

Campus Sexual Assault Response Teams

The Institutional Response to Sexual and Gender-Based Harassment and Violence Under Title IX

Gina Maisto Smith
Leslie M. Gomez
Cozen O'Connor

I. Introduction

The institutional response to sexual and gender-based harassment and violence is governed by a complex federal and state regulatory framework. The federal framework is based on three primary statutes: Title IX of the Education Amendments of 1972¹ (Title IX); the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act² (Clery Act or Clery); and Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA).³ Although this chapter focuses on an institution's responsibilities under Title IX, effective institutional responses demand a coordinated and integrated approach to Title IX, Clery and VAWA. Educational institutions should also carefully consider obligations under state and local laws.

II. Title IX

Title IX is a federal civil rights law which 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."⁴ Title IX applies to all educational institutions that receive federal financial assistance either directly or indirectly, including public and private elementary and secondary schools, school districts, colleges and universities.⁵

A. Scope

Although Title IX is perhaps best known for its mission to achieve gender equity in athletic programming, its protections, and the resulting responsibilities for an educational institution, are much broader in scope. Title IX prohibits discrimination on the basis of sex in all of an institution's programs and activities, including an institution's education programs and activities and in employment.⁶ Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct and sexual violence.⁷ Title IX's protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment. Finally, Title IX applies equally to students, employees and third parties.⁸

B. Law vs. Guidance

Title IX is accompanied by implementing regulations that have the force and effect of law.⁹ In addition to the implementing regulations, the U.S. Department of Education's

Office for Civil Rights (OCR) has issued guidance documents that provide policy guidance to assist educational institutions in meeting their Title IX obligations. Early guidance documents include the 1997 Sexual Harassment Guidance (1997 Guidance) and the 2001 Revised Sexual Harassment Guidance (2001 Guidance).¹⁰ In more recent years, OCR has designated the April 4, 2011 Dear Colleague Letter (2011 DCL) and the April 29, 2014 Questions and Answers on Title IX and Sexual Violence (Title IX Q&A) as significant guidance documents. These guidance documents provide information and examples to inform educational institutions about how OCR evaluates compliance with legal obligations under Title IX.¹¹ While these significant guidance documents do not purport to create or add legally binding requirements to applicable law, recent enforcement efforts by OCR have held institutions accountable for the tenets set forth in these guidance documents.

C. Notice & Obligation to Respond

Under Title IX, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred; if an investigation reveals the existence of a hostile environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence and address its effects.¹² An institution violates Title IX if it has “notice” of a sexually hostile environment and fails to take immediate and corrective action. In addition, an institution’s delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence may subject the complainant to a hostile environment and require the institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately.¹³

An institution is deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment. A responsible employee includes any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe has the authority or responsibility to take action.¹⁴ While institutions have some discretion to identify responsible employees on campus, OCR provides guidance about the identification, training and obligations of responsible employees.¹⁵ To facilitate the institution’s compliance with Title IX, responsible employees are required to share all relevant details about the reported incident, including identifying information about the complainant, respondent, other witnesses, and relevant facts, including the date, time, and location.¹⁶

Notice may come from a direct report or complaint by a student, employee or third party victim, or a responsible employee may observe or witness prohibited conduct. Notice may also come from indirect sources: a parent, friend or third party witness; social networking sites; the media; an open, pervasive or widespread pattern; or other facts and circumstances that should cause an institution, in the exercise of reasonable care, to initiate an investigation that would lead to the discovery of additional incidents.¹⁷ The institution’s Title IX obligations exist regardless of whether the individual who was harassed makes a complaint or asks the institution to take action.¹⁸

D. Core Title IX Tenets

The implementing regulations require that educational institutions publish a non-discrimination statement;¹⁹ appoint a Title IX Coordinator;²⁰ and adopt grievance procedures that are prompt and equitable.²¹

