communicated?
• What is the “marketing plan” for procedures?
• To what extent do you use background checks and vetting processes for employees, staff, and students?
University of Montana Letter

- The University must “ensure that those responsible for responding to allegations of sexual harassment receive training regarding (1) the appropriate legal standards to apply, (2) the need to stop the harassment, (3) the obligation to take interim measures where appropriate, and (4) the need to take steps to prevent harassment from recurring.”
- Requires training for all “University employees, including those who are statutorily barred from reporting, on informing complainants of their right to file Title IX and criminal complaints and how to do so.”
- Requires the University to take additional steps to clarify its policies and procedures and provide training for employees and students so that they understand what processes follow from reporting sexual assault to particular University employees and how those processes differ depending on who receives the report.
- The University is providing more training for students that defines sexual harassment, including sexual assault, and makes clear it is unacceptable. The University will supplement this training with in-person training to ensure that students have opportunities to ask questions and learn from the feedback of their trainers and student peers.
• Yale University Voluntary Resolution Agreement
  – The University has “conducted and will continue to hold annual training for Residential College Deans and Masters, Sexual Harassment and Assault Response and Education Center staff, and Freshmen Counselors on: interacting with victims of sexual misconduct, the Undergraduate Regulations regarding sexual misconduct, resources on campus, the UWC, reporting requirements and other topics it deems relevant.”

• Xavier University Voluntary Resolution Agreement
  – The University will “develop an ongoing Title IX program for staff and faculty that will include annual training and annual written notices from the University to all staff and faculty. All staff and faculty will be invited to participate in one or more offered in-depth training sessions and to participate in refresher sessions on an annual basis thereafter. The goal of the training will be to ensure that University staff and faculty are aware of any changes to the law, University policy, and University practices in this area. In addition, this ongoing training will address the process of ensuring coordination between Campus Police and the Title IX Coordinator. Further, all staff and faculty will be sent an annual notice from the University that addresses the topics described in the two preceding sentences.”
Eastern Michigan University Voluntary Resolution Agreement

“The University will revise its existing online sexual harassment training or develop a new online Title IX training for employees. The training will provide essential guidance and instruction on recognizing and appropriately addressing allegations and complaints of sex discrimination, including the differences between sex discrimination, sexual harassment, and sexual assault and an understanding of the University’s responsibilities under Title IX to address allegations of sexually inappropriate behaviors, whether or not the actions are potentially criminal in nature. In addition, the training will cover the University’s grievance procedures or Title IX complaints. The University shall require all University personnel, including coaches and residence hall officials, who interact with students on a regular basis to complete the online training. Student temporary employees will not be subject to the training requirement. Any University personnel hired after the training completion date contained in this agreement will be required to complete the online training. The online training will be updated annually, if necessary in order to reflect any changes to the law, University policy, and University practices with respect to Title IX compliance. The University will notify University personnel of all such changes within 30 calendar days of such change”
• Notre Dame College Voluntary Resolution Agreement
  – The College “will provide Title IX training to all administrators, professors, instructors, residential assistants, coaches, and other staff who interact with students on a regular basis. The training will provide attendees with essential guidance and instruction on recognizing and appropriately addressing allegations and complaints of sex discrimination, including the differences between sex discrimination, sexual harassment, sexual assault, and sexual violence and an understanding of the College's responsibilities under Title IX to address allegations of sexually inappropriate behaviors, whether or not the actions are potentially criminal in nature. In addition, the College’s portion of the training will cover the College’s new grievance procedure for Title IX complaints.”

  – The College “will develop an ongoing Title IX training program to provide staff and faculty with adequate training each year, which program could consist of one more in-depth training session plus a refresher. The goal of the training will be to provide College staff and faculty with information about any changes to the law, College policy, and College practices in this area.”
Dear Colleague Letter: Monitoring/Tracking

DCL puts tremendous emphasis on climate checks and integration of information to assess the effectiveness of efforts and the need for future proactive steps to ensure that the school is free from harassment.
• **Yale University Voluntary Resolution Agreement**
  – The University “will continue to implement actions intended to improve observance of appropriate behavioral norms by campus organizations and at organized student events. In particular:
    • The University will continue its educational efforts to promote responsible drinking;
    • The University will continue its efforts to expand its student leadership councils to promote norms of responsible conduct, and including efforts to create a council of fraternity and sorority leaders; and
    • The University will continue to study and address issues related to hazing and initiations by student organizations.”

• **Xavier University Voluntary Resolution Agreement**
  – The University “will develop a monitoring program to assess the effectiveness of its anti-harassment efforts. In developing the monitoring program. . . At or before the conclusion of each academic year, the University will conduct an annual assessment of the effectiveness of its anti-harassment efforts.”

**Monitoring/Tracking**
• University of Montana Voluntary Resolution Agreement
  – The University will “develop a monitoring program to assess the effectiveness of its efforts to prevent and address sex-based harassment and retaliation and to promote a non-discriminatory school climate.”

• University of Notre Dame Voluntary Resolution Agreement
  – The “University will create a focus group process, survey, climate check or other means of assessing the effectiveness of the steps taken pursuant to this Agreement and otherwise by the University, to achieve its goal of having a campus environment free of sexual harassment, in particular sexual assaults. The assessment protocol(s) will be submitted to OCR for approval prior to implementation. The University commits to implementing the assessment protocol(s) within three months of approval and annually thereafter during the monitoring of this agreement”
<table>
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<tr>
<th>Statute</th>
<th>Overview</th>
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<tbody>
<tr>
<td>Responsible Employee</td>
<td>• A school violates Title IX if it “has notice” of a sexually hostile environment and fails to take immediate and effective corrective action</td>
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<td>• A school has notice if a responsible employee knew or, in the exercise of reasonable care, should have known about the harassment</td>
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# Title IX – Responsible Employee

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<th>Responsible Employee</th>
<th>Overview</th>
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<td></td>
<td>• A <em>responsible employee</em> includes any employee who:</td>
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<td>- has the authority to take action to redress the harassment;</td>
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<td>- has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or</td>
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<td>- a student could reasonably believe has this authority or responsibility</td>
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<td>• Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is will vary depending various factors (i.e. age &amp; educational level, position held by employee, procedures)</td>
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Practical Considerations for Child Protective Services

• What percentage of your students are minors?
• Do adult employees and students have regular contact with minors in formal or informal programs?
• Consider mandatory reporter training
• How do determine whether you have cause to suspect abuse?
• How do you coordinate with the parent?
Preferred Practices for Policy and Procedure
No One Size Fits All

• Schools differ in:
  – Size
  – Resources
  – Personnel
  – Funding
  – Public vs. Private
  – Policies
  – Institutional values, history, culture
The Mechanics of Implementation
Build the Procedures to Implement Policy

- Uniform reporting of incidents
- Centralized control of investigative process
- Coordination of response by all constituencies
- Sequencing of institutional response
- Coordination of sexual assault support
- Management of Title IX and Student Conduct grievance procedures
- Trend tracking
- Reporting expectations
- Team Building
Identifying Constituents

- Title IX Coordinator & Deputy Coordinators
- Campus law enforcement
- Complaint handlers and first responders
- Student affairs/student conduct
- Human Resources
- Investigators
- Student conduct/judicial boards
- Local law enforcement
- Faculty
- Student body
- Other constituents
Coordinated Institutional Response

• Education and consistency in message re:
  – Confidential resources
  – Reporting options
• Reporting expectations
  – Clear employee/staff/faculty policies re: duty to share
Initial Response Protocol

• Assess Safety & Need for Emergency Response
• Empathetic listening:
  – Thank you for sharing this with me
  – I can see how hard this must be for you
  – Let me help
• I need to share this information to:
  – Make sure you get the support and resources needed
  – Put you in contact with University personnel who will explain your options on and off campus and coordinate transportation for medical examination, law enforcement report, and/or preservation of evidence
• Reassure that a report to the University does not take away the student’s ability to choose how to proceed
Coordinated Institutional Response

• Centralized Review Process (Title IX Team) for consistent application of responsibilities
• Coordination of Information for:
  – Investigation/review/assessment
  – Support services
• Clearly delineated options for proceeding under the appropriate grievance procedure
Incident Response and Management

1. Incident

2. Incident reported verbally to:
   - Administration
   - Campus LE/PS
   - Athletics
   - Student/Friend
   - Hotline
   - Clery: CSA
   - Faculty
   - Student Life
   - General Counsel
   - Health Services
   - Office of President

3. Incident report form filed

4. Central process to uniformly vet all complaints of sexual assault
Central Process/Review Team

Title IX Coordinator

Campus Police

Student Conduct
(or Human Resources)
A Coordinated Response

Single Point of Contact
(Title IX Coordinator)

Police
For Timely Warning
Campus Safety

Sexual Assault Support
On or Off Campus
(Information, Rights and Options)

Complainant
Respondent

Law Enforcement
On and/or Off Campus

College Policy

Student Conduct

Investigation

Title IX

Employee/Faculty
Thinking About Policy

• Does your policy communicate your values?
• Does your policy thoroughly implement the law?
• Does your policy provide practical procedures
• Does your policy incorporate an awareness of the dynamics of sexual violence?
• Does your policy create a perception of bias as to what kind of response a complainant chooses?
• Does your policy incorporate effective tools to address safety and retaliatory conduct?
• Does your policy provide for balanced access to support for the respondent?
• Are your policies and procedures effectively communicated to your constituents?
• Are administrators well informed about policy and responding in a timely and consistent fashion?
Policy: Initial Considerations

• Location
  – Alphabetical?
  – Multiple policies?
  – Umbrella policy?

