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Rebecca Chopp, Ph.D.  
Office of the Chancellor  
University of Denver  
2199 S. University Boulevard  
Denver, CO 80208

Dear Chancellor Chopp:

In July 2014, the University of Denver (the University or DU) engaged Pepper Hamilton LLP to conduct an external audit and assessment of the University's policies, procedures and practices related to sexual and gender-based harassment and violence<sup>1</sup> under Title IX of the Education Amendments of 1972 (Title IX) and related authority, including the intersection of Title IX with the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), as amended by § 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA).

Early in our engagement we spoke with the Chancellor, the Chair of the Board and the Vice Chancellor for Legal Affairs and General Counsel. All three expressed their commitment to an external and objective assessment of the University policies and practices. Other members of senior leadership echoed the Chancellor's commitment to provide national leadership for the prevention, advocacy, and response to issues of sexual and gender-based harassment and violence, and spoke frankly about their commitment to the issues and the challenges they observed in policies, procedures and practices. This willingness to be self-critical and open to review without defensiveness paved the way for meaningful engagement with administrators, staff, faculty and students.

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<sup>1</sup> We recognize that domestic violence, dating violence and stalking are not exclusively forms of sex or gender-based harassment or violence, but for ease of reference in this report, the term sexual and gender-based harassment and violence should be read broadly to include conduct prohibited by Title IX and VAWA.

Our engagement in July of 2014 followed sustained activism and national attention to the issue of campus responses across the country. April 29, 2014 marked the release of *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*<sup>2</sup> and expanded guidance from the U.S. Department of Education's Office for Civil Rights (OCR). OCR's Questions and Answers on Title IX and Sexual Violence (Q&A on Title IX) provided extensive guidance, and in some aspects, new requirements for colleges and universities. Our engagement also followed the opening of a Title IX investigation by OCR at DU and increased enforcement efforts by OCR nationally. During our engagement, the number of colleges and universities under investigation by OCR for Title IX-related issues more than doubled. Conversely, this same time period saw a much smaller number of older investigations resolved through resolution agreements that largely resulted in findings of non-compliance. In addition, DU, like many institutions, was the subject of civil litigation related to the University's response to the resolution of reported misconduct.

A complex framework of law and regulatory guidance requires higher education institutions to effectively prevent, investigate, evaluate, and adjudicate reports of sexual and gender-based harassment and violence, dating violence, domestic violence, stalking and retaliation. In an arena that has traditionally been reserved for law enforcement, higher education institutions today have significant civil rights and legal responsibilities that exist independent of any external law enforcement action. Recent legislation and evolving guidance from the federal government (and many state governments) have expanded institutional responsibility in this area, and higher education institutions must have current, comprehensive and coordinated policies and procedures that integrate the complex regulatory framework, principles of victim/survivor agency and autonomy, trauma-informed practices, fair and impartial practices that give appropriate notice and process, and institutional values. An overview of the regulatory framework guiding this area is attached as Appendix I. This report also includes an overview of training and education requirements as Appendix II.

The observations and recommendations herein incorporate a nuanced and practical understanding of this national context; the complex and evolving regulatory framework; the dynamics of sexual and gender-based harassment and violence, dating and domestic violence, and stalking; the impacts of trauma on individuals and communities; due process considerations; and DU's unique culture, climate, policies, personnel, resources and underlying institutional values. They also reflect our broad-based experience with institutional practices and the context of higher education given our work at colleges and universities across the country assessing and improving campus responses, developing policy and procedures, conducting investigations, and providing education and training programs. Finally, the recommendations in this report are shaped by our unique skill set and background – a background that comes from working with thousands of complainants/victims/survivors over more than four decades of our professional careers responding to sexual violence, child abuse and other forms of interpersonal violence.

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<sup>2</sup> *Not Alone* is available at <https://www.notalone.gov/assets/report.pdf>.

Our bona fide commitment to these issues as former prosecutors, educators, investigators and advisors is apparent from our professional histories, board service, pro bono work and recognition from victim services agencies.

We are hopeful that the University will embrace this candid assessment and accompanying recommendations as an opportunity to enhance the implementation of its policies and procedures on sexual and gender-based harassment and violence.

## **I. Scope of Engagement**

During the fall of 2014, we met with University administrators and faculty responsible for implementing the University's Title IX policies and procedures, including the University's Title IX Coordinator (who also served as the Director of the Office of Equal Opportunity (OEO)), the Associate Provost for Graduate Studies, the Director of Graduate Student Services, the Associate Provost for Student Life, the Director of Student Conduct, the Director of Student Outreach and Success, the Director of Residential Education, the Executive Director of Campus Life, the Director of Student Activities, the Executive Director of Health and Counseling Services (HCC), the Director of Counseling, the Director of CAPE (Center for Advocacy, Prevention and Empowerment), the Associate Provost for Undergraduate Academic Programs, the Associate Athletic Director for Student Athlete Support, the Director of Campus Safety, the Associate Director/Commander Campus Safety, the Director of Human Resources, the OEO Investigator, the Executive Director of Academic Resources, and representatives from Pioneers CARE (Communicate, Assess, Refer, Educate), the Outcomes Council, appellate officers, the Women's Coalition, faculty, graduate student government. We also met with the Board of Trustees, and had the opportunity to meet with a small number of undergraduate students. These meetings occurred in person and by telephone throughout the fall, including a 2-day campus visit on October 8 and 10, 2014. Meetings included group working sessions and individual meetings. The purpose of these consultative meetings was to learn about the culture of the campus and the current processes for investigation and resolution of reports for students, employees and faculty; to share our initial insights as to the implementation of the University's policies and procedures; and to identify any areas of concern in the existing policies.

We also spent significant time with the University's Title IX Coordinator during the summer and early fall of 2014 as she worked with a team of other implementers to revise University policy prior to the start of the 2014-2015 academic year.

Our campus meetings informed our analysis of policies, procedures, and practices, which included a review of all policies and procedures related to sexual and gender-based harassment and violence; relevant student, staff and handbook procedures; the University of Denver Discrimination/Equal Opportunity Policy No. 3.10.010; OEO Procedures 2014-2015; the Employee Handbook (Revised May 2013); the June 2, 2014 Amendment to Board Approved Equal Opportunity Policy; the University of Denver Board of Trustees Resolution Amendments to Board Approved Policy Number 3.10.010; the University of Denver Honor Code (Revised

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August 2013); the University of Denver Faculty Personnel Guidelines Relating to Appointment, Promotion, and Tenure (Revised 2001); the Graduate Policy Manual Academic Year 2013-2014; the 2014-2015 Student Life Organizational Chart; the University of Denver Faculty & Staff Red Folder; Campus Safety Forms, including Responding to an Incident of Sexual Assault, Harassment, Stalking or Domestic/Dating Violence, Interim Safety Measures Checklist, Resources for Victims of Sexual Assault, Harassment, Stalking or Domestic/Dating Violence; Equal Opportunity Forms, including Case Management and Communications Form, Clery Reporting Form, Initial Assessment of Complaint, Interim Measures Form, Process Overview and Discussion – Complainant, Interview Form – Respondent, Interview Form – Witness, and Intake Form 2013-2014.

The attached report presents an overview of our observations and recommendations to enhance the University's policies, procedures and practices related to sexual and gender-based harassment and violence.<sup>3</sup> Our review of procedures and practices was broad-based and includes recommendations about structure of the institutional response, internal operating protocols for coordination of information and personnel, resources and education and training programs. This report is designed to identify areas of recommended change for the University, not to provide an exhaustive discussion or a referendum on current practices. During the course of our engagement, we shared our preliminary observations and recommendations with the Chancellor, the Title IX Coordinator and General Counsel. We also provided ongoing advice and guidance to the University over the course of the year.

Our hope is that this comprehensive assessment provides clear guidance should the University choose to implement some or all of these recommendations. We are pleased to observe that DU has already embraced many of our recommendations in this report, including:

- Implementing a uniform policy (Fall 2014);
- Creating a dedicated website: <http://www.du.edu/equalopportunity/titleix>;
- Expanding staffing in OEO to provide two full-time investigators;
- Hiring a dedicated Title IX Coordinator (to begin June 1, 2015); and,
- Requiring mandatory Title IX training for all University of Denver faculty and staff members (as of May 20, 2015).

In prioritizing our recommendations, we recommend that the University dedicate immediate attention to the following initiatives: 1) review the structure of the institutional response under

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<sup>3</sup> Our audit focused on a systemic review of policies, procedures and the structure for response. Although we reviewed some investigative files, we were not asked to conduct a retroactive review of individual cases, nor did we conduct extensive analysis of the University's investigative protocols and practices.

the newly hired Title IX Coordinator, 2) develop a coordinated multi-disciplinary response team, 3) expand resources for support and advocacy, and 4) conduct strategic planning to meet comprehensive training needs for all constituencies.

## **II. Framework for Effective Responses**

We recommend that the University take steps to assure an integrated and coordinated response to all reports of sexual and gender-based harassment and violence. As a foundational matter, an effective institutional response integrates three concepts:

- (1) compliance with the state and federal regulatory guidance and legal authority;
- (2) an understanding of the dynamics of sexual and gender-based harassment and violence and trauma-related considerations; and
- (3) a recognition of an institution's unique policies, procedures, personnel, resources, culture and climate.

To be effective, the response must coordinate roles and responsibilities of personnel and the sharing of information, provide balanced attention to the needs of the parties, address individual and campus safety, assure fair and impartial investigations, and facilitate a prompt and equitable resolution. The institutional response must also include coordinated training and educational programming for students and employees (including staff and faculty).

Key elements of an effective institutional response include:

- Adherence to coordinated and accessible policies and procedures;
- An independent Title IX Coordinator with sufficient authority and resources to effectively navigate oversight responsibilities;
- A coordinated multi-disciplinary response team to provide support, resources and accommodations and to facilitate informed decision-making;
- A centralized reporting and review process to ensure consistent application of policies and procedures, and appropriate steps to eliminate, prevent and address the effects of sexual and gender-based harassment and violence;
- Delineation between confidential resources with legally-protected and privileged communications versus reporting options to campus administrators which trigger an institution's Title IX obligations;
- Coordination of employee reporting obligations under Title IX, Clery, VAWA, mandatory child abuse reporting, and other state provisions to assure

that all individuals are aware of how and where information that is shared with a University employee will be disclosed;

- An initial assessment in each report designed to evaluate known facts and circumstances, take interim steps to protect the complainant and the campus community, facilitate compliance with Title IX, Clery and VAWA responsibilities, and identify the appropriate institutional response (alternative resolution vs. investigation and disciplinary action);
- Protocols for the identification, implementation and enforcement of reasonably available and appropriate interim remedial and protective measures;
- Separation of support and advocacy functions from impartial investigative and adjudicative processes;
- Reliable, thorough and trauma-informed investigations conducted by experienced and trained investigators;
- Procedures for resolution that recognize the balance between complainant autonomy and agency and fair and impartial process that incorporates notice and an opportunity to be heard;
- Regular communication with the parties and transparency about processes to maintain the trust of individual stakeholders and the community;
- Consistent and coordinated training, education and prevention programs; and
- Centralized record-keeping and documentation for tracking and monitoring reported incidents, monitoring patterns and assessing campus climate.

In keeping with this framework, we recommend that the University consider enhancing current practices through the recommended changes in this report. These recommendations reflect both the evolving nature of the regulatory guidance<sup>4</sup> and an understanding of effective practices across the country. The goal of these recommendations is to enhance implementation systems, improve the integration of processes and coordination of information and tend to student and employee welfare in a seamless manner.

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<sup>4</sup> As noted above, as recently as April 29, 2014, OCR issued a significant guidance document, Questions and Answers on Title IX and Sexual Violence. And on October 20, 2014, the negotiated Rules were finalized for the Violence Against Women Reauthorization Act of 2013, 79 Fed. Reg. 62751, 62789 (Oct. 20, 2014) (to be codified at 34 C.F.R. 668), with an effective date of July 1, 2015.

### **III. Policy and Procedures**

#### **A. Observations and Discussion**

When we began our review, the University had recently passed a Board Approved Discrimination/Equal Opportunity Policy 3.10.0101 (effective June 6, 2014). This policy amended the previous Equal Opportunity/Sexual Harassment Policy (effective date September 10, 2013). We assisted Kathryne Grove, the Director of OEO and Title IX Coordinator, in drafting comprehensive procedures for the investigation and resolution of reports of sexual and gender-based harassment and violence. The procedures were developed to meet the following goals:

- Incorporate evolving regulatory requirements under Title IX and VAWA;
- Provide easily accessible, clear and consistent definitions of prohibited conduct;
- Provide clear and transparent language that speaks to the participant's experience and intersection with the process;
- Provide transparent information about how the University balances complainant agency and autonomy with its broader obligation to tend to campus safety and maintain an environment free from harassment and discrimination;
- Minimize the number of times a complainant or other party/witness is required to be interviewed or share their account;
- Facilitate more consistent, transparent and efficient outcomes;
- Ensure fact-gathering is completed by impartial, experienced and trained implementers, and that the University, not the participants, bears the burden of gathering all relevant information as identified by the complainant, the respondent or the investigator, in determining whether to move forward and in determining responsibility;
- Incorporate trauma-informed investigative and resolution practices;
- Maintain principles of fairness for the complainant and respondent, including notice, an opportunity to meaningfully participate, present information and be heard; and,



- Continue to promote accountability for policy violations.

