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Sexual Violence at Institutions of Higher Education

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Summary

In recent years, a number of high-profile incidents of sexual violence at institutions of higher education (IHEs) have heightened congressional and administration scrutiny of the policies and procedures that IHEs use to address sexual violence on campus. Among other things, concerns have been expressed about standards of evidence used in institutional proceedings that occur in response to a report of sexual violence on campus, the sufficiency of current legal remedies, and Department of Education (ED) guidance to IHEs.

Further, although sexual violence on campus is a widely acknowledged problem, its prevalence can be challenging to establish. Published estimates of the scope and scale of sexual violence at IHEs vary considerably across studies and data sources. Efforts to improve these data are an ongoing focus of federal policy.

Currently, there are two federal laws that address sexual violence on college campuses: the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, as amended (Clery Act), and Title IX of the Education Amendments of 1972 (Title IX). These two statutes differ in significant respects, including in their purpose, coverage, enforcement, and remedies.

The Clery Act requires all public and private IHEs that participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended (HEA), to track crimes in and around their campuses and to report these data to their campus community and to ED. The Clery Act also requires IHEs to publish information about certain campus safety policies, including policies related to reports of sexual violence. Under the Clery Act, such policies must address campus disciplinary proceedings, crime reporting, victim support, and related topics. ED's Office of Federal Student Aid (FSA) oversees compliance with Title IV, including the requirements related to the Clery Act. In this role, FSA conducts program reviews of IHEs' compliance with student aid and Clery provisions, and may levy fines against IHEs that are in violation.

In contrast, Title IX is a civil rights law that prohibits discrimination on the basis of sex under any education program or activity that receives federal funding. Under Title IX, sexual harassment, which includes sexual violence, is a form of unlawful sex discrimination. Unlike the Clery Act, whose coverage is limited to IHEs that receive student financial aid funds under the HEA, Title IX is applicable to education programs or activities that receive any type of federal funding, including any public or private elementary, secondary, and postsecondary school that receives such funds. Although each federal agency enforces Title IX compliance among its own recipients, ED, which administers the vast majority of federal education programs, is the primary agency conducting administrative enforcement of Title IX. Such enforcement by ED's Office for Civil Rights (OCR) may occur as part of a routine compliance audit or in response to a complaint filed by an individual.

Federal policymakers have been actively involved in seeking ways to improve how IHEs respond to, investigate, and adjudicate incidents of campus sexual violence. Members of the 114th Congress have introduced several bills that seek to strengthen existing laws pertaining to campus sexual violence. In April 2014, the White House Task Force to Protect Students from Sexual Assault issued its first report—*Not Alone*—and created a website to address campus sexual violence.

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Introduction and Background

Recent high-profile incidents of sexual violence on campus have heightened congressional and administrative scrutiny of the policies and procedures that institutions of higher education (IHEs) use to address such violence.[1] The Obama Administration has taken steps to facilitate the reporting of sexual violence and to help ensure that appropriate procedures and services are in place.[2] Meanwhile, legislators have introduced several bills that seek to strengthen or build on existing laws pertaining to campus sexual violence, including, in the 114th Congress, the Campus Accountability and Safety Act (CASA, H.R. 1310/S. 590), SOS Campus Act (SOS, H.R. 1490/S. 706), HALT Campus Sexual Violence Act (HALT, H.R. 2680), Safe Campus Act of 2015 (Safe Act, H.R. 3403), and Fair Campus Act of 2015 (Fair Act, H.R. 3408).

Currently, there are two federal statutes that address sexual violence on college campuses: the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, as amended (Clery Act),[3] and Title IX of the Education Amendments of 1972 (Title IX).[4] The Department of Education (ED) has primary responsibility for enforcing these laws.[5] This report provides background information on sexual violence on campus and its prevalence, descriptions of the Clery Act and Title IX, and an analysis of prominent policy and legal issues related to these two statutes. It also includes a brief description of a related third statute focused on educational privacy.

Sexual Violence at IHEs

Campus sexual violence is a widely acknowledged problem.[6] Victims of sexual violence may suffer from a variety of physical and mental health conditions including injuries, unintended pregnancy, sexually transmitted diseases, post-traumatic stress disorder, depression, suicidality, and substance abuse. College students who are the victims of sexual violence may experience a decline in academic performance, drop out, leave school, or transfer.[7]

Prevalence

Although the effects of sexual violence are well understood, the scope and scale of sexual violence is not. Finding ways to accurately assess and establish the prevalence of sexual violence

[1] For purposes of this report, all public and private schools that receive financial assistance under Title IV of the Higher Education Act of 1965, as amended, are considered IHEs.

[2] More information about the Administration's efforts to respond to sexual violence on campus is available at https://www.notalone.gov/.

[3] 20 U.S.C. §1092(f). The Clery Act was incorporated in Section 485(f) of the Higher Education Act of 1965, as amended (HEA). It was first enacted as Title II of the Student Right-to-Know and Campus Security Act of 1990 (P.L. 101-542). Unless otherwise noted, all references to the Clery Act in this report are to the statute as it existed in April 2016. This includes Clery provisions as enacted in 1990, as well as amendments made to the statute under subsequent acts, such as the Violence Against Women Act of 2013 (P.L. 113-4).

[4] P.L. 92-318, codified as amended at 20 U.S.C. §§1681 et seq.

[5] Information about selected related programs at other federal agencies is included in **Appendix C**.

[6] American Association of University Professors, *Campus Sexual Assault: Suggested Policies and Procedures*, February 2013. Christopher P. Krebs, et al., "College Women's Experiences with Physically Forced, Alcohol or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*," Journal of American College Health*, Vol. 57, No. 6, May/June, 2009. Laura P. Chen, et al., "Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systemic Review and Meta-analysis," *Mayo Clinic Proceedings* 85(7), July 2010. Centers for Disease Control, *Sexual Violence Consequences*, http://www.cdc.gov/violenceprevention/sexualviolence/consequences.html.

[7] Connie J. Kirkland, *Academic Impact of Sexual Assaults*, George Mason University, 1994.

has been a major focus of federal policy efforts. A number of studies have attempted to shed light on the incidence and nature of sexual violence (in general and on campus), but there is little agreement in findings, and estimates of sexual violence can vary widely. These variations may stem, at least in part, from the different sources of data used to calculate estimates and the research challenges associated with each of those data sources.

Data used to estimate sexual violence may come from various sources, including crime data reported to police or survey data collected by researchers. The following sections describe some of the research challenges associated with crime and survey data, and highlight some of the efforts to improve federal and IHE sexual violence data collections. (Data on reports of campus sexual violence under the Clery Act are included in **Table A-1**.)

Crime Data

One source of information about the prevalence of campus sexual violence is crime data reported to (and by) the police. The Federal Bureau of Investigation (FBI) tracks and publishes such data in its annual report, *Crime in the United States*. *Crime in the United States* includes information collected from law enforcement agencies throughout the United States through the Uniform Crime Reporting (UCR) Program. The 2014 edition includes data on reported campus crimes (including rape), by state, in "Table 9. Offences Known to Law Enforcement, by State by University and College, 2014."[8] (This table is too large to incorporate in this report. However, data are available at https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/browse-by/universities-and-colleges.)

Many experts believe official crime statistics (possibly significantly) underestimate the prevalence of sexual violence. Such violence has been found to be underreported to police.[9] Some of the reasons that have been implicated in research on the underreporting of sexual violence include not having proof that the incident occurred, belief that the violence was a personal matter, fear on the part of the accuser of retaliation by the perpetrator or of hostile treatment by authorities, known perpetrator (such as a boyfriend), certain campus policies,[10] victim perception that the event was not rape (perhaps because no weapon was used), embarrassment, location of the event (on- or off-campus), and the role (if any) of drugs and alcohol.[11]

[8] For 2014, *Crime in the United States* includes data on rape under both the revised and legacy definitions of that term. (See the text box titled "The UCR Program and Sexual Violence on Campus" for more information about this change.)

[9] Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, NCJ 194530, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, August 2002, at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1133.

[10] For example, a victim who voluntarily used drugs or alcohol may not report sexual violence for fear of reprisal under campus policies prohibiting drinking and drug use. Some policies, such as the provision of victim services and allowing confidential reporting, have been associated with increased reporting.

[11] Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, NCJ 194530, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, August 2002, at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1133.; and Christopher P. Krebs, Christine H. Lindquist, and Tara D. Warner, et al., *The Campus Sexual Assault (CSA) Study: Final Report*, U.S. Department of Justice, National Institute of Justice, December 2007, https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

The UCR Program and Sexual Violence on Campus

The Clery Act directs IHEs to compile and report statistics on campus crimes as defined in the UCR system. Some of the bills addressing campus sexual violence that have been introduced in the 114th Congress also include references to the UCR system (or program). So, what is the UCR, and what about it is especially relevant for legislators interested in sexual violence on campus?

The UCR Program—technically, it is a program, not a system—is the central clearinghouse for statistics on crime in the United States and the source of data published in *Crime in the United States*, including data on reported campus sexual violence. It is comprised of four subprograms: the Summary Reporting System (SRS), National Incident-Based Reporting System (NIBRS), Law Enforcement Officers Killed and Assaulted (LEOKA) Program, and Hate Crime Statistics Program. These subprograms have independent histories, include different data elements in their collections, and use different definitions and categories for the crimes they track.

The SRS and NIBRS are the key UCR subprograms for information about sexual violence reported to law enforcement. The SRS subprogram is a legacy statistical system originally developed in the 1920s. It underwent redesign in the 1980s. NIBRS was born of that process. NIBRS collects more detailed information than the SRS, but is used by fewer reporting agencies. The FBI plans to eventually retire the SRS and to fully implement a NIBRS-only collection. As of January 2016, 6,500 (of about 18,000) law enforcement agencies reported data through NIBRS. 223 colleges and universities reported data through NIBRS in 2014.[12]

In 2013, the FBI changed the definitions of the term "rape" as used in the SRS and NIBRS. The SRS definition—which had previously been, "carnal knowledge of a female forcibly and against her will"—was significantly revised to allow for victims and offenders of both genders, and to allow for various forms of sexual penetration.[13] The NIBRS definition already provided for this broader view, though the phrase "forcibly or against the victim's will," which was previously part of the NIBRS definition, was changed to "without the consent of the victim."[14]

Survey Data

In addition to crime data, a second research technique relies on information collected (typically through interviews or by questionnaire) from a sample of individuals selected from a specific population or cohort—that is, a survey. Many estimates of sexual violence in general (and on campus) come from studies that rely on retrospective survey data.[15] These estimates vary considerably across studies.

