



C. Federal Legislation

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INTRODUCTION

The roles and responsibilities of campus student conduct and judicial boards are dictated by federal legislation and campus policies. It is critical for both those serving in an adjudicating capacity and their trainers have a basic understanding of those policies. This section outlines key federal mandates that guide the student misconduct judicial process. Each campus must insert its own policies into the training process to ensure that all decisions made are congruent with established and approved practices.

Sokolow (2001), in [Comprehensive Sexual Misconduct Judicial Procedures](#), stresses that a cohesive sexual assault risk management strategy is essential for colleges. That statement logically extends to other types of interpersonal violence discussed in this toolkit. Sokolow defines risk management for colleges as a body of knowledge that identifies high-risk issues and enables them to develop cohesive approaches to avoiding negative incidents and their negative consequences. He identifies five very important “pillars” that together support sexual assault risk management:

1. A proactive campus policy addressing sexual misconduct;
2. Comprehensive student conduct and judicial procedures addressing sexual misconduct and related training for student conduct administrators and officers;
3. Creation of a trained, campus-wide sexual assault response protocol/network;
4. Risk reduction through education, safety and awareness; and
5. Compliance with federal and state tort and sexual assault-related laws.

Pillars 1 and 5 are discussed briefly in this toolkit section. *D1. Getting Started* speaks to pillar 2.



A **resource for college staff and students** is NotAlone.gov, the website of the White House Task Force to Protect Students from Sexual Assault. See the following sections:

<u>Students</u>	<u>Schools</u>	<u>Resources</u>	<u>Data</u>
✓ Know Your Rights	✓ Legal Guidance	✓ Find a Service	✓ School Enforcement Map
✓ How to File a Complaint	✓ Developing Policies	✓ Organizations	✓ Data.gov
✓ Confidentiality	✓ Maintaining Confidentiality		
✓ Key Terms	✓ Prevention Resources		

C1. FEDERAL LEGISLATION

Several key pieces of legislation direct the response by colleges to interpersonal violence. Below is a brief overview of the federal legislation that detail the roles and responsibilities of campus student conduct and judicial boards.

The Clery Act

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (known as the Clery Act) is named after Jeanne Clery. Jeanne was a 19-year-old college student who was raped and murdered in 1986 in her Lehigh University dormitory. The Clery Act was passed in 1990, requiring higher education institutions whose students receive federal financial aid to collect and report campus crime data annually to the U.S. Department of Education. It has been amended multiple times to expand the parameters of the legislation, including through the 2013 Campus Sexual Violence Elimination Act or Campus SaVE Act. (Paragraph partly drawn from [The Clery Center for Security on Campus](#).)

Basic components of the Clery Act include (Center for Public Integrity, 2010):

- ✓ Campuses must publish and distribute an annual security report that includes crime statistics for the past three years as well as campus security policies. (The 2013 Campus SaVE Act requires that sexual assault, domestic and dating violence, and stalking in the crimes to be included in this report.)
- ✓ If there is a campus law enforcement/security department, a public daily crime log must be kept.
- ✓ Crimes that pose a serious or continuing threat to the campus community must be reported to the community in a timely manner.

The federal Campus Sexual Assault Victims' Bill of Rights was enacted as a component of the 1992 amendments to the Higher Education Act of 1965 (*Public Law: 102-325, section 486(c)*). It includes:

- ✓ Giving the alleged victim and alleged perpetrator equal opportunity to have others present in

- ✓ disciplinary proceedings and equal notification of the outcome of such proceedings;
- ✓ Notifying alleged victims of counseling services and their right to pursue legal options through local law enforcement; and
- ✓ Notifying alleged victims of their option to change classes or dormitory assignments to avoid contact with alleged assailants.

The 2013 [Campus Sexual Violence Elimination Act](#) (Campus SaVE Act) amended the Clery Act and added the following:

- ✓ Expands rights to campus victims of other interpersonal crimes in addition to sexual violence: dating violence, domestic violence and stalking;
- ✓ Requires every college participating in Title IV financial aid programs to compile statistics of incidents of these crimes that occur within its Clery geography;
- ✓ Outlines reporting procedures for victims of interpersonal violence and additional rights and responsibilities and their rights if they report;
- ✓ Requires written notification to students about services available for victims on campus and in the community;
- ✓ Requires written notification for victims about options for, and available assistance in, changing academic, living, transportation and working situations, if requested by the victim and such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus or local law enforcement; and
- ✓ Requires the provision of information about how the institution will protect the confidentiality of victims (and limitations).

