



Title IX & Clery Act Annual Training

Tuesday, August 4, 2020

© Copyright DL Training Solutions LLC 2020

DL Training Solutions LLC

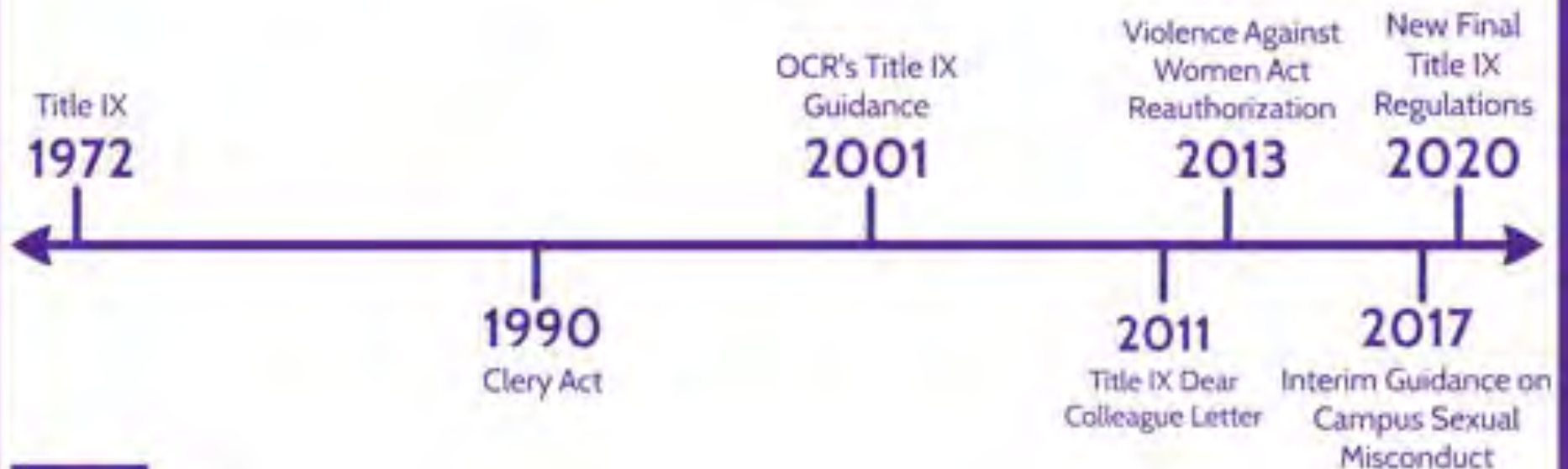


Disclaimer

DL Training Solutions LLC

The material presented is intended for information purposes only. It is not intended as professional advice and should not be construed as such. The material presented is included with the understanding and agreement that DL Training Solutions LLC is not engaged in rendering legal or other professional services by presenting this material. The services of a competent professional should be sought if legal or other specific expert assistance is required. These presentation materials and the information provided herein have not been reviewed and/or approved by the U.S. Department of Education. Any unauthorized use of material contained herein is at the user's own risk. Transmission of the information and material herein is not intended to create, and receipt does not constitute, an agreement to create an attorney-client relationship with DL Training Solutions LLC or any member thereof. DL Training Solutions LLC does not necessarily sponsor, endorse or otherwise approve of the materials appearing in such sites.

Title IX - Clery Act Timeline



DL Training Solutions LLC



Title IX of the Education Amendments of 1972

Prohibits sex discrimination in education programs that receive federal funding.

- Sexual harassment, including sexual assault, is a type of sex discrimination that is banned by Title IX.



Clery Act:

Every institution must:

- **Collect, classify, and count crime reports and crime statistics.**
- Issue a **timely warning** for any *Clery Act* crime that represents an ongoing threat to the safety of students or employees.
- Issue an **emergency notification** upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.
- **Publish an annual security report** containing safety- and security-related policy statements and crime statistics and distribute it to all current students and employees. Schools also must inform prospective students and employees about the availability of the report.
- **Submit crime statistics to ED.** Each year in the fall schools must participate in a Web-based data collection to disclose crime statistics by type, location, and year.
- ED can issue civil **fines of up to \$58,328 per violation** for a substantial misrepresentation of the number, location, or nature of the crimes required to be reported or for a violation of any other provision of the safety- and security-related *HEA* regulations.



2001 OCR Title IX Guidance

Provides the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.