For example, one often cited web-based survey of students—the 2007 *Campus Sexual Assault Study*—found that one in five undergraduate women attending one of two large public universities had experienced a completed or attempted sexual assault since entering college.[16] A 2014 study of data from the nationally representative *National Crime Victimization Survey* (NCVS), on the other hand, estimated that the rate of rape and sexual assault among college females was 6.1 per 1,000 students.[17] (Some researchers have cautioned against relying on either

[12] Email communication between CRS and FBI staff, dated April 6, 2016.

[13] The revised definition of rape is "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." Attempts or assaults to commit rape are also included; statutory rape and incest are excluded. See Federal Bureau of Investigation, *Crime in the United States 2014*, "Rape Addendum," at https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/resource-pages/rape-addendum.

[14] Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reporting Program, "New Rape Definition Frequently Asked Questions," December 11, 2014, at https://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions.

[15] Retrospective survey data is collected by asking respondents to recall and report on information about the past.

[16] Christopher P. Krebs, Christine H. Lindquist, and Tara D. Warner, et al., *The Campus Sexual Assault (CSA) Study: Final Report*, U.S. Department of Justice, National Institute of Justice, December 2007, https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

[17] Sofi Sinozich and Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, NCJ 248471, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, December 2014, at

of these surveys for definitive statements on the prevalence of sexual violence on campus in the United States.)[18]

Why the gap in findings? One answer is study design. Methodological and research choices can significantly affect measurement, response, and survey conclusions in research on sexual violence. Some of the factors in the survey research processes used in this research area that appear to influence findings include the following:

- the purpose and context of the survey (e.g., to identify crimes of sexual violence or public health issues);
- how the survey is administered (telephone survey, in person interview, self-administered computer survey, etc.);
- whether the respondent has privacy during the survey;
- the time frame of the survey (e.g., whether the respondent is asked to provide data for the past six months, the past 12 months, or over their lifetime); and
- whether behaviorally specific definitions are provided for all of the types of sexual violence being surveyed.[19]

Response rates and question wording can also affect study conclusions. Surveys with low response rates (that is, the number or people who participate compared to the number of people who were asked to participate) or a non-random, non-nationally representative sample, may suffer from sampling or selection bias. Question wording can also have a significant effect on participant response and survey findings in sexual violence research.[20]

The two main federal surveys that examine sexual violence include (1) the Department of Justice (DOJ), Bureau of Justice Statistics' (BJS) *National Crime Victim Survey* (NCVS), which views sexual violence from a criminal justice or crime perspective;[21] and (2) the Department of Health and Human Service (HHS), Centers for Disease Control and Prevention's (CDC) *National*

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http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5176.

[18] Christopher Krebs and Christine Lindquist, two of the three *Campus Sexual Assault* study coauthors, have said it is "inappropriate to use the 1-in-5 number in the way it's being used today, as a baseline or the only statistic when discussing our country's problem with rape and sexual assault on campus" because their findings were not nationally representative. See, Christopher Krebs and Christine Lindquist, "Setting the Record Straight on '1 in 5'," *Time*, December 15, 2014, at http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/. On the other hand, a 2014 expert panel review of the NCVS and similar surveys concluded that none of the surveys reviewed could be recommended as "the best or as a standard;" and concluded that the NCVS was likely undercounting rape and sexual assault victimization. See, Kruttschnitt, et al., eds., *Estimating the Incidence of Rape and Sexual Assault*, Panel on Measuring Rape and Sexual Assault in Bureau of Justice Statistics Household Surveys, Committee on National Statistics, Division on Behavioral and Social Sciences and Education, National Research Council (Washington, DC: National Academies Press, 2014), p. 4, at http://www.nap.edu/catalog/18605/estimating-the-incidence-of-rape-and-sexual-assault. (Hereinafter referred to as "NRC 2014.")

[19] See, NRC 2014 and, Bonnie S. Fisher, Francis T. Cullen, and Michael G. Turner, *The Sexual Victimization of College Women*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Bureau of Justice Statistics, NCJ 182369, December 2000, pp. 4-5, https://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

[20] See "Comparing the NCVS and Other Surveys that Measure Rape and Sexual Assault in a College-Age Population," in Sofi Sinozich and Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females: 1995-2013 (Special Report)*, NCJ 248471, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, December 11, 2014, at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5176.

[21] According to the BJS, the NCVS is " ... the nation's primary source of information on criminal victimization." It focuses on a broad population (not just students) but includes information on student victims as well. More information about the NCVS is available at http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245.

Intimate Partner and Sexual Violence Survey (NISVS), which views sexual violence through the lens of public health.[22]

As previously mentioned, a 2014 analysis of NCVS data estimated that the rate of rape and sexual assault among female student victims was 6.1 per 1,000 between 1995 and 2013. (This may be an undercount.)[23] The estimated rate of rape and sexual assault was higher for nonstudents—7.6 per 1,000—than for students, but student victims were less likely to report to police than nonstudent victims (20% vs 32%). An analysis of data from the 2010 NISVS estimated that nearly one in five women (18.3%) and one in 71 men (1.4%) have been raped at some time in their lives.[24] The same analysis estimated that nearly "1 in 2 women (44.6%) and 1 in 5 men (22.2%) experienced sexual violence victimization other than rape at some point in their lives."[25] The analysis of 2010 NISVS data did not distinguish between students and nonstudents. It is unclear how these data might apply to campus sexual violence. Further, the data may be limited by low response rates and other factors related to question wording, research approach, and survey administration.[26]

Efforts to Improve Federal Survey Collections

Given the challenges associated with determining the utility of currently available survey data used in research on sexual violence, the BJS has been involved in a multiyear effort to evaluate its *National Crime Victim Survey* and to identify, develop, and test the best methods for collecting self-report data on rape and sexual assault. As part of that effort, BJS asked the National Research Council's Committee on National Statistics to convene an expert panel to investigate and "recommend best practices for measuring rape and sexual assault on the NCVS and other BJS household surveys."[27] The panel published its findings in 2014.[28]

BJS's efforts to improve the *National Crime Victim Survey* are ongoing. Results from an assessment of certain collection methods (e.g., survey administration) may be available in late 2016 or early 2017; field testing of a redesigned survey instrument is anticipated in 2017.[29]

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[22] According to the CDC, the "NISVS is the first ongoing survey dedicated solely to describing and monitoring these forms of violence as public health issues. It also includes information that has not previously been measured in a nationally representative survey, such as types of sexual violence other than rape, expressive psychological aggression and coercive control, and control of reproductive or sexual health. NISVS is also the first survey to provide national and state level data on IPV, SV, and stalking." Centers for Disease Control and Prevention, "The National Intimate Partner and Sexual Violence Survey: An Overview," fact sheet, at http://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_digest_final-a.pdf. More information about the NISVS is available at http://www.cdc.gov/violenceprevention/nisvs/.

[23] See footnote 16 and NRC 2014, p. 4.

[24] Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, 2011, pp. 17-28, at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

[25] Ibid., p. 19. The NISVS distinguishes between rape (attempted and completed, as well as alcohol and drug facilitated) and "other sexual violence," which includes sexual coercion, unwanted sexual contact, etc.

[26] According to the analysis, the NISVS was subject to limitations, including low response rates, survey administration method (e.g., landline telephone), question design, and victim recall. Efforts were made to correct for some of these limitations. The analysis suggests that prevalence may be undercounted, for various reasons. See, Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, 2011, pp. 2, 85-86, at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

[27] NRC 2014, p. 2.

[28] Ibid.

[29] More information about the NCVS Instrument Redesign and Testing Pilot is available at http://www.bjs.gov/index.cfm?ty=tp&tid=912.

Improvement efforts also seek to address demand for state and local-level victimization estimates.[30]

Campus Climate Surveys

In addition to efforts that are underway to improve the *National Crime Victim Survey*, DOJs Office on Violence Against Women has been working with BJS to develop and test a campus climate survey that researchers or IHEs may use to assess the prevalence and nature of sexual violence on an individual campus or higher education system.[31] As described in a technical report on the new survey, campus climate surveys

> provide one vehicle for measuring the problem of rape and sexual assault among college students, and have the potential to collect information that is needed to understand which policies and programs are most effective at reducing the prevalence of rape and sexual assault, providing effective and necessary services to victims, investigating sexual victimization incidents, and holding perpetrators accountable.[32]

The final technical report on the validation study of the new campus climate survey instrument was published in January 2016.

Some IHEs already collect information on campus sexual violence through independently developed, single institution- or higher education system-specific campus climate surveys. (Reports on the results of these surveys may often be found online.) In 2015, the Association of American Universities (AAU) published findings from a campus climate survey of 27 institutions. 150,072 students participated—a 19.3% response rate, which the AAU survey report noted was lower than the response rate in similar surveys and may have contributed to sampling bias.[33] Nevertheless, the AAU campus climate survey found that, "11.7 percent of student respondents across 27 universities reported experiencing nonconsensual sexual contact by physical force, threats of physical force, or incapacitation since they enrolled...."[34]

[30] More information about efforts to produce subnational crime estimates through the NCVS is available at http://www.bjs.gov/index.cfm?ty=tp&tid=911.

[31] Although the campus climate survey development effort is separate from efforts to improve the NCVS, information gleaned in that process will also inform the effort to improve the NCVS. Email communication between CRS and DOJ, dated March 30, 2016.

[32] Christopher Krebs et al. of RTI International, and Michael Planty et al. of the Bureau of Justice Statistics, *Campus Climate Survey Validation Study: Final Technical Report*, NCJ 249545, January 2016, available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5540.

[33] Nonresponse bias tests of the data implied that survey estimates of victimization and certain attitude items may be biased upward. See, David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Wstat, September 21, 2015, at https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

[34] Ibid., p.viii.