Components of the Clery Act Impacting Student Conduct and Judicial Boards

Under the Clery Act and its subsequent amendments, campuses are required to address incidents of alleged interpersonal violence by processes that incorporate the following components:

- ✓ Procedures when an incident has been reported, including a statement of the standard of evidence that will be used during institutional conduct proceeding arising from the report.
- ✓ Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault and stalking, which shall include:
 - Statements that proceedings shall provide a prompt, fair and impartial investigation and resolution;
 - Be conducted by officials who receive annual training on 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;
 - Providing the accuser and the accused the same opportunity 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; and
 - Simultaneously informing, in writing, both the accuser and the accused of:
 - The outcome of the institutional disciplinary proceeding;

- The institution's procedures for the accused and the victim to appeal the results;
 - Any change in the results that occurs prior to the time the results become final; and
 - When the results become final.
- ✓ Possible sanctions on protective measures the institution may impose following a final determination of an institutional disciplinary procedure regarding sexual assault, domestic violence, dating violence or stalking.



The [Clery Center for Security on Campus](#) provides a clearinghouse of information and resources regarding Clery Act compliance and changes as per the Campus SaVE Act. It also allows you to [search for a specific campus' security data](#). [The Handbook for Campus Safety and Security](#) (2011) presents procedures, examples and references for college administrators to follow in meeting the campus public safety requirements of the Higher Education Act of 1965 (specifically the Clery Act).

Title IX

Victims of sexual violence are afforded additional rights and protections under Title IX. Title IX of the Education Amendments Act of 1972 (*20 U.S.C. Sec. 1681, et seq.*) **prohibits sex-based discrimination in any educational institution receiving federal funds** (virtually all public and private colleges). Under this law, sexual harassment of students is viewed as interfering with their right to an education free from discrimination (Office of Postsecondary Education, 2011). Title IX requires colleges to take reasonable steps to protect students and provide an environment free of sex discrimination.

Although Title IX was enacted in 1972, it was a letter written in 2011 – the *Dear Colleague* letter from the U.S. Department of Education - that clarified the definition of sexual harassment and subsequently expanded the scope of responsibilities for campuses under this legislation. Sexual harassment under Title IX is conduct that is sexual in nature, is unwelcome and denies or limits a student's ability to participate in or benefit from the college's education program. **All acts of sexual violence are considered forms of sexual harassment under Title IX.** (Note that Title IX frames sexual violence as a form of sexual harassment, which is different from general or WV legal definitions, as explained in *B. What You Need to Know.*)

Phillip and Falto (2014) chronicled recent federal guidance issued related to Title IX and sexual violence:

- ✓ 2011: The U.S. Department of Education's (DOE) Office for Civil Rights (OCR) issued a [Dear Colleague Letter](#) (DCL) to clarify that fact that sexual harassment is a form of sex discrimination under Title IX and remind colleges of their responsibility to take immediate and effective steps to respond to sexual violence in accordance with Title IX.
- ✓ 2014: The OCR released [Questions and Answers on Title IX and Sexual Violence](#) to provide more in-depth information on this aspect of Title IX.

- ✓ 2014: Materials from the White House Task Force to Protect Students from Sexual Assault and its website, NotAlone.gov, confirmed the need for stronger policies and procedures to address and prevent campus sexual violence.



Much of the national attention and literature developed related to Title IX and colleges in recent years has focused on sexual violence. As Falto (2014) notes, the 2011 [Dear Colleague Letter](#) stresses the importance of Title IX regulations: “The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college. The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college... The department [of education] is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school’s programs and activities.”

However, Title IX also more broadly prohibits gender-based harassment, including acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex or sex-stereotyping, even if these acts don’t involve conduct of a sexual nature (Phillips & Falto, 2014). Gender-based harassment is inclusive of the fuller spectrum of interpersonal violence discussed in this toolkit, if and when the violence is based on sex discrimination.

Note that the information in this section was drawn from [Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School](#) and the [Sexual Violence Dear Colleague Letter](#) (2011), both by the U.S. Department of Education (DOE), Office for Civil Rights (OCR); and [Title IX and Sexual Assault: Know Your Rights and Your College’s Responsibilities](#) by the American Civil Liberties Union. Material was also included from Phillips and Falto’s *Title IX and Sexual Violence: Programs, Practical Materials and Training* (2014) and Falto’s *Conducting Title IX Investigations* (2014).