1. Notice Of Non-Discrimination

Title IX requires that institutions publish a non-discrimination statement.²² The statement must notify students, parents, and others that the institution does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. Educational institutions must also implement specific and continuing steps to inform students and others about the protections against discrimination on the basis of sex. The notice must make clear that the requirement of non-discrimination in educational programs covers employment and admission, and it must indicate that questions about Title IX may be referred to the institution's Title IX Coordinator or OCR. Institutions must include in the notice of non-discrimination the name, office address, telephone number and email address of the designated Title IX Coordinator.²³

2. Title IX Coordinator

Under Title IX, institutions are required to appoint a Title IX Coordinator to oversee the institution's Title IX compliance efforts, including the centralized review, investigation, and resolution of reports of sexual and gender-based harassment and violence under the institution's complaint processes, and to identify and address any patterns or systemic problems that arise during the review of such complaints. The Title IX Coordinator should be available to meet with students, employees and third parties as needed.²⁴ The Title IX Coordinator's role and responsibilities should be clearly defined, and the Title IX Coordinator's contact information should be easily accessible by students and staff.²⁵

Institutions must take steps to ensure that employees designated to serve as Title IX Coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the institution's Title IX procedures operate.²⁶ In addition, because complaints often involve an institution's law enforcement personnel, all school law enforcement employees should be given copies of the institution's Title IX policies and receive training on the institution's Title IX procedures and any other procedures used for reporting and investigating reports of sexual violence.²⁷

Where an institution chooses to designate more than one Title IX Coordinator, it should ensure that one individual has ultimate oversight responsibility, and the others should have titles that clearly show that they are in a deputy or supporting role to the senior coordinator. Finally, the Title IX Coordinator(s) should not have other job responsibilities that would potentially create a conflict of interest.²⁸

3. Prompt and Equitable Grievance Procedures

Title IX requires that an institution's grievance procedures be prompt and equitable.²⁹ To meet this requirement, an institution must provide notice to students and

employees of the grievance procedures, including where complaints may be filed, and that the grievance procedures apply to complaints filed by any individual alleging sexual or gender-based harassment or violence carried out by students, employees, or third parties.³⁰ The procedures must include: provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and evidence; designated and reasonably prompt time frames for the major stages of the complaint process; written notice to the complainant and respondent of the outcome of the complaint; and assurance that the institution will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.³¹ Grievance procedures should also include: a statement of the institution's jurisdiction over Title IX complaints; adequate definitions of sexual and gender-based harassment and violence and an explanation as to when such conduct creates a hostile environment; reporting policies and protocols, including provisions for requesting confidentiality when making a report; identification of the employee or employees responsible for evaluating requests for confidentiality; notice that Title IX prohibits retaliation; notice of an individual's right to file a criminal complaint and a Title IX complaint simultaneously; notice of available interim measures that may be taken to protect the student in the educational setting; the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint; notice of potential remedies for the complainant; notice of potential sanctions against respondents; and sources of counseling, advocacy, and support.³²

E. Interim Measures

Once an institution has notice of an allegation of sexual or gender-based harassment or violence allegation, it must promptly take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures while the investigation is pending.³³ The institution should notify the complainant of reasonably available measures and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance.³⁴ The institution should also inform the complainant of their Title IX rights and the right to report a crime to campus or local law enforcement.³⁵

The institution should consider a range of factors when determining the appropriate interim measures: the facts and circumstances of each case; the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the alleged harassment; any continuing effects on the complainant; any intersections between the complainant and respondent (shared residence hall, dining hall, class, transportation, or job location); and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).³⁶ In addition, OCR has advised that when taking interim measures, an institution should minimize the burden on the complainant and carefully consider the facts of the case when determining who to remove from a shared class or residence hall.³⁷

F. Complainant Agency and Autonomy

An institution is required to obtain a complainant's consent before beginning an investigation.³⁸ OCR strongly supports a complainant's interest in confidentiality, but recognizes that there are cases in which the institution must take action to meet its Title IX obligations

despite the complainant's request.³⁹ When a complainant makes a report but requests that their name or other identifying information not be shared with a respondent or that the institution not pursue an investigation, the institution should inform the complainant that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the respondent.⁴⁰ The institution should also explain that Title IX prohibits retaliation against an individual who raises a good faith civil rights claim and that the institution will take steps to prevent and respond to retaliation.⁴¹