• Language
  – Tone
  – Value-laden terms
  – Consistency

• Organization
  – Modular
  – Intuitive
  – Redundant

• Web-based
  – Searchable
  – Links

• Supported by
  – Flow Charts
  – Clear step by step guidance
  – FAQ
  – Consistent definitions

• Alignment
Policy: Key Components

• Institutional values
• Notice of non-discrimination
• Purpose
  – Set behavioral expectations
• Scope
  – Applies to all community members
  – On and off campus
• Privacy vs. confidentiality
• Resources
  – Confidential
  – Campus
  – Community
• Interim remedies

• Reporting options
  – Emergency assistance for safety, physical and emotional well-being
  – All employees directed to share with central review process
• Investigative/review process
  – Complainant no consent
  – Threshold determination?
• Procedures for resolution
  – Based on role of the respondent
  – Must be in alignment
Policy: Key Components

- Definitions
  - Sexual harassment
    - Forms
    - Examples
  - Sexual violence
    - Tie to sexual harassment
  - Prohibited conduct
  - Consent
  - Incapacitation
  - Intimate partner violence
- Prior sexual history

- Consensual relationships
  - Prohibited?
  - Discouraged?

- Child protection policies
  - Mandatory reporter obligations

- Protections
  - No retaliation
  - Alternative presence
  - No cross-examination
  - Amnesty considerations
Resources vs. Reporting Options

- Confidential Resources
  - Medical Services
  - HIPAA
  - Mental health/counseling
  - Clergy
  - Rape crisis counselor

- Structural Challenges:
  - Employees with multiple hats, e.g., counselor and administrator

- Reporting Options
  - Emergency for safety, physical or emotional
  - Dedicated campus access points
    - Title IX
    - Campus safety/police
    - Student conduct
  - To any school employee
  - Anonymous
  - Law enforcement
The Title IX Team

- Core stakeholders
  - Title IX Coordinator
  - Student conduct
  - Campus safety/police
  - Human resources
  - Dean of faculty
  - Equity office
- Additional stakeholders
  - Campus mental health
  - Health Center
  - Clergy
- Clearly delineated roles and responsibilities

- Coordinated communication
- Documentation and record-keeping
- Template communications
  - Cooperative complainant
  - Reluctant complainant
  - Third party report
Develop Template Forms

- Complaint Form
- Rights Form
- Options Form
- Resource and Information Form
- No Contact Letter
- Forensic Interview Form
- Notification of Processes Form (Title IX and Student Conduct)
- Notification of Result Form (Title IX and Student Conduct)
The Title IX Coordinator

• Oversight vs. in the weeds
• Structural considerations
  – Reporting structure and chain of command
  – Where do they sit?
• Use of deputy coordinators
  – Subject matter (policy, prevention, case management)
  – Procedure based (student, faculty, employee processes)
• Dedicated investigator?
The Investigation

• Choice of language:
  – Investigation
  – Review
  – Assessment

• Who investigates?
  – Student conduct
  – Campus safety/police
  – Attorney
  – Mental health professional
  – Dedicated Title IX investigator
  – EO/Human Resources
  – External investigator

• Considerations:
  – Training & experience
  – Impartiality
  – Culture of campus
  – No conflict in role
    • Cannot serve dual role of victim support and impartial investigation
    • fact-gather v. fact-finder
The Investigation

• School takes the lead
  – Not the burden of the complainant or respondent

• Goals:
  – To gather the most robust set of facts
  – To listen with an earnest intent to understand
  – To learn, not assume
  – To tend to the individual
  – Search for corroboration
  – Assess credibility

• Key tasks:
  – Manage expectations
  – Regular and timely communications

• Documentation/Report
  – Verbatim/“quotes”
  – Areas of agreement and disagreement
Grievance Procedures

• Defining conduct, consent, and interplay with alcohol
  – Provide clear standards for use by adjudicator
  – Intoxication, impairment & incapacitation
    • Where do you draw the line?
  – Consent
    • Burden on the initiator
    • Affirmative communication?

• Timeframes
  – 60 days is guideline
  – Key is regular and timely communication
  – Can extend when circumstances require additional time

• Composition of the hearing board
Grievance Procedures

• Using prior misconduct of the respondent
  – Clear criteria for when it may be considered:
    • Responsibility or sanction only?
  – Pre-hearing review
  – “Weigh... whether there have been other harassment complaints about the same individual” (DCL, p. 5)

• Using prior sexual history of the complainant
  – Clear criteria for use may remove barrier to reporting
  – Pre-hearing review
  – “The alleged perpetrator should not be given access to communications between the complainant and the counselor or information regarding the complainant’s sexual history.” (DCL, p. 11, n. 29)

• Use of forensic evidence
  – “For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.” (DCL, p. 12, n. 30)
Rules for Remedies

• Should be a holistic approach on the micro and macro level
• No remedy can take root without the appropriate teeth and supervision
• Remedy must consider the whole person and should fit specific needs
• Tailor the remedy to the conduct and the context of the individual
• Can tailor to the individual or the community
• Should augment sanction/outcome
• Title IX remedies often extend beyond conclusion of case
No Contact Orders

- Separate the parties – change in classes, living, no contact orders
- Enforcement of no contact orders – institution must identify and charge someone with enforcement and oversight
- **Need proactive checking in on behalf of school rather than leaving burden to the student**
- No contact orders need to have teeth with consequences that are articulated in advance
- Swift, certain consequence to shape and guide behavior
- If there is a violation, oversight person has to ensure that the consequence is enforced
Individual Title IX Remedies

- Alcohol awareness and prevention
- Academic support
- Counseling
- Mentoring
- Reintegration support
- Traditional disciplinary sanctions
- Suspension or expulsion
- Educational programs that focus on rehabilitation of the mindset
Community Title IX Remedies

• Alcohol awareness and prevention
• Engage students to design education appropriate to the culture of their institution
• Sponsor a contest in sexual assault awareness and prevention
• Challenge students to work in a coordinated way to change student bodies
• Engage students from marketing, psychology & women’s studies to develop innovative and creative programs for credit
• To the extent that it is necessary, broader group education for reintegration and restoration of a hostile-free environment
Sexual Assault Support Checklist

- Ensure physical safety and advise re: medical treatment
- Advise re: preservation of evidence
- Confidentiality and privacy limitations
- Identify rights of both accused and accuser
- Explain University’s obligation to discharge Title IX investigative responsibilities
- Provide information on option to notify appropriate law enforcement authorities and ensure the accuser knows what that process entails
- Provide notification that the university will assist accuser in notifying authorities
- Provide notification of existing on and off campus counseling, mental health or other services for victims
- Provide information on grievance procedures and disciplinary process options, and clarify that internal school investigation does not foreclose report to law enforcement
- Notify the complainant of his or her options to avoid contact with the alleged perpetrator and explain no-contact orders
- Allow students to change academic or living situations as appropriate
- Minimize the burden on the complainant when taking steps to separate the parties
- Not, as a matter of course, remove complainants while allowing alleged perpetrators to remain
Sexual Assault Support Checklist

- Inform that retaliation and harassment are prohibited and will result in disciplinary sanctions; Follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

- Consider the following remedies for the complainant:
  - Providing an escort to ensure safe movement between classes and activities.
  - Ensuring that the complainant and alleged perpetrator do not attend the same classes.
  - Changing the living arrangements.
  - Providing counseling services and assistance in setting up initial appointment.
  - Providing medical services.
  - Providing academic support services.
  - Arranging for the complainant to re-take or withdraw from a course without penalty.
  - Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct.
  - Provide written materials summarizing services offered, options and rights explained, and the victim/accused’s acknowledgment of same.
  - Provide contact information.
Changing Culture
Define Your Culture

• Priority is student welfare
• Develop a culture of accountability and respect for others
• Foster a climate that encourages reporting
• Strive for direct, open, transparent communication
• Students look to university for guidance and direction to set clear expectations for behavior
• Student behavior guided by swift, fair, and certain university response
Key Concepts

• Engage the community
• Embrace the tension
• Seek creativity and innovation
  – Replace the tyranny of the OR with the genius of the AND
• Create fertile ground through education and conversation
  – Plant the seeds to cultivate change
• Scaffolding
• Use a relevant, coordinated and consistent message that can be heard
Fostering Climate Change

• Message must come from top down
  – Involve the highest level of administration
  – Open and transparent engagement

• Prioritize use of resources
  – Invest in technology, marketing, & communications

• Message must resonate at the grass roots level
  – Students need to be engaged

• Education, education, education
Methods of Community Engagement

• Draft ambassadors for change
• Identify campus and community partners
• Identify key leaders in faculty, staff and administration
• Involve leaders in the field and subject matter experts in the faculty
• Involve athletic teams and Greek communities
• Seek the assistance of student activity leaders
• Involve peer educators
• Use social networking tools
• Create a dedicated website that coordinates all policies, prevention and education, and action plan
Forums for Community Engagement

• Use a diversified portfolio that gives all members a place and a space to be heard
  • Town halls
  • Focused groups:
    – Faculty
    – Staff
    – Residence halls
    – Athletic teams
    – Student groups
    – Alumni

• Webcasts
• Diversified groups
• Sit in/day of dialogue
• Anonymous reporting
• Online suggestion box
• Constituency surveys
  – Electronic
  – Tied to class registration
  – Tied to funding of student activities
Targeted Education and Prevention

• For complainant, respondent, community groups, faculty and staff and broader campus population
• Build the scaffolding: “one and done” is anemic
• Primacy & recency with repeated reinforcement
• Engage each constituency to commit to one program a year: students, faculty, staff, administration
• Vary methods and approaches
• Redefine the campus meme in t-shirts, pamphlets, posters, door hangers
Creative Initiatives

- Surf the net
- Crazy hat day
- Livestrong bracelet
- Facebook page
- Twitter
- Clothesline Project
- Iphone App
- Chutes & Ladders
- Risk reduction & prevention
- Interactive skits and plays
- Lockdown weekend
- Red Solo Cup safety messages
- Dorm-room door hangers
- Sexual assault awareness videos
- Radio public service announcements
- Handbills and posters
- **Bystander intervention**
- Walk a Mile in Her Shoes
Additional Proposals

• Consider mandatory course for all students:
  – Sexual respect
  – Consent and communication
  – Social media & intimacy
  – Intimate partner violence
  – Abuse of alcohol or other drugs
  – Bullying/hazing
  – Eating disorders
  – Mental health concerns
  – Depression & suicide