The result was a single, unified policy and a comprehensive set of Equal Opportunity procedures that apply to all faculty, staff, students, Board of Trustee members, volunteers, contractors, guests and visitors of the University. The policy extends to all University activities, both on and off-campus, and addresses sexual and gender-based harassment, sexual assault, dating violence, domestic violence, stalking, retaliation and related forms of prohibited conduct. The use of a unified policy and accompanying procedures allows for a consistent message and application of institutional values, purpose, scope, notice of non-discrimination, applicable definitions of prohibited conduct, available resources, reporting options, the difference between confidential resources and reporting options, information about prevention and the prohibition on retaliation.

## **B. Recommendations**

We offer the following recommendations to enhance the current policy and procedures:

1. During the summer of 2015, in preparation for conclusion of the OCR investigation, review the current Discrimination/Equal Opportunity Policy and Equal Opportunity Procedures in light of:
  - a. the October 14 VAWA Rules, which are implementable in July 2015;
  - b. common elements of OCR resolution agreements released since the fall of 2014; and,
  - c. the experiences of DU investigators, adjudicators and implementers with the 2014-2015 policy and procedures.
2. Consider contacting complainants and respondents who intersected with the Equal Opportunity Office or the University's Title IX processes during 2014-2015 to provide them a voluntary opportunity to share any feedback, concerns or other relevant information about their experience. This information can be aggregated and used to inform any revisions to the Equal Opportunity Procedures or Title IX practices.
3. Commit to conducting an annual review and assessment of Title IX policies, procedures, and practices to reflect and incorporate lessons learned from the current year and evolving law and guidance.
4. Supplement the Discrimination/Equal Opportunity Policy and Equal Opportunity Procedures policy with additional resources. To balance the need for detailed and legally compliant policies with easy to understand language



and accessible guidance, we recommend that the University consider the following: a revised resource and response overview (resource page) that outlines emergency, safety, medical and law enforcement responses, on and off campus confidential resources, reporting options and a summary of the key components of the policy; a Frequently Asked Questions (FAQ) document that provides an alternative format for community members to intersect with the policy; and flow charts that outline the University's centralized reporting process and provide clarity as to the intersection between complainant agency/autonomy and employee reporting responsibilities. The combination of the resource page, FAQ and flow chart(s) provide organization of resources and support, easy access to relevant policies, and a conceptual demonstration of the University's commitment to consistent application of policies and procedures in receiving reports, providing services, conducting investigations, and seeking resolution of reports under the policy. We note that the University has provided resource information and innovative infographics on the newly created Title IX website.<sup>5</sup> We commend these materials and encourage continued expansion.

5. Determine whether there are any remaining policies, procedures, pamphlets, sections in handbooks, brochures, or web content that should be removed or revised to maintain consistency with the Discrimination/Equal Opportunity Policy and Equal Opportunity Procedures.

#### **IV. Dedicated Title IX Coordinator**

##### **A. Observations and Discussion**

When we began our review, one administrator served as both the Director of the OEO and Title IX Coordinator, a dual designation implemented in the fall of 2011. While this is a common model at many institutions, given the size and diversity of DU's student population, this structure was not optimal for DU. We observed that the Title IX Coordinator made significant efforts to institutionalize the vast responsibilities under Title IX, including the revision of policy; oversight of investigation and resolution; coordination and training and education programs; the creation of template communications and internal checklists; and compliance with Title IX generally. Indeed, during the three years before our engagement, DU made significant improvements on all fronts.<sup>6</sup> We also note that the Title IX Coordinator was consistently described as compassionate, dedicated and well-informed.

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<sup>5</sup> <http://www.du.edu/equalopportunity/titleix/resources-for-reporting.html>.

<sup>6</sup> A more detailed list of the University's efforts can be found online in the October 1, 2014 community update at <http://www.du.edu/equalopportunity/titleix/news-updates/100114.html>.

It was also immediately apparent, however, that despite the Title IX Coordinator's best efforts, the breadth of responsibilities in her portfolio impeded OEO's ability to effectively and efficiently oversee and fulfill the University's Title IX mandates. Because of significant under-resourcing, we observed challenges in timely and regular communications with complainants and respondents. We also observed challenges in coordinating information and tasks, particularly with respect to the implementation of interim measures for graduate students, the coordination with student affairs to design remedies that address climate and culture issues within student organizations, and the development a systematic and comprehensive training and education program. In addition, we identified what we perceived to be conflict in role in that the Title IX Coordinator was asked to also serve as a Title IX investigator in some cases. Although OCR has not prohibited the Title IX Coordinator from also serving as the investigator, we note that this practice may impede objective oversight of the investigative functions and remove the natural benefit of having an additional check in the process by an independent coordinator.

Under Title IX, an educational institution (who receives federal funding) is required to appoint a Title IX Coordinator to oversee the institution's Title IX compliance efforts, including the centralized review, investigation, and resolution of reports of sexual and gender-based harassment and violence under the institution's complaint processes, and to identify and address any patterns or systemic problems that arise during the review of such complaints. The Title IX Coordinator should be available to meet with students, employees and third parties as needed.<sup>7</sup> The Title IX Coordinator's role and responsibilities should be clearly defined, and the Title IX Coordinator's contact information should be easily accessible by students, faculty and staff.<sup>8</sup>

Educational institutions must take steps to ensure that employees designated to serve as Title IX Coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the institution's Title IX procedures operate.<sup>9</sup> Where an institution chooses to designate more than one Title IX Coordinator, it should ensure that one individual has ultimate oversight responsibility, and the others should have titles that clearly show that they are in a deputy or supporting role to the senior coordinator. OCR recently noted that larger institutions could benefit from the designation of deputy Title IX Coordinators that "may result in more effective training of the school community on their rights and obligations under Title IX and improved reporting of incidents under Title IX."<sup>10</sup> Finally, the

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<sup>7</sup> 2011 DCL at 7.

<sup>8</sup> 34 C.F.R. § 106.8(a); 2011 DCL at 6.

<sup>9</sup> 2011 DCL at 7.

<sup>10</sup> April 24, 2015 Dear Colleague Letter.

Title IX Coordinator should not have other job responsibilities that would potentially create a conflict of interest.<sup>11</sup>

The importance of an independent Title IX Coordinator was emphasized by recent OCR guidance. OCR noted,

To be effective, a Title IX coordinator must have the full support of your institution. It is therefore critical that all institutions provide their Title IX coordinators with the appropriate authority and support necessary for them to carry out their duties and use their expertise to help their institutions comply with Title IX.<sup>12</sup>

OCR emphasized the importance of independence, noting that the Title IX Coordinator's role should avoid any potential conflicts of interest and suggesting that the Title IX Coordinator "should report directly to the recipient's senior leadership, such as the district superintendent or the college or university president."<sup>13</sup> OCR also, for the first time, suggested that the Title IX Coordinator should be a full-time position to "ensure sufficient time is available to perform all the role's responsibilities."<sup>14</sup>

## **B. Recommendations**

1. Hire a full-time, dedicated Title IX Coordinator. The University has embraced the need for a dedicated and independent Title IX Coordinator as part of the administrative structure. In April 2015, Jean McAllister was hired to become the University's first dedicated Title IX Coordinator. Ms. McAllister will report to the Vice Chancellor of Human Resources, and will begin her work with the University June 1. The community update announcing her hire stated, "In her role as Title IX coordinator, Jean will serve as a central resource for all University constituencies on all issues related to Title IX. She will be the designated agent of the University responsible for coordinating and overseeing compliance with Title IX statutory and regulatory requirement efforts."<sup>15</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> April 24, 2015 Dear Colleague Letter.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> <http://www.du.edu/equalopportunity/titleix/news-updates/042815.html>

2. Ensure that the Title IX Coordinator has autonomy and control over key aspects of an effective Title IX response, including: central review of all reports of sexual and gender-based harassment and violence; participation in the evaluation of reports where a complainant requests anonymity or that no investigation occur; the provision of interim measures; timeliness of the investigative and adjudicative processes; and, the provision of individual and community remedies designed to eliminate a hostile environment, prevent its recurrence and address its effects.
3. Provide appropriate resources to support the Title IX Coordinator in her functioning. This includes administrative support and staffing, technological infrastructure, and the granting of authority and discretion that allows her to act with the approval of the Chancellor.
4. Over time, consider designating University employees as Deputy Title IX Coordinators. Deputy Coordinators could be selected based on task assignment, such as the coordination of education and prevention programming and training, or by constituency (e.g., athletics, undergraduate students, graduate students, professional schools, faculty or staff) to offer access to Title IX trained personnel throughout the campus community. The Deputy Title IX Coordinators can serve as a resource for ensuring University community members and employees understand how to make a report and access resources on campus, and that University employees understand their reporting responsibilities. Deputy Title IX Coordinators can also be available to assist in the routine assessment of climate in the constituency within their purview. The Deputy Title IX Coordinators can also assist with education and training efforts at the department or program level. A team of Deputy Title IX Coordinators, under the oversight of the Title IX Coordinator, could serve as a visible demonstration of the University's commitment to prevention and education, a climate that encourages reporting, and a coordinated and effective institutional response.
5. We recommend spending a day with Ms. McAllister to share our insights from this review and provide guidance and advice about the development of her role and implementation of these recommendations.

## **V. Multi-disciplinary Team for Coordination of Information and Tasks**

### **A. Observations and Discussion**

Many of the administrators with whom we met identified the need for protocols for consistent application of the policy and the development of a formal Title IX team. One administrator noted that the University's response is currently dependent on "individuals and

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relationships.” Another administrator noted their frustration with a perceived lack of protocols, noting “we are trying to feel our way through the process.” Several described a “silo-ed” environment with no defined team that pulls together to respond in a coordinated manner. They noted that the implementers responsible for action under the policy were not operating as a cohesive team. There was some concern that not everyone who needed to be informed about an incident actually was informed, or that individual administrators were not always clear as to their responsibilities. One administrator noted that the “cultural issues were like the tail wagging the dog,” resulting in a “process that seems cluttered and detached.” The lack of a clearly defined team also contributed to a lack of trust in the successful resolution of a report.

To successfully implement a coordinated and compliant response, we recommend that the University designate a multi-disciplinary team of implementers (Title IX team) under the leadership of the Title IX Coordinator. The Title IX team should be composed of a core group of administrators who work together to implement intentional, consistent and compassionate responses when a report is brought to the attention of the Title IX Coordinator. The goal is to provide a centralized response that is both compliant with law and sensitive to the unique issues attendant to a case of sexual or gender-based harassment or violence. Sharing all reports with the Title IX team will help to ensure a prompt and equitable review, investigation and resolution of complaints. Maintaining a centralized, team-based process also encourages consistent application of the University’s Title IX policy and allows the University to respond promptly and equitably to eliminate sexual and gender-based harassment and violence, prevent its recurrence and eliminate its effects. A team-based approach will help to eliminate ad hoc responses, allow for central record keeping for assessment of patterns, and ensure that the review or investigation is thorough, fair and impartial and consistent with policy, law and compassionate practices.

The Title IX team, which serves as the institutional infrastructure for the centralized review, investigation, and resolution of all Title IX-related reports, should be narrowly defined to include the Title IX Coordinator, any Deputy Title IX Coordinator(s), a representative from Campus Safety and, as warranted by the role of the parties, student conduct or student affairs professionals, human resources professionals, or faculty leadership. This core response team may be supplemented by a broader team, which includes CAPE, health services, counseling, members of the LGBTQ or multicultural communities, and other campus members as relevant. All team members should be appropriately trained in the regulatory framework, the dynamics of sexual and gender-based harassment and violence, and in the University’s grievance procedures.

In order to fully benefit from the team approach, a first step is to identify and sequence the steps in the institutional response. This process involves clearly identifying and articulating the roles and responsibilities of each team member. This step also includes discussion about the primary responsibility of each department, protocols for the coordination and sharing of information between and among relevant departments, clear articulation of roles and responsibilities of implementers and the internal operating procedures that should be followed to avoid overlapping responsibilities or conflicts in roles. It requires a clear articulation

of who is accountable for each task, who has oversight responsibility and who will be vested with ultimate decision-making authority on critical issues.