In evaluating a request for confidentiality, the institution must balance the interest of the complainant with its dual obligation: 1) to provide a safe and non-discriminatory environment for all community members and, 2) to fulfill principles of fundamental fairness that require notice and an opportunity to respond before action is taken against a respondent. In making this determination, institutions should consider:

- The seriousness of the conduct
- The respective ages and roles of the complainant and respondent
- Whether there have been other complaints or reports of harassment or misconduct against the respondent
- The rights of the respondent to receive notice and relevant information before disciplinary action is sought
- Whether circumstances suggest there is an increased risk of the respondent committing additional acts of sexual violence or other violence
- Whether the respondent has a history of arrests or records from a prior school indicating a history of violence
- Whether the alleged perpetrator threatened further sexual violence or other violence against the student or others
- Whether the sexual violence was committed by multiple perpetrators
- Whether the circumstances suggest there is an increased risk of future acts of sexual violence under similar circumstances
- Whether the sexual violence was perpetrated with a weapon
- Whether the institution possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).⁴²

An institution 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, but its ability to do so may be limited based on the nature of the request by the complainant.⁴³ Even if not proceeding to an investigation or imposing disciplinary action, however, the institution should still provide reasonably available interim measures and take other steps to limit the effects of the alleged sexual or gender-based harassment or violence and prevent its recurrence.⁴⁴

G. Alternatives to Disciplinary Action

In response to a request for confidentiality, an institution may offer an alternative form of resolution.⁴⁵ Often referred to as voluntary, informal or remedies-based resolution, an alternative form of resolution can effectively eliminate a hostile environment without taking disciplinary action against a respondent. The inclusion of a remedies-based form of resolution

may aid complainants or third parties who are seeking anonymity or confidentiality or for whom pursuing formal disciplinary action may be a barrier to reporting or moving forward. It may also provide an institution with additional mechanisms to tailor a response that recognizes the unique facts and circumstances of a particular incident, particularly in cases where there is not a broader threat to individual or campus safety, or address conduct that might not rise to the level of a hostile environment.

Participation in an alternative form of resolution must be voluntary, and a complainant must be able to request to end voluntary resolution and initiate an investigation at any time.⁴⁶ While an institution may offer mediation in appropriate cases, mediation should not be used in cases involving sexual assault.⁴⁷ In addition, an institution should not compel a complainant to engage in mediation, to directly confront the respondent, or to participate in any particular form of alternative resolution.⁴⁸ The institution should maintain records of all reports and conduct referred for alternative resolution, and ensure that the resolution is completed within an appropriate time frame following the initial report.

An institution may take immediate and corrective action through the imposition of individual and community remedies designed to maximize the complainant's access to the educational, extracurricular and employment activities and to eliminate a hostile environment, prevent its recurrence and address its effects. Potential remedies include providing increased monitoring, supervision, or security; providing training and education materials for students and employees; changing and publicizing institutional policies on sexual and gender-based harassment and violence; conducting climate surveys regarding sexual violence; imposing short- or long-term protective measures for a complainant; and other measures that can be tailored to the facts and circumstances.⁴⁹

H. Investigations

OCR uses the term "investigation" to refer to the process an institution uses to resolve sexual violence complaints, including the fact-finding investigation and any hearing and decision-making process the institution uses to determine whether the conduct occurred by a preponderance of the evidence and if so, the appropriate sanctions and remedies to eliminate the sexual violence/ hostile environment, prevent its recurrence, address its effects.⁵⁰ While an investigation may include a hearing to determine whether the conduct occurred, Title IX does not require a hearing.⁵¹ Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation.

For an educational institution, the fact-finding investigation of sexual and gender-based harassment and violence is one of the most sensitive and difficult tasks involved in the institutional response. The quality and integrity of an investigation is vital in providing a sufficient factual foundation to support determinations of responsibility and establishing faith in outcomes and sanctions. In the context of word-against-word credibility assessments, it is imperative that this aspect of the institution's response be conducted by individuals with appropriate training and experience.