• Reach out to students and parents before they come on campus

• Partner with K-12 schools in education and prevention

• Tie student activity funding to training completion

• Consider “potent tie-ins”

• Partner with community agencies
Analysis of Current Policy Design

Evaluation Of Current Issues

• Consultation re: goals and concerns
• Develop historic context
• Review of relevant existing policies and procedures
• Interview of relevant stakeholders

Analysis of Applicable Laws and Regulations

• Interplay of related policies and procedures
• Institutional values and priorities
• Including Title IX, the Clery Act, FERPA, HIPAA
• Cross-reference policies, procedures and perceptions

Assessment of Constituent Understanding

• Draft internal, confidential questionnaire
• Disseminate questionnaire to all constituents
• Review and analyze responses to identify issues in application of current policies and procedures

Development of Policies and Procedures

• Integration of above analysis
• Identification of current challenges facing peer schools
• Creation of draft policy template

Implementation and Training

• Roll out training for designated constituencies
• Roll out communication plan for University community
• Create web-based central repository of all policies and procedures for University community
Your Homework

• Identify your team
• Assess your policies
• Assess your structure
• Review prior cases
• Engage your community
  – Students
  – Faculty
  – Staff
  – Leadership
  – Local partners

• Make a plan with measurable action items:
  – Task force
  – Consider external policy audit
  – Constituency survey
  – Training and education schedule
Selected Checklist Source Documents

- 2001 Guidance (REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES):
  - http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html
- Dear Colleague Letter, April 4, 2011:
  - http://www2.ed.gov/about/offices/list/ocr/letters/collleague-201104.html
- Clery Act (Sexual Misconduct)
Dear Colleague Letter

• Guidance issued by the Department of Education’s Office of Civil Rights (OCR) on April 4, 2011 to all colleges and universities that receive federal funds
• Expands upon OCR 2001 Revised Sexual Harassment Guidance
• OCR advises recipients to:
  – examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in the DCL and the Revised Sexual Harassment Guidance issued in 2001; and
  – implement changes as needed (DCL, p. 6)
Dear Colleague Letter

- A “significant guidance document”
- Requires that grievance procedures be prompt and equitable
- Provides OCR’s interpretation and expectations of what does/does not satisfy “prompt and equitable” resolutions of complaints
- Provides a roadmap as to how OCR will evaluate whether a school is in compliance

DCL, p. 1
Title IX and Sexual Misconduct

• Sexual violence is a form of sexual harassment
• A single incident may constitute harassment
• A school violates Title IX if it:
  – “has notice” of a sexually hostile environment; and,
  – fails to take immediate and corrective action

DCL, p. 2-4
What is Covered By Title IX

• Protects students and employees in connection with all the academic, educational, extracurricular, athletic and other programs that occur:
  – On-campus
  – Off-campus activities that are school-related (school bus, class at another location, field trip)
  – On campus retaliation following an off-campus, non-school event

DCL, p. 3-4
Who Can File a Title IX Complaint

- A harassed student or employee
- The student’s parent or guardian
- A third party
- Anyone who requests action on the student or employee’s behalf

DCL, p. 4
When Must a School Respond

• If school knows or reasonably should know about student or employee harassment that creates a hostile environment

• School must:
  – Eliminate the harassment
  – Prevent its recurrence
  – Address its effects

• Response must be prompt and equitable

DCL, p. 4-5
Title IX Compliance

• Notice of Non-discrimination
• Title IX Coordinator
• Grievance Procedures
  – Prompt and equitable requirements
  – Notice of grievance procedures
  – Adequate, reliable, and impartial investigation of complaints
  – Designated and reasonably prompt time frames
  – Notice of outcome
• Education and Prevention
• Remedies and Enforcement
• Training
Title IX Coordinator
• “The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance.” (2001 Guidance, p. 4; 34 CFR 106.8(a))

• “While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints.” (2001 Guidance, p. 21)
Dear Colleague Letter: Title IX Coordinator

- Coordinates the recipient’s compliance with Title IX
- Responsibilities include:
  - Oversee all Title IX complaints
  - Identify and address any patterns or systemic problems
  - Be available to meet with students as needed
  - Be available to provide assistance to school law enforcement
- Should not have other job responsibilities that may create a conflict
- A school may designate more than one coordinator
  - Must have clearly delineated responsibilities
  - Must have titles reflecting supporting role
  - Update all notices and policies to identify Title IX Coordinator
  - DCL, p. 7
Dear Colleague Letter: Title IX Coordinator

**MUST**
- Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (DCL, p. 7)
  - Notify all students and employees of the name or title and contact information of the person so designated
- Have adequate training on what constitutes sexual harassment, including sexual violence (DCL, p. 7)
- Understand how grievance procedures operate (DCL, p. 7)

**SHOULD**
- Be available to meet with students as needed (DCL, p. 7)
- If recipient designates more than one coordinator, designate one coordinator as having ultimate oversight responsibility and use titles clearly showing supporting role to the senior coordinator (DCL, p. 7)
  - The other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. (p. 7)
- Not have other job responsibilities that may create a conflict of interest (DCL, p. 7)
Dear Colleague Letter: Title IX Coordinator

SHOULD

- Be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence (DCL, p. 7)
- Train school law enforcement unit employees on the school’s Title IX grievance procedures and any other procedures used for investigating reports of sexual violence (DCL, p. 7)
- Be given access to school law enforcement unit investigation notes and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation (DCL, pp. 7-8)
- Oversee preventive education programs and make victim resources, including comprehensive victim services, available. (DCL, p. 14)

SHOULD

- Review the school’s disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX (DCL, p. 8)
- Train all persons involved in implementing a school’s grievance procedures in handling complaints of sexual harassment and sexual violence, and applicable confidentiality requirements (DCL, p. 12)
- Provide training to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors. (DCL, p. 4)
Dear Colleague Letter: Title IX Coordinator

• “Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX” (DCL, p. 6)

• Title IX Coordinator may not hold a position which would create a conflict of interest
  – General counsel
  – Disciplinary hearing board member

• Should update all notices and policies to identify Title IX Coordinator
Coordination with Law Enforcement
Dear Colleague Letter: Coordination with Law Enforcement

- “A law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.”

DCL, p. 4
Dear Colleague Letter:
Coordination with Law Enforcement

**MUST**

- Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. (DCL, p. 10)
- “Once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.” (DCL, p. 10)

**SHOULD**

- The Title IX coordinator should be given access to school law enforcement unit investigation notes and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation
- School should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school’s internal Title IX investigation

**SHOULD**

- Law enforcement should be trained on:
  - Grievance procedures
  - Instructing complainants of rights under Title IX
  - Reporting incidents to Title IX Coordinator

**MAY**

- Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX
  
  - [In one recent OCR sexual violence case, the prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances]
Dear Colleague Letter:
Prompt Response

• “Designated and reasonably prompt time frames for the major stages of the complaint process” (DCL, p. 9)

• “Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint” (DCL, p. 12)

• “Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment” (DCL, p. 12)
Dear Colleague Letter:
Prompt Response

MUST
• Take immediate action to eliminate harassment, prevent its recurrence, and address its effects
• In all cases conduct an inquiry that is prompt, thorough, and impartial
• Take immediate steps to protect the student in the educational setting, even when there is an ongoing criminal investigation

SHOULD
• Undertake steps to protect the complainant promptly once it has notice of a sexual harassment or violence allegation
Dear Colleague Letter: Prompt Response

• Grievance procedures should specify the time frame within which:
  – (1) the school will conduct a full investigation of the complaint;
  – (2) both parties receive a response regarding the outcome of the complaint; and,
  – (3) the parties may file an appeal, if applicable

• Both parties should be given periodic status updates

• Consider suggested remedies to protect the complainant as soon as possible

DCL, p. 12
Dear Colleague Letter:
Prompt Response/Remedies

SHOULD

- Consider the following remedies for the complainant:
  - providing an escort to ensure that the complainant can move safely between classes and activities;
  - ensuring that the complainant and alleged perpetrator do not attend the same classes;
  - moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
  - providing counseling services;
  - providing medical services;
  - providing academic support services, such as tutoring;
  - arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant’s academic record; and
  - reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.

- Take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates
- Notify the complainant of his or her options to avoid contact with the alleged perpetrator
- Allow students to change academic or living situations as appropriate
- Minimize the burden on the complainant when taking steps to separate the complainant and alleged perpetrator
- Not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain
- Ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.

MAY

- Prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation
Dear Colleague Letter:

Policies/Procedures/Notice

- Must publish comprehensive notice of non-discrimination
- DCL provides detailed roadmap as to how OCR will assess compliance
- Examine current policies and implement changes as needed
Dear Colleague Letter:

Policies/Procedures/Notice

**MUST**

- Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints
  - That apply to sex discrimination complaints filed by students against school employees, other students, or third parties
  - That meet the Title IX requirement of affording a complainant a prompt and equitable resolution
  - That notify a complainant of the right to end the informal process at any time and begin the formal stage of the complaint process
  - Does not use mediation, even on a voluntary basis, in cases involving allegations of sexual assault.
- Have policies and procedures in place to protect against retaliatory harassment
- Ensure that complainants and their parents, if appropriate, know how to report any subsequent problems

**MUST**

- Provide in any MOU with a local police department that the school be allowed to meet its Title IX obligations, notify complainants of their Title IX rights and the school’s grievance procedures, and take interim steps to ensure the safety and well-being of the complainant and the school community while an investigation is ongoing
- Disseminate a notice of nondiscrimination
  - That states that inquiries concerning the application of Title IX may be referred to the recipient’s Title IX coordinator or to OCR
  - That is widely distributed
- Apply to all students, including athletes
- Follow standard procedures for resolving sexual violence complaints involving athletes; such complaints may not be addressed solely by athletics department procedures
Dear Colleague Letter:

Policies/Procedures/Notice

SHOULD

- Examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the 2001 Guidance and implement changes as needed
- Prominently post its Notice of Nondiscrimination and Grievance Procedures, so that they are available and easily accessible on an ongoing basis, on school Web sites and at various locations throughout the school or campus, and publish them in electronic and printed publications of general distribution
- Have a nondiscrimination policy that states that prohibited sex discrimination covers sexual harassment, including sexual violence, and includes examples of the types of conduct that it covers
- Clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints
- Have procedures that are written in language appropriate to the age of the school’s students, easily understood, easily located, and widely distributed
  - Include in their MOU clear policies on when a school will refer a matter to local law enforcement

SHOULD

- Inform students that the schools’ primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence
- Develop specific sexual violence materials that include the schools’ policies, rules, and resources for students, faculty, coaches, and administrators
- Include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive
- Include in such information where and to whom students should go if they are victims of sexual violence, and what to do if they learn of an incident of sexual violence
- OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.”
Dear Colleague Letter and Clery Requirements
Dear Colleague Letter and Clery Requirements

• The Dear Colleague Letter references and captures the sexual misconduct components of Clery and encourages coordinated integration
Clery Requirements and Sexual Misconduct

- Develop educational programs to promote awareness of rape, acquaintance rape and other forcible and non-forcible offenses
- Develop procedures students should follow if a sex offense occurs, including:
  - Reporting procedures
  - The importance of preserving evidence
- Provide information on a student’s option to notify appropriate law enforcement authorities including information so that students know what notifying law enforcement authorities entails
- Provide notification to students that the university will assist them in notifying these authorities
- Provide notification to students of existing on and off campus counseling, mental health or other student services for victims of sex offenses
- Provide notification to students that the university will consider changing a victim’s academic and living situation after an alleged sex offense, and the options for those changes if those changes are requested by the victim and are reasonably available
- Develop procedures for campus disciplinary action in cases of an alleged sex offense
- Make clear that the accuser and accused are entitled to the same opportunities during a disciplinary proceeding
- Inform the accuser and the accused of the outcome of any institutional disciplinary proceeding that is brought alleging a sex offense (Not precluded by FERPA)
- Develop sanctions the university may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape or other forcible or non-forcible sex offenses
- Duty to warn/Timely warnings (Not precluded by FERPA)
Investigations
A critical element to achieve compliance with Title IX’s prompt and equitable requirement:

– “Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence.” (DCL, p.9)

– “As noted in the 2001 Guidance, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences.” (DCL, p. 9)
Title IX Obligation to Investigate

- “[B]ecause legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively. (2001 Guidance, p. 21)

- “A law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.” (DCL, p. 4)

- “A criminal investigation into allegations of sexual harassment or sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.” (Department of Education, Know Your Rights, http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html#note1)
MUST

- Promptly investigate to determine what occurred and then take appropriate steps to resolve the situation (DCL, p. 4, 2001 Guidance, p. 15)
  - Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX (DCL, p. 10)
- Process off-campus complaints in accordance with its established procedures. (DCL, p. 4)
  - Consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus (DCL, p. 4)

MUST

- Determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified (DCL, p. 5)
- Promptly resume and complete its fact-finding for the Title IX investigation once notified that the police department has completed its gathering of evidence (DCL, p. 10)
  - In one recent OCR sexual violence case, the prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances (DCL, p. 10)
Dear Colleague Letter: Investigation

SHOULD

- Not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation (DCL, p. 10)
- Notify a complainant of the right to file a criminal complaint, and not dissuade a victim from doing so either during or after the school’s internal Title IX investigation (DCL, p. 10)
- If an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner (DCL, p. 12)
- Follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred (DCL, p. 16)

SHOULD

- The Title IX coordinator should be given access to school law enforcement unit investigation notes and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation (DCL, pp. 7-8)
- Law enforcement should be trained on:
  - Grievance procedures
  - Instructing complainants of rights under Title IX
  - Reporting incidents to Title IX Coordinator (DCL, p. 7)
MAY NOT

A school **may not absolve** itself of its **Title IX obligations** to **investigate and resolve** complaints of sexual harassment or violence **by delegating**, whether through express contractual agreement or other less formal arrangement, **the responsibility** to administer school discipline to school resource officers or “contract” law enforcement officers. (DCL, p. 8)
**2001 Guidance: Investigation**

**MUST**
- Promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. (2001 Guidance, p. 15)
- Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student’s behalf (2001 Guidance, p. 15)

**SHOULD**
- If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with the student’s request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students. (2001 Guidance, p. 17)
- Make follow-up inquiries to see if there have been any new incidents or any retaliation (2001 Guidance, p. 17)
Credibility Considerations

• From the 2001 Revised Sexual Assault Guidance:
• Based on the totality of the circumstances (p. 9)
• Witness statements (p. 9)
• Level of detail and consistency (p. 9)
• Existence or absence of corroborative evidence (p. 9)
• Prior bad acts and/or prior false reports (p. 9)
• Reaction or behavior after the alleged incident (p. 9)
• Behavioral changes (p. 9)
• Prompt complaint/disclosure (p. 9)
• Other contemporaneous evidence (p. 9)
Consent and Confidentiality
Dear Colleague Letter: Consent and Confidentiality

• “Schools also should inform and obtain consent from the complainant ... before beginning an investigation.” (DCL, p. 5; See 2001 Guidance, p. 17)

• “If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.” (DCL, p. 5)

• If victim requests confidentiality, school should inform complainant:
  – Ability to respond may be limited (DCL, p. 5; See 2001 Guidance, p. 17)
  – School will take steps to prevent retaliation and take strong responsive action if it occurs (DCL, p. 5; See 2001 Guidance, p. 17)
Dear Colleague Letter: Consent and Confidentiality

• School **should** evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. (2001 Guidance, p. 17)

• “Thus, the school **may weigh** the request for confidentiality against:
  – the seriousness of the alleged harassment;
  – the complainant’s age;
  – whether there have been other harassment complaints about the same individual;
  – and the rights of the accused individual to receive information about the accuser; and (2001 Guidance, pp. 17-18)
  – the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an “education record” under FERPA” (DCL, p. 5; 2001 Guidance, pp. 17-18)
Dear Colleague Letter: Consent and Confidentiality

• “The school should inform the complainant if it cannot ensure confidentiality.” (DCL, p. 5)
• “In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant’s confidentiality” (DCL, p. 5)
• Even if the school cannot take disciplinary action against the accused, the school should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. (DCL, p. 5)
Dear Colleague Letter:

Consent and Confidentiality

**SHOULD**
- Inform and obtain consent from the complainant before beginning an investigation
- Take all reasonable steps to investigate and respond to a complaint consistent with a request for confidentiality or a request not to pursue an investigation
- Inform the complainant that its ability to respond may be limited if a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator
- Tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

**SHOULD**
- Evaluate a request for anonymity in the context of its responsibility to provide a safe and nondiscriminatory environment for all students
- Inform the complainant if it cannot ensure confidentiality
- Pursue other steps to limit the effects of the alleged harassment and prevent its recurrence

**MAY**
- Weigh the request for confidentiality against the following factors:
  - the seriousness of the alleged harassment;
  - the complainant’s age;
  - whether there have been other harassment complaints about the same individual; and,
  - the alleged harasser’s rights to receive information under FERPA

(DCL, p. 5)
Balance in Process

and

Grievance Procedures
2001 Guidance & Clery Act:
Grievance Procedures

• Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. (2001 Guidance, p. 19)

• In all cases, the inquiry must be prompt, thorough, and impartial. (2001 Guidance, p. 15)

• Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. (2001 Guidance, p. 20)

• The accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding. (Clery, p. 11)
Separate grievance procedures are not required...
- So long as they comply with the prompt and equitable requirements of Title IX (DCL, p. 8)

A school’s investigation and hearing processes cannot be equitable unless they are impartial (DCL, p. 12)

Any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed (DCL, p. 12)
DCL: Grievance Procedures

**MUST**

- Use a preponderance of the evidence standard (DCL, p. 11)
- Provide parties with an equal opportunity to present relevant witnesses and other evidence and afford them similar and timely access to any information that will be used at the hearing (DCL, p. 11)
- If a school provides for appeal of the findings or remedy, it must do so for both parties (DCL, p. 12)
- Notify both parties, in writing, about the outcome of both the complaint and any appeal (DCL, p. 12)

**MUST**

- Provide due process to the alleged perpetrator if the school is public or state-supported (DCL, p. 12)
- Provide parties with the same rights in regard to the participation of lawyers in the proceedings (DCL, p. 12)
- Maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings (DCL, p. 12)
- Apply to all students, including athletes (DCL, p. 8)
MUST
• Not require a complainant to abide by a nondisclosure agreement that would prevent the redisclosure of information required by Clery (DCL, p. 14)
• Notify the complainant of the right to end the informal process at any time and begin the formal stage of the complaint process (DCL, p. 8)
• Never allow mediation, even on a voluntary basis, in cases involving allegations of sexual assault (DCL, p. 8)

MUST
• Not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or “contract” law enforcement officers. (DCL, p. 8; 34 CFR § 106.4)
DCL: Grievance Procedures

SHOULD
- Not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant (DCL, pp. 11-12)
- Not allow only the alleged perpetrator to present character witnesses at a hearing (DCL, p. 12)
- Not allow the alleged perpetrator to review the complainant’s statement without also allowing the complainant to review the alleged perpetrator’s statement (DCL, p. 12)

SHOULD
- Not allow the parties personally to question or cross-examine each other during the hearing (DCL, p. 12)
- Provide an appeals process that is equally accessible to both parties (DCL, p. 12)
- Disclose any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties (DCL, p. 12)
- Ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant (DCL, p. 12)
DCL: Grievance Procedures

SHOULD

[]} Provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently (DCL, p. 12)

Notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school’s internal Title IX investigation (DCL, p. 10)

SHOULD

Consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus (DCL, p. 4)

Give both parties period status updates (DCL, p. 12)
DCL: Grievance Procedures

**MAY**
- Use student disciplinary procedures or other separate procedures to resolve such complaints (DCL, p. 8)
- Disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution’s rules or policies (DCL, p. 14; 34 CFR § 99.31(a)(14))

**MAY**
- Disclose to the alleged victim the final results of a disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed, without violating FERPA (DCL, p. 14)
- Include in grievance procedures voluntary informal mechanisms (e.g., mediation) for resolving some complaints of sexual harassment, but never those involving sexual assault (DCL, p. 8)
Questioning Techniques

• “OCR strongly discourages schools from allowing the parties personally to question or cross examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.” (DCL, p. 12)
Pattern Evidence

- Prior bad acts/pattern evidence
  - “Weigh... whether there have been other harassment complaints about the same individual (DCL, p. 5)
Complainant’s Sexual History

• Complainant’s Sexual History
  – “The alleged perpetrator should not be given access to communications between the complainant and the counselor or information regarding the complainant’s sexual history.” (DCL, p. 11, n 29)
“In cases involving potential criminal conduct, school personnel must determine, consistent with state and local law, whether appropriate law enforcement or other appropriate authorities should be notified.”