Components of Title IX Impacting Student Conduct and Judicial Boards

(Section drawn from Falto (2014) except where noted. Sources: OCR’s 2014 *Questions and Answers on Title IX and Sexual Violence* and the 2011 *Dear Colleague Letter*.)

Title IX requires all educational facilities (K-college) fulfill 4 key duties: a Title IX Coordinator, a publicized non-discrimination policy, training for staff on handling disclosures; and a **prompt and equitable grievance procedures for responding to reports of sexual harassment**.

The college has a responsibility under Title IX to respond promptly and effectively to reports of sexual violence. If the college knows (or reasonably should know) about possible sexual violence, it must quickly investigate to determine what occurred and then take appropriate steps to resolve the situation. A criminal investigation into allegations of sexual violence does not relieve the college of its duty under Title IX to resolve reports promptly and effectively. The college must ensure that the person who experienced the sexual violence is safe, even while an investigation is ongoing. (Source: NotAlone.gov.)

The *Dear College Letter* says a college must:

- ✓ Provide a grievance procedure to file complaints of sexual violence. A complaint can be filed by the person experiencing the discrimination (called the complainant), a witness, a parent, an employee or an anonymous source.
- ✓ Act once it has knowledge of the report. Investigations should occur within a reasonable time frame (in most cases, 60 days from start to finish).
- ✓ Have procedures must include an equal opportunity for both parties to present witnesses and other evidence and the same appeal rights.
- ✓ Use the preponderance of the evidence standard to resolve complaints of sexual violence.
- ✓ Notify both parties of the outcome of the complaint. This procedure may be the same as the college's procedures for filing complaints of violations of campus conduct policies or a different process altogether.

Students Protected Under Title IX

While sexual harassment, including sexual violence, is disproportionately experienced by female students and perpetrated by males, Title IX recognizes that it can occur between members of the opposite sex as well as those of the same sex. Students, staff, faculty, and other employees; women, girls, men, and boys; straight, LGBT, and gender-nonconforming persons; persons with and without disabilities; and international and undocumented persons all have the right to pursue education, including athletic programs, scholarships, and other activities, free from sex discrimination (NotAlone.gov).

- ✓ **The college's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved.** Note that Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. The college should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence.
- ✓ **When students with disabilities experience sexual violence**, federal civil rights laws other than Title IX may also be relevant to the college's responsibility to investigate and address such incidents. Some students with disabilities may require additional assistance and support. Reporting forms, information or training about sexual violence should be provided in a manner that is accessible to students and employees with disabilities.
- ✓ **All students, regardless of their immigration status, should be aware of their rights under Title IX.** Reporting forms, information or training about sexual violence should also be provided in a manner accessible to students who are English language learners. OCR recommends that the college coordinate with its international student office, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages colleges to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status (see *B. What You Need to Know*).
- ✓ **In situations where the alleged perpetrator is not affiliated with the college**, the response will depend on the level of control the college has over him/her. The college's ability to take direct action against a particular perpetrator may be limited, but it can still take

steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population.



OCR (2014) notes **colleges should be mindful of issues that may arise when a foreign student on a student visa experiences sexual violence**. For example, certain student visas require the student to maintain a full-time course load, but a student may need to reduce their course load while recovering from sexual violence. OCR recommends that the college take steps to ensure that individuals on student visas understand that they must typically seek prior approval of the designated college official for student visas to fall below a full-time course load. The college can also encourage its employees involved in handling sexual violence complaints and counseling students to approach this official on the student's behalf if the student wishes to drop below a full-time course load. In addition, the college can take steps to ensure that its employees who work with international students are trained on the college's sexual violence policies and that employees involved in handling complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter.

FERPA

The 1974 Family Educational Rights and Privacy Act (FERPA) was enacted to protect students' education records. The DOE's [FERPA website](#) indicates its provisions are applicable to parents until the student turns 18; then these rights pertain directly to the student. FERPA generally addresses the parent or eligible student's right to review the student's education record at any time by request, correct errors in the student's record and be asked for permission before the institution releases information from a student's record. (Paragraph from Falto,2014).

