



MILLER NASH^{LLP}
ATTORNEYS AT LAW

**Keeping Up:
The Evolving Federal Landscape on
Title IX and Sexual Misconduct**

Presented by
Jennifer S. Divine

Legal Background

- Title IX of the Education Amendments of 1972

“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.”

20 U.S.C. § 1681(a)

Title IX

- Sexual harassment
- Failure to provide equal opportunity in athletics
- Discrimination in a school's science, technology, engineering, and math (STEM) courses and programs
- Discrimination based on pregnancy

Title IX Regulations

- 34 CFR Part 106 - Nondiscrimination on the Basis of Sex In Education Programs or Activities Receiving Federal Financial Assistance
 - Subpart C: Admission and Recruitment
 - Subpart D: Education Programs or Activities
 - Subpart E: Employment in Education Programs or Activities

34 CFR Part 106 Subpart D

- Discrimination on the basis of sex in education programs or activities prohibited

Education programs or activities
Housing
Comparable facilities
Access to classes and schools
Access to vocational education.
Counseling
Financial assistance

Employment assistance to students
Health and insurance benefits
Marital or parental status
Athletics
Textbooks and curricular material
Standards for measuring PE skills

34 CFR § 106.31 – Education Programs or Activities

“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity.”

34 CFR § 106.31

34 CFR § 106.31 – Education Programs or Activities

- Specific prohibitions include: Recipients may not, on the basis of sex
 - Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of an aid, benefit, or service
 - Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner

34 CFR § 106.31 – Education Programs or Activities (Cont'd)

- Subject any person to separate or different rules of behavior, sanctions, or other treatment
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity

Title IX Litigation

- Litigation from students
 - *Cannon v. University of Chicago*, 441 U.S. 677 (1979)
(Private right of action allowed)
 - *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)
(Any available remedy, including money damages)
- High standard to recover damages
 - *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) (sexual harassment by teacher); *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999) (peer-on-peer sexual harassment)

Title IX – Elements for Private Right of Action

- Substantial Control
 - Over harasser and environment
- Actual knowledge
 - “appropriate person” with “authority to take corrective action to end the discrimination”
- Severe and pervasive harassment
 - “so severe, pervasive, and objectively offensive” that it deprives victim of equal access to education
- Deliberate Indifference
 - Response must be “clearly unreasonable”

Expanded Proof of Knowledge

- Past incidents of harassment
 - *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007)
- Past incidents by other students
 - *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007)

Limitations on Actual Knowledge

- Courts remain hesitant to extend Title IX liability based solely on unrelated past incidents of sexual harassment on campus
 - *Doe v. Blackburn College*, 2012 WL 640046 (C.D. Ill. Feb. 27, 2012)
 - liability only if prior incidents created a risk that was almost certain to materialize if nothing were done

Preventive Action

- Prompt and thorough investigations
- Consistent and equitable application of policies and procedures
 - Adherence to impartial and effective sexual harassment/policies can be successful defense
 - *Doe v. Univ. of the Pacific*, 467 Fed. Appx. 685, 2012 WL 269901 (9th Cir. Jan. 31, 2012)
 - *Stefanowicz v. Bucknell Univ.*, 2010 WL 3938243 (M.D. Pa. Oct. 5, 2010)

Suits from Accused Student

- Potential liability to alleged perpetrators
 - Negligence: failure to exercise reasonable care in implementing misconduct policies and procedures
 - *Doe v. Univ. of the South, (Sewanee)*, 2011 WL 1258104 (E.D. Tenn. Mar. 31, 2011) (negligent construction and application of conduct process)
 - Breach of contract
 - *McCormick, et al. v. Dresdale, et al.*, 2010 WL 1740853 (Apr. 28, 2010) (failure to follow policies and procedures)

OCR Guidance

- Department of Education Office of Civil Rights
 - Regulations - 34 CFR Part 106
 - Sub-regulatory guidance

“significant guidance document”

<http://www2.ed.gov/policy/rights/guid/ocr/sex.html>

<http://www2.ed.gov/about/offices/list/ocr/sexharassresources.html>

OCR Guidance Documents

- *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001 Guidance)*
- September 2008 Pamphlet – *Sexual Harassment: It's Not Academic*
- *2010 Dear Colleague Letter: Harassment and Bullying*

OCR Guidance Documents

- April 4, 2011 *Dear Colleague Letter on Title IX Requirements and How They Relate to Sexual Harassment and Sexual Violence* (2011 DCL)
 - Marked a significant shift in view of issues surrounding sexual violence
 - Accompanying pamphlet for students
 - *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*

OCR Guidance Documents

- 2013 Dear Colleague Letter: Retaliation
- April 29, 2014 *Questions and Answers on Title IX and Sexual Violence*
 - Accompanying pamphlet for students
 - *Know Your Rights about Title IX and Sexual Violence*

NOT ALONE Report

- White House Task Force established January 22, 2014
 - **NOT ALONE:** The First Report of the White House Task Force to Protect Students From Sexual Assault – issued April 2014
 - Data, Resources and Sample Policies available on website

<https://www.notalone.gov/schools/>

Clery Act - VAWA – Title IX

- Clery Act does not change Title IX obligations
 - Must comply with both laws
 - Comparison chart explaining intersections of Clery, Title IX and FERPA