“In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.”

DCL, p. 5
Training/Education/Prevention
Dear Colleague Letter:
Training/Education/Prevention

• Students, faculty and staff must be trained on policy and grievance procedures: who, what, when, how, where

• Persons involved in implementing grievance procedures and in handling complaints must have experience or be trained

• Fact-finders / Decision-makers

• Training must include applicable confidentiality requirements ("confidentiality-light")

• Prevention efforts
2001 Guidance Letter: Training

MUST
- Make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates. (2001 Guidance, p. 21)

SHOULD
- Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported. (2001 Guidance, p. 13)

MAY
- Need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond (2001 Guidance, p. 17)
Dear Colleague Letter: Training

MUST

☐ Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have training or experience in handling complaints of sexual harassment and sexual violence (DCL, p. 12)

☐ Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have training in the recipient’s grievance procedure (DCL, p. 12)

SHOULD

☐ Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have in training in confidentiality requirements (DCL, p. 12)

☐ In sexual violence cases, the fact-finder and decision-maker should have adequate training or knowledge regarding sexual violence (DCL, p. 12)
MUST

☐ Create education programs to promote the awareness of rape, acquaintance rape, and other sex offenses. (Clery, p. 11)

SHOULD

☐ Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have in training in confidentiality requirements (DCL, p. 12)

☐ In sexual violence cases, the fact-finder and decision-maker should have adequate training or knowledge regarding sexual violence (DCL, p. 12)
Dear Colleague Letter:
Training/Education/Prevention

MUST

- Publish a notice of nondiscrimination and adopt and publish grievance procedures.
- Ensure that their employees are trained so that:
  - Employees know to report harassment to appropriate school officials; and
- Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have training or experience in handling complaints of sexual harassment and sexual violence
- Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have training in the recipient’s grievance procedure

SHOULD

- Include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities.
- Be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.
- Ensure that complainants are aware of their Title IX rights and any available resources, such as:
  - Counseling, health, and mental health services; and
  - Their right to file a complaint with local law enforcement
- Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have in training in confidentiality requirements
- In sexual violence cases, the fact-finder and decision-maker should have adequate training or knowledge regarding sexual violence
Dear Colleague Letter:
Training/Education/Prevention

SHOULD

- Assess student activities regularly to ensure that the practices and behavior of students do not violate the schools’ policies against sexual harassment and sexual violence.
- Develop policies, rules, and resources for students, faculty, coaches, and administrators.
- Include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive.
- Include in these materials:
  - Where and to whom students should go if they are victims of sexual violence
  - What to do if students or employees learn of an incident of sexual violence.

SHOULD

- Ensure that the procedures for resolving complaints of sex discrimination, including sexual harassment, are:
  - Written in language appropriate to the age of the school’s students;
  - Easily understood;
  - Easily located; and
  - Widely distributed.
- Make grievance procedures available by:
  - Posting on school Web sites;
  - Sending electronically to all members of the school community;
  - Making available at various locations throughout the school or campus; and
  - Summarizing in or attaching to major publications issued by the school.
Dear Colleague Letter:
Training/Education/Prevention

**SHOULD**
- Provide training for employees, including any likely to witness or receive reports that includes practical information about how to identify and report sexual harassment and violence.
- Ensure that trainees:
  - Understand what types of conduct constitute sexual harassment;
  - Can identify warning signals; and
  - Know how to respond.
- Take proactive measures to prevent sexual harassment and violence by:
  - Implementing preventive education programs; and
  - Making victim resources, including comprehensive victim services, available.

**MAY**
- Include these education programs in:
  - Orientation programs for new students, faculty, staff, and employees;
  - Training for students who serve as advisors in residence halls;
  - Training for student athletes and coaches; and
  - School assemblies and “back to school nights.”
- These programs should include a discussion of:
  - What constitutes sexual harassment and sexual violence;
  - The school’s policies and disciplinary procedures; and
  - The consequences of violating these policies
Monitoring/Tracking
Dear Colleague Letter:  
Monitoring/Tracking

DCL puts tremendous emphasis on climate checks and integration of information to assess the effectiveness of efforts and the need for future proactive steps to ensure that the school is free from harassment.
Dear Colleague Letter: Monitoring/Tracking

SHOULD

- Have the Title IX coordinator review disciplinary procedures to ensure that they comply with the requirements of Title IX if the recipient relies on disciplinary procedures for Title IX compliance
- Assess student activities regularly to ensure that the practices and behavior of students do not violate the schools’ policies against sexual harassment and sexual violence
- Conduct periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school’s policies against sexual harassment and violence
- Investigate whether any other students also may have been subjected to sexual harassment or violence

SHOULD

- Investigate whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations
- Conduct, in conjunction with student leaders, a school or campus “climate check” to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school
- Submit to OCR copies of all grievances filed by students alleging sexual harassment or violence, and provide OCR with documentation related to the investigation of each complaint
MUST

- Comply with Title IX and the Department’s Title IX regulations as a condition for receiving Federal financial assistance. p. 3.
- Agree that education programs or activities will be operated in compliance with the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its programs. p. 3.
- Not, on the basis of sex, treat one student differently from another in determining whether the student satisfies any requirement or condition for the provision of any aid, benefit, or service. p. 4.
- Not, on the basis of sex, provide different aid, benefits, or services or provide aid, benefits, or services in a different manner. p. 4.
- Not, on the basis of sex, deny any student any such aid, benefit, or service. p. 4.
- Not, on the basis of sex, subject students to separate or different rules of behavior, sanctions, or other treatment. p. 4.
- Not, on the basis of sex, aid or perpetuate discrimination against a student by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students. p. 4.
- Not, on the basis of sex, otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity. p. 4.

MUST

- Adopt and publish a policy against sex discrimination and grievance procedures applying to complaints of sex discrimination in the school’s education programs and activities filed by students against school employees, other students, or third parties, and providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. p. 19.
- Have a policy and grievance procedures that provide effective means for preventing and responding to sexual harassment. p. 19.
- Designate at least one employee to coordinate efforts to comply with and carry out Title IX responsibilities and notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated. p. 21.
- Make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates. p. 21.
- Ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. p. 13.
- Recognize sexual harassment when it occurs and take prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. p. iii.
MUST

- Recognize and respond to sexual harassment of students, whether by teachers and other employees, by other students, or by third parties. p. 4.
- Not hesitate to respond to sexual harassment in the same reasonable, commonsense manner as it would to other types of serious misconduct. p. iii.
- Take prompt and effective action to stop the sexual harassment of a student by a school employee, whether or not the recipient has "notice" of the harassment, when the harassment is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students. p. 10.
- Take prompt and effective action to stop the harassment and prevent its recurrence, upon notice of the harassment, when the harassment is not carried out during an employee's performance of his or her responsibilities in relation to students, but is nonetheless sufficiently serious to deny or limit the student in her ability to participate in or benefit from the recipient's program. p. 12.
- Take immediate effective action to eliminate the hostile environment and prevent its recurrence if a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment. p. 12

MUST

- Respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a "reasonably diligent inquiry." p. 13.
- Take immediate and appropriate steps as soon as it has notice of possible sexual harassment, whether or not the student who was harassed makes a complaint or otherwise asks the school to take action, to investigate or otherwise determine what occurred, and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. p. 15.
- Employ an inquiry that is prompt, thorough, and impartial. p. 15.
- Take steps to eliminate any hostile environment that has been created (e.g. dissemination of information, the issuance of new policy statements) and clearly communicate that the school does not tolerate harassment and will be responsive to any student who reports it. p. 16.
- Provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. p. 16.
- Take remedial action to overcome the effects of discrimination. p. 4.
- Take steps to remedy the effects of the harassment on the individual student or students who were harassed. p. 15.
2001 Guidance

MUST

- Take effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had there not been a failure to respond promptly and effectively, thus permitting the student to be subjected to a hostile environment. p. 12.

SHOULD

- Provide, in its policies and procedures:
  - For notice to students and employees of the procedure, including where complaints may be filed;
  - An explanation of the application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
  - For adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
  - Designated and reasonably prompt timeframes for the major stages of the complaint process;
  - For notice to the parties of the outcome of the complaint;
  - An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate;

SHOULD Provide ... (cont’d)

- For an opportunity to appeal the findings or remedy, or both;
- A provision prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry. p. 20.

SHOULD

- Write its procedures in language appropriate to the age of the school’s students, so that they are easily understood, and widely disseminate them. p. 20.
- Give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. p. 21.
- Provide training for employees that includes practical information about how to identify harassment and, as applicable, the person to whom it should be reported. p. 13.
- Provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond. p. 17.
- Consider all relevant circumstances, i.e., “the constellation of surrounding circumstances, expectations, and relationships” to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level. p. 5.
SHOULD

Consider, in evaluating conduct:

- The degree to which the conduct affected one or more students' education;
- That a hostile environment can occur even if the harassment is not targeted specifically at the individual complainant;
- The type, frequency, and duration of the conduct;
- That a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment;
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment;
- The number of individuals involved;
- The age and sex of the alleged harasser and the subject or subjects of the harassment;
- The size of the school, location of the incidents, and context in which they occurred;
- Other incidents at the school;
- That a series of incidents at the school, not involving the same students, could—taken together—create a hostile environment, even if each by itself would not be sufficient;
- Incidents of gender-based, but nonsexual harassment. pp. 6-7.