- Describes the regulatory basis for a school's compliance responsibilities under Title IX
- Outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations
- Provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur



2011 Dear Colleague Letter

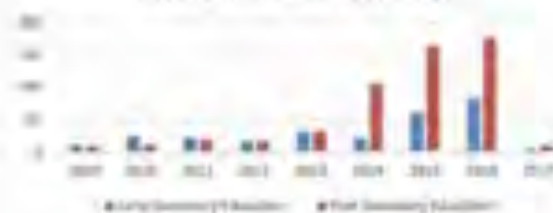
- Was deemed a "significant guidance document" by ED
- Detailed schools' obligations and the appropriate response to sexual harassment and violence
- Guidance was repealed by Secretary DeVos in September 2017



Appendix D: Number of Title IX Complaints, Investigations, and Resolutions 2009-2016

Source: Department of Education, Office for Civil Rights

Number of Sexual Violence Complaints
Received Fiscal Year 2009 - 2016



Number of Sexual Violence Investigations
Fiscal Year 2009 - 2016



Number of Sexual Violence Resolutions
Fiscal Year 2009 - 2016



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



Violence Against Women Reauthorization Act (2013)

Amended the Clery Act to require that schools compile statistics for incidents of:

- domestic violence,
- dating violence,
- sexual assault, and
- stalking

(collectively referred to as "sexual misconduct") that occur on or near campus.



Violence Against Women Reauthorization Act (2013)

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

- The school's **educational programs** to promote awareness of sexual misconduct;
- Possible **sanctions** schools may impose regarding sexual misconduct;
- **Procedures that victims should** follow if an incident of sexual misconduct has occurred;
- The school's procedures for conducting a **disciplinary proceeding** in cases of alleged sexual misconduct;



VAWA Challenges - Non-Traditional Higher Education

The VAWA requirements present particular challenges to postsecondary trade and career schools.

- These schools typically do not have on-campus police or dedicated security forces.
- The Title IX coordinator at these schools is often the director or another administrator whose primary job functions pertain to school operations.
- Given the size of the student body, lack of residential student housing, and limited school-sponsored extracurricular activities, incidents of sexual misconduct may be infrequent at these types of institutes.



VAWA Challenges - Non-Traditional Higher Education

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

- For example, the commenters referenced the requirement for institutional disciplinary proceedings in the case of alleged dating violence, domestic violence, sexual assault, or stalking.
- In response, the Department noted that institutions are not making determinations of criminal responsibility but are determining whether the institution's own rules have been violated.
- The Department further noted that students at smaller institutions should have the same protections as their counterparts at larger institutions.



2014 White House Task Force - First Report Findings:

- One in five women is sexually assaulted in college
- Most often by someone she knows
- Most often not reported
- Many survivors feel isolated, ashamed, or to blame
- Although less often, men also victims

Source: Not Alone, The First Report of the White House Task Force to Protect Students From Sexual Assault, April, 2014, accessed December 5, 2017, <https://www.justice.gov/ovw/page/file/905942/download>



BJS 2016 Campus Climate Survey

- The Bureau of Justice Statistics developed a pilot campus climate survey to address key Task Force goals and key issues related to the measurement of rape and sexual assault in self-report surveys.
- Completed surveys were collected from more than 23,000 undergraduate students at nine schools
 - Data collection occurred March through May 2015
- The overall prevalence rate for completed sexual assault experienced by undergraduate females, averaged across the nine schools, was 10.3%

"Campus Climate Survey Validation Study Final Technical Report," (January 2016), Bureau of Justice Statistics, accessed January 21, 2016 (<http://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>)



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

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows **or reasonably should know** of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.

THIS STANDARD HAS BEEN MODIFIED BY NEW TITLE IX REGULATIONS EFFECTIVE AUGUST 14, 2020

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



2020 FINAL Title IX Regulations - Effective 8-14-20

Final Rule published May 6, 2020

"This new regulation requires schools to act in meaningful ways to support survivors of sexual misconduct, without sacrificing important safeguards to ensure a fair and transparent process. We can and must continue to fight sexual misconduct in our nation's schools, and this rule makes certain that fight continues."

- U.S. Secretary of Education Betsy DeVos, Press Release May 6, 2020



106.44 (a) General response to sexual harassment.

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.



106.44 (a) General response to sexual harassment.

Title IX Coordinator must promptly contact the complainant to:

- discuss the availability of supportive measures,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- explain to the complainant the process for filing a formal complaint.



106.44 (a) General response to sexual harassment.

"Education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- Every Title IX Coordinator, investigator, decision-maker, and person who facilitates an informal resolution process, must be trained on (among other things) "the scope of the recipient's education program or activity,"
- Nothing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.
 - May offer supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions



106.44 (a) General response to sexual harassment.