<https://www.notalone.gov/assets/ferpa-clerychart.pdf>

Clery Act - VAWA Amendments

- Violence Against Women Reauthorization Act (VAWA) - March 7, 2013
 - Section 304 - Campus Sexual Violence Act (Campus SaVE) amended Clery Act
 - Additional reporting obligations
 - New student discipline requirements
 - New training and education requirements
 - Nothing in Campus SaVE alters school's obligation to comply with Title IX and OCR Guidance

Clery Act - VAWA Regulations

- VAWA Negotiated Rulemaking process — Spring 2014
 - Consensus reached – Notice of Proposed Rulemaking published June 20, 2014
 - Final Regulations published in Federal Register - October 20, 2014
 - Not effective until July 1, 2015
 - “Good faith” efforts to comply with VAWA/Clery amendments required until then

White House Task Force To Protect Students From Sexual Assault – January 2014

- Co-chairs from Office of the Vice President and the White House Council on Women and Girls
- Members include:

Attorney General

Secretary of the Interior

Secretary of Health and Human
Services

Secretary of Education

Director of the Office of Science
and Technology Policy

Director of the Domestic Policy
Council

Cabinet Secretary

Heads of other agencies/offices

White House Task Force

- Mandate: strengthen federal enforcement efforts and provide schools with additional tools to help combat sexual assault on their campuses
 - 90 day national conversation
 - Thousands participated
 - Focus on postsecondary schools
 - Function – “advisory only”

Not Alone: White House Task Force Report

- Released April 29, 2014
- Demonstrates administration's commitment to "turn this tide"
- Includes acknowledgement that campus sexual assault is a complicated, multidimensional problem

Not Alone: White House Task Force Report

- Action Steps and Recommendations:
 - Identifying the Problem: Campus Climate Surveys
 - Preventing Sexual Assault on Campus
 - Responding Effectively When a Student is Sexually Assaulted: Partnering with the Community
 - Improving Federal Government's Enforcement Efforts and Transparency

Identifying the Problem: Campus Climate Surveys

- Underreporting statistics and reasons for underreporting
- Campus climate surveys
 - Gauge the prevalence of sexual assault on campus
 - Test students' attitudes and awareness
 - Provide schools with a tool for crafting solutions

Campus Climate Surveys

- Climate Survey Toolkit –

<https://www.notalone.gov/assets/ovw-climate-survey.pdf>

- Call to voluntarily conduct climate surveys during 2014-2015

“A school that is willing to get an accurate assessment of sexual assault on its campus is one that’s taking the problem - and the solution seriously”

- Campus surveys also suggested by OCR Guidance

Climate Surveys – Cautions

- Plan carefully
 - If conducted without sufficient planning, a survey can measure nothing, give false results, or even harm campus efforts to address sexual assault
 - Evidence-based survey may be mandated in 2016

Preventing Campus Sexual Assault

- Prevention efforts are a priority
- Pilot projects/grantees to test and evaluate prevention programs
- Bystander intervention - enlist men as allies
- CDC role:
 - Developing best practices for better prevention
 - Continuing to identify and fill gaps in research

Responding Effectively When a Student Is Sexually Assaulted

- Give survivors more control over reporting and confidential disclosure
- Report disfavours designating all staff as “responsible employees”

Responding Effectively – Victim Advocates

- Key best practice: Identify trained, confidential victim advocates who can provide emergency and ongoing support
 - Understand dynamics of sexual assault, trauma
 - Provide resources, accommodations
 - Explain grievance and disciplinary system
 - Help survivors navigate the process

Responding Effectively – Confidential Reporting

- Sample reporting and confidentiality protocol
<https://www.notalone.gov/assets/ovw-climate-survey.pdf>
- Adapt to your own institution
 - Plan for implementation challenges
 - Identify and clarify confidential roles and reporting responsibilities
 - Train employees

Responding Effectively – Sexual Misconduct Policies

- Developing a Comprehensive Sexual Misconduct Policy
 - Every school should have an easily accessible, user-friendly sexual misconduct policy
- Checklist for a sexual misconduct policy
<https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf>

Responding Effectively – Developing Comprehensive Policy

- Sample policy language for key issues now available on Not Alone website
 - Role of a Title IX Coordinator
 - Interim and Supportive Measures for Victims
 - Definitions of Key Prohibited Conduct Terms in Sexual Misconduct Policies

<https://www.notalone.gov/schools/>

Responding Effectively – Training for School Officials

- Specialized training is crucial to understand:
 - How sexual assault occurs
 - How it is perpetrated
 - How victims might naturally respond both during and after an assault
- Clery Act requires campus officials involved in investigating and adjudicating sexual assault cases to receive annual training

Responding Effectively – Training Resources

- DOJ's National Center for Campus Public Safety
 - Developing Trauma-Informed Sexual Assault Investigations and Adjudications training program for campus officials
 - promised for September
 - pilot course now scheduled for November
- <http://nccpsafety.org/technical-assistance-training>

Responding Effectively – Training Resources

- Current resources: online training course
 - developed by End Violence Against Women International's OnLine Training Institute
 - grants from DOJ's Office on Violence Against Women (OVW)

<http://olti.evawintl.org/Courses.aspx>

Responding Effectively – Training Resources

- OVW's online technical assistance project for campus officials - comprehensive?