Components of FERPA Impacting Student Conduct and Judicial Boards

FERPA and Clery

Every complainant has the right to be notified in writing of the outcome of the complaint, even though federal privacy laws limit disclosure of certain information in disciplinary proceedings. Under FERPA, colleges are permitted to disclose to the complainant information about the sanction(s) imposed on the respondent, when the sanction directly relates to the complainant. When conduct involves a crime of violence (including sexual assault) or a non-forcible sex offense, FERPA permits institutions to disclose to the complainant the final results of a disciplinary proceeding against the alleged perpetrator, regardless of whether the college found that a violation was committed. The college may also disclose to anyone the final results of a disciplinary proceeding if it determines that a student is a perpetrator of a crime of violence (including sexual assault) or a non-forcible sex offense, according to FERPA. Additionally, the Clery Act requires that both parties are informed of the outcome of any institutional proceeding alleging a sex offense. This type of compliance doesn't violate FERPA. Therefore, the colleges may not require a complainant to abide by a non-disclosure agreement. (Paragraph from Phillips & Falto, 2014.)

FERPA and Title IX

The 2011 *Dear Colleague Letter* notes: “FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in colleges, the requirements of Title IX override any conflicting FERPA provisions.”



A [chart](#) is available through NotAlone.gov to help colleges understand the requirements of Title IX and Clery, clarify how they intersect with students’ rights under FERPA, and resolve any concerns about apparent conflicts.

First Amendment Rights

According to OCR’s guidance (2001, confirmed by OCR, 2014), “Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.” OCR (2001) says that for a violation of Title IX, the sex discrimination must be “sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program.” OCR also states that the student’s age is a factor in determining whether a violation has occurred (e.g., what is appropriate for an adult may not for a middle school student), as is the location; a legitimate classroom discussion about sensitive material is very different from lewd catcalls on campus grounds. (Paragraph from Phillips & Falto, 2014.)

C2. COLLEGE CONDUCT POLICIES

Many colleges have conduct policies which define how specific groups are expected to behave as members of that college community. There may be student codes of conduct, employee policies, student organization codes of conduct, department specific policies and other nondiscrimination policies affecting students and employees. Violations of these policies are typically regarded as cause for disciplinary action by the college. Colleges normally have procedures in place for students to report violations of conduct policies and campus conduct/judicial systems to investigate and resolve such violations, as is discussed in *D. Getting Started Student Conduct Complaints*. For additional information on policies, see *F. Sample Policies and Procedures*.



Bennett, Gregory and Loschiavo, 2014, note that **policies must be written in a way that students can understand them and they must be communicated to the campus in an effective manner**. They stress that students should understand what will happen if they report, if they are accused, if the case proceeds to a hearing etc. Policies and procedures should not be buried in websites, catalogs or in annual security reports.

C3. ROLE OF LEGAL COUNSEL

Campuses can utilize their legal counsel to help craft policies that include considerations that student conduct and judicial boards will likely have to address. For example, having a policy with sanctions for underage drinking and a policy to investigate sexual assaults will undoubtedly result at some point where the board will be faced with imposing sanctions on a victim of a rape who had been drinking. An amnesty clause in the policy would encourage more victims in those situations to report.

Phillips and Falto (2014) offer some examples of questions to ask the college's legal counsel related to federal legislation and the college conduct policies, to ensure that the college is in compliance with federal legislation and to clarify concerns:

- ✓ Must the college always conduct an investigation when sexual violence occurs, even if it's off-campus and being investigated by local law enforcement?
- ✓ Are there certain proactive efforts the college should be making to prevent sexual harassment and sexual violence among our students?
- ✓ In instances of sexual harassment and sexual violence, would another student's parent be considered a "third party" who could inflict this violation on a student?
- ✓ Under the college's current structure, would it be advisable to have separate Title IX deputy coordinators to handle complaints by students, faculty and other employees?
- ✓ If an instance of sexual harassment occurs at an off-campus location, would any parts of the college's process be different than if it occurred on campus?
- ✓ Where does cyber bullying fall in the continuum of sexual conduct? Should the college include it in Title IX-related procedures? Why or why not?
- ✓ Do we have an amnesty policy on alcohol?
- ✓ Is there ever an instance where the college can promise a Title IX complainant confidentiality? If so, what is it?
- ✓ When is it okay to put the safety of others in the community ahead of an individual student's confidentiality request? Is there any entity that should be consulted with regarding evaluating safety risks? What, if any, perpetrator rights are protected by FERPA? What can the college say while still working within the confines of FERPA?

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