I. Introduction

The institutional response to sexual and gender-based harassment and violence is governed by a complex federal and state legal and regulatory framework. The federal framework is based on two primary statutes: Title IX of the Education Amendments of 1972 (Title IX), and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act or Clery), as amended by Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA). Effective institutional responses require a coordinated and integrated approach to Title IX and Clery, as well as related obligations under state and local laws.

During the past decade, educational institutions have navigated significant changes in the legal and regulatory framework that governs the institutional response to sexual and gender-based harassment and violence, sexual assault, dating violence, domestic violence and stalking. The changes have included new federal and state legislation, evolving regulatory and sub-regulatory guidance, increased civil litigation, and shifts in regulatory enforcement approaches and considerations. As of the date of this memo, higher education is awaiting the release of proposed regulations from the U.S. Department of Education’s Office for Civil Rights – regulations that are expected to again require a shift in institutional responses.

This memo sets forth guideposts that may serve as stable moorings in four key areas of the institutional response to sexual and gender-based harassment and violence: intake and outreach, alternative resolution, investigation, and adjudication. The elements identified here are consistent with current federal law and guidance, reinforce procedural fairness and reflect effective and promising practices.

To better understand the legal and regulatory context, the following section provides a brief introduction to Title IX and the Clery Act.
A. Title IX

Title IX is a federal civil rights law that provides that no “person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Title IX applies to all educational institutions that receive federal financial assistance either directly or indirectly, including public and private elementary and secondary schools, school districts, colleges and universities. The Title IX regulations apply to the participation of any person, including students and employees, in an institution’s education programs as well as to the employment context.

Title IX prohibits discrimination on the basis of sex in all of an institution’s programs and activities, including those related to both education and employment. Title IX applies to all forms of sex discrimination, including sexual and gender-based harassment and violence.

Title IX is accompanied by implementing regulations that have the force and effect of law. Title IX’s implementing regulations articulate three specific obligations related to how an educational institution must address sex discrimination that occurs in connection with the school: that an institution publish a non-discrimination statement; that it appoint a Title IX coordinator; and that it adopt grievance procedures that are prompt and equitable.

Under Title IX, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals the existence of a hostile environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile environment and prevent its recurrence. In some

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620 U.S.C. § 1681(a); 34 C.F.R. § 106.11.
7While OCR’s guidance typically refers to students, the language of the statute and regulation is broad enough to cover third parties as well. Like the Title IX statute, the regulation provides that “no person” shall be subjected to discrimination on the basis of sex “in any education program or activity operated by a recipient” of federal funding, including academic, research or extracurricular activities. (34 C.F.R. § 106.31(a) (emphasis added).
8See 34 C.F.R. § 106.8(b) (requiring schools to adopt and publish grievance procedures for students and employees); 34 C.F.R. § 106.51 (prohibiting discrimination on the basis of sex in employment in education programs or activities); see also 2011 DCL at p.4 n.11 (“Title IX also protects employees of a recipient from sexual harassment.”).
10U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, April 4, 2011 (2011 DCL) at 1. In 2011, OCR defined sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol.” 2011 DCL at 1. As noted separately in this memorandum, the 2011 DCL was rescinded on September 22, 2017, and replaced with interim guidance, which uses the terms sexual misconduct and sexual violence, albeit without definition. See OCR’s September 22, 2017 Questions & Answers on Campus Sexual Misconduct (2017 Q&A).
11These implementing regulations are codified at 34 C.F.R. § 106.
1234 C.F.R. § 106.9.
1334 C.F.R. § 106.8(a).
1434 C.F.R. § 106.8(b).
152001 Guidance at 15. Note that in the 2017 Q&A, citing section VII of the 2001 Guidance, OCR states that the school’s obligation is to “take steps to understand what occurred and to respond appropriately.” 2017 Q&A at 1. This is arguably a broader and less specific requirement than “investigate or otherwise determine what occurred.”
cases, the institution must also remedy some of the effects of the sexual violence. Specifically, an institution’s delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence by a student or a third party may subject the complainant to a hostile environment and require the institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately. In the case of sexual harassment by an employee acting in the context of their responsibilities that creates a hostile environment or conditions an educational decision or benefit on a student’s submission to unwelcome sexual conduct, however, an institution’s obligations are broader: it is responsible for “remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence,” regardless of whether it had notice of the conduct.