<http://www.justice.gov/ovw/responding-campus-sexual-assault>

- Department of Education National Center on Safe and Supportive Learning Environments trauma-informed training materials for campus health center staff
 - promised for December 2014
 - current status unknown

Responding Effectively – Holding Offenders Accountable

- New Investigative and Adjudicative Protocols
 - Who should gather evidence, make determination, decide sanction, process appeals?
 - Task Force Report favors single investigator model over traditional college hearing/judicial board
- OVW and National Institute of Justice charged with assessing investigative and adjudicative models and identify promising practices

Responding Effectively – Providing Support

- Provide comprehensive support by partnering with the community
- MOUs with rape crisis centers
 - Key services needed
 - Crisis intervention services available 24/7
 - Advocates to attend medical and legal appointments
 - Longer-term clinical therapies

Improving Enforcement & Transparency

- Administration taking aggressive action to strengthen enforcement efforts and provide transparency
 - Increase coordination among responsible federal agencies
 - Improve communication with students, parents, school administrators, faculty, and the public

Transparency and Information-Sharing

- NotAlone.gov – making enforcement data public and other resources accessible
 - Give students a clear explanation of their rights under Title IX and Title IV
 - Provide a simple description of how to file a complaint with OCR and DOJ and what to expect throughout the process
 - Help students with complicated legal definitions and point them toward people who can give them confidential advice

Transparency and Information-Sharing

- Public website postings of enforcement efforts and guidance
 - All OCR resolution letters and agreements (except those that raise individual privacy concerns)
 - All DOJ federal court filings, including complaints, motions, and briefs, consent decrees, and out-of-court agreements

Transparency and Information-Sharing

- Public website postings (cont'd)
 - Relevant guidance on federal obligations, best available evidence, research on prevention programs, sample policies and model agreements
 - OCR will make public the schools that are under OCR investigation, including Title IX sexual violence allegations
 - Department of Education will collect and disseminate list of Title IX coordinators

Clarifying Enforcement Guidance

- Administration efforts to provide more clarity on obligations under Title IX
 - April 4, 2011 Dear Colleague Letter on schools' obligations to prevent and respond to sexual violence raised many unanswered questions
 - April 29, 2014 Questions and Answers on Title IX and Sexual Violence is OCR's attempt to provide answers to many frequently asked questions

Strengthening Enforcement Procedures

- OCR process changes
 - 90-day limit on voluntary resolution agreement negotiations where OCR has found a school in violation of Title IX
 - Schools should provide survivors with interim relief pending the outcome of an OCR investigation
 - OCR will be more visible on campus and reach out to more students and school officials during its investigations

Clarifying Legal Obligations

- Administration efforts to clarify how key federal laws intersect
 - Title IX, Clery, FERPA – comparison chart
<https://www.notalone.gov/assets/ferpa-clerychart.pdf>
 - MOU with DOJ
 - MOU with Federal Student Aid office

OCR Guidance – Significant Guidance Documents

- *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001 Guidance)*
 - Detailed overview of obligations for responding to sex discrimination, including sexual harassment
 - Remains in full force and effect

OCR Guidance – Significant Guidance Documents

- Dear Colleague Letter – April 4, 2011 (DCL)
 - Marked a significant shift in view of issues surrounding sexual violence

“The sexual harassment of students, including sexual violence, interferes with students’ right to receive an education free from discrimination and, in the case of sexual violence, is a crime.”

- Explains schools’ responsibility to take "immediate and effective steps to end sexual harassment and sexual violence.”

OCR Guidance – Significant Guidance Documents

- April 29, 2014 *Questions and Answers on Title IX and Sexual Violence*
 - Should be read in conjunction with 2001 Guidance and 2011 DCL
 - Intended to clarify legal requirements and guidance from earlier documents
 - Examples of proactive efforts schools can take to prevent sexual violence and remedies they can use to end such conduct, prevent its recurrence, and address its effects
 - Document should be read in full

OCR Questions and Answers – Title IX and Sexual Violence

- Laying the Groundwork
 - Section A: School's Obligation to Respond
 - Section B: Students Protected by Title IX
 - Section C: Procedural Requirements
 - Section D: Responsible Employees & Reporting

OCR Q&A Section A – School's Obligation to Respond

- *What is sexual violence?*
 - Physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent
- *How does Title IX apply to student-on-student sexual violence?*
 - Federally funded schools must ensure that students are not denied or limited in their ability to participate in or benefit from a school's educational programs based on sex

OCR Q&A Section A – School’s Obligation to Respond

- A school violates a student’s rights under Title IX when:
 - Alleged conduct is sufficiently serious to limit or deny participation in or benefit from the school’s education program, i.e. creates a hostile environment; **AND**
 - School, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and remedy its effects

OCR Q&A Section A – School's Obligation to Respond

- *How does OCR determine if a hostile environment has been created?*
 - Review situation from perspective of a reasonable person in the alleged victim's position
 - Consider all the facts and circumstances
 - The more severe the conduct, the less need to show a repetitive series of incidents