SHOULD

- Use common sense and reasonable judgment in determining whether a sexually hostile environment has been created. p. 7.
- Be particularly concerned about the issue of whether the conduct was welcome if the harasser is in a position of authority. p. 8.
- Initially discuss with the complainant what actions he or she is seeking in response to the harassment. p. 15.
- Explain to the complainant the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. p. 15.
- Contact the student who was harassed, if a responsible school employee has directly observed the sexual harassment, and explain that the school is responsible for taking steps to correct the harassment, and provide the appropriate information. p. 15.
- Consider, in regard to responding to third party complaints:
  - The source and nature of the information; the seriousness of the alleged incident;
  - The specificity of the information; the objectivity and credibility of the source of the report;
  - Whether any individuals can be identified who were subjected to the alleged harassment;
  - Whether those individuals want to pursue the matter. p. 18.
2001 Guidance

SHOULD

- Determine whether appropriate law enforcement authorities should be notified. p. 16.
- Not rely exclusively upon police investigations or reports or insurance company investigations to satisfy its investigative obligations under Title IX. p. 21.
- Make every effort to prevent disclosure of the names of all parties involved – the complainant, the witnesses, and the accused -- except to the extent necessary to carry out an investigation. p. 16.
- Discuss confidentiality standards and concerns with the complainant initially. p. 17.
- Inform the student that a confidentiality request may limit the school’s ability to respond. p. 17.
- Tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. p. 17.
- Take all reasonable steps to investigate and respond to the complaint consistent with a student’s request that his or her name not be revealed, as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students. p. 17.
- Evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. p. 17.

SHOULD

- Take reasonable, timely, age-appropriate, and effective corrective action to end the harassment, including steps tailored to the specific situation. p. 16.
- Design responsive measures to minimize, as much as possible, the burden on the student who was harassed. p. 16.
- Take steps to prevent any further harassment and to prevent any retaliation against the harassed student, against third party complainants, or against witnesses. p. 17.
- Make sure that the harassed students know how to report any subsequent problems, and make follow-up inquiries to see if there have been any new incidents or any retaliation. p. 17.
- Inform students who have alleged harassment about the status of the investigation on a periodic basis. p. 20.
2001 Guidance

MAY

- Use a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a “prompt and equitable” resolution of the complaint. p. 21.

- Include in its procedures informal mechanisms for resolving sexual harassment complaints, with the following caveats:
  - The parties must agree to do so;
  - The complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process;
  - The informal process must not require a complainant to work out the problem directly with the alleged harasser, without appropriate involvement by the school;
  - In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. p. 21.

- Take steps to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant, such as conducting sexual harassment training, taking a student survey, or implementing other systemic measures. p. 18.

MAY

- Consider the following in weighing the need for confidentiality against the school’s responsibility to ensure a safe environment for students:
  - The seriousness of the alleged harassment;
  - The age of the student harassed;
  - Whether there have been other complaints or reports of harassment against the alleged harasser;
  - The rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result. pp. 17-18.

- Take interim measures during the investigation of a complaint. p. 16.

- Decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school’s investigation. p. 16.
• Consider the following if there is a dispute about whether harassment occurred or whether it was welcome:
  – Statements by any witnesses to the alleged incident;
  – Evidence that the alleged harasser has been found to have harassed others;
  – Evidence that the complainant has been found to have made false allegations against other individuals;
  – Evidence of the allegedly harassed student’s reaction or behavior after the alleged harassment;
  – Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred;
  – Other contemporaneous evidence.  p. 9.
Title IX Coordinator

- To designate a University-wide Title IX Coordinator and deputy coordinators to ensure compliance with Title IX.
- To publish, annually in print and on-line, the name, email, and telephone contact information, and duties of the University Title IX Coordinator and deputy coordinators.
- To ensure coordination with the deputy coordinators and appropriate student services offices on campus to: (1) track trends on campus and address any patterns or systemic problems; (2) assess the overall efficacy of the coordination among these various services; and (3) solicit feedback on the efficacy of the overall response to sexual misconduct.
- To provide information to individuals regarding their Title IX rights, the University’s formal and informal grievance processes, the availability of interim measures during an investigation of a grievance, and the ability to file a complaint with Yale Police Department (“YPD”).
- To conduct a semiannual review of all formal and informal Title IX complaints brought to the University Title IX Coordinator and deputy Title IX coordinators, before the University-Wide Committee on Sexual Misconduct, any other grievance procedures, and/or independently investigated by the University in order to identify and address any patterns or systemic problems.
- To communicate with YPD regarding the University’s obligations under Title IX and serving as a resource on Title IX issues.
- To notify complainants in criminal cases of their right to file a Title IX complaint with the University in addition to pursuing a criminal process.
- To provide complainants with written information describing the University’s Sexual Harassment and Assault Response and Education Center, the University-Wide Committee on Sexual Misconduct, and the Title IX Coordinators.
- To provide the University Title IX Coordinator with synopses of sexual misconduct complaints.
- To provide the University Title IX Coordinator with access to YPD records of its investigation and findings regarding Title IX investigations, so long as it does not significantly compromise any pending criminal proceeding.
- To periodically assess the efficacy of the University’s overall Title IX compliance efforts.
Yale University

Grievance Procedures Addressing Sexual Misconduct

❑ To form the University-Wide Committee on Sexual Misconduct (“UWC”) as its primary mechanism to promptly and equitably respond to complaints of sexual misconduct under Title IX both informally and formally

❑ To launch, and continue to widely publicize on an annual basis, a website specific to the UWC to raise awareness about its function and availability

❑ To ensure that if the University creates a new Title IX grievance process, it affords the following:
  ❑ Broad notice to the University community of the procedures applicable to a complaint of sexual misconduct;
  ❑ Applicability of the process to student and third party complainants;
  ❑ If informal process(es) are available, the option for complainants to bypass an informal process for a formal process at any point, per the complainants’ discretion;
  ❑ No complainant will be required to have face-to-face interaction with an alleged perpetrator in any informal resolution or mediation involving a complaint of sexual assault;
  ❑ Designated timeframes for major stages of the process;
  ❑ Adequate, prompt and impartial investigations of allegations of sexual misconduct including:
    ❑ Not delaying the University’s investigation of possible sexual misconduct under Title IX until related criminal processes are concluded;
  ❑ Equitable information gathering from both the complainant(s) and the alleged perpetrator(s);
  ❑ Use of the preponderance of evidence standard in determining whether sexual misconduct occurred;
  ❑ Availability of interim measures to protect the parties during the University’s investigation of possible sexual misconduct. Such interim measures should not disproportionately impact the complainant(s).
  ❑ Assurances that the University will take steps to stop any sexual misconduct if found, prevent its recurrence and remedy its effects on those impacted;
  ❑ Assurances that retaliation is prohibited and that retaliation will be handled promptly and equitably if it occurs;
  ❑ Notice in writing to the relevant parties regarding the outcome of the process including whether sexual misconduct was found and a description of the University’s response; and
    ❑ Equitable rights to both parties throughout the process, including the right to appeal, if applicable.

❑ To strengthen students’ understanding, through education and enforcement, that they are subject to the Undergraduate Regulations both on and off campus

❑ To revise and expand its definition of sexual misconduct and its definition of hazing in its Undergraduate Regulations
The University has conducted and will continue to hold annual training for freshmen students on: (1) the University’s obligations under Title IX; (2) its regulations regarding sexual misconduct; relevant resources available on campus; (3) the UWC’s procedures, including accepting, processing and investigating complaints of sexual misconduct; (4) interacting with victims of sexual misconduct; (5) gathering relevant evidence and assessing it in the Title IX context; (6) the importance of confidentiality, fair process, impartiality, and applicable legal standards; (7) safety considerations when determining interim measures and disciplinary sanctions; (8) and other topics it deems relevant.

To conduct and continue to hold annual training for sophomore students, including on bystander intervention, and reaffirm the topics presented to freshman students.

To conduct and continue to hold annual training for leaders of registered student groups and varsity teams on the critical role student organizations play in creating and maintaining a safe learning and living environment at the University. The training will continue to include information on the University’s alcohol and hazing policies and the Undergraduate Regulations including those related to sexual misconduct, resources on campus, and other topics it deems relevant.

To conduct annual training for relevant YPD officers on: (1) interacting with victims of sexual misconduct, (2) the resources available on campus, and (3) the protocol for referring students to the Sexual Harassment and Assault Response and Education Center.

To conduct training for relevant YPD officers on reporting and referring information and complainants to the University Title IX Coordinator and/or the UWC.

To conduct and continue to hold annual training for Residential College Deans and Masters, Sexual Harassment and Assault Response and Education Center staff, and Freshmen Counselors on: interacting with victims of sexual misconduct, the Undergraduate Regulations regarding sexual misconduct, resources on campus, the UWC, reporting requirements and other topics it deems relevant.