Scope of "Education program or activity:"

A teacher's sexual harassment of a student is likely to constitute sexual harassment "in the program" of the school even if the harassment occurs off campus.

Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

May include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.



New Title IX Regulations § 106.8 (b) Dissemination of policy

Each recipient must:

- provide notice that it does not discriminate on the basis of sex in the education program or activity that it operates;
- prominently display the Title IX Coordinator contact information and grievance policy on its website, if any, and in each handbook or catalog.



New Title IX Regulations § 106.8 (c) Adoption of grievance procedures.

- A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee Title IX complaints.
- A recipient must provide notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.



Transgender Students

Joint Dear Colleague Letter issued by DOJ & ED on 5/13/16

- Treated a student's gender identity as the student's sex for Title IX purposes
- School could not treat a transgender student differently from the way it treated other students of the same gender identity
- A school's failure to treat students consistent with their gender identity may have created or contributed to a hostile environment in violation of Title IX

JOINT DOJ & ED LETTER WITHDRAWN BY TRUMP ADMINISTRATION 2/17/17

JUNE 2020 - US Supreme Court rules that firing an individual for being homosexual or transgender is impermissible sex discrimination (Bostock v. Clayton). While this case was not decided under Title IX, it may influence future court interpretations regarding the scope of Title IX.



State Policies

State legislatures have also addressed the issues of sexual misconduct on college campuses, including:

- Affirmative Consent
- Transcript Notations
- Mandatory Reporting
- Access to Medical Attention
- Memorandums of Understanding (MOU)
- Climate Surveys
- Good Samaritan Provisions

To the extent of a conflict between State or local law and Title IX, the obligation to comply with Title IX takes priority



Title IX Coordinator

DL Training Solutions LLC



Dear Colleague Letter April 24, 2015

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



New Title IX Regulations § 106.8 (a) Designation of Title IX Coordinator

- Each recipient must designate at least one employee as the "Title IX Coordinator."
- Must notify applicants for admission and employment, students, and employees of the Title IX Coordinator's name or title, office address, email address, and telephone number.
- Any person may report sex discrimination, including sexual harassment, in person, by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
- Report may be made at any time (including during non-business hours) by using the telephone number or email address, or by mail to the office address, listed for the Title IX Coordinator.



Title IX Coordinator

Title IX does not categorically exclude particular employees from serving as Title IX coordinators.

- However, when designating a Title IX coordinator, an institution should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest.
- A dedicated, full-time Title IX coordinator is the ideal.
- Designating a full-time Title IX coordinator will also minimize the risk of a conflict of interest.
- Some colleges and universities may not have the resources to support a full-time position.
- If this is the case, it is critical that the employee has all the qualifications, training, authority, and time to address all complaints raising Title IX issues.



Title IX Coordinator Responsibilities

Responsible for monitoring and overseeing school's compliance with Title IX and prevention of sexual misconduct.

- Knowledgeable and trained in school's policies and procedures and relevant state and federal law.
- Available to advise individuals about school and community resources and reporting options.
- Available to provide assistance to school employees regarding how to respond appropriately to report of Title IX-related prohibited conduct and related retaliation.



Title IX Coordinator Responsibilities

- Ensures effective implementation of school's sexual misconduct policies and procedures.
- Oversees training, prevention, and education efforts and annual reviews of climate and culture.
- Overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints.
- The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.



Training & Education

DL Training Solutions LLC



VAWA (Clery Act) Requirements:

Institutional disciplinary hearings must be:

“conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability”

20 USC 1092(f)(8)(iv)(I)(bb)



Prevention and Education

Clery Act requires that an institution's annual security report include a statement of policy that addresses the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking.

- The statement must include—
 - i. A description of the institution's primary prevention and awareness programs for all incoming students and new employees, and
 - ii. A description of the institution's ongoing prevention and awareness campaigns for students and employees



Primary Prevention Programs

Defined in regulations as programming, initiatives, and strategies that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through:

- the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality,
- encourage safe bystander intervention, and
- seek to change behavior and social norms in healthy and safe directions.

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



Prevention and Education

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

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



Prevention and Education

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

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



New Title IX Regulations: § 106.45 (b)(10) Recordkeeping.

A recipient must maintain for a period of **seven years** records of all materials used to train Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process.

These training materials must be publicly available on the recipient's website, or if the recipient does not maintain a website then upon request.



Clery Reporting

DL Training Solutions LLC



Reporting Clery Crimes

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



The tools you need for Campus Safety and Security analysis

Get Data for One School

Select from a variety of data general information and the most recent data of safety, security, campus crime, and the National Crime Data Center.