OCR Q&A Section A – School's Obligation to Respond

- *When does OCR consider a school to have notice of student-on-student sexual violence?*
 - Received directly – witnessed or received report from complainant, student, friend, parent to Title IX coordinator or responsible employee
 - faculty member, administrator, campus law enforcement, staff in student affairs office
 - Received indirectly
 - Social networking sites, media, member of local community

OCR Q&A Section A – School’s Obligation to Respond

- Indirect report of sexual violence
 - “Should trigger an investigation that would lead to the discovery of additional incidents”
- OCR may conclude school should have known about hostile environment based on a failure to make inquiry

OCR Q&A Section A – School's Obligation to Respond

- *What are a school's basic responsibilities to address student-on-student sexual violence?*
 - Take immediate and appropriate steps to investigate (subject to confidentiality)
 - Take prompt and effective steps reasonably calculated to
 - end sexual violence
 - eliminate the hostile environment
 - prevent its recurrence
 - remedy its effects
 - Includes interim steps to protect complainant, provide periodic updates and make resources available

OCR Q&A Section A – School's Obligation to Respond

- Title IX covers employee-on-student sexual conduct, including sexual abuse of children
 - State law prevention and reporting obligations may exceed Title IX duties to minors
 - Strong presumption under Title IX that sexual activity between an adult student and an adult employee is unwelcome and nonconsensual

2014 Q&A Section B - Students Protected by Title IX

- Title IX protects all kinds of students from sexual violence
 - Elementary through professional school
 - Male and female
 - Straight, gay, lesbian, bisexual, transgender
 - Part-time and full-time
 - Disability
 - Race
 - National origin

OCR Q&A Section B – Students Protected by Title IX

- How to handle same-sex complaints?
 - LGBT and gender non-conforming individuals are entitled to same protections as other students
 - Include same-sex examples of prohibited conduct if other examples given
 - Make sure culturally competent counseling is available
 - Training for hearing boards and investigators should include information about working with LGBT, gender nonconforming students and same-sex violence

OCR Q&A Section B – Students Protected by Title IX

- What about students with disabilities who experience sexual violence?
 - Accessibility of materials and information
 - Reporting forms, information and training must be provided in a manner accessible to students and employees with disabilities

OCR Q&A Section B – Students Protected by Title IX

- International students and undocumented students?
 - Accessibility of materials and information
 - Reporting forms, information and training must be provided in a manner accessible to students who are English language learners

OCR Q&A Section B – Students Protected by Title IX

- International students (cont'd)
 - Schools are encouraged to provide foreign national complainants with information about U and T nonimmigrant statuses
 - Be aware of the impact on visa when course load falls below full-time

2014 Q&A Section C – Title IX Procedural Requirements

- *What procedures must a school have in place to prevent sexual violence and resolve complaints?*
 - Three key requirements
 - Disseminate a notice of nondiscrimination
 - Designate at least one employee to coordinate efforts to comply with Title IX responsibilities
 - Adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints

2014 Q&A Section C – Title IX Coordinator’s Responsibilities

- Oversight of response to Title IX reports and complaints
- Identifying and addressing patterns or systemic problems revealed by complaints
- Must be informed of all reports and complaints
 - Subject to confidentiality limitations
 - Regardless of where report or complaint initially filed

2014 Q&A Section C – Title IX Coordinator's Responsibilities

- Evaluate student's request for confidentiality in context of school's responsibility to provide safe and nondiscriminatory environment for all
- If Title IX includes disciplinary process, review procedures to ensure that they comply with prompt and equitable relief requirements

2014 Q&A Section C – Title IX Coordinator's Responsibilities

- Optional Title IX Coordinator Responsibilities
 - Training (students, faculty, staff)
 - Conducting Title IX investigations
 - Determining appropriate sanctions for perpetrator and remedies for complainant
 - Determining appropriate interim measures
 - Coordinating policies and procedures with local law enforcement, victim advocacy groups and service providers
 - Be available to meet with students as needed

2014 Q&A Section C – Title IX Coordinator's Responsibilities

- Employees who should not serve as the Title IX coordinator
 - Anyone whose other job responsibilities might create a conflict of interest
 - General Counsel
 - Director of Athletics
 - Dean of Students
 - Any employee who serves on the judicial/hearing board or to whom an appeal might be made

2014 Q&A Section C – Title IX Sexual Violence Grievance Procedures

- Critical Elements
 - Notice to students and employees of grievance procedures, including where to file complaints
 - Application of procedures to complaints filed by or on behalf of students regardless of by whom carried out – students, employees, third parties
 - Designated and reasonably prompt time frames for major stages of complaint process

2014 Q&A Section C – Title IX Sexual Violence Grievance Procedures

- Provisions for adequate, reliable and impartial investigation
 - Must include opportunity for both parties to present witnesses and evidence (additional standards in Clery)
- Written notice to complainant and alleged perpetrator of the outcome (Clery has sanction and rationale requirements)
- Assurance that school will take steps to prevent recurrence of sexual violence and remedy discriminatory effects on complainant and others

2014 Q&A Section C – Additional Grievance Procedures

- 11 more required elements
 1. Statement of the school's jurisdiction over Title IX complaints
 2. Adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment
 3. Reporting policies and protocols (including provisions for confidential reporting)