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

## **B. Recommendations**

Our specific recommendations to enhance the effectiveness of the Title IX team are as follows:

1. Reinforce a centralized review process by ensuring that all reports regarding sexual and gender-based harassment and violence, dating violence, domestic violence, stalking and retaliation are referred to a consistent review process under the oversight of the Title IX Coordinator. Each report known to the University should be referred to the Title IX Coordinator and supporting multi-disciplinary team (Title IX team) to assess the appropriate steps to eliminate, prevent and address the underlying misconduct, and assure a prompt and equitable review and resolution that incorporates the wishes of the complainant and the University's broader obligation to campus safety.
2. Identify a coordinated multi-disciplinary response team (Title IX team) to provide support, resources and accommodations, to facilitate and document informed decision-making, and to integrate compliance requirements. As part of this process, the University should:
  - a. Identify roles and responsibilities of each team member for timely and efficient responses that do not duplicate efforts;

- b. Map out specific steps to be taken by each administrator/department in response to a report;
    - c. Separate support and advocacy functions from the impartial investigative and adjudicative processes; and,
    - d. As below, implement internal operating protocols to facilitate the coordination of information, the sequencing of institutional actions, and assure consistent responses.
  3. Establish a routine meeting schedule (weekly or more frequently as needed) for the core Title IX response team to review active cases, and periodic meetings for the broader Title IX implementing team to assess progress with recommendations, evaluate available supports, assess patterns and coordinate educational and programming efforts.
  4. Develop protocols for the Title IX team. We recommend that the University draft internal operating protocols that funnel all information to a centralized multidisciplinary team for coordinated and consistent assessment, map the internal operating procedures and process workflow, build mechanisms for timely sharing of information, and outline the available institutional steps that may be taken following a report. The protocols should build routine pathways for coordination of personnel and sharing of information to develop trust and break down barriers between departments. Specific tasks include:
    - a. As noted above, clearly identify the multi-disciplinary team members and articulate the roles and responsibilities of each University employee involved in responding to a report of sexual or gender-based harassment or violence;
    - b. Identify all potential first responders and create first responder protocols to relay consistent information to the parties and the Title IX Coordinator in a timely manner;
    - c. Identify the primary responsibility of each department, the protocols for coordination and sharing of information between and among relevant departments, and the protocols that should be followed when there are overlapping responsibilities or conflicts in roles;
    - d. Develop protocols and an integrated workflow that organizes and sequences an informed and deliberate institutional response to reports of sexual and gender-based harassment and violence, and the specific expectations for implementation responsibilities identified in step 3;



- e. Facilitate coordination with local law enforcement by creating protocols for sharing of information;<sup>16</sup>
  - f. Ensure transparent and consistent communication with the parties, including the use of template materials and correspondence that reflect sensitive and compassionate tone and language; and, as appropriate, follow-up before, during and after an investigation and resolution; and,
  - g. Set clear expectations for all team members and ensure oversight of each stage of the process.
5. Draft protocols for key decisions. We recommend that the University develop consistent protocols for application to critical decisions. This includes identifying who has the responsibility for making a determination, outlining the applicable law and guidance, establishing a list of key factors to consider, and maintaining appropriate documentation of the factual foundation for each decision. There should be a consistent decision-maker with clear authority, and an opportunity for a respondent to challenge the implementation of protective measures. Critical decisions may include: imposing protective measures that may limit a respondent's movement, schedule or living arrangements; interim suspension; evaluating a complainant's request for anonymity, that a respondent not be notified, or that no investigation be pursued; timely warning assessments; and whether to notify law enforcement.
6. Review template communications. The University should review and standardize existing template communications for regular stages of the process to assure consistency, the use of trauma-informed language, adherence to policy requirements and compliance with federal law regarding required written communications.

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<sup>16</sup> In the April 29, 2014, Questions and Answers on Title IX and Sexual Violence, OCR stated:

OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

7. Maintain appropriate documentation. We recommend that the University maintain records of all reports and steps taken to eliminate, prevent and address the effects of the prohibited conduct. The Title IX Coordinator should document the information gathered in the initial assessment and the factors considered to support good decision-making based on consistent factors. The Title IX Coordinator, in conjunction with the supporting Title IX team, should document key determinations, such as timely warning under the Clery Act, interim suspension considerations, deciding to conduct an investigation despite a complainant's request to the contrary, interim protective measures and broader remedies, and responding to retaliation. To ensure thorough and consistent documentation, the University should develop protocols for documenting information, and should consider systems for efficient and coordinated record keeping and tracking of all informal and formal complaints involving students, staff and faculty.
8. Coordinate with law enforcement. We recommend that the University meet with local law enforcement and prosecuting authorities to review and update any memorandum of understanding. This is a critical step to facilitate the sharing of information between law enforcement and the University and in defining roles and expectations.
9. Build in a process for feedback with involved employees and implementers to demonstrate follow-through and enhance trust in the process by increasing transparency.

## **VI. Routine Actions upon Receipt of a Report**

### **A. Observations and Discussion**

We recognize that the functioning of the OEO as it relates to Title IX and investigative functions is in flux, both because of the implementation of a revised policy in the fall of 2014, and because of recent changes in staffing. Given that the University has hired a full-time Title IX Coordinator and two full-time investigators, internal OEO practices may evolve naturally with the addition of newly established positions and personnel. In addition, we did not review or evaluate individual investigative files, the timeliness of investigations and resolutions, or the documentation practices in the OEO.

However, we noted general concerns expressed about case management, and in particular, some challenges in connecting a complainant to the Title IX Coordinator in a timely manner and in OEO maintaining regular and consistent communication with the parties. We also note that OCR and the Clery Compliance Division (also under the U.S. Department of Education) are placing increased emphasis on the documentation of information, institutional

decisions and the systemization and implementation of Title IX obligations. Accordingly, we offer the following recommendations.

**B. Recommendations**

1. Systemize case management. We recommend that the University develop structured protocols and systems for case management that maintain comprehensive records, document investigative steps, interim measures and communications, track timelines and facilitate regular and ongoing communication. The case management system can also serve to track patterns and assist in the evaluation of the effectiveness of the process.
2. Conduct an initial assessment (consistent with the current OEO Procedures) in every case and ensure contemporaneous documentation of steps taken and information considered. The initial review should proceed to the point where a reasonable assessment of the safety of the individual and of the campus community can be made, and the Title IX Coordinator and/or Title IX team has sufficient information to determine the best course of action, which may include an investigation or steps to otherwise determine what occurred.
3. As part of the initial assessment, and consistent with the OEO Procedures, develop a systemized process for evaluating a complainant's request for anonymity, determining the appropriate course of action, and documenting the facts and circumstances that inform the University's determination. This process, which must be supportive of a complainant's needs and iterative in nature, can involve the Title IX Coordinator, the Title IX core response team, or a separate entity specially designated to assist or evaluate a request for anonymity. The Title IX Coordinator should document the information gathered, the factors considered, the determination reached, and any additional steps taken to eliminate, prevent and address the effects of the misconduct.
4. Consistent with the OEO Procedures, ensure that all forms of alternative resolution are clearly documented to demonstrate the actions that are taken to meet the University's Title IX obligation to eliminate a hostile environment, prevent its recurrence and address its effects on the complainant and the community.
5. Maintain regular and consistent communications with the parties. Ensure that processes are in place to comply with the VAWA requirement that any extension of designated time frames is for good cause, and that the delay and the reason for the delay is provided in writing to the complainant and respondent.

## **VII. Resources for Support and Advocacy**

### **A. Observations and Discussion**

The University has taken significant steps to expand and enhance resources available to support students who experience sexual and gender-based harassment and violence, but we observed the need for additional enhancements. Currently, the University requires all counseling trainees (graduate students) to obtain 40-hour victim advocacy training, provides access to counselors after hours through a central hotline, and offers support to both complainants and respondents through Pioneer CARES.

We are impressed with the University's direct advocacy services provided through CAPE, but note some challenges as follows: 1) the need for expanded staffing and resources to fully meet the demand for direct advocacy and educational programming; 2) the inaccessibility of the location for graduate students given the need for a key card; 3) the difficulty in accessing CAPE during working hours if the director is otherwise engaged; 4) the absence of a backup resource if the director of CAPE is not available; and, 5) the need to seamlessly provide interim measures. Currently, CAPE has taken on the role of providing interim measures, which should be provided by the Title IX Coordinator or another neutral University administrator. While CAPE can provide valuable advocacy for a victim, decisions as to the reasonableness of interim measures, particularly as they relate to protective measures taken against a respondent, are best left to a neutral decision-maker. In addition, although CAPE is well-respected on campus, CAPE is limited to requesting the imposition of interim measures, whereas the Title IX Coordinator has the authority to require, impose and enforce them.

We also note that in general, resources are more clearly defined and available for undergraduate students than for graduate students, and that there have been significant challenges in implementing interim measures for graduate students. This stems largely from some misunderstanding as to who has the ultimate oversight and authority to impose interim measures. There also seems to be a lack of connectedness among and between the departments and individuals who provide support for participants in the process. We also note that some of the administrators with whom we met seemed well connected to students, but less connected to process and how students intersect with the process.

### **B. Recommendations**

1. Conduct a benchmark study/gap analysis to determine whether the current functioning of HCC and CAPE provide adequate staffing levels to meet the needs imposed by the size and diversity of the University population.
2. Examine the existing campus resources to ensure that appropriate services are available to campus community members on an emergency and ongoing basis and to identify any gaps in services. This includes an assessment of the extent

to which resources are available outside of business hours (24/7 availability, evenings, weekends, and school breaks), the visibility and transparency to students, the level of training and/or sensitivity by staff, whether there are any conflicts in the roles of individuals providing services who also bear other job responsibilities on campus, and whether there is a clear articulation and understanding of confidential resources versus reporting options.

3. Expand the staffing of CAPE to allow for ease of access during working and non-working hours, expanded direct advocacy services, and expanded education and prevention programming.
4. Provide a clear and routine pathway for evaluating and imposing reasonably available interim measures. We recommend that the University enhance the systems and protocols to facilitate more consistent and streamlined access to interim remedies and protective measures. We recommend designating an individual or multiple individuals within a department for implementation and oversight of support and interim remedies under the oversight and control of the Title IX Coordinator. The processes for implementation of interim remedies should build in uniform follow-up and check in communications (both oral and written) with both the complainant and the respondent to create a feedback loop. It should also provide protocols for coordination of information as necessary between University departments. The goal is to assure that appropriate remedies, which are tailored to the needs of the parties, are available, offered, and where appropriate, implemented on a timely and consistent basis. The system should also ensure that protective measures are strictly enforced, and that the University respond to any violation promptly and equitably to protect both individual and community safety.
5. To ensure the integrity of the investigation, the responsibility for implementing support services and interim measures should be managed by an individual who is not directly involved in the investigation of an allegation. Combining support and investigative functions can blur the clear demarcation necessary to maintain a neutral and impartial investigative function. Combining support and investigative functions can also create confusion for a complainant or respondent and lead to a lack of trust in the integrity of the investigation based on a perception of bias toward one party or the other.

## **VIII. Oversight of Student Organizations**

### **A. Discussion**

We did not conduct a full assessment of the University's relationship with student organizations, nor did we review investigative files that might demonstrate investigative actions

taken with respect to student organizations. Anecdotally, however, administrators shared a frustration at what they perceived to be ineffective oversight of fraternity and sorority life. Some observed that Greek life and other identified student organizations were not subject to discipline. They also opined that the culture of group dynamics was not sufficiently addressed as it relates to sexual and gender-based harassment and violence. Administrators also expressed frustration at the advisor system of oversight of fraternities and sororities, noting that many advisors, who are volunteers, are not equipped to provide effective oversight, nor do they embrace requests by the University to undertake proactive steps or receive training.

## **B. Recommendations**

In keeping with evolving practices across the nation, we recommend that the University carefully evaluate the nature of their relationship with fraternities and sororities and other social organizations. At a minimum, we urge the University to consider the following recommendations:

1. Institute mandatory training and education requirements for all fraternity and sorority members, and engage fraternity and sorority leaders as peer educators within the Greek system.
2. Review the University's formal relationship with student organizations to assure that the University has the capacity to discipline, to take other remedial action, and to mandate appropriate training and educational programming.
3. Consider reevaluating the process for formal recognition by the University. For example, consider a certification process where the organization demonstrates significant compliance with required educational programming and other goals set by the University.
4. Consider restructuring the advisor system of oversight. There should be a baseline of knowledge and education required, as well as a more direct relationship to the fraternity or sorority and to the University. One alternative is to require fraternities and sororities to maintain a full-time house director who is responsible for setting behavioral standards within each community. Consistent with VAWA and Title IX requirements for training of employees, all advisors should be required to complete relevant education and training programs prior to serving as an advisor.