To train other populations and/or shift the focus of trainings as identified through applicable assessments and analyses discussed throughout the Agreement.
Yale University

Sexual Harassment and Assault Response and Education Center
- The University’s Sexual Harassment and Assault Response and Education Center (SHARE) will serve as the initial place of referral for students seeking services and options as the result of sexual misconduct
- To commit to ensure that SHARE has adequate resources to provide services to students, such as its 24/7 ‘on-call’ counselors, and take actions to raise the awareness of SHARE’S functions and availability through a comprehensive website

University-wide Climate Assessment
- To conduct periodic assessments (at least annually) of campus climate with regard to gender discrimination, sexual misconduct and Title IX, seeking input from students and student groups, including women’s groups, as well as a wide variety of other sources
- To consider such assessments in identifying future actions to ensure that it maintains an environment that is safe and supportive to all students and in compliance with Title IX

Miscellaneous
- To continue to implement actions intended to improve observance of appropriate behavioral norms by campus organizations and at organized student events
- To continue its educational efforts to promote responsible drinking
- To continue its efforts to expand its student leadership councils to promote norms of responsible conduct, and including efforts to create a council of fraternity and sorority leaders
- To continue to study and address issues related to hazing and initiations by student organizations
- To maintain all records of informal and formal complaints, consistent with the UWC’s procedures, and all retained records and actions taken in response to complaints brought to the University and deputy Title IX Coordinators.
Title IX Grievance Procedures

- To submit to OCR either new or revised Title IX grievance procedures to specifically address complaints of sex discrimination and provide for the prompt and equitable response and resolution of complaints alleging sex discrimination, including student-on-student discrimination
- To provide notice that the procedures apply to complaints alleging sex discrimination by employees, students, or third parties
- To explain how to file a complaint pursuant to the procedures
- To provide information regarding the name or title, office address, and telephone number of the individual with whom to file a complaint
- To define and provide examples of what types of actions may constitute sex discrimination
- To afford the opportunity for the parties to present witnesses and other evidence
- To assure the Title IX Coordinator’s supervision and oversight of the University’s Title IX grievance process
- To provide timeframes for the major stages of the investigation, with a provision indicating that the University will comply with law enforcement requests for cooperation, that such cooperation may require the University to temporarily suspend the fact-finding aspect of a Title IX investigation while the law enforcement agency is in the process of gathering evidence, and that the University will promptly resume its Title IX investigation as soon as notified by the law enforcement agency that it has completed the evidence gathering process
- To clarify that the University will implement appropriate interim steps during the law enforcement agency’s investigation period to provide for the safety of the victim(s) and the campus community and to avoid retaliation

- To assure that victims are aware of their Title IX rights and available resources, such as counseling and the local rape crisis center, as well as their right to file a complaint with a local law enforcement agency

- To assure that the University will not use mediation and other informal mechanisms to resolve allegations of sexual assault, and to only offer an informal process to resolve other types of sexual harassment complaints on a voluntary basis when appropriate, with notification of the right to end the informal process at any time and begin the formal stage of the complaint process

- To clarify that the University will not require a student victim filing a complaint with the Campus Police or Title IX Coordinator to sign a no-contact order on the sole basis that the student filed a complaint

- To clarify that in instances where a complainant requests confidentiality, the University will take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation, and where the University cannot take disciplinary action against an alleged harasser because of a complainant’s insistence on confidentiality, it will pursue other steps to limit the effects of the alleged harassment and prevent its recurrence

- To provide written notification to the parties of the outcome of the complaint

- To notify the parties of their opportunity to appeal the findings

- To assure that an appeal will be conducted in an impartial manner by an impartial decision-maker

- To assure that the University will take steps to prevent recurrence of any discrimination, with examples of the range of possible disciplinary sanctions and the types of remedies available to address the discriminatory effects on victims and others

- To issue a statement that Title IX prohibits retaliation against any individual who files a complaint under Title IX or participants in a complaint investigation

- To, within 60 calendar days of receipt of the OCR-approved, revised Title IX grievance procedures, adopt and implement the procedures and provide all students and employees with electronic or written notice regarding the new grievance procedures, together with information on how to obtain a copy of the procedures. The University, at a minimum, will make this notification through the University’s website and electronic mail messages to employees and students, as well as by any other additional means of notification the University deems effective to ensure that the information is widely disseminated. The University may adopt and publish the procedures at an earlier date, and will then within such timelines as mentioned above, adopt and publish necessary amendments, if any, after receipt of the described response from OCR
Xavier University

Training for Title IX Coordinator and University Personnel

- To invite staff and faculty to participate in one or more offered in-depth training sessions and to participate in refresher sessions on an annual basis thereafter
- To ensure that University staff and faculty are aware of any changes to the law, University police, and University practices in this area
- To conduct training that addresses the process for ensuring coordination between Campus Police and the Title IX Coordinator.
- To send staff and faculty annual notices from the University that addresses the topics described above
- To provide OCR with documentation that it implemented the above items within 15 calendar days. This includes a copy of the documents that the University adopted and provided notice of its revised Title IX grievance procedures, any agendas, outlines, handouts, and sign-in sheets from the training(s) provided to faculty and staff, a description of the qualifications of the presenters, a copy of the training program developed, and a copy of the notice sent out
- To conduct training on how to conduct and document adequate, reliable, and impartial Title IX investigations, including the appropriate legal standards to apply in a Title IX investigation, as well as how the University’s responsibility under Title IX and the Clery Act differ.
- To conduct training that advises staff to ensure that victims of sexual offenses that are criminal in nature are aware of the University’s Title IX obligations and its Title IX grievance procedures
- To develop an ongoing Title IX program for staff and faculty that will include annual training and annual written notices from the University to all staff and faculty.
Xavier University

Student-Focused Remedies

☐ To add additional representative leaders from the student community to the Title IX Committee
☐ The ensure that the Committee continues to take steps to identify strategies for ensuring that students understand their rights under title IX, as well as how to report possible violations of Title IX, and feel comfortable that the University officials to whom they make such reports will take them seriously and promptly and equitably respond

☐ To continue to identify strategies for the prevention of sexual harassment/sexual assault incidents, including outreach and educational activities, such as continuing the requirement that all incoming freshmen take a course or attend a workshop that highlights the connection between alcohol abuse and sexual harassment and sexual violence

☐ To offer a series of informational session(s) to students to ensure that they: (1) are aware of the University’s prohibition against sex discrimination (including sexual harassment, sexual assault, and sexual violence); (2) can recognize such sex discrimination and sexual harassment when they occur; and (3) understand how and with whom to report any incidents of sex discrimination

☐ To offer sessions that cover the University’s grievance procedures for Title IX complaints, as well as a general overview of what Title IX is, the rights it confers on students, the resources available to students who believe they have been victims of sexual harassment/assault/violence, and the existence of OCR and its authority to enforce Title IX

☐ To provide these sessions as part of the annual student orientation for new students, annual refresher sessions for returning students, and annual residence life orientation for students residing in campus housing

☐ To develop and submit to OCR a pamphlet on sexual harassment. The pamphlet will contain information on what constitutes sexual harassment, what to do if you have been the victim of sexual harassment, and contact information for on- and off-campus resources for victims of sexual harassment.

☐ To include in the pamphlet, information on how to file a complaint of sexual harassment with the University, how to file a separate complaint of sexual assault with the University, the name and contact information for the University’s Title IX Coordinator(s) and a description of the Title IX Coordinator’s role, information on how to obtain counseling and academic assistance in the event of sexual harassment, and information on what interim measures can be taken if the alleged perpetrator lives on campus and/or attends classes with the victim

☐ To post the above pamphlet, within 45 calendar days of receipt of written notification from OCR, on the University’s website, included in the University’s student handbooks and staff handbooks, discussed at all future student orientations, and distributed at any sex discrimination awareness events held in accordance with the above

☐ To widely post the key information contained in the pamphlet throughout campus buildings, in particular in residence calls, athletic facilities, student unions, and fraternity and sorority houses

☐ To distribute the pamphlet to each individual who makes a complaint of sexual harassment and/or assault
To conduct, with the support and assistance of student group leaders on campus, annual climate check or series of climate checks with students on campus to assess the effectiveness of steps taken pursuant to this Resolution Agreement or otherwise by the University to ensure a campus free of sexual harassment, including sexual assault and sexual violence.

To develop a monitoring program to assess the effectiveness of the University’s anti-harassment efforts, taking into consideration the recommendations and suggestions made by its Committee and the information gathered during the climate checks.

To conduct, at or before the conclusion of each academic year, an annual assessment of the effectiveness of the University’s anti-harassment efforts. The assessment shall include:

- Consultation with the Committee;
- Student and faculty surveys and at least one public meeting each academic year to identify student and faculty concerns and to determine where and when harassment on the basis of sex occurs;
- A review of all reports of harassment and University responses;
- Evaluation and analysis of the data collected, including a disaggregated assessment of whether the reported incidents of harassment have increased or decreased in number and severity; and
- Proposed recommendations for improvement to the University’s anti-harassment program and timelines for the implementation of the recommendations.

To review campus police records for the 2010-2011 and 2011-2012 academic years and, for complaints of sexual assault/sexual violence that were treated solely as a criminal or disciplinary matter and/or where the Title IX Coordinator was not involved, the University’s Title IX Coordinator will review the matter to determine whether the victim or the alleged perpetrator is still enrolled as a student and, if the incident(s) in question raise possible sexual harassment, take appropriate steps to address the harassment.

To issue a letter to Student A offering to reimburse her for counseling services undergone from April 8, 2011 through the present that relate to sexual harassment at issue in the complaint, to be paid within two weeks of Student A’s production to the University’s Title IX Coordinator of supporting documentation, such as billing invoices, receipts, cancelled checks, or other similar records of Student A’s out-of-pocket costs for the counseling, and reimbursement of the out-of-pocket costs for individual counseling twice a month by a licensed therapeutic counselor of Student A’s choice for one year from the date of this Agreement, also to be paid upon Student A’s production of supporting documentation of the cost of the counseling to the University’s Title IX Coordinator.

To take appropriate measures within one week to protect Student A in the event that the male student at issue in the above-referenced complaint returns to the University at any time during Student A’s enrollment, which could include some or all of the following: (1) the enforcement of a “no contact” order prohibiting the male student’s contact with Student A, directly or through a third party; (2) prohibiting the male student’s enrollment in the same courses, academic activities, and extracurricular activities in which Student A is enrolled; and/or (3) the designation of a contact person for Student A on campus should the male student approach Student A or otherwise violate the no-contact order.