B. The Clery Act

The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act is a federal statute enacted in 1990 that requires all public and private postsecondary institutions that participate in any of the Federal financial aid programs under Title IV of the Higher Education Act of 1965 to keep and publish information about crime on or near their campus. Specific provisions of the Clery Act were subsequently amended by the Violence Against Women Reauthorization Act of 2013. Section 304 of VAWA amended the Clery Act by revising colleges and universities’ obligations with respect to education and prevention, reporting, and policies and procedures relating to sexual assault and expanding those same categories of required steps to domestic violence, dating violence, and stalking. VAWA requires that schools disclose statistics

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17OCR’s guidance on the question of how an institution must remedy the effects of sexual harassment by students and third parties has been inconsistent. In the 2001 Guidance, OCR stated:

As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school’s own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student’s ability to participate in or benefit from the school’s program on the basis of sex. In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

2001 Guidance at 12 (footnote omitted; emphasis added). The 2017 Q&A states only that when sexual misconduct (an undefined concept) is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the school must respond. 2017 Q&A at 1.

182001 Guidance at 9-10. Because Title IX obligates a recipient of Federal funds to provide services in a nondiscriminatory manner, and because an institution typically provides services through its employees, harassment carried out in the context of an employee’s responsibilities in relation to students that denies or limits a student’s ability to participate in or benefit from the institution’s program on the basis of sex represents prohibited discrimination by the institution. Id.


20See generally 20 U.S.C. § 1092 (f); 34 C.F.R. § 668.46. In addition to reports on crime and dating violence, the Clery Act also requires institutions to submit reports on fire prevention procedures, missing person procedures, and on-campus safety procedures, which are not discussed in this memorandum.

21Public Law 113-4. VAWA regulations became effective July 1, 2015. 34 C.F.R. § 668.46.

22Sexual assault is defined as an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program. 34 C.F.R. § 668.46(a).
for incidents of dating violence, domestic violence, sexual assault, stalking, and new categories of hate crimes; implement and disclose programs to prevent dating violence, domestic violence, sexual assault, and stalking; disclose procedures victims should follow if a crime of dating violence, domestic violence, sexual assault, or stalking has occurred; and implement and disclose procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault, and stalking.\(^{23}\)

There are three sources of authority relevant to the Clery Act: (1) the Clery Act statute, 20 U.S.C. § 1092(f), which sets forth the law; (2) the Clery Act’s implementing regulations, 34 C.F.R. § 668.46, which are issued by the U.S. Department of Education and have the force and effect of law; and (3) the U.S. Department of Education’s June 2016 Handbook for Campus Safety and Security Reporting (“Clery Handbook”), which is not legally binding but is intended to provide guidance on interpreting the regulations. The Clery Act statute and its implementing regulations therefore take precedence over the Clery Handbook.

OCR’s 2017 Q&A reiterated that when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.\(^{24}\)

C. Evolving Title IX Guidance

In addition to the implementing regulations, the U.S. Department of Education’s Office for Civil Rights (OCR) has issued guidance documents that provide policy guidance to assist educational institutions in meeting their Title IX obligations. Early guidance documents include the 1997 Sexual Harassment Guidance (1997 Guidance) and the 2001 Revised Sexual Harassment Guidance (2001 Guidance).\(^{25}\) In April 2011, OCR designated its April 4, 2011 Dear Colleague Letter (2011 DCL) as a significant guidance document. In response to questions about implementation of the 2011 DCL, on April 29, 2014, OCR released its Questions and Answers on Title IX and Sexual Violence (2014 Q&A), which was also designated as a significant guidance document. According to OCR, significant guidance documents provide information and examples to inform educational institutions about how OCR evaluates compliance with legal obligations under Title IX.\(^{26}\) In contrast to both the 1997 Guidance and 2001 Guidance, the 2011 DCL and the 2014 Q&A were not subject to notice and comment, and controversy arose over what some viewed as an overreach by OCR.\(^{27}\) While these guidance documents did not purport to create or

\(^{23}\)Id. Clery Handbook at 1-1 through 1-2.
\(^{24}\)2017 Q&A at 2.
\(^{25}\)The 2001 Guidance replaced the 1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. 62 Fed. Reg. 12,034 (Mar. 13, 1997). The 1997 guidance was “the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers” and the document was made available for public comment. The 2001 Guidance was also published in the Federal Register, at 62 Fed. Reg. 66,092 (Nov. 2, 2000), and was available for public comment. The 2001 Guidance is available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.
\(^{26}\)See 2011 DCL at n. 1.
\(^{27}\)OCR issued an April 2015 Dear Colleague Letter on Title IX Coordinators and accompanying Title IX Resource Guide. These documents, which were not subject to notice and comment, have not been rescinded by OCR.
add legally binding requirements to applicable law, enforcement efforts by OCR between 2011 and 2017 held institutions accountable for the tenets set forth in these guidance documents.\textsuperscript{28}

On September 22, 2017, OCR issued a Dear Colleague Letter (2017 DCL) rescinding the 2011 DCL and the 2014 Q&A and expressing its intent to implement a policy, through a rulemaking process, that considers public comment. OCR concurrently issued interim guidance in the form of a Questions & Answers on Campus Sexual Misconduct (2017 Q&A). The 2017 Q&A outlines how OCR intends to review a school’s compliance with Title IX, and makes clear that it will continue to rely on its 2001 Guidance, which was reissued in a Dear Colleague Letter issued on January 25, 2006 (2006 DCL). The 2017 Q&A includes concepts that have not yet been subject to rulemaking, and is silent on many of the concepts set forth in the 2011 DCL and 2014 Q&A, leaving many unanswered questions about the current state of Title IX guidance as it relates to critical concepts.