5. Evaluate rules regarding social events, parties and the use and dissemination of alcohol.<sup>17</sup>

## **IX. Education, Prevention and Training**

### **A. Observations and Discussion**

The University has made great strides in identifying educational and training needs and working to fill those needs. For example, this past year, the University began to use Alcohol.edu and Haven, online training modules for first year students. While an online program provides baseline information, it cannot be the only mechanism to educate, inform and begin to shift culture and climate. In-person sessions in Discoveries Orientation supplement the online modules, but even more can be accomplished with dedicated and recurring residential education and formal curriculum initiatives like University 101 or the First Year Seminar Program.

The University also has implemented the B.O.S.S. bystander intervention program. While B.O.S.S. has been offered to athletics teams, fraternities and sororities, participation by students has not been mandated or required. Indeed, many administrators told us “we don’t mandate anything here.” Another described a “culture of complacency,” and before Chancellor Chopp’s arrival, a perceived lack of visible leadership from the top with respect to sexual and gender-based harassment and violence. One administrator lamented that the University had not taken a strong position on hazing, sexual assault, or Title IX, noting, “If we talk about it, then we have a problem with it.” Equally as challenging, because of limited personnel resources and an inability to mandate the training, CAPE does not have the capacity to fully engage all campus constituents in participating in B.O.S.S. training.

Further, there was a general consensus that education for students beyond the first year class was lacking. For example, it appears that programming for upperclassmen, graduate students and international students is far less robust. With respect to graduate students, it was reported that there is little to no dedicated programming, that graduate students are not familiar with how to access resources and did not know the process for reporting or investigating reports. We heard similar concerns about faculty and gaps in their knowledge about Title IX, University procedures and available resources.

We also learned of some concern about the role of Campus Safety and concern that some students did not want to report to “Campo” because of perceived barriers related to alcohol or the sensitivity of the officers. While each of these areas of observation were limited to anecdotal accounts and cannot necessarily be extrapolated to statistically significant findings,

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<sup>17</sup> We do not make any specific recommendations regarding the University’s policies and practices regarding alcohol, but do note the impact of alcohol on issues of sexual and gender-based harassment and violence. We are aware that the University is separately considering issues related to alcohol and other drugs on campus.



they nonetheless highlight the need for greater awareness, training and transparency about University practices. In addition, one administrator noted, “There is a lack of trust in the Title IX office because the campus doesn’t know what they are actually doing.” We note, however, that OEO and CAPE have recently developed more user-friendly web content and the University has been providing regular updates to the community to increase transparency and visibility of the Title IX Coordinator and OEO.

Finally, many shared with us the concern that neither student life, housing and residential education (HRE) nor CAPE had sufficient staffing and resources to fully embrace the Title IX and VAWA training and education requirements.

We are pleased to note that as of May 2015, the University has mandated training programs for all employees. Generally speaking, however, we still observe a need for specific oversight of programming and leadership in prevention, education and training.

We recommend that the University implement a coordinated and systemic approach to education and prevention. The risks attendant to not incorporating comprehensive and thorough training are significant. Failing to set consistent expectations about reporting under Title IX, Clery/VAWA and state child protective services law may result in information not being routed to appropriate administrators and, as a result, individual complainants may receive *ad hoc* responses that do not meet their needs, are not compliant with federal law, allow patterns of persistent or pervasive behavior to continue unabated, or subject the University to civil or regulatory action for failing to take appropriate steps to eliminate a hostile environment, prevent its recurrence or address its effects.<sup>18</sup> An overview of the federal training requirements is attached as Appendix III.

## **B. Recommendations**

We recommend that the University consider the following steps:

1. Designate one individual with oversight responsibility for coordination and vetting of all University training and educational programming related to and required by Title IX, Clery and VAWA;
2. Categorize all constituencies (students and employees) by identity groups and departments to prioritize training needs and assign/delegate responsibility for meeting those training needs in a coordinated and timely manner;

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<sup>18</sup> Indeed, OCR has noted, “If a school delays responding to allegations of sexual violence or responds inappropriately, the school’s own inaction may subject the student to a hostile environment.” Title IX Q&A, Question A-5, p. 3.

3. Prioritize training for the senior leadership team and supervisors;
4. Prioritize training for specific individual groups, including:
  - a. Student-athletes
  - b. Fraternities and sororities
  - c. International students
  - d. Graduate students
  - e. Athletics and coaching staff
5. Ensure that all education and training materials are clearly written and reflect consistency with current law, guidance, policy, trauma-informed practices and fair and impartial processes;
6. Consider creating an Education and Prevention Committee to ensure coordinated approach to education and training;
7. Consider multi-disciplinary programming to address issues of sexual violence, gender equity, tolerance, inclusion and diversity, alcohol and substance abuse, intimacy, consent, the “hook up” culture, social media, bullying, hazing, classism, racism, and other issues that can impact campus culture and the development and education of students;
8. Incorporate VAWA requirements to provide programming for students and employees addressing the issues of domestic violence, dating violence, sexual assault and stalking. Education programs should include:
  - a. Primary prevention and awareness programs for all incoming students and new employees, including safe and positive options for bystander intervention;
  - b. Information on risk reduction to recognize warning signs of abusive behavior; and,
  - c. Ongoing prevention and awareness programs for students and faculty.
9. Provide integrated training to all employees, including tenure track professors and adjunct professors, which addresses reporting responsibilities for campus employees re:

- a. Clery: Campus Security Authority;
  - b. Title IX: Responsible Employee;
  - c. Mandatory child abuse reporting; and,
  - d. Colorado state law.
10. Provide dedicated training for faculty members, which should be incorporated through dedicated, in-person trainings that seek to reinforce centralized reporting; training may be provided to department leaders/chairs, who will then be responsible for ensuring that individual department members are appropriately and consistently trained and informed.
  11. Review existing training programs to assure that they encompass the expanded scope of content under the Title IX Q & A and VAWA.
  12. Consider the use of potent tie-ins to accomplish training goals (contractual, by merit increase, by evaluation, by computer log-ins, or meeting professional standards or curriculum requirements).
  13. Develop a campaign to reflect DU's core messaging and values. In the development of an intentional community, consider educational programming that communicates core value messages, shared responsibility for community and an understanding of the intersectionality of individual identity and social responsibility.
  14. Consider using student leaders and developing paid peer educator positions.

**C. Campaign and Core Messaging**

To complement the continued emphasis on training and education, we recommend that the Title IX Coordinator and OEO Director collaborate with the University's Communications Department to develop an intentional and strategic plan, identify branding, design visual content, and consider the effectiveness of forms of delivery, including web content, written materials, posters and other formats. The messaging should be consistent with all policies, procedures and training content.

In order to effectively launch and maintain a campaign, we recommend the integration of coordinated prevention, education and training programs through the lens of a coordinated and impactful campaign that provides consistent messaging designed to shift culture and climate.

We also recommend that the University develop a calendar to maintain steady and periodic programming. Consistent with the strategic plan, the University should identify community members who are responsible for resourcing and presenting regular training, as vetted by Title IX Coordinator. This can include engaging students, student organizations, athletic teams, Greek Life, staff and faculty.

In addition, we recommend that the University consider incorporating core elements in all training and educational programs for students, staff and faculty. For example, core concepts for student education might include:

- The University of Denver is a place where we encourage **conversation and dialogue** about sexual assault prevention, education and compassionate support for community members impacted by sexual violence. Breaking the culture of silence requires a willingness to engage the community and **speak openly** about these issues.
- The University **prohibits all forms of sexual and gender-based harassment and violence, relationship violence and stalking** on our campus. The policy contains specific definitions, but in general, the University prohibits all conduct of a sexual nature that occurs without consent.
- **Consent** requires clear, knowing and voluntary agreement to participate in sexual activity or behavior, expressed either by words or actions that create mutually understandable, clear permission regarding willingness to engage in sexual activity.
- The University encourages all students to be **active community members** and take reasonable and prudent actions **to prevent or stop** an act of sexual or gender-based harassment or violence, intimate partner violence or stalking. Taking action may include direct intervention when safe to do so, enlisting the assistance of friends, contacting campus safety or law enforcement, or seeking assistance from a person in authority.<sup>19</sup>
- The University prohibits **retaliation** against any individual or group who makes a report or participates in an investigation.
- DU provides **campus resources** where a student can speak to a trained professional who is mandated by law to maintain **confidentiality**. These include:

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<sup>19</sup> This concept is consistent with the B.O.S.S. program already initiated by the University. B.O.S.S. is a workshop series that teaches practical bystander-intervention skills for preventing violence and encouraging community engagement. See <http://www.du.edu/health-and-counseling-center/cape/boss.html>.

CAPE, HCC, and the University Chaplain. There are also confidential resources in the community.

- The University encourages all students who experience or witness a crime to make a report to local law enforcement and, as appropriate, seek medical treatment. The University also encourages all students to make a **prompt report** to the Title IX Coordinator or Campus Safety. There is no time limit for reporting. The University will respect the **privacy** of all individuals in responding to a report.
- When a report is made, under most circumstances, a student maintains **agency and autonomy** in choosing how to proceed. **Procedural options** following a report include alternative resolution or investigation and disciplinary action. The University will balance an individual's expressed preferences with its obligation to provide for campus safety.
- DU will **support** any individual who is affected by sexual or gender-based harassment, relationship violence or stalking, regardless of whether or not disciplinary action is sought. There are many **interim measures and supports** available to a student, including no contact orders, academic accommodations and residence modifications.
- The University will respond to sexual or gender-based harassment, relationship violence or stalking appropriately, and anyone found to have violated University policy will receive an appropriate **sanction**. A student can be **dismissed or expelled**, and an employee can be **terminated**.

## **X. Climate Assessment**

### **A. Discussion**

There are many methods for assessing climate, including studies that measure prevalence and the effectiveness of policies, procedures and practices. Those options include a formal climate survey (properly vetted and calibrated), protocols for seeking regular feedback from participants in the process, the maintenance of an anonymous suggestion box, and incorporation of assessment tools to be used during the training and evaluation processes.

There is no legal requirement, at this time, that the University conduct a climate assessment. In the 2011 Dear Colleague Letter, OCR recommended that schools “conduct[], in conjunction with student leaders, a school or campus ‘climate check’ to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and us[e] the

resulting information to inform future proactive steps that will be taken by the school.”<sup>20</sup> In the Title IX Q&A, OCR also suggested that a school consider conducting climate surveys “to learn more about the prevalence of sexual violence at the school.”<sup>21</sup> In addition, the White House Task Force “urge[d] schools to show they’re serious about the problem by conducting [a climate] survey” within the next year.<sup>22</sup> Like the Title IX Q&A, the White House Task Force recommends a climate assessment to test prevalence, noting that, “When done right, these surveys can gauge the prevalence of sexual assault on campus, test students’ attitudes and awareness about the issue, and provide schools with an invaluable tool for crafting solutions.”<sup>23</sup> While the recommendations in the significant guidance documents and references to climate surveys in the White House Task Force report are not binding, we acknowledge that a typical voluntary resolution agreement will require a climate assessment to test the effectiveness of policies. We also note that White House Task Force is exploring legislative or administrative options to require schools to conduct a survey in 2016.

However, as noted above, the University will likely be required to conduct a climate assessment as part of any resolution agreement with OCR. In moving forward with a climate assessment, we recommend that the University proceed carefully in the design and application of any assessment. A close look at the sample climate survey toolkit provided as a link in the White House Task Force Report reflects that the sample climate survey questions admittedly “have not been validated.” Further, the authors of the toolkit acknowledge that “untrustworthy data can do more harm than good in efforts to change campus climate.” In particular, we note that it would be reasonable at this juncture for the University to defer a climate assessment on prevalence and instead, focus current efforts on understanding the effectiveness of policies and procedures. This can be achieved by building these topics into broader surveys designed to evaluate student success, expanding the opportunities to debrief with all participants and incorporating surveys into mandatory training and education programs.

## **B. Recommendations**

1. Consider conducting a climate assessment that seeks to identify challenges in the current campus climate that affect the educational or employment environment or creates barriers to reporting. This may include: an assessment of the campus climate, an evaluation of the role of alcohol or other drugs on

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<sup>20</sup> 2011 DCL at 18.

<sup>21</sup> Title IX Q&A at 24.

<sup>22</sup> *Not Alone, The First Report of the White House Task Force to Protect Students From Sexual Assault*, April 2014, pg. 2, located at <https://www.notalone.gov/assets/report.pdf>.