Introduction to the Clery Act and Title IX

Both the Clery Act and Title IX contain provisions intended to protect students at IHEs from sexual violence. Indeed, the Obama Administration's 2014 initiative to combat sexual violence on college campuses emphasizes the responsibilities of IHEs under the two statutes. Nevertheless, it is important to remember that the Clery Act and Title IX are two different laws with two different purposes. Those purposes happen to overlap in the context of sexual violence on college campuses. Because an IHE's mishandling of sexual violence incidents may lead to violations of one or both laws, there has been some confusion about the comparative scope and applicability of the Clery Act and Title IX. Some of the differences between the two laws are described below.

Table 1. Comparison of the Clery Act and Title IX

	The Clery Act	Title IX
Purpose	Requires disclosure of campus crime statistics and safety policies	Prohibits sex discrimination in federally funded education programs and activities
Covered Entities	IHEs that participate in HEA Title IV(P.L. 89-329) student financial aid programs	Education programs or activities that receive federal funding, including elementary, secondary, and postsecondary schools
Covered Acts	Applies to any failure to collect and report required campus crime statistics and to establish and disseminate required policy statements	Applies to any type of sex discrimination that occurs in a federally funded education program or activity
Enforcement Agency	Federal Student Aid Office at Department of Education	Federal agencies, including the Office for Civil Rights at Department of Education
Remedies	Penalty of up to $35,000 per violation or suspension of institutional participation in federal student financial aid programs	Informal resolution or suspension or termination of federal funding

Source: Congressional Research Service, based on 20 U.S.C. §1092(f) and 20 U.S.C. §§1681 et seq.

The primary purpose of the Clery Act is disclosure of campus crime statistics and policies. Under Clery, all public and private IHEs that participate in HEA Title IV student financial assistance programs must track crimes in and around their campuses, and report these data to their campus community and to ED.[35] Notably, the Clery Act requires such reports for all types of crimes and offenses enumerated in the law, not just crimes of sexual violence. The Clery Act also requires that IHEs develop and publish certain policies relating to campus crime and safety, including policies related to sexual violence, as well as those that relate to emergency response, evacuation, and related topics.

In contrast, Title IX is a civil rights law that prohibits discrimination on the basis of sex under any education program or activity that receives federal funding. Under Title IX, sexual harassment, which includes sexual violence, is a form of unlawful sex discrimination. Unlike the Clery Act, whose coverage is limited to IHEs that receive student financial aid funds under the HEA, Title IX is applicable to education programs or activities that receive any type of federal funding,

[35] For data on Clery crimes that have been reported to campus security or police, and/or local law enforcement (but, not necessarily adjudicated), see ED's Campus Safety and Security Data Analysis Cutting Tool website at http://www.ope.ed.gov/security/Index.aspx.

including any public or private elementary, secondary, and postsecondary school that receives such funds.

Title IX and the Clery Act differ not only in their purpose and coverage, but also in their enforcement and remedies. ED's Federal Student Aid (FSA) office oversees educational institutions' compliance with the student financial aid requirements under Title IV of the HEA, including requirements related to the Clery Act. In this role, FSA conducts program reviews of institutions' compliance with Title IV student financial aid requirements, including compliance with the Clery Act. After conducting a review of an IHE's compliance with the Clery Act, the FSA may impose a fine of up to $35,000 per Clery Act violation. FSA also has authority to suspend institutional participation in federal financial student aid programs for violations of the Clery Act, although it appears that this penalty has never been imposed.

Meanwhile, for purposes of enforcing Title IX at the administrative level,[36] federal agencies are responsible for ensuring that education programs or activities that receive federal funding are complying with Title IX. Although each agency enforces Title IX compliance among its own recipients, ED, which administers the vast majority of federal education programs, is the primary agency conducting administrative enforcement of Title IX. Such enforcement by ED's Office for Civil Rights (OCR) may occur as part of a routine compliance audit or in response to a complaint filed by an individual. The administrative sanction for violating Title IX is suspension or termination of federal funding, although such a penalty is the last resort, and may occur only if OCR has first sought an informal resolution with the IHE in question.

Both the Clery Act and Title IX are discussed in greater detail below.

Notalone.gov

The White House Task Force to Protect Students from Sexual Assault has stablished a website addressing campus sexual violence—www.notalone.gov. The website includes information for students, schools, and IHEs, as well as a map of schools and IHEs that have resolved enforcement activities conducted by ED and DOJ. These activities include Title IX resolution agreements with OCR, Clery reports from the FSA, and resolution agreements and other court filings addressing sexual violence and sexual harassment on campuses from DOJ's Civil Rights Division. Student-related topics on the website include information about how to file a complaint, how to help a friend, and what to do if you have been sexually assaulted. For schools and IHEs, the website includes information about model policies and practices, principles of confidentiality, and compliance with federal law.

Overview of the Clery Act

The Clery Act requires IHEs to do two things: (1) report campus crime statistics, and (2) establish and disseminate campus safety and security policies. These requirements apply to sexual violence on campus and to other crimes and offenses specified in the statute, such as murder and hate crimes. Both the campus crime statistics and campus safety and security policies must be compiled and distributed to current and prospective students and employees in an institution's Annual Security Report (ASR).

The most recent amendments to the Clery Act were adopted as part of the Violence Against Women Reauthorization Act of 2013 (VAWA, P.L. 113-4).[37] This report refers to and describes the

[36] Title IX may also be enforced privately by victims of sex discrimination, who may sue in federal court. Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

[37] VAWA incorporated provisions from the Campus Sexual Violence Elimination Act (S. 128/H.R. 812), which amended the Clery Act.

Clery Act as it exists in April 2016, which includes amendments made under VAWA, as well as other enacted changes made to the statute between 1990 and 2016.[38] This report also refers to certain Clery Act regulations[39] and the *Handbook for Campus Safety and Security Reporting* (Clery Handbook).[40]

Data on the number of reported crimes under the Clery Act, and a list of IHEs that received Final Program Review Determinations in response to claims of a violation of the Clery Act, are included in **Appendix A**.

Campus Crime Statistics

Under the Clery Act, IHEs must collect and report data on criminal offenses—and offenses referred for disciplinary action—that have been reported to a campus security authority or local police if the offense occurred on Clery geography (on or around campus). The Clery Act further requires IHEs to publish this information (for the most recent three years) in their Annual Security Reports (ASR). ASRs must be published by October 1st of each year. In addition, the Clery Act directs IHEs to submit campus crime statistics to ED, which is done through a web-based data collection portal, in the fall of each year.

Campus Security Authorities. Campus security authorities—who play a role in collecting and reporting campus crime statistics—are referenced, but not defined, in the Clery Act. However, under ED's Clery Act regulations, a campus security authority is defined as

> (i) A campus police department or a campus security department of an institution.
>
> (ii) Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department under paragraph (i) of this definition, such as an individual who is responsible for monitoring entrance into institutional property.
>
> (iii) Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.
>
> (iv) An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. If such an official is a pastoral or professional counselor as defined below, the official is not considered a campus security authority when acting as a pastoral or professional counselor.[41]

As described by ED's Clery Handbook, campus security authorities are responsible for collecting and reporting (to the IHE's designated official) Clery Act reportable data and crimes.[42] ED's Clery Act regulations specify that Clery Act reporting does not also require an investigation of the

[38] For information about historical changes to Clery, see CRS Report R43759, *History of the Clery Act: Fact Sheet*, by Heather B. Gonzalez.

[39] 34 C.F.R. §668.46. See also, 34 C.F.R. §§668.14, 666.16, 668.41, and 668.49. These regulations have been revised to reflect changes made by VAWA.

[40] U.S. Department of Education, *The Handbook for Campus Safety and Security Reporting*, February 2011, at http://www2.ed.gov/admins/lead/safety/campus.html.

[41] 34 C.F.R. §668.46(a).

[42] Clery Handbook, pp. 73-96.

alleged crime or disclosure of personally identifying information about the victim.[43] (Such duties may be required under other laws.)

Clery Geography. Clery geography includes campus areas, noncampus areas, and public property. These terms are defined in Section (6)(A)(ii) of the Clery Act, and are included in ED's Clery Act regulations under the definition of "Clery geography."[44] Under the Clery Act,

> (ii) The term "campus" means-
>
> (I) any building or property owned or controlled by an institution of higher education within the same reasonably contiguous geographic area of the institution and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and
>
> (II) property within the same reasonably contiguous geographic area of the institution that is owned by the institution but controlled by another person, is used by students, and supports institutional purposes (such as a food or other retail vendor).
>
> (iii) The term "noncampus building or property" means-
>
> (I) any building or property owned or controlled by a student organization recognized by the institution; and
>
> (II) any building or property (other than a branch campus) owned or controlled by an institution of higher education that is used in direct support of, or in relation to, the institution's educational purposes, is used by students, and is not within the same reasonably contiguous geographic area of the institution.
>
> (iv) The term "public property" means all public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution's educational purposes.[45]

Additionally, Section (6)(B) of the Clery Act specifies that when branches, schools, or administrative divisions within an institution are not "within a reasonably contiguous geographic area," they are to be treated as separate campuses for Clery Act reporting requirements.[46]

Reportable Crimes and Offenses. The list of Clery Act reportable crimes and offenses is generally described in the statute. However, ED's Clery Act regulations add additional detail—distinguishing, for example, in the category of "murder," between criminal homicide and negligent manslaughter. As enumerated in the Clery Act regulations, reportable crimes include

> (i) Primary crimes, including—
>
> (A) Criminal homicide:
> (1) Murder and nonnegligent manslaughter; and
> (2) Negligent manslaughter.
>
> (B) Sex offenses:
> (1) Rape;
> (2) Fondling;
> (3) Incest; and
> (4) Statutory rape.

[43] 34 C.F.R. §668.46(c)(2).

[44] 34 C.F.R. §668.46(a). Clery geography is also described in the Clery Handbook, pp. 11-31.

[45] 20 U.S.C. §1092(f)(6)(A)(ii).

[46] 20 U.S.C. §1092(f)(6)(B).

(C) Robbery.

(D) Aggravated assault.

(E) Burglary.

(F) Motor vehicle theft.

(G) Arson.

(ii) Arrests and referrals for disciplinary actions, including—

(A) Arrests for liquor law violations, drug law violations, and illegal weapons possession.

(B) Persons not included in paragraph (c)(1)(ii)(A) of this section who were referred for campus disciplinary action for liquor law violations, drug law violations, and illegal weapons possession.

(iii) Hate crimes, including—

(A) The number of each type of crime in paragraph (c)(1)(i) of this section that are determined to be hate crimes; and

(B) The number of the following crimes that are determined to be hate crimes:
(1) Larceny-theft.
(2) Simple assault.
(3) Intimidation.
(4) Destruction/damage/vandalism of property.