According to the 2011 Dear Colleague Letter, Title IX requires adequate, reliable and impartial investigations that are conducted by investigators with sufficient experience or

training.⁵² OCR expanded on this guidance in the 2014 Title IX Q&A, outlining significant training requirements for investigators and noting that “provisions for adequate, reliable, impartial and prompt investigation of complaints require: the opportunity for both parties to present witnesses and evidence; interim measures to be implemented before the final outcome of the investigation; periodic updates on the status of the investigation to be presented to the parties; and the application of the preponderance of the evidence standard.”⁵³ OCR has also noted that “a balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.”⁵⁴ Notably, OCR has not provided specific standards of care for investigations beyond broadly capturing concepts such as adequate, reliable, impartial and thorough, and institutions are free to designate investigators of their choosing, whether they be employees of the institution or external resources.

Institutions can choose from a variety of models: campus investigator, public safety, sworn law enforcement officers, student conduct staff, human resources personnel, or outside investigator. Regardless of the model, the goal is the same: fair and impartial gathering of the facts by sensitive, trauma-informed individuals with training and experience.

Institutions should separate the provision of support functions from the investigative functions. To ensure the integrity of the investigation, the responsibility for implementing support services and interim measures should be managed by an individual who is not directly involved in the investigation of an allegation. Combining support and investigative functions can blur the clear lines of demarcation necessary to maintain a neutral and impartial investigation. It can also create confusion for the complainant or respondent and lead to a lack of trust in the integrity of the investigation based on a perception of bias toward one party or the other.

I. Coordination with Law Enforcement

A criminal investigation and a Title IX investigation are two distinct processes, each with its own set of procedural protections and legal standards.⁵⁵ The purpose of a criminal investigation is to determine whether an individual violated a law, and if so, the individual may be imprisoned or subject to other criminal penalties.⁵⁶ In the criminal justice context, the Constitution provides criminal defendants who face the risk of incarceration numerous protections including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination and the right to confrontation.⁵⁷ In addition, police and prosecutors have discretion to decide which complaints to investigate and immunity for civil liability when they decline to investigate or prosecute.⁵⁸

In contrast, Title IX investigations, which will never result in an incarceration, have different procedural protections and legal standards.⁵⁹ Under Title IX, institutions are required to respond to all complaints of Title IX-related conduct.⁶⁰ The Title IX obligation to resolve all complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students is not discretionary.⁶¹

In all cases, the institution should notify the complainant of the right to file a criminal complaint and should not dissuade a complainant from doing so at any stage of the institution’s Title IX investigation.⁶² While Title IX does not require an institution to report

alleged incidents of sexual violence to law enforcement, an institution may have reporting obligations under state, local, or other federal laws.⁶³ Where there are concurrent investigations, an institution should coordinate investigations and establish appropriate fact-finding roles for each investigator.⁶⁴ An institution should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event.⁶⁵ However, an institution should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation.⁶⁶ Although an institution may need to delay temporarily the fact-finding portion of a Title IX investigation while law enforcement is gathering evidence, the institution must still take interim measures to protect the complainant and the community.⁶⁷

OCR recommends that an institution enter into a memorandum of understanding (MOU) or other agreement with local law enforcement and local prosecutor's office regarding the protocols and procedures for referring allegations of sexual violence, sharing information and conducting contemporaneous investigations.⁶⁸ Any MOU or other agreement must allow the institution to meet its Title IX obligation to resolve complaints promptly and equitably and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.⁶⁹

Timeframes

As noted above, institutions are required to designate reasonably prompt timeframes for the major stages of the complaint process, which include timeframes for the investigation, notice of the outcome and any appeal. In the April 4, 2011 DCL, OCR opined that a typical investigation takes approximately 60 calendar days following receipt of the complaint.⁷⁰ OCR further noted that a determination of timeliness may depend on the complexity of the investigation and the severity and extent of the harassment.⁷¹