2014 Q&A Section C – Additional Grievance Procedures

4. Identifying employee(s) responsible for evaluating confidentiality requests
5. Notice that Title IX prohibits retaliation
6. Notice of student's right to file criminal and Title IX complaints simultaneously
7. Notice of available interim sanctions (Clery requires range of interim sanctions)

2014 Q&A Section C – Additional Grievance Procedures

8. Evidentiary standard that must be used –
preponderance of the evidence (Clery does not
specify – law vs. guidance)
9. Notice of potential remedies for students
10. Notice of potential sanctions against perpetrators
(Clery requires a list of all possible sanctions)
11. Sources of counseling, advocacy, and support

2014 Q&A Section C – Title IX Effects on Due Process Rights

- “Rights” established under Title IX must be interpreted consistently with any federally guaranteed due process rights.
- **But** OCR warns that in providing due process rights, schools should not restrict or unnecessarily delay the protections provided by Title IX to complainants

2014 Q&A Section C – Sexual Violence Grievances

- No requirement for separate process
 - Schools can use:
 - Student disciplinary procedures
 - General Title IX grievance procedures
 - Sexual harassment procedures
 - Separate procedures to resolve sexual violence complaints
- Procedure must provide prompt and equitable resolution

2014 Q&A Section D – Responsible Employees and Reporting

- *Which school employees are obligated to report incidents of possible sexual violence to school officials?*
 - Obligation falls to “responsible employees”
 - School obligated to address sexual violence about which a responsible employee knew or should have known
 - Liability imputed to the school if responsible employee fails in his or her duties

2014 Q&A Section D – Responsible Employees and Reporting

- *Who is a “responsible employee”?*
 - Any employee who has the authority to take action to redress sexual violence
 - An employee who has been given the duty of reporting incidents of sexual violence or other misconduct to the Title IX coordinator or other appropriate school designee
 - Any employee whom a student could reasonably believe has this authority or duty

2014 Q&A Section D – Responsible Employees and Reporting

- Make clear to all employees and students which staff members are responsible employees
 - Enables students to make decisions about whether to disclose
- Inform responsible employees of their reporting obligations

2014 Q&A Section D – Responsible Employees and Reporting

- Inform responsible employees of importance to advise complainants about:
 - The responsible employee's obligation to report
 - Options for requesting confidentiality
 - Available confidential resources
 - Rights to file Title IX complaint and report crimes to police

2014 Q&A Section D – Responsible Employees and Reporting

- *What information is responsible employee obligated to report about an incident of possible student-on-student sexual violence?*
 - ALL relevant details
 - Names of parties, witnesses, date, time, location

2014 Q&A Section D – Responsible Employees and Reporting

- *What should a responsible employee tell a student who discloses an incident of sexual violence?*
 - The employee's obligation to report
 - The student's option to request that school maintain his or confidentiality
 - Confidential resources

2014 Q&A Section D – Resident Assistant/ Advisor (RA) Reporting Issues

- *Is an RA a “responsible employee”?*
 - Does the RA have general authority to take action to redress misconduct or the duty to report misconduct?
 - If there is a duty to report some misconduct, there will be a duty to report all
 - Could students reasonably believe RAs have this authority or duty?
 - Has school declared and informed students that RAs are available for confidential discussions?

2014 Q&A Section D – Resident Assistant/Advisor (RA) Reporting Issues

- OCR recommends certain conversations between RAs and students who report BEFORE reporting to Title IX Coordinator
 - What does student need to feel safe (interim measures)
 - Explain that reporting does not necessarily mean there will be an investigation if student requests confidentiality
 - Right to file Title IX complaint and report a crime

OCR Questions and Answers – Putting It Into Context

- Section E: Confidentiality and Obligation to Respond
- Section F: Investigations and Hearings
- Section G: Interim Measures
- Section H: Remedies and Notice of Outcome
- Section I: Appeals
- Section J: Title IX Training, Education and Prevention
- Section K: Retaliation

2014 Q&A Section E – Confidentiality and Obligation to Respond

- *What if complainant does not want name disclosed or asks that no investigation or disciplinary action be pursued?*
 - “Limited” situations when a school must override
 - Information should be maintained in a secure manner
 - School should notify students of the information that will be disclosed, to whom, and why

2014 Q&A Section E – Confidentiality and Obligation to Respond (Cont'd)

- School should identify in its policies the employee(s) responsible for making decisions about confidentiality
- Must still provide remedial measures
- School must take immediate action to protect the student while maintaining confidentiality

2014 Q&A Section E – Confidentiality

- *What factors should be considered in weighing student request for confidentiality?*
 - Circumstances that suggest an increased risk of the alleged perpetrator committing additional acts of sexual violence. Does school have “credible information” about prior sexual violence by the accused?
 - Consider whether the school possesses other means to obtain the relevant evidence.

2014 Q&A Section E – Reporting Responsibilities

- Reporting responsibilities of employees who provide counseling, advocacy, or other services to students who have experienced sexual violence
 - OCR “interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student’s consent.”