<sup>23</sup> *Not Alone, The First Report of the White House Task Force to Protect Students From Sexual Assault*, April 2014, pg. 8, located at <https://www.notalone.gov/assets/report.pdf>.

campus and the efficacy of existing alcohol policies; and, an assessment of any areas of risk for students. A canvassing of all campus community members through a variety of methods – online and in-person, both anonymous and in open forums – serves a critical role in identifying key issues, assessing campus climate as reflected in recent OCR guidance, identifying educational and training needs for all constituencies and ultimately, eliminating a hostile environment based on a greater understanding of the context. It also demonstrates the University’s commitment to addressing issues of sexual violence directly and openly.

2. Study options for more formalized future surveys addressing prevalence.

## **XI. Other Recommendations**

### **A. Investigation**

1. Conduct a review of Title IX files regarding informal and formal reports received during the 2014-2015 academic year to ensure that appropriate steps were taken in each report, including an initial assessment, evaluation of request for anonymity, the provision of interim and protective measures, alternative resolution or investigation, and Outcomes Council. Review these files for completeness of the investigations, timeliness and implementation of appropriate remedies (both individual and campus-wide).

### **B. Outcomes Council**

1. Consider placing the Outcomes Council under the direct supervision of the Office of Equal Opportunity and Title IX or other appropriate office. As it stands now, there is no clear mechanism for oversight, supervision, education or training of the Outcomes Council.

### **C. Incorporate Student Feedback and Involvement**

1. We recognize that incorporating student and community feedback is essential to achieving and maintaining effective institutional responses. The scope of our engagement did not include debrief meetings with complainants or respondents, nor an assessment of climate and culture through broad-based outreach to students. We recommend that the University continue to seek mechanisms to incorporate student input through student leaders, open forums and individual engagement. DU’s students have already shown the capacity



for leadership on this issue, and those strengths should inform partnership and collaborative efforts between students and the University.<sup>24</sup>

**D. Clery Audit**

1. Finally, we recommend the University consider an audit of policies, procedures and practices under the Clery Act. While this was not part of our scope, our experience is that institutions who face Title IX challenges, as identified here, often face similar challenges in coordination and implementation of Clery responsibilities. In addition, given the intersections of Title IX and Clery through the recent VAWA amendments, it is critical that the University's responses under Title IX and Clery be integrated, policies and procedures be developed synergistically and trained administrators work as a seamless team to coordinate information, support functions, processes and compliance mandates.

**XII. Conclusion**

We commend the commitment of senior leadership, staff, faculty and students to these critical issues and know that DU will embrace the daily and ongoing tasks and challenges inherent in building an integrated and coordinated institutional response.

Thank you for the opportunity to assist DU and to candidly share our observations and recommendations. We remain available to discuss these recommendations in greater detail, or at your request, to assist in their implementation.

Sincerely,



Gina Maisto Smith



Leslie M. Gomez

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<sup>24</sup> See the October 24, 2014 letter to the community from Hayden Johnson, president of the Undergraduate Student Government, and Leslie Rossman, president of the Graduate Student Government. The letter can be found online at <http://www.du.edu/equalopportunity/titleix/news-updates/102414.html>.



## **Appendix I: Overview of the Regulatory Framework**

### **I. The Regulatory Framework**

The institutional response to sexual and gender-based harassment and violence is governed by a complex federal and state regulatory framework. In an arena traditionally reserved for law enforcement, higher education institutions today have significant legal responsibilities that exist regardless of whether a sexual violence complaint is made to police. Moreover, recent changes in the law have significantly broadened the scope of institutional responsibility in this area. For example, Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA) imposes new primary obligations on colleges and universities to combat sexual assault, domestic violence, dating violence, and stalking. The result of these legal changes is that higher education institutions today must have current, comprehensive and coordinated policies and procedures that address this complex labyrinth of legal obligations.

The federal framework is based on three primary sources: statutory law, implementing regulations, and “significant guidance documents,” promulgated by government agencies, such as the U.S. Department of Education (DOE), relating to those laws and regulations. This section outlines these relevant laws: (1) Title IX of the Education Amendments of 1972<sup>25</sup> (Title IX); and, (2) the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act<sup>26</sup> (Clery Act or Clery), as amended by (3) the Violence Against Women Act<sup>27</sup> (VAWA), including amendments made in the Reauthorization Act of 2013.<sup>28</sup>

Effective institutional responses demand a coordinated and integrated approach to Title IX, Clery and VAWA. Educational institutions should also carefully consider obligations under state and local laws.

#### **A. Title IX Overview**

Title IX is a federal civil rights law which provides that no “person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>29</sup> Title IX applies to all educational institutions that receive federal

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<sup>25</sup> Title IX is codified starting at 20 U.S.C. § 1681.

<sup>26</sup> 20 U.S.C. § 1092(f).

<sup>27</sup> VAWA is codified in part at 42 U.S.C. §§ 13701-14040.

<sup>28</sup> Pub. L. 113-4, Violence Against Women Act of 2013 (Mar. 7, 2013).

<sup>29</sup> 20 U.S.C. § 1681(a).

financial assistance either directly or indirectly, including public and private elementary and secondary schools, school districts, colleges and universities.<sup>30</sup>

## **1. Scope**

Although Title IX is perhaps best known for its mission to achieve gender equity in athletic programming, its protections, and the resulting responsibilities for an educational institution, are much broader in scope. Title IX prohibits discrimination on the basis of sex in all of an institution's programs and activities, including an institution's education programs and activities and in employment.<sup>31</sup> Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct and sexual violence.<sup>32</sup> Title IX's protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment. Finally, Title IX applies equally to students, employees and third parties.<sup>33</sup>

## **2. Notice & Obligation to Respond**

Under Title IX, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred; if an investigation reveals the existence of a hostile environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence and address its effects.<sup>34</sup> An institution violates Title IX if it has "notice" of a sexually hostile environment and fails to take immediate and corrective action. In addition, an institution's delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence may subject the complainant to a hostile environment and require the

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<sup>30</sup> 20 U.S.C. § 1681(a); 34 C.F.R. § 106.11.

<sup>31</sup> *See generally* 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106.

<sup>32</sup> U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, April 4, 2011 (2011 DCL) at 1.

<sup>33</sup> *See* 34 C.F.R. § 106.8(b) (requiring schools to adopt and publish grievance procedures for students and employees); 34 C.F.R. § 106.51 (prohibiting discrimination on the basis of sex in employment in education programs or activities); *see also* 2011 DCL at n. 11 ("Title IX also protects employees of a recipient from sexual harassment.").

<sup>34</sup> *Id.* at 4; 1997 Guidance; Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, April 29, 2014 (Title IX Q & A) at 2-3.

institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately.<sup>35</sup>

An institution is deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment. A responsible employee includes any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe has the authority or responsibility to take action.<sup>36</sup> While institutions have some discretion to identify responsible employees on campus, OCR provides guidance about the identification, training and obligations of responsible employees.<sup>37</sup> To facilitate the institution's compliance with Title IX, responsible employees are required to share all relevant details about the reported incident, including identifying information about the complainant, respondent, other witnesses, and relevant facts, including the date, time, and location.<sup>38</sup>

Notice may come from a direct report or complaint by a student, employee or third party victim, or a responsible employee may observe or witness prohibited conduct. Notice may also come from indirect sources: a parent, friend or third party witness; social networking sites; the media; an open, pervasive or widespread pattern; or other facts and circumstances that should cause an institution, in the exercise of reasonable care, to initiate an investigation that would lead to the discovery of additional incidents.<sup>39</sup> The institution's Title IX obligations exist regardless of whether the individual who was harassed makes a complaint or asks the institution to take action.<sup>40</sup>

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<sup>35</sup> Title IX Q & A at 4.

<sup>36</sup> Title IX Q & A at 15-16.

<sup>37</sup> Title IX Q & A at 14-18.

<sup>38</sup> Title IX Q & A at 16.

<sup>39</sup> Title IX Q & A at 2.

<sup>40</sup> 1997 Guidance.

### **3. Core Title IX Tenets**

The implementing regulations require that educational institutions publish a non-discrimination statement;<sup>41</sup> appoint a Title IX Coordinator;<sup>42</sup> and adopt grievance procedures that are prompt and equitable.<sup>43</sup>

#### **a. Notice of Non-Discrimination**

Title IX requires that institutions publish a non-discrimination statement.<sup>44</sup> The statement must notify students, parents, and others that the institution does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. Educational institutions must also implement specific and continuing steps to inform students and others about the protections against discrimination on the basis of sex. The notice must make clear that the requirement of non-discrimination in educational programs covers employment and admission, and it must indicate that questions about Title IX may be referred to the institution's Title IX Coordinator or OCR. Institutions must include in the notice of non-discrimination the name, office address, telephone number and email address of the designated Title IX Coordinator.<sup>45</sup>

#### **b. Title IX Coordinator**

Under Title IX, institutions are required to appoint a Title IX Coordinator to oversee the institution's Title IX compliance efforts, including the centralized review, investigation, and resolution of reports of sexual and gender-based harassment and violence under the institution's complaint processes, and to identify and address any patterns or systemic problems that arise during the review of such complaints. The Title IX Coordinator should be available to meet with students, employees and third parties as needed.<sup>46</sup> The Title IX Coordinator's role and responsibilities should be clearly defined, and the Title IX Coordinator's contact information should be easily accessible by students and staff.<sup>47</sup>

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<sup>41</sup> 34 C.F.R. § 106.9.

<sup>42</sup> 34 C.F.R. § 106.8(a).

<sup>43</sup> 34 C.F.R. § 106.8(b).

<sup>44</sup> 34 C.F.R. § 106.9.

<sup>45</sup> Office for Civil Rights, U.S. Dept. of Education, *Notice of Non-Discrimination*, <http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>.

<sup>46</sup> 2011 DCL at 7.

<sup>47</sup> 34 C.F.R. § 106.8(a); 2011 DCL at 6.

Institutions must take steps to ensure that employees designated to serve as Title IX Coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the institution's Title IX procedures operate.<sup>48</sup> In addition, because complaints often involve an institution's law enforcement personnel, all school law enforcement employees should be given copies of the institution's Title IX policies and receive training on the institution's Title IX procedures and any other procedures used for reporting and investigating reports of sexual violence.<sup>49</sup>

Where an institution chooses to designate more than one Title IX Coordinator, it should ensure that one individual has ultimate oversight responsibility, and the others should have titles that clearly show that they are in a deputy or supporting role to the senior coordinator. Finally, the Title IX Coordinator(s) should not have other job responsibilities that would potentially create a conflict of interest.<sup>50</sup>

### **c. Prompt and Equitable Grievance Procedures**

Title IX requires that an institution's grievance procedures be prompt and equitable.<sup>51</sup> To meet this requirement, an institution must provide notice to students and employees of the grievance procedures, including where complaints may be filed, and that the grievance procedures apply to complaints filed by any individual alleging sexual or gender-based harassment or violence carried out by students, employees, or third parties.<sup>52</sup> The procedures must include: provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and evidence; designated and reasonably prompt time frames for the major stages of the complaint process; written notice to the complainant and respondent of the outcome of the complaint; and assurance that the institution will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.<sup>53</sup> Grievance procedures should also include: a statement of the institution's jurisdiction over Title IX complaints; adequate definitions of sexual and gender-based harassment and violence and an explanation as to when such conduct creates a hostile environment; reporting policies and protocols, including provisions for requesting confidentiality when making a report; identification of the employee or employees responsible for evaluating requests for

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<sup>48</sup> 2011 DCL at 7.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 34 C.F.R. § 106.8(b).

<sup>52</sup> Title IX Q & A at 12-13.

<sup>53</sup> *Id.*



confidentiality; notice that Title IX prohibits retaliation; notice of an individual's right to file a criminal complaint and a Title IX complaint simultaneously; notice of available interim measures that may be taken to protect the student in the educational setting; the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint; notice of potential remedies for the complainant; notice of potential sanctions against respondents; and sources of counseling, advocacy, and support.<sup>54</sup>

#### **4. Interim Measures**

Once an institution has notice of an allegation of sexual or gender-based harassment or violence allegation, it must promptly take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures while the investigation is pending.<sup>55</sup> The institution should notify the complainant of reasonably available measures and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance.<sup>56</sup> The institution should also inform the complainant of their Title IX rights and the right to report a crime to campus or local law enforcement.<sup>57</sup>

The institution should consider a range of factors when determining the appropriate interim measures: the facts and circumstances of each case; the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the alleged harassment; any continuing effects on the complainant; any intersections between the complainant and respondent (shared residence hall, dining hall, class, transportation, or job location); and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).<sup>58</sup> In addition, OCR has advised that when taking interim measures, an institution should minimize the burden on the complainant and carefully consider the facts of the case when determining who to remove from a shared class or residence hall.<sup>59</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> Title IX Q & A at 32-33.