(iv) Dating violence, domestic violence, and stalking as defined in paragraph (a) of this section.[47]

Sections (6) and (7) of the Clery Act provide crime definitions for Clery Act purposes. Under these sections, the above-listed primary crimes (murder, sex offenses, etc.) and hate crimes are to be compiled according to the definitions used in the DOJ's Uniform Crime Reporting (UCR)

[47] 34 C.F.R. §668.46(c)(1).

system.[48] "Dating violence," "domestic violence," and "stalking" are defined in accordance with VAWA.[49]

Section (1)(F)(ii) of the Clery Act requires that hate crimes be reported by category of bias: race, gender, gender identity, sexual orientation, religion, ethnicity, national origin, and disability. Other provisions require that crimes be recorded by calendar year and location, but do not require identification of the victim.

Campus Safety and Security Policies

Under the Clery Act, IHEs are required to establish a wide variety of safety- and security-related policies and to include statements on these policies in their ASRs. The following list includes a selected summary of some of these required policy statements, focusing most closely on policies related to sexual violence. For a complete, detailed list of required policy statements see the Clery Act, Clery Act regulations, and Clery Handbook.

As per the Clery Act, an ASR must include campus crime statistics, as well as a statement of campus policies regarding

- campus law enforcement (including the law enforcement authority of campus security personnel, and the relationship between campus security personnel and local or state law enforcement agencies); procedures to report criminal actions and emergencies; policies to encourage crime reporting (when the victim elects or is unable to do so); and policies concerning the institution's response to such reports;[50]
- programs to prevent sexual violence, procedures the institution will follow in response to a report of sexual violence, and the standard of evidence that will be used in any institutional proceedings that result from such a report;[51]

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[48] ED's Clery Act regulations (34 C.F.R. §668.46(c)(9)) further specify that,

> "(i) An institution must compile the crime statistics for murder and nonnegligent manslaughter, negligent manslaughter, rape, robbery, aggravated assault, burglary, motor vehicle theft, arson, liquor law violations, drug law violations, and illegal weapons possession using the definitions of those crimes from the "Summary Reporting System (SRS) User Manual" from the FBI's UCR Program, as provided in Appendix A to this subpart.
>
> (ii) An institution must compile the crime statistics for fondling, incest, and statutory rape using the definitions of those crimes from the "National Incident-Based Reporting System (NIBRS) User Manual" from the FBI's UCR Program, as provided in Appendix A to this subpart.
>
> (iii) An institution must compile the crime statistics for the hate crimes of larceny-theft, simple assault, intimidation, and destruction/damage/vandalism of property using the definitions provided in the "Hate Crime Data Collection Guidelines and Training Manual" from the FBI's UCR Program, as provided in Appendix A to this subpart.
>
> (iv) An institution must compile the crime statistics for dating violence, domestic violence, and stalking using the definitions provided in paragraph (a) of this section.
>
> (v) In counting crimes when more than one offense was committed during a single incident, an institution must conform to the requirements of the Hierarchy Rule in the "Summary Reporting System (SRS) User Manual.
>
> (vi) If arson is committed, an institution must always record the arson in its statistics, regardless of whether or not it occurs in the same incident as another crime.
>
> (vii) If rape, fondling, incest, or statutory rape occurs in the same incident as a murder, an institution must record both the sex offense and the murder in its statistics."

[49] The VAWA definitions are codified at 42 U.S.C. §13925(a).

[50] 20 U.S.C. §1092(f)(1)(C) and (1)(A).

[51] 20 U.S.C. §1092(f)(8)(A).

- sexual violence awareness and prevention programs for all incoming students and new employees, including a statement from the IHE prohibiting such violence; the definition of sexual violence in the applicable jurisdiction and definition of consent; and options for bystander intervention and risk reduction;[52]
- sanctions that may be imposed following a final determination in an institutional proceeding arising from a report of sexual violence;[53]
- procedures that alleged victims should follow after sexual violence has occurred; including evidence preservation, information about to whom the alleged offense should be reported, and options for reporting (or not reporting) such incidents to campus authorities or law enforcement; as well as (where applicable) information about orders of protection and similar orders that may be obtained through a court process;[54]
- procedures for institutional disciplinary action, including a clear statement that
  - such proceedings shall provide a prompt, fair, and impartial investigation and resolution; and be conducted by officials who receive annual training on issues relating to sexual violence and on how to conduct investigations and hearings in response to a report of such violence;
  - both the accuser and accused are entitled to have others present during such proceedings (including an advisor of choice);[55] and shall receive simultaneous notification in writing of the outcome of such proceedings, appeal procedures, changes in the results that occur before final determination, and the final determination.[56]
- how the IHE will protect the confidentiality of the victim or alleged victim, as well as information about counseling, health, and legal services; and information on options for changing academic schedules, housing assignments, etc.[57]

The Clery Act also prohibits the Secretary of Education from requiring IHEs to adopt particular policies, procedures, or practices; and prohibits retaliation against anyone exercising his or her rights or responsibilities under the act.[58]

Enforcement Efforts

ED's Office of Federal Student Aid (FSA) is responsible for administration and oversight of the Clery Act. It monitors ASRs submitted by IHEs, and may initiate a review to evaluate an IHE's compliance with Clery Act requirements. A review may be initiated when a complaint is received, a media event raises concerns, the IHE's independent audit identifies serious noncompliance, or through a review selection process that may also coincide with state reviews performed by the FBI's Criminal Justice Information Service (CJIS) Audit Unit. A Clery review may consist of

[52] 20 U.S.C. §1092(f)(8)(B)(i).

[53] 20 U.S.C. §1092(f)(8)(B)(ii).

[54] 20 U.S.C. §1092(f)(8)(B)(iii).

[55] ED's Clery Act regulations stipulate that the IHE "may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties." See 34 C.F.R. §688.46(k)(2)(iv).

[56] 20 U.S.C. §1092(f)(8)(B)(iv).

[57] 20 U.S.C. §1092(f)(8)(B)(v)(vi), and (vii).

[58] 20 U.S.C. §1092(f)(2) and (17).

examining an IHE's crime log, ASR, and incidents that have been reported to local police. The review may or may not include an onsite visit to the IHE.

Once a review is completed, ED issues a Program Review report that describes noncompliance concerns and gives the IHE an opportunity to respond. After reviewing all of the information it has received, ED issues a Final Program Review Determination letter. Based on the findings, the Final Program Review Determination may be referred to FSA's Administrative Actions and Appeals Service Group for consideration of possible adverse administrative action. Under current law, ED may impose a fine of up to $35,000 for each Clery violation, and it may suspend an IHE's participation in federal student financial aid programs (although it appears that the latter sanction has never been imposed).[59] However, a Final Program Review Determination may or may not actually result in adverse administrative actions (including fines), depending on the findings in the case. FSA maintains a searchable website showing which IHEs have received a Final Program Review Determination from ED.[60] (**Table A-2** compiles this information and lists IHEs that have received a Final Program Review Determination, by year.)

Some concerns have been expressed about the sufficiency of Clery Act enforcement, including staff levels, at ED. In a May 19, 2014 roundtable discussion addressing campus sexual violence, then-Acting Assistant Secretary of the Office of Postsecondary Education, Lynn Mahaffie, indicated that her office employed 13 staff focused exclusively on monitoring compliance with the Clery Act and the Drug-Free Schools and Communities Act (DFSCA, as reflected in 34 C.F.R. Part 86). These staff conduct approximately 20 reviews per year. Overall, Mahaffie indicated that her office conducts approximately 300 program reviews per year of IHE's compliance with financial aid requirements in two categories: general assessment reviews and compliance assurance reviews. All general assessment reviews also include a basic Clery Act and DFSCA compliance check.[61]

ED provides information (which ultimately aids enforcement) on procedures for IHE's to follow in meeting campus safety and security requirements. This information is included in the Clery Handbook and online tutorial, "Campus Safety and Security Reporting Training."[62]

Overview of Title IX

Title IX (P.L. 92-318) is a federal civil rights law that prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance.[63] The scope of this prohibition is quite broad, encompassing discrimination against both women and men. The statute applies in a wide variety of educational contexts, such as school admissions, athletics, educational services, extracurricular activities, employment, and more. Because Title IX applies to education programs or activities that receive federal funding, the vast majority of public and private institutions of higher education must comply with the statute's requirements or risk losing federal aid.[64]

[59] 34 C.F.R. §668.84(a) authorizes the Secretary of Education to impose a fine of up to $27,500 (as adjusted for inflation) per violation. After adjusting for inflation, this fine was $35,000 as of February 2106.

[60] Data are available for 1997-2015. Available at https://studentaid.ed.gov/sa/clery-act-reports.

[61] A recording of the roundtable discussion is available at http://www.mccaskill.senate.gov/media-center/video/view/kytv-mccaskill-hosts-roundtable-on-campus-sexual-assualt-reporting-enforcement-and-prevention.

[62] Available at http://www2.ed.gov/campus-crime/HTML/cc_on/index.html.

[63] 20 U.S.C. §1681(a).

[64] The statute does, however, contain a number of exceptions, such as exemptions for educational institutions that train

The current effort to combat sexual violence on college campuses is derived from Title IX's prohibition against sexual harassment. Under Title IX, sexual harassment is a form of sex discrimination that may occur when the harassing conduct is severe or pervasive enough that it creates a hostile environment that interferes with a student's ability to access the educational program or activity in question.[65] In 2011, ED released guidance clarifying that sexual violence in schools is a form of sexual harassment that is prohibited by Title IX.[66] Supplemental guidance was released in 2014.[67] Although Title IX also prohibits a school employee's sexual harassment of students, ED's sexual violence guidance focuses only on the issue of student-on-student sexual harassment.[68]

The applicability of the 2011 guidance was reinforced in 2014 when the Obama Administration launched its initiative to prevent sexual violence on college campuses. As part of this effort, the Administration established a website to inform students about their rights under current law and to remind institutions of their legal obligations under Title IX and the Clery Act.[69] Although the initiative appears to be focused primarily on efforts to enforce existing law, ED did issue additional guidance to remind schools of their Title IX obligations related to sexual violence. In the meantime, ED has also stepped up efforts to ensure that schools are complying with these requirements. ED's administrative enforcement efforts and sexual violence guidance are discussed in more detail below, following a brief discussion of the difference between administrative and individual enforcement under Title IX.