On November 16, 2018, OCR published a proposed Title IX rule which seeks “to ensure that all schools clearly understand their legal obligations under Title IX and that all students clearly understand their options and rights.”\textsuperscript{29} The proposed rule was posted for public comment. Over the past year, OCR has reviewed the voluminous comments, numbering well over 100,000, and speculation is that a new Title IX rule will be promulgated early in 2020.

II. The Intake and Outreach Process

Regardless of the content of the final rule, Title IX offices will still need to respond in a compassionate and effective manner to direct and third-party reports of sexual and gender-based harassment and violence. In addition, providing equitable resources and supports to complainants and respondents will help to reinforce the balance and neutrality of the institution’s Title IX processes.

We recommend that an educational institution’s Title IX Office conduct and document an initial assessment for each report. The initial assessment is designed to evaluate known facts and circumstances, assess and impose interim steps to protect the complainant and the campus community, facilitate compliance with Title IX and Clery responsibilities, and identify the appropriate institutional response after triaging available and relevant information. During the intake assessment, the Title IX Coordinator should take steps to respond to any immediate health

\textsuperscript{28}While Congress authorized the U.S. Department of Education (DOE) to effectuate the provisions of Title IX, 20 U.S.C. § 1681, by issuing rules, regulations, or orders of general applicability, Congress also specified that “[n]o such rule, regulation, or order shall become effective unless and until approved by the President.” 20 U.S.C. § 1682. The Title IX implementing regulations expressly give the Assistant Secretary for Civil Rights discretion over the implementation of certain requirements, such as the requirement to dictate the information and manner in which the funding recipient disseminates its Title IX policy. 34 C.F.R. § 106.9(a). The enabling legislation and implementing regulations with respect to Title IX do not, however, authorize the Assistant Secretary for Civil Rights to promulgate standards for administrative enforcement that differ from the standards set forth by the Supreme Court. 34 C.F.R. § 106. Moreover, the former Assistant Secretary for Civil Rights has acknowledged that administrative guidance documents, issued without notice and comment, do not have “the force and effect of law.” Catherine E. Lhamon, Assistant Secretary Education, Office for Civil Rights, Letter to U.S. Senator James Lankford, Feb. 17, 2016, p. 2.

or safety concerns raised by the report. The Title IX Coordinator should also assess the nature and circumstances of the report to determine whether the reported conduct raises a potential policy violation, whether the reported conduct is within the scope of Title IX, and the appropriate manner of resolution under the educational institution’s Title IX policy.

While the Title IX Coordinator has the ultimate oversight authority for the implementation of Title IX, the appropriateness of interim measures, and the steps necessary to comply with Title IX’s mandate to eliminate, prevent and address or remedy the effects of a hostile environment, initial assessment processes work best when supported by a multi-disciplinary team that includes, at a minimum, Title IX, campus safety, security and law enforcement functions, student affairs, human resources, and academic or faculty affairs/Provost.

As part of the initial assessment, the Title IX Coordinator will typically:

- Assess the nature and circumstances of the report, including whether it provides the names and/or any other information that identifies the complainant, the respondent, any witness and/or any other individual with knowledge of the reported incident;
- Address immediate physical safety and emotional well-being;
- Notify the complainant of their right to contact (or decline to contact) law enforcement or seek a civil protection order;
- Notify the complainant of the right to seek medical treatment;
- Notify the complainant of the importance of preservation of evidence;
- Refer the report to appropriate campus officials to enter the report into the daily crime log if required by the Clery Act and assess the reported conduct to determine the need for a timely warning under the Clery Act;
- Provide the complainant with written information about on and off campus resources;
- Notify the complainant of the range of interim measures available;
- Provide the complainant with an explanation of the procedural options, including alternative resolutions and investigative resolutions.
- Notify the complainant of the right to be accompanied at any meeting by an advisor of choice;
- Assess the available information for any pattern of conduct by respondent;
- Discuss the complainant’s expressed preference for manner of resolution and any barriers to proceeding (e.g., confidentiality concerns);
- Explain the policy prohibiting retaliation and how to report acts of retaliation; and
• Determine the age of the complainant; and if the complainant is a minor, make the appropriate report of suspected abuse consistent with state law.

Below are some key elements of the initial assessment phase of responding to a report of sexual and gender-based harassment and violence:

1. **Intake Meeting.** The initial assessment typically includes a meeting with the complainant to understand the nature and circumstances of the report; to provide the complainant with information about resources, procedural options, and interim measures; and to discuss the school’s policies and procedures. The intake meeting should be followed by written correspondence to the complainant providing information required by the Clery Act.