In the April 2014 Title IX Q&A, OCR clarified that the 60 days referenced are calendar days, and inclusive of the entire investigation process, including the fact-finding investigation, determining the outcome, and imposing any appropriate sanctions and remedies.⁷² OCR clarified that the 60-day timeframe does not include appeals, but noted that undue delays in the appeal process may impact the promptness of the institution's response under IX.⁷³

OCR also conceded that it does not require an institution to complete an investigation within 60 days and that OCR will evaluate promptness on a case-by-case basis.⁷⁴ In addition to considering the complexity of the investigation and the severity and extent of the alleged conduct, OCR will also evaluate the impacts of a parallel criminal investigation, school breaks, witness availability and other factors affecting the integrity of the process.⁷⁵

III. Training Requirements

Title IX requires educational institutions to provide education and prevention programs.⁷⁶ Title IX requires training of all community members regarding what constitutes sexual harassment and sexual violence, the institution's policies and disciplinary procedures and the consequences of violating those policies.⁷⁷ Title IX also requires more specific training for employees, implementers and adjudicators relating to the institution's grievance procedures and its proper response to complaints of sexual harassment and sexual violence.⁷⁸

A. Employees

According to OCR, while there is no minimum number of hours required, training should be provided on a regular basis.⁷⁹ Each institution should determine, based on its particular circumstances, how training should be conducted, who has the relevant expertise required to conduct the training and who should receive the training, to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX.⁸⁰

All employees likely to witness or receive reports of sexual violence (including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsel, athletic coaches, health personnel and resident advisors) should receive practical information including:⁸¹

- How to prevent and identify sexual violence, including same-sex sexual violence;
- The behaviors that may lead to and result in sexual violence;
- The attitudes of bystanders that may allow conduct to continue;
- The potential for re-victimization by responders and its effect on students;
- Appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language and the impact of trauma on victims;
- The person(s) to whom such misconduct must be reported;
- Information on how to inform students of the reporting obligations of responsible employees;
- Students' option to request confidentiality and available confidential advocacy, counseling or other support services; and
- Rights to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.⁸²

In addition, employees designated as responsible employees should receive specific training on their reporting obligations, including how to respond appropriately to reports of sexual violence, what should be included in a report and any consequences for the failure to report, and the procedure for responding to students' requests for confidentiality, including providing the contact information for the Title IX coordinator.⁸³ Responsible employees should also understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the Title IX coordinator.⁸⁴

Professional counselors, pastoral counselors and non-professional counselors or advocates must understand the extent to which they may keep a report confidential.⁸⁵

Finally, all persons involved in implementing an institution's grievance procedures (e.g., Title IX coordinators, others who receive complaints, investigators and adjudicators) must have training or experience in handling sexual violence complaints and in the operation of the grievance procedures.⁸⁶ Training for implementers should include:

- Information on working with and interviewing persons subjected to sexual violence;
- Information on particular types of conduct that constitute sexual violence, including same-sex sexual violence;
- The proper standard of review for sexual violence complaints (preponderance of the evidence);
- Information on consent and the role drugs or alcohol can play in the ability to consent;
- The importance of accountability for individuals found to have committed sexual violence;
- The need for remedial actions for the perpetrator, complainant and school community;
- How to determine credibility; how to evaluate evidence and weigh it in an impartial manner;
- How to conduct investigations;
- Confidentiality;
- The effects of trauma, including neurobiological change; and
- Cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.⁸⁷

B. Students

Institutions should provide age-appropriate training to their students regarding Title IX and sexual violence.⁸⁸ Training may be provided separately or as part of the institution's broader training on sex discrimination and sexual harassment.⁸⁹ However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students.⁹⁰ The institution should include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights.⁹¹ Institutions should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals.⁹² OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the institution's policies;
- The institution's definition of consent applicable to sexual conduct, including examples;
- How the institution analyzes whether conduct was unwelcome under Title IX;
- How the institution analyzes whether unwelcome sexual conduct creates a hostile environment;
- Reporting options, including formal reporting and confidential disclosure options and any timeframes for reporting;