Title IX Enforcement

As a preliminary matter, it is important to distinguish between administrative and individual enforcement under Title IX. At the administrative level, federal agencies are responsible for ensuring that entities that receive federal education funding are complying with Title IX. Although each agency enforces Title IX compliance among its own recipients, ED, which administers the vast majority of federal education programs, is the primary agency conducting administrative enforcement of Title IX. Such enforcement by OCR may occur as part of a routine compliance audit or in response to a complaint filed by an individual.

individuals for military service or the merchant marines or those institutions operated by a religious institute whose religious tenets are inconsistent with Title IX. *Id.*

[65] CRS Report RL33736, *Sexual Harassment: Developments in Federal Law*, by Jody Feder.

[66] Russlynn Ali, "*Dear Colleague" Letter*, U.S. Department of Education, April 4, 2011, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html (hereinafter "2011 Guidance").

[67] Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. Department of Education, April 29, 2014, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (hereinafter "2014 Guidance).

[68] U.S. Department of Education, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, January 19, 2001, http://www2.ed.gov/print/about/offices/list/ocr/docs/shguide.html.

[69] The website is https://www.notalone.gov/.

In addition to administrative enforcement, Title IX has been interpreted to contain an implied private right of action that allows an individual to sue in federal court for monetary damages and injunctive relief.[70] Thus, individuals who believe they have been victims of unlawful sexual harassment have two different, but not mutually exclusive, options: (1) they may file complaints with OCR and rely on ED to take action if a school is found to be violating Title IX; and/or (2) they may sue their educational institutions directly. If a school is sued for monetary damages, it may be held strictly liable if an employee sexually harasses a student, but liability for student-on-student sexual harassment in this context would attach only if the school had actual knowledge of and was deliberately indifferent to the harassment. In contrast, for purposes of administrative enforcement by ED, a grant recipient such as a school violates Title IX if the recipient knows or reasonably should know about student-on-student harassment, but fails to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

The 2014 initiative to combat sexual violence on college campuses has primarily focused on Title IX administrative enforcement. Thus, this area is explored in greater detail below. For more information on private Title IX lawsuits against schools, see CRS Report RL33736, *Sexual Harassment: Developments in Federal Law*, by Jody Feder.

Administrative Enforcement

Two different federal agencies have administrative enforcement authority regarding Title IX violations involving campus sexual violence. In the lead role is ED, which enforces an educational institution's compliance with Title IX requirements via several different mechanisms, including periodic compliance reviews, as well as investigations conducted in response to complaints.[71] If an individual believes an educational institution has violated Title IX, he or she may file a Title IX complaint with OCR. At that point, OCR must conduct an investigation of the institution and, if a violation is found, seek an informal resolution. If informal resolution fails, then OCR may seek to suspend or terminate the institution's federal funding.[72]

Notably, suspension or termination of federal funding is currently the only enforcement mechanism available to ED or other federal agencies when an agency cannot reach a voluntary resolution agreement with an institution that it has found to be noncompliant. This penalty has rarely, if ever, occurred in the Title IX context, but the threat of losing federal funding appears to motivate institutions to reach compliance agreements with ED.

A suspension or termination of funding must be limited to the particular program, or part thereof, that is out of compliance with Title IX.[73] A school may challenge such an enforcement action by seeking a hearing before an Administrative Law Judge (ALJ) in ED's Office of Hearings and Appeals (OHA). ALJ decisions may be appealed to OHA's Civil Rights Reviewing Authority

[70] Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

[71] 34 C.F.R. §100.7. These regulations govern Title VI of the Civil Rights Act, 42 U.S.C §§2000d et seq., but, because Title IX is patterned on Title VI, ED incorporated Title VI's regulatory enforcement procedures into Title IX when it enacted regulations under the latter statute. 34 C.F.R. §106.71. Meanwhile, OCR's Case Processing Manual provides detailed information about ED's Title IX procedures and is available on ED's website at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html. DOJ also publishes a Title IX Legal Manual, which is available on its website at http://www.justice.gov/crt/about/cor/coord/ixlegal.php.

[72] 20 U.S.C. §1682; 34 C.F.R. §100.8, as incorporated by 34 C.F.R. §106.71.

[73] 34 C.F.R. §100.8, as incorporated by 34 C.F.R. §106.71.

and, in some cases, to the Secretary.[74] A school may also opt to challenge the agency's action in federal court, but may do so only after exhausting its administrative appeals.[75]

In addition to ED, the Civil Rights Division (CRD) at DOJ plays a significant role in enforcing laws that prohibit sex discrimination in education. CRD has two primary duties: coordination and litigation. With respect to coordination, the division's Federal Coordination and Compliance Section is responsible for coordinating the efforts of federal agencies to consistently and effectively implement and enforce Title IX. In this role, the section "operates a comprehensive, government-wide program of technical and legal assistance, training, interagency coordination, and regulatory, policy, and program review."[76]

With respect to litigation, CRD is responsible for representing federal agencies such as ED when an agency has referred a determination of Title IX noncompliance to DOJ for judicial enforcement of any sanctions an agency has imposed. Thus, the division's Educational Opportunities Section is authorized to sue in federal court on behalf of an agency for violations of the statute.[77] Such suits may seek injunctive relief, specific performance, or other remedies. The Educational Opportunities Section is also responsible for enforcing Title IV of the Civil Rights Act (P.L. 88-352), which prohibits public schools and colleges from discriminating on the basis of race, color, national origin, sex, and religion.[78]

Despite DOJ's role in Title IX enforcement, ED remains the lead agency that administers Title IX with respect to traditional educational institutions. As a result, this report primarily focuses on ED's part in combating campus sexual violence. ED pursues this goal by performing periodic compliance reviews of grant recipients, as well as by conducting investigations in response to Title IX complaints filed with the agency.[79] Available data on ED's Title IX enforcement activities are included in **Appendix B**.

Title IX Guidance on Sexual Violence

As part of its administrative enforcement effort with respect to Title IX, ED released guidance related to sexual violence in both 2011 and 2014. As defined by ED, sexual violence "refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent."[80] Collectively, the 2011 and 2014 guidance documents clarify that sexual violence, including rape, sexual assault, sexual battery, and sexual coercion, is a form of sexual harassment that violates Title IX. Specifically, the guidance notes that a single instance of sexual violence may be sufficiently severe such that it creates a hostile environment that limits or denies a student's ability to participate in or benefit from the educational program.[81] Any school that

[74] 34 C.F.R. §100.10, as incorporated by 34 C.F.R. §106.71.

[75] 34 C.F.R. §100.11, as incorporated by 34 C.F.R. §106.71.

[76] See the Federal Coordination and Compliance Section website at http://www.justice.gov/crt/about/cor/.

[77] Executive Order 12250, "Leadership and Coordination of Nondiscrimination Laws," 45 *Federal Register* 72995, November 4, 1980. For more information, see the Educational Opportunities website at http://www.justice.gov/crt/about/edu/.

[78] 42 U.S.C. §§2000c et seq.

[79] 34 C.F.R. §106.7.

[80] 2014 Guidance, *supra* note 67, at 1. An individual may be incapable of giving consent for several reasons, including, but not limited to, being under the legal age of consent or being under the influence of drugs or alcohol.

[81] 2011 Guidance, *supra* note 66, at 3. The federal courts have recognized this principle in both the employment and education setting. *See, e.g.,* Berry v. Chi. Transit Auth., 618 F.3d 688, 692 (7th Cir. 2010) ("a single act can create a hostile environment if it is severe enough"); Soper v. Hoben, 195 F.3d 845, 854-55 (6th Cir. 1999) (rape and sexual

knows or should have known about possible harassment must "take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."[82]

The 2011 and 2014 guidance extensively detail the types of action a school is expected to take in order to comply with Title IX. In general, a school's duties fall into one of two categories: preventive measures and responsive measures.

Preventive Measures

Under Title IX, an educational institution has an affirmative duty to prevent sexual violence against its students. This duty includes a responsibility to disseminate a nondiscrimination notice, to designate an employee to coordinate Title IX compliance, to provide sexual harassment training to employees, and to adopt and publish grievance procedures.[83] Other proactive steps may include providing preventive education programs and materials, as well as victim services.

ED's guidance provides additional information regarding the role of the Title IX coordinator. According to ED, the coordinator's responsibilities "include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints."[84] Coordinators should be adequately trained, available to meet with students, and informed about relevant complaints. A school may assign its Title IX coordinator or coordinators with additional responsibilities, such as providing training to students, faculty, and staff; conducting Title IX investigations; determining sanctions and remedies; and coordinating with victims' service providers. Finally, the guidance stipulates that coordinators should not have other job duties, such as general counsel or athletics director, that may create a conflict of interest.[85] In 2015, ED issued a guidance package that provides additional detail regarding requirements related to Title IX coordinators.[86]

With respect to grievance procedures, the guidance sets forth several parameters. For example, grievance procedures should specify investigative measures and identify the time frames for various stages of the proceedings, as well as provide both parties with an opportunity to present witnesses and other relevant evidence. Moreover, although such procedures may include informal mechanisms such as mediation, "it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school."[87] In addition, the guidance requires that all individuals responsible for implementing a school's grievance procedures, including Title IX coordinators, investigators, and adjudicators, must have training or experience regarding how to apply the school's grievance procedures and handle sexual violence complaints.[88] The guidance provides a

abuse "obviously qualifies as being severe, pervasive, and objectively offensive sexual harassment").

[82] 2011 Guidance, *supra* note 66, at 4. ED has also released detailed guidance on sexual harassment. Stephanie Monroe, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. Department of Education, "Dear Colleague" Letter, January 19, 2001, http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[83] 34 C.F.R. §§106.8-106.9.

[84] 2014 Guidance, *supra* note 67, at 10.

[85] *Id*. at 10-12.

[86] The guidance package, which includes a Dear Colleague letter reminding schools of their duty to appoint a Title IX coordinator, a letter to Title IX coordinators describing their role in more detail, and a Title IX resource guide, is available at http://www2.ed.gov/policy/rights/guid/ocr/title-ix-coordinators.html.

[87] 2011 Guidance, *supra* note 66, at 8.