Under the Clery Act, educational institutions must include in their annual security report procedures victims should follow if a crime of dating violence, domestic violence, sexual assault, or stalking has occurred. The procedures must include written information about: the importance of preserving evidence; how and to whom the alleged offense should be reported; options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities; and information on individual rights and the school’s responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court.

Educational institutions also must notify individuals in writing of the following remedial and interim measures: on and off campus counseling, health, mental health, victim advocacy and legal assistance programs; interim remedies that are available regardless of whether an individual chooses to report an alleged crime to campus police or law enforcement; and a written explanation of an individual’s rights and options when a student or employee reports that they have been a victim of on or off campus domestic violence, dating violence, sexual assault, or stalking.

2. **Interim Measures.** Under current OCR guidance, interim measures are “individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.” Per the 2017 Q&A, interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

In cases covered by the Clery Act (sexual assault, dating violence, domestic violence, and stalking), an educational institution must provide interim measures upon the request of a

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3134 C.F.R. § 668.46(b)(11).
32See n.45 at 7.
34Id. In the 2017 Q&A, OCR did not include victim advocacy in its list of recommended interim measures, although victim advocacy had previously been included in the 2014 Q&A. 2014 Q&A at 32-33.
reporting party if such measures are reasonably available. Current OCR guidance also
reflects that “[i]t may be appropriate for a school to take interim measures during the
investigation of a complaint.” OCR included the following provisions:

- “In fairly assessing the need for a party to receive interim measures, a school may
  not rely on fixed rules or operating assumptions that favor one party over another,
  nor may a school make such measures available only to one party.”

- “Interim measures should be individualized and appropriate based on the
  information gathered by the Title IX Coordinator, making every effort to avoid
depriving any student of her or his education.”

- “The measures needed by each student may change over time, and the Title IX
  Coordinator should communicate with each student throughout the investigation to
ensure that any interim measures are necessary and effective based on the students’
evolving needs.”

In prior guidance, OCR directed institutions to consider a range of factors when
determining the appropriate interim measures: the facts and circumstances of the particular
case; the specific need expressed by the complainant; the age of the students involved; the
severity or pervasiveness of the alleged harassment; any continuing effects on the
complainant; any intersections between the complainant and respondent (shared residence
hall, dining hall, class, transportation, or job location); and whether other judicial measures
have been taken to protect the complainant (e.g., civil protection orders). While these
factors are not contained in the current guidance, they nonetheless provide a helpful list of
factors to consider.

With respect to effective practices, educational institutions have begun to differentiate
between interim remedial/support measure and interim protective/restrictive measures.
Generally, interim remedial/support measures are designed to provide support and
maintain continued access to educational opportunities. They are available to either party,
regardless of whether a complainant pursues an investigation or seeks a disciplinary
resolution. Typically interim remedial/support measures only impact the party requesting
the interim measure. Examples of remedial interim measures include facilitating access to
counseling and medical services; guidance in obtaining a sexual assault forensic
examination; assistance in arranging rescheduling of exams and assignments and
extensions of deadlines; academic support; assistance in requesting long-term academic
accommodations if the individual qualifies as an individual with a disability; change in
class schedule, including the ability to transfer course sections or withdraw from a course;

35 34 C.F.R. § 668.46(b)(11)(v).
36 2017 Q&A at 3; 2001 Guidance at (VII)(A).
37 In prior guidance, OCR stated that when taking interim measures, an institution should minimize the burden on the
complainant and carefully consider the facts of the case when determining whom to remove from a shared class or
residence hall. 2014 Q&A at 32-33. This approach has been disavowed under the current guidance.
38 2017 Q&A at 3.
39 Id.
voluntary changes in work schedule or job assignment; voluntary changes in campus housing; escort and other safety planning steps; voluntary leave of absence; mutual no contact order; voluntary leave of absence; referral to resources to assist in obtaining a protective order; referral to resources to assist with any financial aid, visa or immigration concerns; and any other remedial measure that does not interfere with either party’s access to education.

In contrast, interim restrictive/protective measures involve a restrictive action taken against the respondent. Restrictive interim measures are typically only available prior to and during a formal investigation when the educational institution has an articulable factual foundation that would support the imposition of such a measure against a respondent. Restrictive interim measures include: imposition of a “no contact order” prohibiting certain individuals from having contact or communications with other individuals; change in the respondent’s class schedule; change in the respondent’s work schedule or job assignment; change in the respondent’s campus housing; exclusion from all or part of campus housing; exclusion from specified activities or areas of campus; prohibition from participating in student activities or representing the educational institution in any capacity; interim suspension; and, other protective measures.