Compare Data for Multiple Schools

Select from a variety of data general information and the most recent data of safety, security, campus crime, and the National Crime Data Center.

Download Custom Data

Select from a variety of data general information and the most recent data of safety, security, campus crime, and the National Crime Data Center.

Generate Trend Data

Select from a variety of data general information and the most recent data of safety, security, campus crime, and the National Crime Data Center.

Download Data

Select from a variety of data general information and the most recent data of safety, security, campus crime, and the National Crime Data Center.

What is the Campus Safety and Security Data Analysis Cutting Tool?

The Campus Safety and Security Data Analysis Cutting Tool is designed to provide the most comprehensive and accurate data for campus safety and security. The data is collected from the 2010 Campus Safety and Security Survey, which is a national survey of campus safety and security. The data is collected from the 2010 Campus Safety and Security Survey, which is a national survey of campus safety and security. The data is collected from the 2010 Campus Safety and Security Survey, which is a national survey of campus safety and security.

<https://ope.ed.gov/campussafety/#/>



Clery Geography

You must disclose statistics for reported Clery crimes that occur:

- on campus,
- on public property within or immediately adjacent to the campus, and
- in or on noncampus buildings or property that your institution owns or controls.



Clery Geography: On-Campus

Under Clery, the **on-campus** category encompasses the following:

- Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and
- Any building or property that is within or reasonably contiguous to the property described above, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).

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

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



Clery Geography: On-Campus

Institutions that lease space in strip malls:

- Your campus consists of any space within the strip mall that is covered by your written agreement.
- If the lease includes use of the parking lot, or selected spaces in the lot, include the lot (or selected spaces) as part of your campus.
- If your students need to use stairwells or elevators or hallways to access the space your institution controls, include them as part of your campus as well.
- Do not include any of the strip mall's stores, restaurants, offices, etc., in your on-campus category because your institution doesn't control them.



Clery Geography: Public Property

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

Clery Geography

Example of public property: sidewalk, street, sidewalk.

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



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



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



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

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 2-14.



Clery Geography: Noncampus

- The Clery definition of **noncampus buildings or property** is:
 - any building or property owned or controlled by a student organization that is officially recognized by the institution; or
 - Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.
- The noncampus category encompasses two distinct types of buildings and property:
 - those owned or controlled by officially recognized student organizations, and
 - those located off campus but owned or controlled by your institution.



Space versus Program Agreements

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

- If you own or control the site or any space within the site, include the site or the specified space in your non-campus category.
- If you do not own or control the space, don't include it.
- If you have an agreement, even a written agreement, to send your students to a location for one of the aforementioned reasons, but that written agreement is for the program rather than for the use of the physical space, you do not have control of the location and do not have to include statistics for crimes that occur there.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 2-21.



Space versus Program Agreements

For example:

If you have a written agreement to send students to a privately owned hospital for clinical training, but you don't have a written agreement for use of the hospital or any space within the hospital, you do not have to include statistics for crimes that occur there.

- However, if you rent classroom space for your students within the same hospital, you are required to include crime statistics for that space, as well as for any other areas, such as a lobby or hallways and elevators used to access that space for the period of time specified in the agreement.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 2-21.



Identifying and Reporting Sexual Misconduct

DL Training Solutions LLC



Prohibited Sexual Misconduct

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

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



Sexual Harassment

New Title IX Regulations - § 106.30 Definitions. ***Sexual harassment*** means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault," "dating violence," "domestic violence," or "stalking" as defined for VAWA purposes.



Domestic Violence

Domestic violence. (1) A felony or misdemeanor crime of violence committed -

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

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

34 CFR 668.46



Examples of Domestic Violence

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

Scenario 2: A neighbor reports yelling in the apartment next door in a university housing complex. The officer who arrives at the apartment finds a husband and wife having an argument. Neither party reports any physical injuries and neither party reports being intimidated. Do not include this incident in your *Clery Act* statistics.

Scenario 3: An employee reports to the campus police that her ex-husband has physically assaulted her four times. All four assaults occurred at the employee's private residence; however, he has also recently showed up in the noncampus parking lot outside her office and threatened to hurt her. Include one noncampus Domestic Violence incident for the intimidation that occurred in the noncampus parking lot. Do not include the Aggravated Assaults in your *Clery Act* statistics because they did not occur on *Clery Act* geography. Do not include the Intimidation as a Hate Crime in your *Clery Act* statistics because there was no evidence that it was motivated by bias. Also include one incident of noncampus Stalking (Stalking is discussed below).