2014 Q&A Section E – Reporting Responsibilities

- Pastoral and professional counselors should indicate that they are available to assist students in filing complaints with the school and law enforcement
- But collect aggregate data from these individuals to identify systemic issues or patterns

2014 Q&A Section F – Investigations and Hearings

- *What elements should Title IX investigation include?*
 - Investigation includes the hearing, if there is one.
 - “Adequate, reliable, impartial, and prompt.”
 - Title IX Coordinator could be the one charged to investigate, “provided there are no conflicts of interest.”
 - Allow for interim and remedial measures.

2014 Q&A Section F – Investigations and Hearings

- Elements of Title IX Investigation (Cont'd)
 - If one party is permitted to have an attorney, the other must also be allowed to have an attorney
 - If one party is permitted to submit expert testimony, the other must be permitted as well

2014 Q&A Section F – Investigations and Hearings

- Key differences between Title IX investigation and criminal investigation
 - Title IX investigations do not result in incarceration
 - “[W]hile a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary.”

2014 Q&A Section F – Investigation of Off-Campus Conduct

- Complaints of alleged sexual violence that occurred off campus must be processed
 - Off-campus education programs and activities include fraternity houses
 - If alleged assault was not in the context of an education program or activity, still must consider whether the effects of the off-campus misconduct create a hostile environment on campus

2014 Q&A Section F – Investigation of Off-Campus Conduct (Cont'd)

- “Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus . . . the school still should handle these incidents as it would handle other off-campus incidents of misconduct.”

2014 Q&A Section F – Hearing Procedure

- *Must a school allow or require the parties to be present during an entire hearing?*
 - No, but if one can, both can
 - When requested, a school should arrange the hearing such that the complainant and respondent are not in the room at the same time
 - School must not require the complainant to be present as a prerequisite to proceeding
 - OCR discourages allowing student participation on hearing panels

2014 Q&A Section F – Hearing Procedure

- *May every witness, including the parties, be cross-examined?*
 - Not required, but must be equal if permitted
 - Personal cross-examination of parties is “strongly discouraged.”

2014 Q&A Section F – Hearing Procedure

- *May the complainant's sexual history be introduced at hearings?*
 - Questioning about complainant's sexual history with anyone other than the respondent should not be permitted
 - “The school should also ensure that the hearings are conducted in a manner that does not inflict additional trauma on the complainant.”

2014 Q&A Section F – Investigation Time Frame

- *What stages of the investigation are included in the DCL 60-day timeframe for a typical investigation?*
 - Includes the investigation and hearing (if any), but not the appeal (if any)
 - OCR would evaluate on a case-by-case basis
 - May take longer if school needs to stop the investigation during school breaks or between school years, although the school should “make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.”

2014 Q&A Section G – Interim Measures

- Interim measures required before completion of investigation

“The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate.”

2014 Q&A Section G – Interim Measures

- School must implement remedial measures even when it determines it can respect a complainant's request for confidentiality
 - Including changing course schedules, assignments or tests, and providing increased monitoring or security at the location or activity at which the misconduct occurred

2014 Q&A Section G – Interim Measures

- *How should a school determine what interim measures to take?*
 - Fact dependent based on need
 - Minimize the burden on the complainant
 - Don't move the complainant while allowing the respondent to remain in place without carefully considering the facts of the case

2014 Q&A Section G – Interim Measures

- *If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?*
 - No
 - “If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.”

2014 Q&A Section H – Remedies and Notice of Outcome

- *What remedies should school consider in a case of student-on-student sexual violence?*
 - Sanctions alone are unlikely to be sufficient to remedy effects on survivor
 - Offer remedies even if refused at the interim stage

2014 Q&A Section H – Remedies and Notice of Outcome

- Remedies may include:
 - Providing an “effective” escort between classes and activities “to ensure that the complainant can move safely”.
 - Moving the respondent (or complainant if she requests)
 - Providing comprehensive, holistic victim services
 - Don’t forget remedial measures for the broader student population, including when the school is unable to conduct a full investigation

2014 Q&A Section H – Remedies and Notice of Outcome

- *What information must be provided to the complainant in the notice of outcome?*
 - Whether or not responsible, individual remedies, sanctions directly related to the complainant (can include all sanctions if sexual violence per Clery and FERPA), and remedies to eliminate the hostile environment and prevent recurrence
 - Respondent does not get information regarding individual remedies for complainant
 - VAWA regulations include “rationale” for the outcome and sanctions

2014 Q&A Section I – Appeals

- *What are the requirements for an appeal process?*
 - Recommended where procedural error or previously unavailable relevant evidence could significantly impact the outcome, or where a sanction is substantially disproportionate to the findings

2014 Q&A Section I – Appeals (Cont'd)

- Complainant must be allowed to appeal on the basis that a sanction was not severe enough, if the respondent is permitted to appeal on the basis that it was too severe
- Those hearing appeals should be trained in the dynamics of and trauma associated with sexual violence

2014 Q&A Section J – Title IX Training, Education, and Prevention

- What types of training should a school provide to *employees*?
 - Provide training to all “likely to witness or receive reports of sexual violence.”
 - Training should include:
 - How to prevent and identify sexual violence
 - How to respond in a manner consistent with the employee’s obligations

