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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 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, 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, trained 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; 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 in 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 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>





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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;
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- Continue to promote accountability for policy violations





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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 underresourcing, 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 a





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relationships.” Another administrator noted their frustration with a perceived lack of protocols, not

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of who is accountable for each task, who has oversight responsibility and who will be vested with ultimate decisionmaking 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 decisionmaking, 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;

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- 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 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.

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- 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 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 where 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 trained 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.



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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 factors considered to support good decisionmaking 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 fulltime 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

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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 ~~case~~ ~~also~~ 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 ~~the~~ ~~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 ~~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~~ ~~is~~ good cause, and that the delay and the reason for the delay ~~is~~ ~~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 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

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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 APE 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 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



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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

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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 d

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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, ~~tra~~uninformed practices and fair and impartial processes;
6. Consider creating an Education and Prevention Committee to ensure coordinated approach to education and training;
7. Consider multidisciplinary 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 includi



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- 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 potential incentives to accomplish training goals (contractual, by merit increase, by evaluation, by computer-aided learning, or meeting professional development goals).

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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 genderbased 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



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resulting information to inform future proactive steps that will be taken by the school. 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>20</sup> In addition, the White House Task Force “urged schools to show they’re serious about the problem by conducting [a climate] survey within the next year.”<sup>21</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.” 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.<sup>22</sup>

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 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 create 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> ://TTO 2(w)Tj Ew

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campus and the efficacy of existing alcohol policies, 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 student feedback, identifying educational and training needs for 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

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for leadership on this issue, and those strengths should inform membership 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,

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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 prevent the recurrence of such conduct and to address the effects of the harassment.<sup>34</sup>

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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<sup>36</sup> 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<sup>37</sup> 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>35</sup> To facilitate the institution's compliance with Title IX, responsible employees are required to share all relevant details about the reported incident,<sup>37</sup> 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.



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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. 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**

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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 residen

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- 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).

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. 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 remediated resolution, an alternative form of resolution can effectively eliminate a hostile environment without taking disciplinary action against a respondent. The inclusion of a remediated 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

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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 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. 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 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 what steps to take.



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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>



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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 **final** portion of a Title IX investigation while law enforcement is gathering evidence, the institution must still **take** 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

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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

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considered by the school to represent a threat to students and employees. 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. 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. 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. 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 mail, intranet, text message, etc.

Finally, the Clery Act mandates that schools develop policies, procedures and programs [(e)4(s)-E.

### **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. 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





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violence cases, the factfinder and decisionmakers 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 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. 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, 2001 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 made 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/colleagues201104.html>

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

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

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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

## 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

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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 (i.e., 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.<sup>152</sup> 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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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 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>



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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~~sexual violence, under the school's policies;

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- 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.**

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- Procedures for institutional disciplinary action ~~in~~ <sup>in</sup> 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)



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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 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.