Scenario 4: A father argues with his son at a football game in the on-campus stadium. He eventually hits his son, breaking his jaw. Include this as one on-campus incident of Domestic Violence and one Aggravated Assault.

U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2016 Edition, Washington, D.C., 2016, p. 38.



Dating Violence

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

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

(ii) For the purposes of this definition—

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

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

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

34 CFR 668.46



Examples of Dating Violence

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

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

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

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

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



Sexual Assault

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

Rape - The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, **without the consent of the victim**.

Sex Offenses - Any sexual act directed against another person, **without the consent of the victim**, including instances where the victim is incapable of giving consent.

A. *Fondling* - The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

B. *Incest* - Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

C. *Statutory Rape* - Sexual intercourse with a person who is under the statutory age of consent.

34 CFR 668.46

Examples of Sexual Assault

Scenario 1: A female student reports that she was raped by an unidentified male while jogging along a campus trail. Include this as one on-campus Rape.

Scenario 2: A female student reports that her ex-boyfriend had sex with her in a common residence hall room while she was unconscious after a night of drinking alcohol. Include this as one Rape in the on-campus category and one Rape in the on-campus student housing facility category. Also include one incident of Dating Violence in both the on-campus and on-campus student housing facility categories (Dating Violence is discussed on pages 3-36 and 3-37).

Scenario 3: A male student reports that another male student fondled him in a campus building while telling him that he was glad they could finally be alone. Include this as one on-campus Fondling.

Scenario 4: A female student reports to the campus police that she was raped in her car in a parking lot on her school's campus by students from another college. Include this as one on-campus Rape.

Scenario 5: Three female students report that they were each raped by five male students at an off-campus fraternity house owned by a recognized fraternity. Each male raped each of the female students. Include this as three on-campus Rapes.

Scenario 6: A female student reports that an unknown male attempted to rape her in a very-wooded sidewalk outside a classroom building on campus, but that he was frightened away by another individual before completing the attack. Include this as one public property Rape.

Scenario 7: A woman is walking on a public sidewalk in front of your campus and a male student has her back to her back by her. Include this as one public property Fondling only if the victim reports that it was sexual in nature.

Scenario 8: A female student reports that she has been raped three times since January by someone who lives in the same on-campus student housing facility. All three of the sexual assaults occurred in that housing facility. Include this as three Rapes in both the on-campus category and on-campus student housing facility category.

Scenario 9: A 21-year-old student has sex with a 15-year-old juvenile in the student's on-campus apartment. There is no use of force or threat of force (the statutory age of consent is 18). Include this as one Statutory Rape in the on-campus category and not Statutory Rape in the on-campus student housing facility category.

Scenario 10: Campus police respond to a call from the dean reporting that an unknown man exposed himself to a group of female students in common. Do not include this incident in your Clery Act statistics as it is not a Clery Act crime.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p 3-8.





Consent

In both VAWA & Title IX final regulations, Department of Education considered and **chose not** to define consent.

- At minimum, the definition should recognize that:
 - consent is a voluntary agreement to engage in sexual activity;
 - someone who is incapacitated cannot consent;
 - past consent does not imply future consent;
- silence or an absence of resistance does not imply consent;
- consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
- consent can be withdrawn at any time; and
- coercion, force, or threat or either invalidates consent.



Affirmative Consent

- "Affirmative consent" is defined as an affirmative, conscious, and voluntary agreement to engage in sexual activity.
- Neither the lack of protest or resistance nor silence constitutes consent, and consent may be withdrawn at any time.
- Affirmative consent must be given by all parties to sexual activity.
- Often referred to as "Yes Means Yes"



Example of Affirmative Consent Standard

N.Y. Education Law Sec. 6441. AFFIRMATIVE CONSENT TO SEXUAL ACTIVITY. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct:

- Affirmative Consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity.
- Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- Silence or lack of resistance, in and of itself, does not demonstrate consent.
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.



Affirmative Consent

- Under VAWA & Title IX, schools have option to adopt an affirmative consent standard to determine whether a student has given consent to sexual activity.
 - BUT: If state law requires affirmative consent, then school must comply with state law standards
- The affirmative consent standard is distinguishable from the standards applicable to criminal proceedings in certain ways.
 - First, the affirmative consent standard does not apply in the criminal context.
 - A criminal trier of fact may consider whether an individual affirmatively consented, but that alone is not determinative of whether the sexual activity was consensual.
 - Other evidence of consent or lack of consent, such as body language or silence, may also be considered in the analysis of whether a crime occurred.
 - Under the affirmative consent law, the question of whether a victim affirmatively consented is by itself determinative of whether wrongdoing occurred.