2014 Q&A Section J – Title IX Training (Cont'd)

- The level of confidentiality, if any, that attaches to the employee's position
- Behaviors that may lead to and result in sexual violence
- Bystander attitudes that may allow sexual violence to continue
- The potential for victimization
- Appropriate methods for response
- The impact of trauma on victims
- The persons to whom sexual assault should be reported and how

2014 Q&A Section J – Title IX Training (Cont'd)

- Train on a “regular basis”
- Have methods for verifying effectiveness of training

2014 Q&A Section J – Title IX Training, Education, and Prevention

- What types of training should school provide to *employees involved in implementing grievance procedures*?
 - Training should include:
 - Working with and interviewing persons subjected to sexual violence
 - Particular types of conduct that would constitute sexual violence
 - The proper standard of review

2014 Q&A Section J – Title IX Training (Cont'd)

- Consent and the role drugs or alcohol can play in the ability to consent
- The importance of accountability for those found responsible
- Remedial actions for the respondent, complainant, and community
- Credibility
- Evaluating evidence and weighing it in an impartial manner

2014 Q&A Section J – Title IX Training (Cont'd)

- How to conduct investigations
 - Confidentiality
 - The effects of trauma, including neurobiological change
 - Cultural awareness
- Train on a regular basis

2014 Q&A Section J – Title IX Training, Education, and Prevention

- What types of training should a school provide to *students*?
 - Training should include:
 - How to report (internally and to criminal authorities)
 - To whom they can report confidentially
 - What constitutes sexual violence under the school's policies
 - The school's definition of consent, with examples

2014 Q&A Section J – Title IX Training (Cont'd)

- How the school analyzes whether the conduct was unwelcome and whether it created a hostile environment
- Grievance procedures, disciplinary code provisions, and sanctions
- The effects of trauma, including neurobiological changes
- The role of alcohol and drugs in sexual violence incidents, including deliberate use to perpetrate sexual violence

2014 Q&A Section J – Title IX Training (Cont'd)

- Bystander strategies
- Protections against retaliation
- Train at “regular intervals”

2014 Q&A Section K – Retaliation

- Title IX protects against retaliation
 - Inform everyone involved and ensure they know how to report retaliation
 - “Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary.”

2014 Q&A Section K – Retaliation

- Q&A does not address situation where a respondent is being “retaliated against”
 - Consider how to handle those concerns, particularly during the process, and in cases where there is no finding of responsibility

2014 Q&A – Additional Issues

- Section L: First Amendment
- Section M: The Clery Act and the Violence Against Women Reauthorization Act of 2013
- Section N: Further Federal Guidance

2014 Q&A – First Amendment

- *How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?*
 - DCL did not address
 - Prior First Amendment guidance remains in effect
 - 2001 Guidance; OCR's July 28, 2003 Dear Colleague Letter on the First Amendment; OCR's October 26, 2010 Dear Colleague Letter on harassment and bullying

2014 Q&A – First Amendment

- OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution
 - Therefore, when a school works to prevent and redress discrimination, it must respect the free speech rights of students, faculty, and other speakers
 - Title IX protects students from sex discrimination; it does not regulate the content of speech

2014 Q&A – First Amendment

- OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX
 - Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials
 - 34 C.F.R. § 106.42

2014 Q&A – Clery Act

- Clery Act does not alter Title IX obligations
 - FERPA-Clery-Title IX comparison chart
<https://www.notalone.gov/assets/ferpa-clerychart.pdf>
- Neither does the VAWA Reauthorization Act
 - Nothing in Section 304 of the VAWA Reauthorization Act (Campus SaVE) relieves a school of its obligation to comply with Title IX and OCR guidance

Clery Act - VAWA Regulations

- VAWA Reauthorization Act - March 7, 2013
 - Section 304 - Campus Sexual Violence Act (Campus SaVE)
 - Amends Clery Act to add reporting of domestic violence, dating violence, and stalking
 - New student discipline requirements
 - Additional training and education mandates
 - Schools required to make “good faith effort to comply” until final regulations issued

Clery Act - VAWA Regulations

- VAWA Negotiated Rulemaking process -- Spring 2014
 - Consensus reached - Notice of Proposed Rulemaking published June 20, 2014
- Final Regulations published October 20, 2014
 - Effective July 1, 2015; changes must be included in October 1, 2015 Annual Security Report (ASR)
 - Obligation to make "good faith effort to comply" continues until then

VAWA Regulations

- Key definitions for statistical counting of reported crimes
 - Dating violence
 - Domestic violence
 - Sexual assault
 - Stalking
- Hierarchy rule
 - rape/murder counted in both categories

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
 - Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
 - The existence of a social relationship of a romantic or intimate nature with the victim is determined based on:
 - The reporting party's statement;
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved

Domestic Violence

- Felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim
 - A person with whom victim shares a child in common
 - A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
 - Person similarly situated to spouse under local domestic or family laws
 - Any other person against an adult or youth victim who is protected under local domestic or family violence laws

Sexual Assault

- Offense that meets the definition of rape, fondling, incest, or statutory rape as stated in the FBI's Uniform Crime Reporting (UCR) program
 - **Rape** is defined as 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 a person
 - Removed “carnal knowledge”
 - Replaced “force” requirement — “without consent”