<sup>56</sup> Title IX Q & A at 32-33.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

## 5. Complainant Agency and Autonomy

An institution is required to obtain a complainant's consent before beginning an investigation.<sup>60</sup> OCR strongly supports a complainant's interest in confidentiality, but recognizes that there are cases in which the institution must take action to meet its Title IX obligations despite the complainant's request.<sup>61</sup> When a complainant makes a report but requests that their name or other identifying information not be shared with a respondent or that the institution not pursue an investigation, the institution should inform the complainant that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the respondent.<sup>62</sup> The institution should also explain that Title IX prohibits retaliation against an individual who raises a good faith civil rights claim and that the institution will take steps to prevent and respond to retaliation.<sup>63</sup>

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

- The seriousness of the conduct
- The respective ages and roles of the complainant and respondent
- Whether there have been other complaints or reports of harassment or misconduct against the respondent
- The rights of the respondent to receive notice and relevant information before disciplinary action is sought
- Whether circumstances suggest there is an increased risk of the respondent committing additional acts of sexual violence or other violence
- Whether the respondent has a history of arrests or records from a prior school indicating a history of violence

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<sup>60</sup> 2011 DCL at 5.

<sup>61</sup> Title IX Q & A at 18-19.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

- Whether the alleged perpetrator threatened further sexual violence or other violence against the student or others
- Whether the sexual violence was committed by multiple perpetrators
- Whether the circumstances suggest there is an increased risk of future acts of sexual violence under similar circumstances
- Whether the sexual violence was perpetrated with a weapon
- Whether the institution possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).<sup>64</sup>

An institution should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation, but its ability to do so may be limited based on the nature of the request by the complainant.<sup>65</sup> Even if not proceeding to an investigation or imposing disciplinary action, however, the institution should still provide reasonably available interim measures and take other steps to limit the effects of the alleged sexual or gender-based harassment or violence and prevent its recurrence.<sup>66</sup>

## **6. Alternatives to Disciplinary Action**

In response to a request for confidentiality, an institution may offer an alternative form of resolution.<sup>67</sup> Often referred to as voluntary, informal or remedies-based resolution, an alternative form of resolution can effectively eliminate a hostile environment without taking disciplinary action against a respondent. The inclusion of a remedies-based form of resolution may aid complainants or third parties who are seeking anonymity or confidentiality or for whom pursuing formal disciplinary action may be a barrier to reporting or moving forward. It may also provide an institution with additional mechanisms to tailor a response that recognizes the unique facts and circumstances of a particular incident, particularly in cases where there is not a broader threat to individual or campus safety, or address conduct that might not rise to the level of a hostile environment.

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<sup>64</sup> Title IX Q & A at 19-22.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 2011 DCL at 8.

Participation in an alternative form of resolution must be voluntary, and a complainant must be able to request to end voluntary resolution and initiate an investigation at any time.<sup>68</sup> While an institution may offer mediation in appropriate cases, mediation should not be used in cases involving sexual assault.<sup>69</sup> In addition, an institution should not compel a complainant to engage in mediation, to directly confront the respondent, or to participate in any particular form of alternative resolution.<sup>70</sup> The institution should maintain records of all reports and conduct referred for alternative resolution, and ensure that the resolution is completed within an appropriate time frame following the initial report.

An institution may take immediate and corrective action through the imposition of individual and community remedies designed to maximize the complainant's access to the educational, extracurricular and employment activities and to eliminate a hostile environment, prevent its recurrence and address its effects. Potential remedies include providing increased monitoring, supervision, or security; providing training and education materials for students and employees; changing and publicizing institutional policies on sexual and gender-based harassment and violence; conducting climate surveys regarding sexual violence; imposing short- or long-term protective measures for a complainant; and other measures that can be tailored to the facts and circumstances.<sup>71</sup>

## **7. Investigations**

OCR uses the term “investigation” to refer to the process an institution uses to resolve sexual violence complaints, including the fact-finding investigation and any hearing and decision-making process the institution uses to determine whether the conduct occurred by a preponderance of the evidence and if so, the appropriate sanctions and remedies to eliminate the sexual violence/ hostile environment, prevent its recurrence, address its effects.<sup>72</sup> While an investigation may include a hearing to determine whether the conduct occurred, Title IX does not require a hearing.<sup>73</sup> Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation.

For an educational institution, the fact-finding investigation of sexual and gender-based harassment and violence is one of the most sensitive and difficult tasks involved in the

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<sup>68</sup> 2011 DCL at 8.

<sup>69</sup> 2011 DCL at 8.

<sup>70</sup> 2011 DCL at 8.

<sup>71</sup> Title IX Q & A at 20.

<sup>72</sup> Title IX Q & A at 24-25.

<sup>73</sup> Title IX Q & A at 25.

institutional response. The quality and integrity of an investigation is vital in providing a sufficient factual foundation to support determinations of responsibility and establishing faith in outcomes and sanctions. In the context of word-against-word credibility assessments, it is imperative that this aspect of the institution's response be conducted by individuals with appropriate training and experience.

According to the 2011 Dear Colleague Letter, Title IX requires adequate, reliable and impartial investigations that are conducted by investigators with sufficient experience or training.<sup>74</sup> OCR expanded on this guidance in the 2014 Title IX Q&A, outlining significant training requirements for investigators and noting that "provisions for adequate, reliable, impartial and prompt investigation of complaints require: the opportunity for both parties to present witnesses and evidence; interim measures to be implemented before the final outcome of the investigation; periodic updates on the status of the investigation to be presented to the parties; and the application of the preponderance of the evidence standard."<sup>75</sup> OCR has also noted that "a balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions."<sup>76</sup> Notably, OCR has not provided specific standards of care for investigations beyond broadly capturing concepts such as adequate, reliable, impartial and thorough, and institutions are free to designate investigators of their choosing, whether they be employees of the institution or external resources.

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

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

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<sup>74</sup> 2011 DCL at 9-12.

<sup>75</sup> Title IX Q & A at 3, 12-14.

<sup>76</sup> *Id.* at 24-26.

## 8. Coordination with Law Enforcement

A criminal investigation and a Title IX investigation are two distinct processes, each with its own set of procedural protections and legal standards.<sup>77</sup> The purpose of a criminal investigation is to determine whether an individual violated a law, and if so, the individual may be imprisoned or subject to other criminal penalties.<sup>78</sup> In the criminal justice context, the Constitution provides criminal defendants who face the risk of incarceration numerous protections including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination and the right to confrontation.<sup>79</sup> In addition, police and prosecutors have discretion to decide which complaints to investigate and immunity for civil liability when they decline to investigate or prosecute.<sup>80</sup>

In contrast, Title IX investigations, which will never result in an incarceration, have different procedural protections and legal standards.<sup>81</sup> Under Title IX, institutions are required to respond to all complaints of Title IX-related conduct.<sup>82</sup> The Title IX obligation to resolve all complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students is not discretionary.<sup>83</sup>

In all cases, the institution should notify the complainant of the right to file a criminal complaint and should not dissuade a complainant from doing so at any stage of the institution's Title IX investigation.<sup>84</sup> While Title IX does not require an institution to report alleged incidents of sexual violence to law enforcement, an institution may have reporting obligations under state, local, or other federal laws.<sup>85</sup> Where there are concurrent investigations, an institution should coordinate investigations and establish appropriate fact-finding roles for each investigator.<sup>86</sup> An institution should also consider whether information can be shared

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<sup>77</sup> *Id.* at 27.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Title IX Q & A at 27.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 24-26.

among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event.<sup>87</sup> However, an institution should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation.<sup>88</sup> Although an institution may need to delay temporarily the fact-finding portion of a Title IX investigation while law enforcement is gathering evidence, the institution must still take interim measures to protect the complainant and the community.<sup>89</sup>

OCR recommends that an institution enter into a memorandum of understanding (MOU) or other agreement with local law enforcement and local prosecutor's office regarding the protocols and procedures for referring allegations of sexual violence, sharing information and conducting contemporaneous investigations.<sup>90</sup> Any MOU or other agreement must allow the institution to meet its Title IX obligation to resolve complaints promptly and equitably and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.<sup>91</sup>

## **9. Timeframes**

As noted above, institutions are required to designate reasonably prompt timeframes for the major stages of the complaint process, which include timeframes for the investigation, notice of the outcome and any appeal. In the April 4, 2011 DCL, OCR opined that a typical investigation takes approximately 60 calendar days following receipt of the complaint.<sup>92</sup> OCR further noted that a determination of timeliness may depend on the complexity of the investigation and the severity and extent of the harassment.<sup>93</sup>

In the April 2014 Title IX Q&A, OCR clarified that the 60 days referenced are calendar days, and inclusive of the entire investigation process, including the fact-finding investigation, determining the outcome, and imposing any appropriate sanctions and remedies.<sup>94</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 28.

<sup>89</sup> *Id.*.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 2011 DCL at 12.

<sup>93</sup> *Id.*

<sup>94</sup> Title IX Q & A at 31-32.

OCR clarified that the 60-day timeframe does not include appeals, but noted that undue delays in the appeal process may impact the promptness of the institution's response under IX.<sup>95</sup>

OCR also conceded that it does not require an institution to complete an investigation within 60 days and that OCR will evaluate promptness on a case-by-case basis.<sup>96</sup> In addition to considering the complexity of the investigation and the severity and extent of the alleged conduct, OCR will also evaluate the impacts of a parallel criminal investigation, school breaks, witness availability and other factors affecting the integrity of the process.<sup>97</sup>

## **B. Clery Act Overview**

The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act<sup>98</sup> is a federal statute enacted in 1990 that requires all schools that receive federal financial assistance, either directly or indirectly, to keep and publish information about crime on or near their campus.<sup>99</sup> The purpose of the Clery Act is to provide students, their families and employees with accurate, complete and timely information about campus safety to better inform future decisions.<sup>100</sup>

Clery requires that schools report offenses and disclose statistics for crimes reported to the local police and Campus Security Authorities.<sup>101</sup> It also requires timely warning notification to the campus community of all Clery Act crimes that are reported to Campus Security Authorities or local police and are considered by the school to represent a threat to students and employees.<sup>102</sup> Finally, the Clery Act mandates that schools develop policies, procedures and programs regarding sex offenses.<sup>103</sup> The reporting procedures should outline the procedures that a student should follow if a sexual offense occurs, including who should be

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 20 U.S.C. § 1092(f).

<sup>99</sup> *See generally* 20 U.S.C. § 1092 (f); 34 C.F.R. § 668.46.

<sup>100</sup> U.S. Department of Education, *The Handbook for Campus Safety and Reporting* (Feb. 2011) at xi, <http://www2.ed.gov/admins/lead/safety/handbook.pdf>.

<sup>101</sup> 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(c).

<sup>102</sup> 20 U.S.C. § 1092 (f)(3); 34 C.F.R. § 668.46(e).

<sup>103</sup> 20 U.S.C. § 1092 (f)(8); 34 C.F.R. § 668.46(b)(11).



contacted, the importance of preserving evidence and to whom the alleged offense should be reported.<sup>104</sup>

Clery requires that schools report offenses and disclose statistics for crimes that were reported to the local police and Campus Security Authorities.<sup>105</sup> Reportable crimes include those that occurred on-campus, in or on non-campus buildings or property or on public property within or immediately adjacent to and accessible from the school's campus.<sup>106</sup> Furthermore, it is not necessary for the crime to have been investigated by the police or a Campus Security Authority, nor must a finding of guilt or responsibility be made to constitute a reportable crime—as long as there is a reasonable basis for believing the information is not rumor or hearsay, the crime should be reported.<sup>107</sup>

Campus Security Authorities at institutions include four groups of individuals and organizations: (1) individuals who work within a campus police or security department; (2) individuals who have responsibility for campus security but are not a part of a campus police or security department; (3) individuals who are named in an institution's policy as persons to whom students and employees should report; and (4) individuals who have significant responsibility for student and campus activities.<sup>108</sup>

Campus Security Authorities are required to report, to the individual or office designated by the institution to collect crime report information, any Clery Act crime allegations that the Campus Security Authorities believe were made in good faith.<sup>109</sup> Under Clery, the report must contain information about: (1) where the crime occurred, (2) the type of crime, (3) to whom the crime was reported and (4) when the crime was reported.<sup>110</sup> When reporting sex crimes, the offenses should be divided into two categories: forcible and non-forcible.<sup>111</sup> Forcible sex offenses include any sexual act that is directed against another person either (1) forcibly and/or against that person's will or (2) non-forcibly or against the person's will and the victim is

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<sup>104</sup> 20 U.S.C. § 1092 (f)(8)(B)(iii); 34 C.F.R. § 668.46(b)(11)(ii).

<sup>105</sup> 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(c).

<sup>106</sup> 20 U.S.C. § 1092(f)(1)(F), 20 U.S.C. § 1092(f)(12); 34 C.F.R. § 668.46(c), 34 C.F.R. § 668.46(c)(4).