- The institution’s grievance procedures used to process sexual violence complaints;
- Disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- Effects of trauma, including neurobiological changes;
- The role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- Strategies and skills for bystanders to intervene to prevent possible sexual violence;
- How to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX’s protections against retaliation.⁹³

The training should also encourage students to report incidents of sexual violence and should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a hostile environment before reporting the incident.⁹⁴ OCR recommends that institutions inform students that the primary concern is student safety, and that use of alcohol or drugs never makes the complainant at fault for sexual violence.⁹⁵ It is also important for institutions to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence, including the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services and legal assistance.⁹⁶

IV. Recommendations for Effective Implementation of Title IX

A. Elements of an Effective Response

Key elements of an effective institutional response include:

- Adherence to coordinated and accessible policies and procedures;
- An independent Title IX Coordinator with sufficient authority and resources to effectively navigate oversight responsibilities;
- A coordinated multi-disciplinary response team to provide support, resources and accommodations and to facilitate informed decision-making;
- A centralized reporting and review process to ensure consistent application of policies and procedures;
- Delineation between confidential resources with legally-protected and privileged communications and reporting options which trigger an institution’s Title IX obligations;

- Coordination of employee reporting obligations under Title IX, Clery, VAWA, mandatory child abuse reporting, and other state provisions to assure that all individuals are aware of how and where information that is shared with an employee will be disclosed;
- An initial assessment in each report designed to evaluate known facts and circumstances, take interim steps to protect the complainant and the campus community, facilitate compliance with Title IX, Clery and VAWA responsibilities, and identify the appropriate institutional response (remedies-based vs. disciplinary);
- Protocols for the identification, implementation and enforcement of interim measures;
- Separation of support and advocacy functions from impartial investigative and adjudicative processes;
- Reliable and thorough investigations by experienced and trained investigators;
- Procedures for resolution that recognize the balance between complainant autonomy and agency and fair and impartial process that incorporates notice and an opportunity to be heard;
- Regular communication with the parties and transparency about processes to maintain the trust of individual stakeholders and the community;
- Consistent training, education and prevention programs; and
- Centralized record-keeping and documentation for tracking and monitoring reported incidents, monitoring patterns and assess campus climate.

B. The Title IX Team

To successfully implement a coordinated and compliant response, we recommend that institutions designate a multi-disciplinary team of implementers (Title IX team). The Title IX team is a core group of administrators who work together to implement intentional, consistent, and compassionate responses. The membership of the Title IX team is likely a subset of an institution's Sexual Assault Response Team. The goal is to provide a centralized response that is both compliant with law and sensitive to the unique issues attendant to a case of sexual or gender-based harassment or violence. Sharing all reports with the Title IX Team will help to ensure a prompt and equitable review, investigation and resolution of complaints. Maintaining a centralized, team-based process encourages consistent application of the institution's Title IX policy and allows the institution to respond promptly and equitably to eliminate sexual harassment, prevent its recurrence and eliminate its effects. A team-based approach will help to eliminate ad hoc responses across campus, allow for central record keeping for assessment of patterns, and ensure that the review or investigation is thorough, fair and impartial.

The Title IX Team, which serves as the institutional infrastructure for the centralized review, investigation, and resolution of all Title IX-related reports, may include the Title IX Coordinator, Deputy Title IX Coordinators, student conduct or student affairs professionals, campus safety/police officers, human resources professionals, faculty leadership, health services, counseling, members of the LGBTQ or multicultural communities, and other campus members as identified on each campus. All team members should be appropriately

trained in the regulatory framework, dynamics of sexual assault and harassment, and in the institution's grievance procedures.

In order to fully benefit from the team approach, a first step is to identify the sequence of potential steps in the institutional response. This process involves clearly identifying and articulating the roles and responsibilities of each team member. This step also includes discussion about the primary responsibility of each department, protocols for the coordination and sharing of information between and among relevant departments, clear articulation of roles and responsibilities of implementers and the internal operating procedures that should be followed to avoid overlapping responsibilities or conflicts in roles. It also requires a clear articulation of who is accountable for each task, who has oversight responsibility and who will be vested with ultimate decision-making authority on critical issues.