No Regulatory Definition of Consent

- Consent definition proposed:

“affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter”

- Individual who was asleep or incapacitated would not be able to consent
- Could not infer consent under circumstances in which consent was not clear
 - absence of “no” or “stop”
 - existence of a prior or current relationship or sexual activity

Stalking

- Engaging in course of conduct directed at a specific person that would cause **reasonable** person to fear for the person's safety or the safety of others or suffer substantial emotional distress
 - Course of conduct is two or more acts, including, but not limited to:
 - Acts in which stalker directly, indirectly, or through third parties by any action, method, device, or means
 - Follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property

Stalking (Cont'd)

- **Substantial emotional distress** is significant mental suffering or anguish that may, but does not necessarily require, medical or other professional treatment or counseling
- A **reasonable person** is one under similar circumstances and with similar identities to the victim

VAWA Regulations – Annual Security Report

- Annual security report (“ASR”) must include a statement of policy regarding the institution’s programs to prevent *dating violence, domestic violence, sexual assault, and stalking*
- Policy statement must include:
 - A description of the institution’s primary prevention and awareness programs for all incoming students and new employees, which must include:

ASR Policy

Statement Requirements

- A statement that the institution prohibits the crimes of *dating violence, domestic violence, sexual assault, and stalking*
- The definitions of “dating violence,” “domestic violence,” “sexual assault,” and “stalking” in the applicable jurisdiction
- The definition of “**consent**,” in reference to sexual activity, in the applicable jurisdiction
 - Can still use institutional definition of consent in sexual misconduct policy, but must notify community of jurisdictional definition as well, for prevention programming purposes

ASR Policy

Statement Requirements (Cont'd)

- A description of safe and positive options for bystander intervention
 - Information on risk reduction
- A description of the institution's ongoing prevention and awareness campaigns for students and employees
- Procedures victims should follow in the event of a crime of *dating violence, domestic violence, sexual assault, or stalking*

Definition of Consent in Washington

“at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.”

RCW 9A.44.010(7)

ASR Policy Statements – Victim Procedures

- Procedures for victims must contain information about:
 - The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or which may be helpful in obtaining a protection order
 - How and to whom the alleged offense should be reported

ASR Policy Statements – Victim Procedures (Cont'd)

- Options about the involvement of law enforcement and campus authorities, including notification of the victim's option to:
 - Notify proper law enforcement authorities, including on-campus and local police
 - Decline to notify such authorities
- Where applicable, the rights of victims and the institution's responsibilities for *court orders of protection, restraining orders, etc.*

ASR Policy Statements – Victim Procedures (Cont'd)

- Information about how school will protect victim confidentiality, including how it will:
 - Complete publicly available record-keeping and disclosure, without inclusion of identifying information about the victim
 - Maintain as confidential *any accommodations or protective measures* provided to the victim (as much as possible)

ASR Policy Statements – Victim Procedures (Cont'd)

- A statement that the institution will provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, and other services available for victims, both within the institution and in the community

ASR Policy Statements – Victim Procedures (Cont'd)

- A statement that the institution will provide written notification to victims about options for, and available assistance in, changing academic, living, transportation, and working situations. The institution must make such accommodations if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement

VAWA Regulations – Disciplinary Proceedings

- ASR must contain explanation of procedures for institutional disciplinary action in cases of alleged *dating violence, domestic violence, sexual assault, or stalking*, including:
 - A description of each type of disciplinary proceeding used by the institution
 - The steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding

ASR Explanation of Disciplinary Proceedings (Cont'd)

- How the institution determines which type of proceeding to use based on the circumstances of an allegation of dating violence, domestic violence, sexual assault, or stalking
- A description of the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking

ASR Explanation of Disciplinary Proceedings (Cont'd)

- A listing of **all** of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking
- A description of the range of protective measures that the institution may offer following an allegation of dating violence, domestic violence, sexual assault, or stalking

VAWA Regulations - Requirements for Disciplinary Procedures

- Institutional disciplinary proceedings must
 - Include a prompt, fair, and impartial process from the initial investigation to the final result
 - Be conducted by officials who receive annual training on:
 - Issues related to dating violence, domestic violence, sexual assault, and stalking
 - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

Regulatory Requirements for Disciplinary Proceedings (Cont'd)

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice
- Not limit the choice of advisor or presence for either the accuser or the accused
 - Attorneys have to be allowed
 - Institution can restrict participation – “potted plant”
 - Restrictions must apply equally to both parties

VAWA Regulations – Written Explanation of Rights

- Victims must be provided a written explanation of rights and options
 - When a student or employee reports to the institution that the student or employee has been a victim of *dating violence, domestic violence, sexual assault, or stalking*, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options with respect to the report
- Providing explanation in ASR is not enough

VAWA Regulations – Retaliation Prohibited

- VAWA amendments added a non-retaliation provision, § 485(f)(17), to the Clery Act
- VAWA regulations incorporate retaliation prohibition
 - Neither the institution, nor any officer, employee, or agent, may retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under the regulations

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Thank you

Jennifer S. Divine
Miller Nash LLP
4400 Two Union Square
Seattle, Washington
jennifer.divine@millernash.com
206.622.8484