<sup>107</sup> *The Handbook for Campus Safety and Reporting*, *supra*, at 73, 77.

<sup>108</sup> 34 C.F.R. § 668.46(a) (defining "Campus security authority"); *The Handbook for Campus Safety and Reporting*, *supra*, at 74-75.

<sup>109</sup> 34 C.F.R. § 668.46(b)(2)(iii); *The Handbook for Campus Safety and Reporting*, *supra*, at 73.

<sup>110</sup> *See generally* 34 C.F.R. § 668.46(c); *The Handbook for Campus Safety and Reporting*, *supra*, at 11.

<sup>111</sup> 20 U.S.C. § 1092(f)(1)(F)(ii); 34 C.F.R. § 668.46(c)(ii).

incapable of giving consent.<sup>112</sup> Examples of forcible sex offenses are rape and fondling.<sup>113</sup> Non-forcible sex offenses are those incidents of unlawful, non-forcible sexual intercourse.<sup>114</sup> Examples of non-forcible sex offenses are incest and statutory rape.<sup>115</sup>

Moreover, the Clery Act requires that the school's Campus Security Authorities maintain a public Daily Crime Log of all crimes reported to them.<sup>116</sup> A crime entry must be made within two business days of when the school learned the information, and each entry must include information about: (1) the nature of the crime, (2) the date of the crime, (3) the time of the crime, (4) the general location of the crime and (5) the disposition of the complaint, if known.<sup>117</sup> The log must be accessible to the public during normal business hours and remain open for 60 days, after which it must be made available upon request within two business days.<sup>118</sup>

The Daily Crime Log must include *all* crimes reported to campus police or security for the required geographic location.<sup>119</sup> The geographic location includes all reported crimes that occur "on campus, in or on noncampus buildings or property or on public property within the campus or immediately adjacent to and accessible from the campus," as well as all crimes that occur within the patrol jurisdiction of the campus police.<sup>120</sup> The patrol jurisdiction comprises any property that does not meet any of the Clery geographic area definitions but is regularly provided with police or security patrol services by campus security.<sup>121</sup>

The Clery Act requires timely warning notification to the campus community of all Clery Act crimes that are reported to Campus Security Authorities or local police and are

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<sup>112</sup> *The Handbook for Campus Safety and Reporting, supra*, at 37.

<sup>113</sup> *Id.* at 37-38.

<sup>114</sup> *Id.* at 39.

<sup>115</sup> *Id.* at 39-40.

<sup>116</sup> 20 U.S.C. § 1092 (f)(4)(A); 34 C.F.R. § 668.46(f).

<sup>117</sup> 20 U.S.C. § 1092 (f)(4)(A); 34 C.F.R. § 668.46(f)(2).

<sup>118</sup> 20 U.S.C. § 1092 (f)(4)(B); 34 C.F.R. § 668.46(f)(5); *The Handbook for Campus Safety and Reporting, supra*, at 95.

<sup>119</sup> *The Handbook for Campus Safety and Reporting, supra*, at 91; 20 U.S.C. § 1092 (f)(4)(A); 34 C.F.R. § 668.46(f).

<sup>120</sup> *The Handbook for Campus Safety and Reporting, supra*, at 91; *see also* 34 C.F.R. § 668.46(f).

<sup>121</sup> *The Handbook for Campus Safety and Reporting, supra*, at 92.

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considered by the school to represent a threat to students and employees.<sup>122</sup> Warnings are to be made as soon as the pertinent information is available, so as to effectively alert the community of a continuing threat to safety and aid in the prevention of similar crimes.<sup>123</sup> Schools must issue a timely warning when a Clery crime is considered by the school to represent a “serious or continuing” threat to students and employees.<sup>124</sup> The decision to warn is to be made by the school on a case-by-case basis taking into consideration the nature of the crime, the threat of continuing danger and the coordination with law enforcement.<sup>125</sup> If the school concludes that a warning is appropriate, the warning should be made in a format that is reasonably likely to reach the entire campus community, e.g., via e-mail, intranet, text message, etc.<sup>126</sup>

Finally, the Clery Act mandates that schools develop policies, procedures and programs regarding sex offenses.<sup>127</sup> The reporting procedures should outline the procedures that a student should follow if a sexual offense occurs, including who should be contacted, the importance of preserving evidence and to whom the alleged offense should be reported.<sup>128</sup> The school should also have procedures for disciplinary action, including an equal right to have persons present during the proceeding, to be informed of the outcome and the sanctions imposed, and to speak about the offense.<sup>129</sup> Additionally, the policy should list the potential sanctions for offenses.<sup>130</sup> The victim should be informed of his/her right to call police (both local and on-campus), the availability of on- and off-campus counseling and mental health services, and the options for reasonable accommodations in changing academic and living situations after an alleged sexual assault incident.<sup>131</sup>

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<sup>122</sup> 20 U.S.C. § 1092 (f)(3); 34 C.F.R. § 668.46(e).

<sup>123</sup> *The Handbook for Campus Safety and Reporting*, *supra*, at 111.

<sup>124</sup> *Id.* at 118; *see also* 20 U.S.C. § 1092 (f)(3) (requiring that campus security “make timely reports to the campus community on crimes considered to be a threat to other students and employees”); 34 C.F.R. § 668.46(e)(iii) (requiring warnings when crimes are “[c]onsidered by the institution to represent a threat to students and employees”).

<sup>125</sup> *The Handbook for Campus Safety and Reporting*, *supra*, at 112-13.

<sup>126</sup> *Id.* at 114.

<sup>127</sup> 20 U.S.C. § 1092 (f)(8); 34 C.F.R. § 668.46(b)(11).

<sup>128</sup> 20 U.S.C. § 1092 (f)(8)(B)(iii); 34 C.F.R. § 668.46(b)(11)(ii).

<sup>129</sup> 20 U.S.C. § 1092 (f)(8)(B)(iv); 34 C.F.R. § 668.46(b)(11)(vi).

<sup>130</sup> 20 U.S.C. § 1092 (f)(8)(B)(ii); 34 C.F.R. § 668.46(b)(11)(vii).

<sup>131</sup> 20 U.S.C. § 1092 (f)(8)(B)(v)-(vii); 34 C.F.R. § 668.46(b)(11)(iii)-(iv).

### **C. VAWA Overview**

The third primary source of law governing an institution's response to sexual and gender-based harassment and violence is the Violence Against Women Act.<sup>132</sup> On March 7, 2013, President Barack Obama signed a bill reauthorizing VAWA and supplementing its legal requirements.<sup>133</sup> Section 304 of VAWA revised schools' requirements with respect to education and prevention, reporting, and policy and procedures with respect to sexual assault. It also expanded those same categories of required steps to domestic violence, dating violence and stalking.

Under the new data collection requirements, VAWA requires that schools: disclose incidents of domestic violence, dating violence, sexual assault and stalking, in annual campus crime statistic reports; expand the definition of reportable hate crimes to include bias crimes that are based on an individual's national origin or gender identity; and withhold the names of complainants as confidential in timely warnings notifications. Schools must also provide information about how they will protect the confidentiality of individuals, including protecting such information in publicly available records.

In addition, the new VAWA amendments require that schools develop and distribute policies regarding: education programs designed to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking and prevent domestic violence, dating violence, sexual assault and stalking; procedures they will follow once an incident of domestic violence, dating violence, sexual assault or stalking is reported; and the standard of evidence used during disciplinary actions.

VAWA requires schools to provide education programs that promote awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking. The education programs must be provided to all incoming students and new employees and should include: a statement that the school prohibits the offenses of domestic violence, dating violence, sexual assault and stalking; the definition of domestic violence, dating violence, sexual assault and stalking in the applicable jurisdiction; the definition of consent, in reference to sexual activity, in the applicable jurisdiction; safe and positive options for bystander intervention; information regarding risk reduction; and the school's ongoing prevention and awareness campaigns for students and faculty.

Further, VAWA requires that a school's written policy contain all of the information taught in the school's education program. The policy must also contain: the range of available protective measures and the list of sanctions that the school may impose following a final determination of rape, acquaintance rape, domestic violence, dating violence, sexual assault

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<sup>132</sup> VAWA is codified in part at 42 U.S.C. §§ 13701-14040.

<sup>133</sup> See generally 34 CFR 668, Violence Against Women Reauthorization Act of 2013 (Mar. 7, 2013).

or stalking; procedures individuals should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking occurs; information regarding the importance of preserving evidence; identification of the administrator that alleged offenses should be reported to; options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities; and individuals' rights and the school's responsibilities regarding orders of protection, no contact orders, restraining orders or similar lawful orders issued by a criminal, civil or tribal court. Schools must also publish procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking. These procedures must include a clear statement that the proceedings will entail a prompt, fair and impartial investigation and resolution.

Under VAWA, during disciplinary actions, both parties must have the same opportunities to have others present during a disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice. Furthermore, both parties must be simultaneously informed in writing of: the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault or stalking; the institution's procedures for both parties to appeal the results of the disciplinary proceeding; any change to the results of the proceeding that occurs prior to the time that such results become final; and when results of the proceeding become final.

Schools also must notify individuals regarding: on and off-campus counseling, health, mental health, victim advocacy and legal assistance programs; interim remedies that are available regardless of whether an individual chooses to report an alleged crime to campus police or law enforcement; and a written explanation of an individual's rights and options when a student or employee reports that they have been a victim of on or off-campus domestic violence, dating violence, sexual assault or stalking. VAWA also requires schools to prohibit retaliation, intimidation, threats, coercion or any other type of discrimination against any individual for reporting domestic violence, dating violence, sexual assault or stalking.

Further, VAWA requires that implementers must 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." This requirement builds on OCR's 2001 Guidance, which directed schools to "ensure that employees are trained so that those with authority to address harassment know how to respond appropriately," and the April 2011 DCL, which requires that schools: "ensure that all persons involved in implementing grievance procedures (e.g. Title IX Coordinators, investigators, and adjudicators) have training in the recipient's grievance procedure"; "ensure that all persons involved in implementing grievance procedures (e.g. Title IX Coordinators, investigators, and adjudicators) have training in confidentiality requirements"; and "in sexual

violence cases, the fact-finder and decision-maker should have adequate training or knowledge regarding sexual violence.”<sup>134</sup>

#### **D. The Relationship between Statutes, Regulations, and Significant Guidance Documents**

As noted above, there are three primary sources of legal authority and guidance relating to an institution’s response to sexual misconduct: statutory law, implementing regulations, and “significant guidance documents” relating to those laws and regulations. Understanding the relationship between these legal sources is critical to effective compliance. Generally speaking, statutes and their implementing regulations have the force of law, but guidance documents do not—guidance documents merely represent policy guidance promulgated to assist schools in meeting their legal obligations.

##### **1. Title IX: Law, Regulations, and Guidance**

There are three categories of legal authority under Title IX: (1) the Title IX statute, 20 U.S.C. § 1681 et seq., which sets forth the law; (2) Title IX’s implementing regulations, 34 C.F.R. Part 106, which have the force and effect of law; and (3) guidance documents from the Department of Education’s Office for Civil Rights (OCR). The most notable of the guidance documents are the 2001 Revised Sexual Harassment Guidance (“2001 Guidance”),<sup>135</sup> the April 4, 2011 Dear Colleague Letter (“2011 DCL”)<sup>136</sup> and the April 29, 2014 Questions and Answers on Title IX and Sexual Violence (“Title IX Q&A”).<sup>137</sup> These guidance documents are not law; nor are they intended to add requirements to applicable law. However, they purport to provide information and examples to inform educational institutions about how OCR evaluates compliance with legal obligations under Title IX.<sup>138</sup> The Bulletin on “Agency Good Guidance Practices” (“GGP”) sets forth general policies and procedures for developing,

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<sup>134</sup> See generally January 19, 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties - Title IX; 2011 DCL.

<sup>135</sup> The 2001 Guidance replaced the 1997 *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. 62 Fed. Reg. 12,034 (Mar. 13, 1997). The 1997 guidance was “the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers” and the document was made available for public comment. 2001 Guidance. The 2001 Guidance was also published in the Federal Register, at 62 Fed. Reg. 66,092 (Nov. 2, 2000), and was available for public comment. The 2001 Guidance is available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>136</sup> The 2011 DCL is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>137</sup> The Title IX Q&A is available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>138</sup> See 2011 DCL at n. 1.

issuing and using guidance documents, which include the provision that significant guidance documents do not create legally binding requirements.<sup>139</sup>

The distinction between law and guidance is critical to effective compliance. This is because the guidance documents address implementation and practical matters in general, not prescriptive, terms. So while the guidance documents provide general expectations about an institution's response in the form of "shoulds," they do not provide specific standards of care or a yardstick against which an institution may measure its compliance efforts. The expansion of these significant guidance documents has resulted in a complex labyrinth of quasi-requirements. In another context, a federal judge has described the complex relationship between statutes, regulations, and guidance in this way:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.<sup>140</sup>

Voluntary resolution agreements between institutions and OCR provide yet another source of information on the Department of Education's views on certain compliance issues. These are agreements entered into between institutions and the federal government in connection with Title IX complaints accepted for investigation by OCR. These agreements, which are generally public, can provide insight into how DOE and OCR interpret and implement Title IX. Although the agreements can be instructive, they are not binding legal mandates, because they are specific to the institution and the unique set of facts in each investigation.