Educational institutions should maintain all documents and electronic communications related to decisions about interim measures. Educational institutions should also periodically check to ensure that the interim measures are still appropriate given that the measures needed by a party may change over time, and the Title IX Coordinator should communicate with each party throughout the investigation to ensure that any interim measures are necessary and effective based on the party’s evolving needs.

3. Complainant’s Request to Remain Anonymous. The current OCR guidance is silent about whether and how an educational institution should respond to a complainant’s request for anonymity, not to notify a respondent of a report, or not to move forward with an investigation. Prior OCR guidance, now rescinded, stated that an educational institution should attempt to obtain a complainant’s consent before beginning an investigation. In prior OCR guidance, OCR also said that it strongly supports a complainant’s interest in confidentiality, but that there are cases in which the institution must take some action to meet its Title IX obligations despite the complainant’s request.

As noted above, the 2017 Q&A requires educational institutions to take steps to understand what occurred and to respond appropriately, but does not mandate that a formal investigation occur. In addition, as described in more detail below, the 2017 Q&A expressly permits a less-formal mechanism for resolution of sexual and gender-based harassment and violence for complaints than that established by its standard grievance procedures.

402011 DCL at 5.
412014 Q&A at 18-19.
42 2017 Q&A at 1.
432017 Q&A at 4; 2011 DCL at 8.
Given the ability to pursue a less-formal mechanism, and the recognition that a significant number of complainants choose not to pursue a formal investigation, we recommend that educational institutions continue to maintain a written policy and internal operating protocols that govern how the Title IX Coordinator will evaluate a request for anonymity or that no investigation be pursued. We recommend that educational institutions continue to rely upon the risk assessment process set forth in the 2014 Q&A.\textsuperscript{44} Accordingly, when a complainant makes a report but requests that their name or other identifying information not be shared with a respondent or that the institution not pursue an investigation, the institution should inform the complainant that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the respondent.\textsuperscript{45} The institution should also explain that Title IX prohibits retaliation against an individual who raises a good faith civil rights claim and that the institution will take steps to prevent and respond to retaliation.\textsuperscript{46}

If the complainant nonetheless requests that no investigation or that their anonymity be preserved, the educational institution should balance the interest of the complainant with its obligations: 1) to provide a safe and non-discriminatory environment for all community members and 2) to fulfill principles of fairness that require notice and an opportunity to respond before action is taken against a respondent.

In making this determination, we recommend that educational institutions consider:

- Whether circumstances suggest there is an increased risk of the respondent committing additional acts of sexual violence or other violence, such as the following:
  - There have been other complaints or reports of harassment or misconduct against the respondent;
  - The respondent has a history of arrests or records from a prior school indicating a history of violence;
  - The alleged perpetrator threatened further sexual violence or other violence against the student or others;
  - The complainant’s report reveals a pattern of perpetration, such as via the illicit use of drugs or alcohol;
- Certain elements indicating the seriousness of the conduct, including:
  - Whether the sexual violence was committed by multiple perpetrators;
  - Whether the sexual violence was perpetrated with a weapon;

\textsuperscript{44} In public presentations, OCR has stated that educational institutions can still rely on the well-established principals and reasoning from earlier guidance documents to the extent that they are not inconsistent with the current guidance. 
\textsuperscript{45}\textit{Id.}
\textsuperscript{46}\textit{Id.}
• The respective ages and roles of the complainant and respondent;

• The rights of the respondent to receive notice and relevant information before disciplinary action is sought; and,

• Whether the institution possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).  

The Title IX Coordinator should seek resolution consistent with the complainant’s request, if it is reasonably possible to do so, based upon the facts and circumstances, while also protecting the health and safety of the parties and the campus community. Where the Title IX Coordinator determines that a complainant’s request(s) can be honored, the Title IX Coordinator may nevertheless take other appropriate steps to eliminate the reported conduct, prevent its recurrence and remedy its effects on the complainant and the campus community. Those steps may include offering appropriate interim remedial/support measures, providing targeted training and prevention programs, and/or providing or imposing other remedies. Other potential remedies include providing increased monitoring, supervision, or security; providing training and education materials for students and employees; changing and publicizing institutional policies on sexual and gender-based harassment and violence; conducting climate surveys regarding sexual violence; imposing short- or long-term protective measures for a complainant; and, other measures that can be tailored to the facts and circumstances.

4. Clery Act Reporting Requirements. The Clery Act requires institutions to disclose statistics for reported Clery Act crimes, including rape, fondling, statutory sexual assault, fondling, sexual assault, dating and domestic violence, and stalking, that occur within Clery geography; those disclosures include entry into the daily crime log, the annual security report and annual statistics submitted to the Department of Education. The Clery Act also requires institutions to assess the need to issue a timely warning to alert the campus community about crimes that pose a serious or continuing threat to campus safety.