[88] *Id*. at 7.

more detailed list of the elements that should be included in a school's Title IX grievance procedures.[89]

The guidance also describes who is a responsible employee that is required to report allegations of sexual violence. Responsible employees are defined to include any employee who: "has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee, or whom a student could reasonably believe has this authority or duty."[90] Such employees must report incidents to the Title IX coordinator and/or other designated school officials, although school counselors are exempt from these reporting requirements, and schools may designate additional individuals, such as volunteers in sexual assault centers, as confidential sources.[91] Schools must also provide training to all responsible employees regarding how to report, respond to, and prevent sexual violence. Detailed training requirements are set forth in the guidance.[92]

Responsive Measures

As part of their Title IX responsibility to respond to complaints regarding sexual violence, schools must conduct investigations and take steps to resolve complaints. According to ED,

> the term "investigation" refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.[93]

Under Title IX, an investigation must be "prompt, thorough, and impartial." A school's obligation to investigate sexual violence complaints applies regardless of whether or not the alleged incident occurred on school campus or off-campus.[94] In addition, a school must conduct an investigation into allegations of sexual violence regardless of whether local law enforcement launches its own criminal investigation. The guidance specifies that schools should notify complainants of their right to file a criminal complaint, but should not wait for a criminal investigation to conclude before starting their own Title IX investigation.[95] It is important to note that the victim of the sexual violence is generally the one who decides whether to file a complaint with the police, the educational institution, or both, although some states may have mandatory reporting laws that require school officials to notify law enforcement regarding certain types of crimes.

The guidance also sets forth several requirements related to confidentiality. In general, if a complainant wishes to preserve his or her confidentiality or to avoid the formal complaint resolution process, the school must take reasonable steps to accommodate the student's request. Nevertheless, because an educational institution that knows or reasonably should be aware of sexual harassment is obligated to take steps to prevent discrimination from reoccurring, there may

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[89] 2014 Guidance, *supra* note 67, at 12-13.

[90] *Id*. at 15.

[91] *Id*. at 23.

[92] *Id*. at 38-40.

[93] *Id*. at 24-25.

[94] *Id*. at 29. Under some circumstances, a school may also have a Title IX duty to respond to a sexual violence complaint when the alleged perpetrator is not affiliated with the school. *Id*. at 9.

[95] 2011 Guidance, *supra* note 66, at 10.

be cases in which a school is unable to comply with the complainant's request.[96] The guidance discusses the factors that a school should consider when determining whether to fulfill a student's request for privacy.[97] It is also important to note that a complainant's confidentiality request may conflict with an alleged perpetrator's right to access his or her educational records under the Family Educational Rights and Privacy Act (FERPA, P.L. 93-380). The intersection between FERPA and Title IX is discussed in a separate section below.

The Disciplinary Hearing

Once the initial fact-finding stage of the investigation is complete, an educational institution will generally hold a hearing to determine whether a Title IX violation has occurred and, if so, what sanctions should be imposed on the perpetrator. Often, such hearings are conducted as part of the regular disciplinary process that most schools have established to evaluate violations of an institution's code of conduct. An institution may use its traditional disciplinary process to resolve Title IX complaints as long as its grievance procedures conform to the requirements of Title IX.

One such Title IX requirement pertains to the standard of proof that should apply when resolving Title IX complaints. In the past, some schools have used a "clear and convincing evidence" standard, which requires a finding that it is highly probable or reasonably certain that a violation occurred, while other schools relied on the less stringent "preponderance of the evidence" standard that requires a school to determine whether it is more likely than not that sexual harassment occurred. The preponderance of the evidence standard is the standard of proof that generally applies in civil rights cases,[98] as well as many other types of civil litigation and administrative adjudication. As a result, the guidance specifies that schools must adopt this standard when resolving Title IX complaints.[99] As discussed in more detail below, adoption of this preponderance of the evidence standard has proved controversial.

Final Stages of Investigation

After the disciplinary process has concluded, a school must provide both parties with written notice of the outcome, consistent with FERPA requirements relating to the privacy of educational records.[100] OCR has indicated that a typical investigation should take approximately 60 days to complete, although the agency has acknowledged that this time frame may vary depending on the circumstances involved.[101]

If a school determines that a hostile environment exists, it must take corrective action "to eliminate the harassment, prevent its recurrence, and address its effects."[102] In addition to disciplinary action taken against the perpetrator, corrective action may include remedies for the complainant. Such remedies may include interim measures that may be taken before the

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[96] *Id*. at 5.

[97] 2014 Guidance, *supra* note 67, at 21-22.

[98] *See, e.g*., Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) ("Conventional rules of civil litigation generally apply in Title VII cases ... and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence".); Bazemore v. Friday, 478 U.S. 385 (1986); Williams v. Paint Valley Local Sch. Dist., 400 F.3d 360 (6th Cir. 2005); Cohen v. Brown Univ., 991 F.2d 888, 902 (1st Cir. 1993).

[99] 2011 Guidance, *supra* note 66, at 10-11. Under the Clery Act, IHEs must disclose the standard of proof that they use in disciplinary hearings involving domestic violence, dating violence, sexual assault, or stalking. Although the Clery Act does not specify what the standard of proof must be in such cases, it seems likely that schools will adopt a preponderance of the evidence standard in order to remain in compliance with Title IX.

[100] 2011 Guidance, *supra* note 66, at 13-14.

[101] 2014 Guidance, *supra* note 67, at 31-32.

[102] 2011 Guidance, *supra* note 66, at 4.

complaint is resolved, such as accommodations regarding living arrangements, class schedules, course work, or extracurricular activities. Schools should also notify complainants of their rights under Title IX and refer them to available counseling resources. The guidance provides a detailed list of the types of remedies an educational institution may wish to consider.[103]

If OCR finds that an educational institution has not complied with its Title IX obligation to prevent and respond to sexual violence, then the agency has broad discretion to negotiate a wide range of remedies and corrective action with that institution. If OCR and the institution cannot reach a voluntary agreement, then OCR may seek to suspend or terminate federal funding. The guidance provides a series of examples of the various types of remedies that OCR might seek if it finds that an institution is not in compliance with Title IX's prohibition against sexual harassment.[104]

Educational institutions should also be aware that Title IX prohibits retaliation.[105] Thus, a school violates Title IX if it retaliates against a student, parent, teacher, or other employee who complains about sexual violence or participates in an investigation related to such a complaint. According to ED, an educational institution must take steps to prevent retaliation against a complainant by an alleged perpetrator.[106]

Finally, it is important to note that ED has clarified that Title IX's prohibition against sex discrimination encompasses gender stereotyping that results in discrimination on the basis of gender identity.[107] Thus, sexual violence against individuals who fail to conform to stereotypical notions of masculinity or femininity is subject to the requirements outlined in ED's guidance. The guidance also provides information regarding the applicability of Title IX's prohibition against sexual violence to special populations, including disabled students and students who are not citizens.[108]

The Family Educational Rights and Privacy Act

FERPA (P.L. 93-380) guarantees students access to their education records, while limiting the disclosure of those records to third parties. FERPA privacy protections that extend to an alleged perpetrator, therefore, may conflict at times with the Title IX rights afforded to an alleged victim of sexual violence.

As noted above, an educational institution is required under Title IX to take steps to preserve a complainant's confidentiality if so requested. An alleged perpetrator, however, has the right to review the complaint if it is an educational record within the meaning of FERPA.[109] Under such circumstances, an educational institution must provide the alleged harasser with access to the

[103] 2014 Guidance, *supra* note 67, at 34-36.

[104] *Id*. at 16-19.

[105] 34 C.F.R. §100.7(e). *See also*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

[106] *Id*. at 42-43.

[107] *See*, *e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000); Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809 (S.D. Iowa 2004). *See also*, U.S. Department of Education, *Office for Civil Rights*, Dear Colleague Letter, October 26, 2010, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

[108] 2014 Guidance, *supra* note 67, at 6-8.

[109] "Education records" are defined to include those records, files, documents, and other materials that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. §1232g(a)(4)(A).

information contained in the complaint but should, to the extent possible, avoid revealing the complainant's name or other identifying information.

FERPA also prohibits educational institutions that receive federal funds from releasing students' educational records without prior written consent.[110] On its face, this prohibition would appear to prevent a school from disclosing the results of a disciplinary hearing that are part of a perpetrator's educational record. However, FERPA contains a number of exceptions. For example, a postsecondary institution may disclose to an alleged victim of any crime of violence or nonforcible sex offense the final results of any disciplinary proceeding conducted by the institution against the alleged perpetrator. Likewise, an institution may disclose to anyone the final results of any disciplinary proceeding conducted against a student who is an alleged perpetrator of any crime of violence or nonforcible sex offense if the institution determines as a result of the proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.[111] Thus, FERPA permits, but does not require, a school to publicly disclose the results of a disciplinary hearing involving sexual violence.

Current Clery Act and Title IX Issues Regarding Sexual Violence at IHEs

This section discusses several policy and legal issues that have arisen with respect to the Clery Act and Title IX.

Reliability of Clery Statistics

IHEs have come under increasing scrutiny due to allegations that some may be underreporting crimes of sexual violence at their campuses as required by the Clery Act. In addition, the lack of consistency in the way crimes are reported across IHEs has raised questions about the usefulness of these statistics in assessing the extent of sexual violence and how it is being handled across IHEs. The American Association of University Professors has stated that "[w]hile a small number of institutions have put in place rigorous procedures for obtaining, collating, tracking, processing, and reporting Clery statistics, a standardized model for the overall process does not yet exist."[112] IHEs that are the most rigorous in monitoring and collecting statistics on campus sexual violence may report more complaints of sexual violence than IHEs that are not as diligent in monitoring and reporting such complaints. Thus, in press accounts and in their ASRs, IHEs that may be in compliance with Clery reporting requirements may appear to have a more serious sexual violence problem than IHEs that may not be in compliance (and may actually have a more serious sexual violence problem). These potential discrepancies are important for IHEs because press accounts and ASR data on campus sexual violence may be viewed by current and prospective students and their families to evaluate the safety of IHEs.[113]

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[110] 20 U.S.C. §1232g(b). For more information on FERPA, see CRS Report RS22341, *The Family Educational Rights and Privacy Act (FERPA): A Legal Overview*, by Jody Feder.