This mapping of roles and responsibilities can serve as the initial framework for the drafting of internal operating protocols. Those internal operating procedures should funnel all information to a centralized institutional response, outline workflow steps, utilize template forms and communications and create checklists to ensure a consistent response. Institutions should identify critical stages of the assessment and investigative process and build decision tree models that outline the legal framework, the list of relevant factors that should be evaluated, the individuals who should be consulted in making a determination, the individual with authority to make the decision, and the process for documenting information considered. Critical stages include: timely warning assessment; determining how to proceed if a complainant requests that their name not be shared with the respondent or no investigation be pursued; implementation of interim remedies; imposing interim suspension or leave; responding to retaliation and other key determinations to seek consistent institutional responses. This approach will minimize the risks attendant to relying upon ad hoc responses to each incident. There should also be clear expectations about coordinated communication and protocols for regular documentation and record-keeping.

C. Initial Assessment

The first step for any institution upon receipt of a report of sexual misconduct should be to conduct an initial assessment that considers the nature of the report, the safety of the individual and campus community, the complainant's expressed preference for resolution, and the necessity for any interim remedies or accommodations to protect the safety of the complainant or the community. Following this assessment, an institution may: 1) seek an alternate resolution that does not involve disciplinary action against a respondent; or 2) seek judicial resolution by initiating an investigation to determine if disciplinary action is warranted. The goal of the investigation is to gather all relevant facts and determine if there is sufficient information to refer the report for disciplinary action. Each resolution process should be guided by the same principles of fairness and respect for all parties.

As provided in OCR guidance, in the course of a Title IX assessment, an institution should consider the interest of the complainant and the complainant's expressed preference for manner of resolution. Where possible and as warranted by an assessment of the facts and circumstances, an institution should seek action consistent with the complainant's request.

As part of the initial assessment of the facts, an institution should:

- Assess the nature and circumstances of the allegation
- Address immediate physical safety & emotional well-being
- Notify the complainant of the right to notify or decline to notify law enforcement
- Notify the complainant of the importance of preservation of evidence
- Notify the complainant of the availability of medical and mental health resources
- Identify appropriate Clery responsibilities, including entering the report into the institution's daily crime log and assessing the reported conduct for the need for a timely warning
- Provide the complainant with information about on and off-campus resources
- Notify the complainant of the range of interim accommodations and remedies
- Provide the complainant with an explanation of the procedural options
- Identify support options for the complainant and respondent, including the right to an advisor of choice
- Assess for pattern evidence or other similar conduct by respondent
- Consider the complainant's expressed preference for manner of resolution and any barriers to proceeding
- Explain the institution's policy prohibiting retaliation

The initial review should proceed to the point where a reasonable assessment of the safety of the individual and of the campus community can be made, and the Title IX Coordinator and/or Team has sufficient information to determine the best course of action.

At the conclusion of the Title IX Assessment, a Title IX Coordinator, in coordination with the Title IX team, should determine the appropriate manner of resolution, which may include alternative resolution or the initiation of an investigation to determine if disciplinary action is warranted. As appropriate, if the respondent is known and has been notified of the allegations, the institution should also provide information about on and off campus resources, the applicability of interim measures, and an explanation of the procedural options.

¹ Title IX is codified starting at 20 U.S.C. § 1681.

² 20 U.S.C. § 1092(f).

³ Pub. L. 113-4, Violence Against Women Act of 2013 (Mar. 7, 2013).

⁴ 20 U.S.C. § 1681(a).