Accordingly, we recommend that all Title IX reports be immediately shared with the educational institution’s Clery Coordinator, and that a timely warning assessment be conducted consistent with the educational institution’s written timely warning policy. The facts of the report, the factors considered, and the determination whether or not to issue a timely warning should be contemporaneously documented and the records maintained for seven years.

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472014 Q&A at 19-22.
48According to the 2014 Q&A, where an institution accedes to a request for confidentiality or a request not to pursue an investigation, it should still take all reasonable steps to investigate and respond to the complaint consistent with that request, although its ability to do so may be limited Id.
49According to the 2014 Q&A, the institution should still “determine whether interim measures are appropriate or necessary” and take other steps to limit the effects of the alleged sexual or gender-based harassment or violence and prevent its recurrence. Id.
502014 Q&A at 20.
5. **Outcome of the Initial Assessment.** At the conclusion of the initial assessment, the Title IX Coordinator should determine whether the reported conduct raises a potential policy violation, whether the reported conduct is within the scope of Title IX, and the appropriate manner of resolution under the educational institution’s Title IX policy in light of the complainant’s preference regarding resolution, campus safety considerations, and the educational institution’s Title IX obligations. While the Title IX Coordinator may determine that the allegations, even if established by a preponderance of the evidence to have occurred, would not constitute a violation of the educational institution’s Title IX policy, we do not recommend reaching any determination at this juncture that would involve an evaluation of credibility. Reports that involve credibility determinations should be resolved through the investigative and adjudicative process.

If the Title IX Coordinator determines to proceed to a formal investigation, the Title IX Coordinator should notify the parties of their decision in writing, including, as noted below, a written notice of investigation. If the Title IX Coordinator concludes that the matter is outside the policy or the jurisdiction of the educational institution, that an alternative resolution is appropriate or that the educational institution can accede to the complainant’s request for anonymity or not to move forward, the Title IX Coordinator should notify the complainant in writing.

Based on recent and current regulatory enforcement approaches by OCR, the initial assessment should be deemed a major stage of the process. Accordingly, the educational institution may wish to include an approximate time frame for this process. Also, if the outcome of the initial assessment precludes the potential to move forward with a formal investigation, OCR has required educational institutions to provide the complainant a mechanism to appeal or seek review of that determination.

### III. Alternative Resolution

Often referred to as voluntary, informal or remedies-based resolution, an alternative form of resolution can sometimes provide an effective means to respond to a report in a manner consistent with a complainant’s expressed preference and the educational institution’s Title IX obligation. For example, the inclusion of an alternative form of resolution may aid complainants or third parties who are seeking anonymity or for whom being required to pursue formal disciplinary action may be a barrier to reporting or moving forward with a complaint. It may also provide an educational institution with additional mechanisms to address conduct that might not rise to the level of creating a hostile environment, or to tailor a response to the unique facts and circumstances of a particular incident, especially where there is not a broader threat to individual or campus safety.

Under current guidance, an educational institution may offer a less-formal mechanism for resolution of sexual harassment, including sexual violence, complaints than that established by its

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51To the extent possible, the individuals involved in the intake and outreach process should not be the same individuals who subsequently conduct the investigation. We recommend taking care to separate the role and function of support (or advocacy) from the role and function of fact-gathering and decision-making.
standard grievance procedures. Both prior and current guidance are clear that participation in an alternative form of resolution must be voluntary. In its 2017 Q&A, OCR clarified that informal resolution may be appropriate if: (1) all parties voluntarily agree to participate, (2) after receiving full disclosure of the allegations and their options for formal resolution, and (3) the school determines the particular complaint is appropriate for informal resolution. While OCR previously provided that mediation should not be used in cases involving sexual assault, and that an educational institution should not compel a complainant to engage in mediation, to directly confront the respondent, or to participate in any particular form of alternative resolution, current guidance suggests that the prohibition on mediation in cases of sexual assault has been lifted. In the 2017 Q&A, OCR provided that “the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.”

OCR does not provide criteria for when alternative resolution may be “appropriate.” However, VAWA provisions are somewhat instructive. VAWA requires an educational institution to include in its annual security report a description of each type of disciplinary proceeding used by the institution (i.e., informal or formal resolution), which shall include the steps of each, the anticipated timeliness and decision-making process for each, how to file a disciplinary complaint (including contact information for the person with whom it is to be filed), and how the institution determines which type of proceeding to use based on the circumstances of an allegation (e.g., risk factors, whether the respondent or complainant is an employee or student).