[111] 20 U.S.C. §1232g(b)(6).

[112] American Association of University Professors, *Campus Sexual Assault: Suggested Policies and Procedures*, updated, February 2013, http://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures.

[113] http://www.mccaskill.senate.gov/media-center/latest-headlines/why-some-schools-should-celebrate-being-at-the-top-of-reported-campus-rape-lists.

The possibility that some IHEs may be underreporting incidents of sexual violence, as well as the inconsistency across IHEs in the rigor with which sexual violence is monitored and reported, have prompted some to suggest that more objective measures of sexual violence at IHEs, such as school climate surveys,[114] might be useful to get a clearer picture of the extent of sexual violence across IHEs.[115]

Title IX and the Preponderance of the Evidence Standard

As noted above, the Title IX guidance requires schools to adopt a preponderance of the evidence standard for disciplinary hearings involving sexual violence. This requirement has proved controversial. Indeed, some critics contend that use of this standard is unfair, arguing that alleged perpetrators who are subject to this standard are being deprived of their due process rights.[116] From a legal perspective, however, it is well established that different rights and corresponding procedures attach in the administrative versus judicial setting, and that it is common for an individual to be subject to both criminal and civil proceedings based on the same incident. In general, the standard of proof is higher in the criminal context because more is at stake, while a lesser standard of proof is permitted in civil proceedings because the potential loss of rights is less significant.

The concept of procedural due process has its origins in the due process clause of the U.S. Constitution, which prohibits government action that would deprive any person of "life, liberty, or property, without due process of law." The premise behind due process is that the government, for reasons of basic fairness, must provide certain procedures before taking any of these important interests away from protected parties. The Supreme Court has stated that due process "is a flexible concept that varies with the particular situation,"[117] and has made it clear that "something less than a full evidentiary hearing is sufficient prior to adverse administrative action."[118] Ultimately, the degree of procedural protection that is due depends on the nature of the individual and governmental interests at stake and varies significantly in the civil and criminal context.[119]

It is also important to note that the due process clause applies only to governmental actors, not private entities. Thus, public IHEs must provide due process protections to students who are subject to disciplinary proceedings, but private IHEs are not subject to the same requirement. Although it is possible that state statutory or common law due process protections may apply in the private setting, the relationship between private IHEs and their students is generally governed by contract law. Under this arrangement, a student who accepts an offer of admission to an IHE agrees to abide by a school's rules and policies regarding attendance. Such rules and policies, which are generally established at the institution's discretion, may or may not include certain procedural protections for students who violate the school's code of conduct. Thus, a private IHE is under no obligation to provide due process rights when sanctioning students unless it has

[114] According to ED, "By assessing the perceptions of school climate, educators and education agencies can identify key issues in need of reform. Once needs are identified, data from school climate assessments can be used to set goals and priorities and choose programmatic interventions. Data also can identify areas where students, staff, and parents view climate in similar or dissimilar ways." http://safesupportivelearning.ed.gov/topic-research/school-climate-measurement.

[115] http://safesupportivelearning.ed.gov/topic-research/school-climate-measurement.

[116] Nick Anderson, "Men Punished in Sexual Misconduct Cases on College Campuses are Fighting Back," *Washington Post*, August 20, 2014.

[117] Zinermon v. Burch, 494 U.S. 126, 127 (1989).

[118] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985).

[119] Matthews v. Eldridge, 452 U.S. 18, 33-34 (1981).

specified that it will do so. However, ED's Title IX guidance does clarify that if an educational institution provides procedural rights to one party, such as the right to present witnesses or have an attorney present, then these rights must be available to both parties.[120] Likewise, although Title IX does not require schools to have a process for appealing disciplinary decisions, the guidance recommends that schools adopt such a process and notes that if an appeals process is provided, it must be made available to both parties.[121]

Title IX Remedies

Another issue that has arisen under Title IX involves questions about whether the current remedies are sufficient. As noted above, suspension or termination of federal funding is currently the only enforcement mechanism available to ED or other federal agencies when an agency cannot reach a voluntary resolution agreement with an institution that it has found to be noncompliant. On the one hand, the threat of losing federal funding appears to motivate institutions to reach compliance agreements with ED, but some institutions have complained that this potential loss of federal aid is coercive, leading them to enter into such agreements even when they disagree with ED's findings of non-compliance.

At the same time, some critics allege that ED relies too heavily on informal Title IX resolutions due to the severe consequences that would attach if the agency suspended or terminated a school's financial aid. According to this critique, because an educational institution may simply enter into a new compliance agreement with ED if it fails to comply with an existing resolution, these informal agreements are ineffective deterrents that effectively allow schools to violate Title IX without incurring significant penalties. It is also important to note that penalties involving suspension or termination of federal funding have rarely, if ever, occurred in the Title IX context. As a result, several legislative proposals would create new penalties, including fines, under Title IX.

The Role of Agency Guidance

Recently, at least two legislators have raised questions about ED's legal authority to issue Title IX guidance related to sexual violence at institutions of higher education.[122] Specifically, Senator Lankford alleged in a letter to ED that, among other things, the agency's sexual violence guidance does not merely offer an interpretation of Title IX, but rather functions as a legally binding regulation would and therefore should have been promulgated in accordance with the procedures established under the Administrative Procedure Act (APA).[123]

Federal agencies are generally responsible for implementing, interpreting, and enforcing the statutes that they administer.[124] Thus, ED has the initial duty to determine how to apply the statutes under its jurisdiction. Typically, an agency communicates its interpretation regarding a

[120] 2014 Guidance, *supra* note 67, at 26.

[121] *Id*. at 37.

[122] Jake New, "Senators Challenge Legality of U.S. Guidance On Campus Sexual Assault," *Inside Higher Ed*, January 7, 2016.

[123] Letter from Sen. James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., to Hon. John B. King, Jr., Acting Sec'y U.S. Dep't of Educ., (Jan. 7, 2016), http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf. The APA is codified as amended at 5 U.S.C. §551 et seq.

[124] This authority derives from the take care clause of the Constitution, which charges the President and, by extension, the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §3.

statute's implementation via regulations and informal agency guidance. Although regulations are legally binding, informal guidance is not. Rather, such guidance aids agencies in establishing consistent policies and enforcement priorities, as well as in informing affected parties of the agency's current thinking about how such parties can comply with the law in question. Although agency use of guidance documents is common practice, some critics argue that agencies use guidance documents to effectively change the law or expand the scope of their delegated regulatory authority.[125]

In general, the APA imposes various procedural requirements when agencies issue rules, subject to several exceptions. While "legislative" or "substantive" rules that bind the public or an agency must comply with these procedural requirements, "interpretive rules" and "general statements of policy," often known as guidance documents or "nonlegislative rules"[126] are exempt from these strictures.[127]If, however, there is disagreement with an agency's interpretation or enforcement of the statute, an affected party can challenge the agency's action in court.[128]

In the event of a legal challenge, the amount of deference that an agency interpretation of its own statute will receive from a reviewing court "has been understood to vary with the circumstances."[129] Although courts will generally defer to an agency's interpretation of an ambiguous statute, such deference is warranted only in instances where that interpretation was formally established via notice-and-comment rulemaking, agency adjudications, or other agency actions that have the force of law.[130] Where an interpretation is presented informally, a lesser form of deference will generally apply. Indeed, in *Skidmore v. Swift & Co*., the Supreme Court held that the deference granted to an agency's informal interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[131]

Absent a definitive judicial ruling on the subject, it is currently unclear whether ED's sexual violence guidance constitutes informal agency guidance that would be exempt from the APA's procedural requirements and subject to a lesser degree of judicial deference in the event of a legal challenge. However, in response to Senator Lankford's letter, OCR asserted that, although ED "does not view such guidance to have the force and effect of law," the guidance reflects the agency's interpretation of the Title IX statute and regulations.[132] Indeed, under Title IX, federal

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[125] Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007); Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like–Should Federal Agencies Use Them to Bind the Public?*, 1992 DUKE L.J. 1311, 1316 (1992).

[126] William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1322 (2001).

[127] 5 U.S.C. §553 (b), (c). However, "significant" policy statements and guidance documents are subject to review by the Office of Information and Regulatory Affairs in the White House Office of Management and Budget. *See* Memorandum from Peter R. Orszag, Director of the Office of Management and Budget, to Heads and Acting Heads of Executive Departments and Agencies, March 4, 2009, http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

[128] The APA authorizes judicial review of final agency actions, findings, and conclusions, including those that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or those that are "without observance of procedure required by law." 5 U.S.C. §§702, 706(2). For a detailed analysis of some of the legal considerations that arise during challenges to agency guidance, see CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey.

[129] United States v. Mead Corp., 533 U.S. 218, 228, 236-37 (2001).

[130] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

[131] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[132] Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Sen. James Lankford,

funding recipients have a duty to prevent and remedy all aspects of sex discrimination. Many of the detailed requirements in ED's guidance appear to have evolved from this basic obligation. It is also important to note that in many instances, ED's guidance appears to be informed by case law. In other words, rather than being derived from statute, many of the Title IX requirements contained in ED's sexual violence guidance are derived instead from judicial decisions involving challenges under these laws, and federal funding recipients who wish to avoid liability under these statutes would be well advised to take these rulings into account. Thus, ED typically incorporates this case law into its guidance documents at least in part to inform affected parties about these non-statutory legal obligations. Ultimately, ED's guidance, which reminds federal funding recipients of their obligation to comply with these civil rights statutes, generally appears to be based on current law, but a final decision regarding any enforcement action that ED might take pursuant to this guidance—or whether the guidance itself complies with the APA—would be up to a reviewing court.

Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt (Feb. 17, 2016), http://www.lankford.senate.gov/imo/media/doc/DEPT.%20of%20EDUCATION%20LANKFORD%20LETTER%202-17-16.pdf.

Appendix A. Clery Act Data and Enforcement

This Appendix includes data on the number of reported crimes under the Clery Act, and a list of IHEs that received Final Program Review Determinations in response to claims of a violation of the Clery Act. (See "Overview of the Clery Act" for more information.)

Clery Act Data

As previously noted, IHEs must submit data on reported campus crimes to ED annually. ED publishes these data via the Campus Safety and Security Data Analysis Cutting Tool. The tool is searchable by individual or groups of institutions; and by state, enrollment, type of institution (e.g., public, four-year), and instructional program.[133] It also allows users to limit by year and category (e.g., hate crimes on campus in 2012, non-campus arrests in 2011, etc.). **Table A-1** includes the number of selected crimes (related to sexual violence) reported to IHEs that, in turn, were reported to ED under the provisions of the Clery Act in 2014.