-
- ⁵ 20 U.S.C. § 1681(a); 34 C.F.R. § 106.11.
- ⁶ See generally 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106.
- ⁷ U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, April 4, 2011 (2011 DCL) at 1.
- ⁸ See 34 C.F.R. § 106.8(b) (requiring schools to adopt and publish grievance procedures for students and employees); 34 C.F.R. § 106.51 (prohibiting discrimination on the basis of sex in employment in education programs or activities); see also 2011 DCL at n. 11 (“Title IX also protects employees of a recipient from sexual harassment.”).
- ⁹ These implementing regulations are codified at 34 C.F.R. § 106.
- ¹⁰ The 2001 Guidance replaced the *1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. 62 Fed. Reg. 12,034 (Mar. 13, 1997). The 1997 guidance was “the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers” and the document was made available for public comment. The 2001 Guidance was also published in the Federal Register, at 62 Fed. Reg. 66,092 (Nov. 2, 2000), and was available for public comment. The 2001 Guidance is available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
- ¹¹ See 2011 DCL at n. 1.
- ¹² *Id.* at 4; 1997 Guidance; Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, April 29, 2014 (Title IX Q & A) at 2-3.
- ¹³ Title IX Q & A at 4.
- ¹⁴ Title IX Q & A at 15-16.
- ¹⁵ Title IX Q & A at 14-18.
- ¹⁶ Title IX Q & A at 16.
- ¹⁷ Title IX Q & A at 2.
- ¹⁸ 1997 Guidance.
- ¹⁹ 34 C.F.R. § 106.9.
- ²⁰ 34 C.F.R. § 106.8(a).
- ²¹ 34 C.F.R. § 106.8(b).
- ²² 34 C.F.R. § 106.9.
- ²³ Office for Civil Rights, U.S. Dept. of Education, *Notice of Non-Discrimination*, <http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>.
- ²⁴ 2011 DCL at 7.
- ²⁵ 34 C.F.R. § 106.8(a); 2011 DCL at 6.
- ²⁶ 2011 DCL at 7.
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ 34 C.F.R. § 106.8(b).
- ³⁰ Title IX Q & A at 12-13.
- ³¹ *Id.*
- ³² *Id.*
- ³³ Title IX Q & A at 32-33.
- ³⁴ Title IX Q & A at 32-33.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ 2011 DCL at 5.
- ³⁹ Title IX Q & A at 18-19.
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² Title IX Q & A at 19-22.
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ 2011 DCL at 8.
- ⁴⁶ 2011 DCL at 8.
- ⁴⁷ 2011 DCL at 8.
- ⁴⁸ 2011 DCL at 8.
- ⁴⁹ Title IX Q & A at 20.
- ⁵⁰ Title IX Q & A at 24-25.

⁵¹ Title IX Q & A at 25.
⁵² 2011 DCL at 9-12.
⁵³ Title IX Q & A at 3, 12-14.
⁵⁴ *Id.* at 24-26.
⁵⁵ *Id.* at 27.
⁵⁶ *Id.*
⁵⁷ *Id.*
⁵⁸ *Id.*
⁵⁹ *Id.*
⁶⁰ *Id.*
⁶¹ *Id.*
⁶² Title IX Q & A at 27.
⁶³ *Id.*
⁶⁴ *Id.* at 24-26.
⁶⁵ *Id.*
⁶⁶ *Id.* at 28.
⁶⁷ *Id.*.
⁶⁸ *Id.*
⁶⁹ *Id.*
⁷⁰ 2011 DCL at 12.
⁷¹ *Id.*
⁷² Title IX Q & A at 31-32.
⁷³ *Id.*
⁷⁴ *Id.*
⁷⁵ *Id.*
⁷⁶ 2011 DCL at 14-15.
⁷⁷ 2011 DCL at 14-15.
⁷⁸ *Id.* at 4, 7-8, 12; Title IX Q & A at 38-42.
⁷⁹ Title IX Q & A at 39.
⁸⁰ *Id.*
⁸¹ *Id.*
⁸² *Id.* at 38-39.
⁸³ *Id.* at 38.
⁸⁴ *Id.*
⁸⁵ *Id.*
⁸⁶ *Id.* at 40.
⁸⁷ *Id.*
⁸⁸ *Id.* at 41.
⁸⁹ *Id.*
⁹⁰ *Id.*
⁹¹ *Id.*
⁹² *Id.*
⁹³ *Id.*
⁹⁴ *Id.* at 41-42.
⁹⁵ *Id.* at 42.
⁹⁶ *Id.*