- Department of Education’s Discussion to Notice of Proposed Rulemaking, 73 FR 74806 (December 9, 2008)
  - “In response to the commenter who stated that a school should not be prevented from releasing information when the subject of the record has waived any pretense of confidentiality by contacting the media and making the incident well-known in the community, we have found that in limited circumstances a parent or student may impliedly waive their privacy rights under FERPA by disclosing information to parties in a special relationship with the institution, such as a licensing or accreditation organization. However, we have not found and do not believe that parents and students generally waive their privacy rights under FERPA by sharing information with the media or other members of the general public. The fact that information is a matter of general public interest does not give an educational agency or institution permission to release the same or related information from education records without consent.”

• Department of Education’s Discussion to Notice of Proposed Rulemaking, 65 FR 41852 (July 6, 2000)
  – “Several commenters asked the Department to extend the theory of implied waiver of the right to consent to a non-litigation context. Specifically, they alluded to the Department’s ruling that when a student has taken an adversarial position against the institution, made written allegations of wrongdoing against the institution, and shared this information with third parties, the institution must be able to defend itself. While we offered this interpretation in a previous letter of finding, we did not propose to regulate on this issue in the NPRM. As a result, we cannot include these guidelines in our final regulations.”
• Department of Education’s Discussion to Notice of Proposed Rulemaking, 65 FR 41852 (July 6, 2000)
  – “While FERPA does not directly address this issue, the Department interprets FERPA to allow an educational agency or institution to infer the parent's or student's implied waiver of the right to consent to the disclosure of information from the student's education records if the parent or student has sued the institution. The Secretary believes this interpretation is sound because an educational agency or institution must be able to defend itself if a parent or student has initiated legal action against the agency or institution. This interpretation, however, does not place a requirement on educational agencies or institutions, and thus it is not included in the regulations.”
2011 Dear Colleague Letter

- “As discussed in the 2001 Guidance, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant’s age; whether there have been other harassment complaints about the same individual; and the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an ‘education record’ under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.”

- “For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant’s name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant’s confidentiality.”

- “Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator’s prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant’s sexual history.”

• 2011 Dear Colleague Letter
  – “Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant. FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student’s ‘education record.’ However, as stated in the 2001 Guidance, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall. Disclosure of other information in the student’s ‘education record,’ including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.”
  – “In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA ‘shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program.’ 20 U.S.C. § 1221(d). The department interprets this provision to mean that 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.”
2011 Dear Colleague Letter

- “Further, when the conduct involves a crime of violence or a non-forcible sex offense, FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed. Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution’s rules or policies.”

- “Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that “both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense.” Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act. Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.”

• 2011 Dear Colleague Letter
  – “Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses.”
  – “Any personally identifiable information from a student’s education record that the Title IX coordinator provides to the school’s law enforcement unit is subject to FERPA’s nondisclosure requirements.”
Revised Sexual harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties

In the development of both the 1997 guidance and the current revisions to the guidance, commenters raised concerns about the interrelation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and Title IX. The concerns relate to two issues: (1) the harassed student’s right to information about the outcome of a sexual harassment complaint against another student, including information about sanctions imposed on a student found guilty of harassment; and (2) the due process rights of individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.

FERPA generally forbids disclosure of information from a student’s “education record” without the consent of the student (or the student’s parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student’s education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student’s complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring.
The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department’s position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment.

There is, however, an additional statutory provision that may apply to this situation. In 1994, as part of the Improving America’s Schools Act, Congress amended the General Education Provisions Act (GEPA)—of which FERPA is a part—to state that nothing in GEPA “shall be construed to affect the applicability of ... title IX of the Education Amendments of 1972....” The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and 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. The Department is in the process of developing a consistent approach and specific factors for implementing this provision. OCR and the Department’s Family Policy Compliance Office (FPCO) intend to issue joint guidance, discussing specific areas of potential conflict between FERPA and Title IX.
FERPA is also relevant when a student accuses a teacher or other employee of sexual harassment, because written information about the allegations is contained in the student’s education record. The potential conflict arises because, while FERPA protects the privacy of the student accuser, the accused individual may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges. The 1997 guidance made clear that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment.

Several commenters urged the Department to expand and strengthen this discussion. They argue that in many instances a school’s failure to provide information about the name of the student accuser and the nature of the allegations seriously undermines the fairness of the investigative and adjudicative process. They also urge the Department to include a discussion of the need for confidentiality as to the identity of the individual accused of harassment because of the significant harm that can be caused by false accusations. We have made several changes to the guidance, including an additional discussion regarding the confidentiality of a person accused of harassment and a new heading entitled “Due Process Rights of the Accused,” to address these concerns.
• **Other Crimes Evidence / Pattern Evidence**
  – “Weigh... whether there have been other harassment complaints about the same individual” (DCL, p. 5)

• **Rape Shield**
  – “The alleged perpetrator should not be given access to communications between the complainant and the counselor or information regarding the complainant’s sexual history.” (DCL, p. 11, n. 29)

• **Forensic Evidence:**
  – “For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.” (DCL, p. 12, n. 30)

• **Coordination with Law Enforcement:**
  – “In one recent OCR sexual violence case, the prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances.” (DCL, p. 10, n. 25)
Dear Colleague Letter: Prompt Response

MUST

- Take immediate action to eliminate harassment, prevent its recurrence, and address its effects
- In all cases conduct an inquiry that is prompt, thorough, and impartial
- Take immediate steps to protect the student in the educational setting, even when there is an ongoing criminal investigation

SHOULD

- Undertake steps to protect the complainant promptly once it has notice of a sexual harassment or violence allegation
Dear Colleague Letter: Prompt Response/Remedies

SHOULD

☑ Consider the following remedies for the complainant:
☐ providing an escort to ensure that the complainant can move safely between classes and activities;
☐ ensuring that the complainant and alleged perpetrator do not attend the same classes;
☐ moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
☐ providing counseling services;
☐ providing medical services;
☐ providing academic support services, such as tutoring;
☐ arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant’s academic record; and
☐ reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.

SHOULD

☐ Take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates
☐ Notify the complainant of his or her options to avoid contact with the alleged perpetrator
☐ Allow students to change academic or living situations as appropriate
☐ Minimize the burden on the complainant when taking steps to separate the complainant and alleged perpetrator
☐ Not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain
☐ Ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement

MAY

☑ Prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation
Dear Colleague Letter:

Training/Education/Prevention

MUST

- Publish a notice of nondiscrimination and adopt and publish grievance procedures.
- Ensure that their employees are trained so that:
  - Employees know to report harassment to appropriate school officials; and
- Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have training or experience in handling complaints of sexual harassment and sexual violence
- Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have training in the recipient’s grievance procedure

SHOULD

- Include information to encourage students to report sexual violence to the appropriate school and law enforcement authorities.
- Be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.
- Ensure that complainants are aware of their Title IX rights and any available resources:
  - Counseling, health, and mental health services; and
  - Their right to file a complaint with local law enforcement
- Ensure that all persons involved in implementing grievance procedure (e.g. Title IX Coordinators, investigators, and adjudicators) have in training in confidentiality requirements
- In sexual violence cases, the fact-finder and decision-maker should have adequate training or knowledge regarding sexual violence
Dear Colleague Letter:
Training/Education/Prevention

SHOULD

- Assess student activities regularly to ensure that the practices and behavior of students do not violate the schools’ policies against sexual harassment and sexual violence.
- Develop policies, rules, and resources for students, faculty, coaches, and administrators.
- Include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive.
- Include in these materials:
  - Where and to whom students should go if they are victims of sexual violence
  - What to do if students or employees learn of an incident of sexual violence.

SHOULD

- Ensure that the procedures for resolving complaints of sex discrimination, including sexual harassment, are:
  - Written in language appropriate to the age of the school’s students;
  - Easily understood;
  - Easily located; and
  - Widely distributed.

- Make grievance procedures available:
  - Posting on school Web sites;
  - Sending electronically to all community members;
  - Making available at various locations throughout the school or campus; and
  - Summarizing in or attaching to major publications issued by the school.
Dear Colleague Letter: Training/Education/Prevention

SHOULD

- Provide training for employees, including any likely to witness or receive reports that includes practical information about how to identify and report sexual harassment and violence.
- Ensure that trainees:
  - Understand what types of conduct constitute sexual harassment;
  - Can identify warning signals; and
  - Know how to respond.
- Take proactive measures to prevent sexual harassment and violence by:
  - Implementing preventive education programs; and
  - Making victim resources, including comprehensive victim services, available.

MAY

- Include these education programs:
  - Orientation programs for new students, faculty, staff, and employees;
  - Training for students who serve as advisors in residence halls;
  - Training for student athletes and coaches; and
  - School assemblies and “back to school nights.”
- These programs should include a discussion of:
  - What constitutes sexual harassment and sexual violence;
  - The school’s policies and disciplinary procedures; and
  - The consequences of violating these policies.
• Yale University Voluntary Resolution Agreement
  – “The University will hold annual training for student leaders on the University’s alcohol and hazing policies and the Undergraduate Regulations including those related to sexual misconduct, resources on campus, and other topics it deems relevant.”

• Eastern Michigan University, Xavier University and the University of Notre Dame’s Voluntary Resolution Agreements
  – “At least one required training topic will specifically address the connection between alcohol abuse and sexual harassment and sexual assault.”
“In cases involving potential criminal conduct, school personnel must determine, consistent with state and local law, whether appropriate law enforcement or other appropriate authorities should be notified.”

“In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.”

DCL, p. 5
Alcohol

• University of Montana Resolution Agreement
  – Teaching students about the link “between alcohol and drug use and sex-based harassment and best practices to address that link, including, but not limited to: a. how to address the challenges of investigating incidents involving alcohol or drug use; and b. how to encourage victims and witnesses of sex-based harassment to cooperate with investigations if they have concerns about possible conduct implications of their own alcohol and drug use.”

• University of Montana Letter
  – Students will attend regular “training sessions that will emphasize: issues around consent in sexual interactions; the criminal, athletic, academic, housing, and student record-related consequences that flow from committing sexual assault, sexual harassment, and retaliation; the role of alcohol and drug use in such misconduct, including how such use does not excuse the perpetrator’s conduct and how such use relates to consent.”