Table A-1. Number of Reported Crimes Under the Clery Act, 2014

Selected Crimes (Sexual Violence)

Reported Crime	2014
Rape	5,187
Statutory Rape	67
Fondling	2,709
Incest	1
Domestic Violence	3,992
Dating Violence	3,568
Stalking	4,610
Sexually Violent Hate Crimes (total)	12
Rape	*8*
Statutory Rape	*0*
Fondling	*4*
Incest	*0*

Source: CRS, based on data from ED's Campus Safety and Security Data Analysis Cutting Tool, available at http://ope.ed.gov/security/index.aspx.

Note: These data do not necessarily reflect prosecutions or convictions. Rather, they represent alleged crimes reported to campus security authorities or local law enforcement. Because of changes in some of these crime categories, comparable data are not available for prior years.

Some analysts have questioned the reliability of Clery Act data. These issues are discussed at greater length in "Reliability of Clery Statistics."

[133] Available at http://ope.ed.gov/security/.

Final Program Review Determinations under the Clery Act

Table A-2 lists IHEs that received a Final Program Review Determination in response to claims of a violation of the Clery Act, by year.

Table A-2. IHEs that Received Final Program Review Determinations

By Year

Year	IHEs	Year	IHEs
2015	Century College	2010	Slippery Rock University
	University of Missouri, Kansas City		Virginia Polytechnic Institute and State University
2014	McDaniel College		Florida State University
	Rosemont College of the Holy Child Jesus		Liberty University
	Mid-Atlantic Christian University		Notre Dame College of Ohio
	Midlands Technical College		Wesley College
	Sterling College	2009	Northwest Vista College
	University of Nebraska-Kearney		Palo Alto College
2013	Arlington Medical Institute		San Antonio College
	Buckner Barber School		Schreiner University
	Wards Corner beauty Academy		Saint Philip's College
	Cornell College		Tarleton State University
	Mount Mercy University		West Virginia University
	Salina Area Technical College	2008	Paul Smith's College of Arts & Sciences
2012	Wichita Area Technical College		University of Virginia
	Joliet Junior College	2007	Eastern Michigan University
	Plaza Beauty School	2006	LaSalle University
	Mitsu Sato Hair Academy		Ohio State University (The)
	Xenon International Academy	2005	Miami University of Ohio
	First Institute		Northern Illinois University
	University of Wisconsin-Green Bay		Saint Mary's College of California
	Franklin Pierce University	2004	Georgetown University
	Delaware State University		Salem International University
	Dominican College of Blauvelt	2003	California State University
	University of Delaware		University of California - Davis
2011	University of Alaska		University of California - Los Angeles
	University of Texas at Arlington		University of California - San Diego
	University of North Dakota	2002	Mount Saint Mary College
	College of New Jersey (The)		Saint Mary's College - Notre Dame
	University of Michigan	2001	College of New Jersey (The)

Year	IHEs	Year	IHEs
	University of Arkansas		Ramapo College of New Jersey
	Oklahoma State University	2000	Ashford University
	Wake Forest University		West Virginia Wesleyan College
	Louisiana State University	1998	University of Pennsylvania
	University of Utah	1997	Clemson University
	Yale University		Miami University of Ohio
	University of Vermont		Minnesota State University
	University of Northern Iowa		Virginia Polytechnic Institute and State University
	Washington State University		
	Lincoln University		
	Oregon State University		
	South Dakota State University		

Source: CRS. Based on data from U.S. Department of Education, Office of Financial Aid, Clery Act Reports, available at https://studentaid.ed.gov/sa/clery-act-reports#.

Note: A Final Program Review Determination may or may not result in adverse administrative actions, depending on the findings in the case.

Appendix B. OCR Title IX Enforcement Data

There are limited data regarding OCR's enforcement efforts with respect to sexual violence. As a preliminary matter, it is important to note that OCR has enforcement duties under multiple civil rights statutes, meaning that Title IX enforcement constitutes only a portion of the agency's portfolio. In addition, OCR's responsibility to enforce Title IX extends beyond sexual violence to encompass all forms of sex discrimination in education.

According to the most recent data published by ED, over a period of two years (FY2013-14), OCR "received over 5,800 Title IX-related complaints and launched 20 systemic, proactive investigations.... "[134] Of the 5,845 Title IX complaints, 854 were related to sexual harassment and sexual violence.[135] The figures do not indicate whether these complaints of wrongdoing occurred in the elementary and secondary education context or in the higher education setting, nor is a precise breakdown by institution or complaint type available for the investigations begun during this period. However, ED did report that OCR resolved 90 sexual violence-related Title IX investigations, including 25 that resulted in resolution agreements, during the two-year period covered by the report.[136] Overall, the number of Title IX sexual violence complaints that OCR received represented 9% of the total number of civil rights complaints that OCR received in FY2013-FY2014, and the number of sexual violence compliance reviews represented 19% of the total number of civil rights compliance reviews that OCR conducted during this period.[137]

Although a comprehensive source of more recent data does not appear to be publicly available, ED has indicated that the number of audits and investigations related to sexual violence has increased in the years since the agency released its 2011 guidance. Reportedly, OCR received 11 sexual violence complaints in FY2009, a figure that increased to 30 in FY2013.[138] ED has also publicly released information regarding institutions currently under investigation for violating Title IX's prohibition against sexual violence. According to ED, as of May 1, 2014, 55 institutions of higher education were under investigation for Title IX violations involving sexual violence.[139] That figure had reportedly risen to 221 cases of sexual violence under investigation at 175 IHEs as of April 6, 2016.[140]

Meanwhile, data regarding the duration and outcome of Title IX investigations do not appear to be publicly available, although it does appear that the length of such investigations may vary widely depending on a number of considerations, including the complexity of the allegations, the cooperation of the parties, and other factors. According to one analysis of Title IX sexual harassment complaints filed with OCR between 2003 and 2013, ED dismissed or closed the

[134] U.S. Department of Education, Office for Civil Rights, *Protecting Civil Rights, Advancing Equity*, Report to the President and Secretary of Education, 28, http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf.

[135] *Id*.

[136] *Id*. at 29.

[137] *Id*. at 6.

[138] Carolyn Penicle, "Campus Sexual Assault Gains a Spotlight in Congress," *CQ News*, April 28, 2014.

[139] U.S. Department of Education, *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, Press Release, May 1, 2014, http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i.

[140] Allie Grasgreen Ciaramella, "175 Colleges Under Federal Investigation for Title IX Sexual Violence Issues," *Politico Pro*, April 7, 2016.

majority of the complaints it received.[141] ED may opt to make the results of its investigation and any resolution agreement that might result available online.[142]

[141] Jason P. Smith, "How a Title IX Complaint is Processed," *The Chronicle of Higher Education*, April 30, 2014.

[142] OCR publishes a list containing a sample of case resolutions involving sex discrimination at http://www2.ed.gov/about/offices/list/ocr/frontpage/caseresolutions/m-sex-cr.html. OCR also maintains a searchable database of all civil rights resolution letters and agreements that are reached on or after October 1, 2013 at http://www2.ed.gov/about/offices/list/ocr/docs/investigations/search-ocr.html. However, these sources do not appear to be comprehensive, given that the information contained on each of these sites is inconsistent with the other.

Appendix C. Selected Related Federal Programs and Activities

Although the main focus of this CRS report is on Department of Education laws and policies governing IHE response to sexual violence—and on legislative efforts to improve those laws and policies—the Departments of Justice and Health and Human Services administer relevant programs designed to address sexual violence. Some of these programs are included herein in order to provide background for ED's activities, as well as broad context for bills introduced in the 114th Congress.[143]

Campus Program.[144] This DOJ, Office on Violence Against Women (OVW) program provides grants to IHEs to adopt comprehensive response to sexual assault, domestic violence, dating violence, and stalking. The Consolidated Appropriations Act, 2016 (P.L. 114-113) provided $20.0 million for these activities in FY2016. OVW's FY2017 congressional budget justification states that grantees reported

> serving an average of 850 victims during each six-month period in 2014. The most frequently provided services were victim advocacy, crisis intervention, counseling and support groups, academic advocacy, and legal advocacy. Grantees reported providing 794 trainings during the year, mostly to student affairs staff, educators, and peer educators. Additionally, grantees reported convening 1,538 events to educate incoming students about preventing sexual and domestic violence.[145]

For FY2016, OVW reports that it estimates it will issue 45 awards (out of 242 applicants).

Rape Prevention and Education (RPE) Program.[146] The purpose of this CDC program is to strengthen sexual violence prevention efforts at the state, local, and national level. According to the CDC's FY2017 congressional budget justification,

> The RPE program supports implementation of proven, culturally relevant rape prevention and education activities. In FY 2014, CDC began a five-year cooperative agreement cycle for all 50 states, Washington, D.C., and four territories. Award amounts were determined based on population after providing base funding of $150,000 per state or $35,000 per territory. Grantees use CDC funding to operate state and community hotlines, implement statewide sexual violence prevention plans, and address local needs.[147]

Campus sexual violence has been a focus of RPE program activities. The program received $44.4 million in funding in FY2016.

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[143] This section is not intended as a comprehensive list of all such federal programs.

[144] More information about the Grants to Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program (Campus Program) is available at https://www.justice.gov/ovw/responding-campus-sexual-assault.

[145] Department of Justice, Office of Violence Against Women, FY2017 Congressional Justification, February 4, 2016, pp. 27-28, at https://www.justice.gov/jmd/file/821736/download.

[146] Centers for Disease Control and Prevention, "Rape Prevention and Education: Transforming Communities to Prevent Sexual Violence," fact sheet, at http://www.cdc.gov/violenceprevention/pdf/rpe-fact-sheet-a.pdf. More information about the RPE program is available at http://www.cdc.gov/violencePrevention/RPE/index.html.

[147] Department of Health and Human Services, *FY2017 Centers for Disease Control and Prevention Justification of Estimates for Appropriations Committees*, p. 331, at http://www.cdc.gov/budget/documents/fy2017/fy-2017-cdc-congressional-justification.pdf.

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