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<sup>139</sup> Good Guidance Practices ("GGP") are maintained to ensure that guidance documents of Executive Branch departments and agencies are: developed with appropriate review and public participation, accessible and transparent to the public, of high quality and not improperly treated as legally binding requirements. Moreover, GGP clarify what does and does not constitute a guidance document to provide greater clarity to the public. All offices in an agency are expected to follow these policies and procedures. 72 Fed. Reg. 16 (Jan. 25, 2007).

<sup>140</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (discussing the relationship between statutes, regulations, and guidance in a different regulatory context).



In addition, President Barack Obama convened the White House Task Force to Protect Students from Sexual Assault, and the White House Task Force released *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*.<sup>141</sup> While this document is advisory in nature and has no binding legal authority, it nonetheless sets forth the federal government's expectations regarding campus responses.

## **2. Clery Act Regulations and Guidance**

There are three sources of law and guidance relevant to the Clery Act: (1) the Clery Act statute, 20 U.S.C. § 1092(f), which sets forth the law; (2) the Clery Act's implementing regulations, 34 C.F.R. § 668.46, which are issued by DOE and have the force and effect of law; and (3) the DOE's February 2011 Handbook for Campus Safety and Security Reporting, which is not legally binding but is intended to provide guidance on interpreting the regulations. The Clery Act statute and its implementing regulations therefore take precedence over the Handbook.

## **3. VAWA**

To date, there are two sources of law and guidance related to VAWA: (1) the VAWA statute, 42 U.S.C. §§ 13701-14040, and, (2) the negotiated Rules, 79 Fed. Reg. 62751, 62789 (Oct. 20, 2014) (to be codified at 34 C.F.R. 668), which were finalized on October 20, 2014 after a negotiated rulemaking process and period of public comment. Both have the force of law. We expect further guidance in the form of amendments to the DOE's February 2011 Handbook for Campus Safety and Security Reporting.

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<sup>141</sup> *Not Alone* is available at <https://www.notalone.gov/assets/report.pdf>.



## Appendix II: Training and Education Guide

### I. Title IX Training Mandates

Title IX requires training of all community members regarding what constitutes sexual harassment and sexual violence, the institution's policies and disciplinary procedures and the consequences of violating those policies.<sup>142</sup> Moreover, all implementers (persons involved in implementing the grievance procedures, including the Title IX Coordinator, investigators and adjudicators) must have training or experience in responding to complaints of sexual harassment and sexual violence and in the institution's grievance procedures.<sup>143</sup>

On April 29, 2014, in its Questions and Answers on Title IX and Sexual Violence, OCR provided further guidance regarding the Title IX and sexual violence training that institutions should provide to their employees. OCR noted that, while there is no minimum number of hours required, training should be provided on a regular basis.<sup>144</sup> Each school should determine, based on its particular circumstances, how training should be conducted, who has the relevant expertise required to conduct the training and who should receive the training, to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX.<sup>145</sup> Training should cover the following areas:

- Responsible employees with the authority to address sexual violence need to know how to respond appropriately to reports of sexual violence, and need to know that they are obligated to report sexual violence incidents to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time and location, although efforts should be made to comply with requests for confidentiality from the complainant. All other employees should know how to respond to reports of sexual violence.<sup>146</sup>
- Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before

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<sup>142</sup> 2011 DCL at 14-15.

<sup>143</sup> *Id.* at 12

<sup>144</sup> Title IX Q&A at 39.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 38.

reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, the coordinator is likely to be in a better position than the employee to evaluate whether an incident of sexual harassment or sexual violence creates a hostile environment and how the school should respond.<sup>147</sup>

- Professional counselors, pastoral counselors and non-professional counselors or advocates must understand the extent to which they may keep a report confidential.<sup>148</sup>
- All employees likely to witness or receive reports of sexual violence (including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsel, athletic coaches, health personnel and resident advisors) should receive practical information including:<sup>149</sup>
  - How to prevent and identify sexual violence, including same-sex sexual violence;
  - The behaviors that may lead to and result in sexual violence;
  - The attitudes of bystanders that may allow conduct to continue;
  - The potential for re-victimization by responders and its effect on students;
  - Appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language and the impact of trauma on victims;
  - The person(s) to whom such misconduct must be reported;
  - Responsible employees' reporting obligations, including what should be included in a report and any consequences for the failure to report, and the procedure for responding to students' requests

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

for confidentiality, including providing the contact information for the school's Title IX coordinator;

- Information on how to inform students of the reporting obligations of responsible employees;
- Students' option to request confidentiality and available confidential advocacy, counseling or other support services; and
- Rights to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.<sup>150</sup>

All persons involved in implementing a school's grievance procedures (e.g., Title IX coordinators, others who receive complaints, investigators and adjudicators) must have training or experience in handling sexual violence complaints and in the operation of the school's grievance procedures.<sup>151</sup> OCR also notes:

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures, may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures, even if such individuals also have prior relevant experience.<sup>152</sup>

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<sup>150</sup> *Id.* at 38-39.

<sup>151</sup> *Id.* at 40.

<sup>152</sup> *Id.*

The training for implementers should include:

- Information on working with and interviewing persons subjected to sexual violence;
- Information on particular types of conduct that constitute sexual violence, including same-sex sexual violence;
- The proper standard of review for sexual violence complaints (preponderance of the evidence);
- Information on consent and the role drugs or alcohol can play in the ability to consent;
- The importance of accountability for individuals found to have committed sexual violence;
- The need for remedial actions for the perpetrator, complainant and school community;
- How to determine credibility; how to evaluate evidence and weigh it in an impartial manner;
- How to conduct investigations;
- Confidentiality;
- The effects of trauma, including neurobiological change; and
- Cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.<sup>153</sup>

Schools should provide age-appropriate training to their students regarding Title IX and sexual violence.<sup>154</sup> Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment.<sup>155</sup> However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 41.

<sup>155</sup> *Id.*

training provided to students.<sup>156</sup> The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights.<sup>157</sup> A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals.<sup>158</sup> OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- The school's definition of consent applicable to sexual conduct, 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;
- The school's grievance procedures used to process sexual violence complaints;
- Disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- Effects of trauma, including neurobiological changes;
- The role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- Strategies and skills for bystanders to intervene to prevent possible sexual violence;

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

- How to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.<sup>159</sup>

The training should also encourage students to report incidents of sexual violence and should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a hostile environment before reporting the incident.<sup>160</sup> OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.<sup>161</sup> It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence, including the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services and legal assistance.<sup>162</sup>

## **II. VAWA Training Mandates**

The Violence Against Women Reauthorization Act of 2013 (VAWA) also requires schools to develop education, primary prevention and awareness programs for all incoming students and new employees, and ongoing prevention and awareness campaigns for students and faculty.<sup>163</sup> VAWA requires education programs to promote the awareness of rape, acquaintance rape, sexual assault, domestic violence, dating violence and stalking.<sup>164</sup> Under VAWA, educational and training programs must include:

- A statement that the school prohibits the offenses of domestic violence, dating violence, sexual assault and stalking;

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 41-42.

<sup>161</sup> *Id.* at 42.

<sup>162</sup> *Id.*

<sup>163</sup> Section 304 of the VAWA, 34 CFR 668, Violence Against Women Reauthorization Act of 2013 (Mar 7, 2013).

<sup>164</sup> *Id.*

- The definition of domestic violence, dating violence, sexual assault and stalking in the applicable jurisdiction;
- The definition of consent, in reference to sexual activity, in the applicable jurisdiction;
- Safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault or stalking against a person other than such individual;
- Information on risk reduction to recognize warning signs of abuse behavior and how to avoid potential attacks;
- Possible sanctions or protective measures that the school may impose following a final determination of an institutional disciplinary procedure regarding sexual assault, domestic violence, dating violence or stalking;
- Procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking has occurred, including information in writing about:
  - The importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault or stalking, or in obtaining a protection order;
  - To whom the alleged offense should be reported;
  - Options regarding law enforcement and campus authorities, including notification of the victim's options to:
    - (1) Notify proper law enforcement authorities, including on-campus and local police,
    - (2) Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses and
    - (3) Decline to notify the authorities.
  - The rights of victims and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders or similar lawful orders issued by a criminal, civil or tribal court;

- Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking, which shall include a clear statement that the proceedings shall:
  - (1) Provide a prompt, fair and impartial investigation and resolution;
  - (2) 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;
  - (3) Assure that the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice;
  - (4) Simultaneously inform both the accuser and the accused, in writing, of:
    - (a) The outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault or stalking;
    - (b) The institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding, of any change to the results that occurs prior to the time that such results become final; and
    - (c) When such results become final.

In addition, VAWA requires annual education of implementers 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.

On October 20, 2014, the final VAWA Negotiated Regulations were published. The regulations seek to implement the concepts outlined above.<sup>165</sup>

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<sup>165</sup> <https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act>.



### **III. Additional Considerations for Prevention, Education and Training**

We recommend that educational institutions proactively engage in the education and prevention of sexual and gender-based harassment and violence, including sexual assault, domestic violence, dating violence and stalking. Education and prevention requires an integrated communications plan to effectively share institutional policies, prevention efforts, reporting options and resources with all community members. Clear communication in all training and education programs is critical for a Title IX team to be successful and compliant. In a coordinated and integrated approach to the evolving training requirement, it is critical for a designated administrator, or prevention and education team, to outline the tone (balanced, sensitive, informed, and impartial), content (legally compliant and psychologically informed) and timing (early and ongoing) of the Title IX team's communication strategy and maintain consistency in all training and education programs.

All communications platforms should be developed with the core constituents in mind – students, faculty, and staff, while considering the perspective of additional interested constituencies – administration, board, alumni, community partners, and regional Offices for Civil Rights.

A balanced and sensitive tone should frame the delivery of legally informed content and will set the stage for all subsequent materials and messages. The Title IX team should develop a communications campaign that brands Title IX education and prevention materials with a sensitive and impartial tone. Any spokespersons, web materials, written copy, collateral and broadcast materials should be consistent and reinforce the chosen tone and content. In developing the campaign, consider concepts of primacy, repetition, and branding in developing relevant messages that can be heard and will resonate with listeners.

Recognizing that there are as many different learning styles and communication modes on campus as there are community members, the communications plan should include a diversified portfolio to reach all constituencies. This portfolio should provide many different access points, including: in person, both in small, targeted settings like residence halls or classes and in broader more community-based presentations; listening sessions; through the use of online technology, including trainings, e-mails communications, and a web page dedicated to sexual respect; through student media, including daily and monthly publications; and anonymously, through ethics point or an anonymous hotline/suggestion box. The goal is to provide a safe and supported space for conversation, to embrace the tension these issues naturally engender, and to allow the campus climate and culture to both shape the conversation, and importantly, to be shaped by the conversation.

Education and prevention must be an institutional priority that involves high-level administrators, faculty members, and coaches alike. We recommend that schools consider creating an educational seminar designed by faculty members and administrators that addresses issues of sexual violence, gender equity, tolerance and diversity, alcohol and substance abuse,

intimacy, consent, the “hook up” culture, social media, bullying, hazing, classism, racism, and other issues that can impact the campus culture and the development and education of students. This direct educational approach – a for-credit seminar that utilizes the skills of our most effective and engaging educators – is a cutting edge practice in changing culture that demonstrates the school’s commitment to student welfare and development.

Education and prevention must also actively engage students in the development of educational programming. This may include residence life campaigns, art or design contests, competitions for the best alternative social events, and other creative ideas shaped by the engaging and entrepreneurial minds of our student population. The direct involvement of our students can engender responsibility for self and others, ownership of prevention and education, and a more closely connected campus culture through programs like bystander intervention training, peer advisors, and other student-run initiatives.

Any education and prevention program must involve widespread and ongoing campus initiatives throughout the academic year. Programming must be consistent, ongoing and repeated in many formats and forums, not simply limited to new student orientation. The goal of this scaffold approach is to foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome. Empowering students to respect themselves and one another and to confront difficult issues with openness and transparency has the potential to directly impact culture. Similarly, identifying and addressing barriers to reporting through education efforts can help to instill confidence across the campus community that allegations will be investigated, evaluated, and adjudicated in a fair and equitable manner that is supportive to both complainant and respondent.