In keeping with the VAWA provision that the educational institution must include a description of how the institution determines which type of proceeding to use (e.g., is “appropriate”), we recommend that educational institutions take a number of steps to develop a system for evaluating the appropriateness of alternative resolution and safeguard the institutional decision-making process. To develop a consistent decision-making framework that seeks to make determinations aligned with Title IX’s prohibition against sex discrimination, key steps include:

1) Defining the types of alternative resolution that may be used by the educational institution;
2) Ensuring that the individuals who may facilitate alternative resolution have sufficient training and competencies;
3) Outlining the factors the educational institution will consider in evaluating whether alternative resolution is appropriate (which may be similar to, or the same, risk assessment factors considered in evaluating a complainant’s request for anonymity);
4) Clear written communication with the parties regarding alternative resolution, and whether such a resolution is considered a final resolution; and,
5) Careful documentation of the available information and factors considered.

52 2017 Q&A at 4; 2011 DCL at 8.
53 2017 Q&A at 4.
54 2017 Q&A at 4.
55 2011 DCL at 8.
56 Id.
57 34 C.F.R. § 668.46(k).
The educational institution should maintain records of all reports and conduct referred for alternative resolution, and ensure that the resolution is completed within an appropriate time frame following the initial report. The initiation of an alternative resolution should be shared with the parties in writing, and the conclusion with a written notice of outcome.

Alternative resolution can include a range of options:

1) Support or remedies-based resolution, where the focus is support or resources for the complainant, without notification to the respondent
2) Broader community remedies to eliminate, prevent and address, where the focus is on taking action to resolve the concern without seeking disciplinary action against the respondent (may typically involve education and training, change in policies or procedures, or changes in protocols)
3) Non-disciplinary outcome for the respondent with agreed upon conditions and resolution, with the agreement of both the complainant and the respondent
4) Disciplinary outcome for respondent, with the agreement of both the complainant and the respondent

Specific forms of alternative resolution involving a complainant and a respondent can include: facilitated direct dialogue; dialogue through an intermediary; video or journal exchanges; restorative justice circles and conferences; mediation (face-to-face or shuttle); arbitration and other processes.

Effective alternative resolution processes typically include the following elements:

- Notice to the parties of the allegations constituting a potential violation of the educational institution’s Title IX policy, including the specific section of the code allegedly violated.
- A description of the school’s formal and alternative resolution processes, including that:
  - The parties may be accompanied by an advisor or support person at any scheduled meeting during the alternative resolution process;
  - An explicit determination whether statements made by the parties during an alternative resolution process can be included in a subsequent formal resolution;
  - The alternative resolution process will result in a written resolution agreement between the parties, with input from both parties, that will be approved by the school;
  - Failure to meet the requirements described in the written resolution agreement may result in subsequent disciplinary action;
  - Prior to the signing of the written resolution agreement, either party may withdraw from the informal resolution process and initiate a formal resolution process; and
  - The school reserves the right to suspend or terminate the alternative resolution process and initiate a formal disciplinary process at any time before the parties reach a final agreement.
- If a party requests to proceed by way of alternative resolution (after receiving a description of the school’s formal and informal resolution processes), the Title IX
Coordinator should, in consultation with appropriate school officials, determine whether the facts and circumstances of the complaint are appropriate for such a process. If it is determined that the facts are not appropriate for alternative resolution, the school should inform the requesting party that the requested option is not available.

- If the Title IX Coordinator determines that the matter is appropriate for alternative resolution, the Title IX Coordinator will meet with the other party next to determine whether that party wishes to participate in alternative resolution. During the meeting, the Title IX Coordinator should explain the elements of the alternative resolution process described above.

Once the informal resolution process is initiated, the school should engage a trained and skilled facilitator to ensure that the process is equitable and complies with federal law and regulation. The facilitator(s) should: (1) engender trust in the process; (2) be thoughtful in application; (3) understand the special dynamics of trauma and sexual and gender-based harassment and violence; (4) guide the parties to a voluntary resolution agreement that seeks to effectively repair the impact of the alleged behavior(s); and (5) appreciates the values and educational mission of the institution.

IV. Investigation

In this section, we first outline the requirements of the Clery Act, as amended by VAWA, then turn to the guidance set forth in the 2017 Q&A. Following the passage of VAWA in 2013, and the promulgation of implementing regulations in October 2014, there was a disconnect between elements of the grievance procedures required under Clery for the VAWA-offenses and the existing guidance related to grievance procedures required under Title IX. Generally, the VAWA procedural requirements were more prescriptive as to certain elements, which complicated implementation and policy development. In the 2017 Q&A, however, as documented below, OCR essentially adopted the VAWA provisions for all Title IX-related reports, including conduct, like sexual harassment, that would not have been subject to the VAWA requirements. This has led to a more precise alignment of Title IX guidance with the Clery statutory provisions related to many procedural requirements.

The VAWA Amendments to the Clery Act require that an educational institution include in its annual security report a clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking. The statement of policy that addresses the procedures must include:

1. A description of each type of disciplinary proceeding used by the institution (i.e., informal or formal resolution), which shall include the steps of each, the anticipated

58In the 2014 Q&A, OCR used the term “investigation” to refer to the process an institution uses to resolve sexual violence complaints, including the fact-finding investigation and any hearing and decision-making process the institution uses to determine whether the conduct occurred by a preponderance of the evidence and if so, the appropriate sanctions and remedies to end the sexual violence, eliminate the hostile environment, and prevent its recurrence. 2014 Q&A at 24-25.
5934 C.F.R. § 668.46(k).
timeliness and decision-making process for each, how to file a disciplinary complaint (including contact information for the person with whom it is to be filed), and how the institution determines which type of proceeding to use based on the circumstances of an allegation (e.g., risk factors, whether the respondent or complainant is an employee or student).  

2. The standard of evidence used during disciplinary actions;  

3. A list of sanctions that may be imposed following a final determination of sexual assault, domestic violence, dating violence, or stalking; and,  

4. The range of protective measures that may be offered following an allegation of dating violence, domestic violence, sexual assault, or stalking.  

VAWA further provides that the proceedings will entail a prompt, fair, and impartial investigation and resolution. VAWA states that a prompt, fair, and impartial proceeding includes a proceeding that is “(A) completed within reasonably prompt timeframes designated by an institution’s policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay; (B) conducted in a manner that is (1) consistent with the institution’s policies and transparent to the accuser and accused; (2) includes timely notice of meetings at which the accuser or accused, or both, may be present; and (3) provides timely and equal access the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and (C) conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.”

Under VAWA, the proceedings must be conducted by “officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.” This requirement builds on OCR’s 2001 Guidance, which directed schools to “ensure that employees are trained so that those with authority to address

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60 Id.  
61 Id.  
62 20 U.S.C. § 1092 (f)(8)(B)(ii); 34 C.F.R. § 668.46(b)(11)(vii). The Clery Handbook explains, “[t]he Clery Act does not specify the sanctions an institution may impose. Each institution must determine which sanctions it will impose for each of the VAWA offenses and list all possible sanctions in this statement.” Clery Handbook at 8-20. Sanction descriptions should be specific. For example, if suspension is a sanction, it should include the type and length of the suspension and any requirements that must be met for reinstatement. In addition, institutions are not restricted from using a sanction not listed in the statement so long as they include the sanction in the next published security report. Id.  
63 Id.  
64 34 C.F.R. § 668.46(j).  
65 34 C.F.R. § 668.46(k). VAWA further provides that compliance with these provisions does not constitute a violation of FERPA. Id.  
66 Id.
harassment know how to respond appropriately,”67 and the 2011 DCL, which requires that schools: “ensure that all persons involved in implementing grievance procedures (e.g., Title IX Coordinators, investigators, and adjudicators) have training in the recipient’s grievance procedures” and “applicable confidentiality requirements,”68 and ensure that “in sexual violence cases, the fact-finder and decision-maker have adequate training or knowledge regarding sexual violence.”69

During disciplinary actions, the accuser, the accused and appropriate officials must be given timely and equal access to information that will be used in the decision.70 VAWA provides that the parties have a right to an advisor of their choice, including an attorney, who may be present at any meeting or disciplinary proceeding, but schools are permitted to define the scope of the advisor’s role.71 For example, the school may include in its policy that the advisor may serve as a proxy for the student and whether the advisor is permitted to speak or otherwise participate in the proceeding. Additionally, VAWA provides that both parties must be simultaneously informed in writing of the following: the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking; the institution’s procedures for both parties to appeal the results of the disciplinary proceeding; any change to the results of the proceeding that occurs prior to the time that such results become final; and when results of the proceeding become final.72

In the 2017 Q&A, OCR stated that a school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.73 OCR identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including, among others, whether the school ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designates and follows a reasonably prompt time frame for major stages of the complaint process; and, notifies the parties of the outcome of the complaint.74

In the 2017 Q&A, OCR reinforced that the burden is on the school, not the parties, to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed.75

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68 2011 DCL at 12. Although rescinded, the principles related to training are still instructive.
69 Id.
70 34 C.F.R. § 668.46(k).
71 Id.
72 Id.
73 2017 Q&A at 3.
74 Id. The full list of elements OCR identified in evaluating whether a school’s grievance procedures are prompt and equitable, includes whether the school (i) provides notice of the school’s grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate. Id.
75 2017 Q&A at 4.
While OCR does not dictate who may serve as an investigator, OCR stated that “A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school.”76 Further, OCR stated that “[s]chools should ensure that institutional interests do not interfere with the impartiality of the investigation.”77

Citing the 2001 Guidance and VAWA, OCR confirmed that “An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.”78 OCR also advised, “The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.”79

OCR reiterated that any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.80 With respect to written notice, OCR stated that,

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.81

In addition, OCR stated that each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation.82

Importantly, while educational institutions may currently use a range of investigative and decision-making models, OCR specifically provided that “[t]he investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence.” OCR further stated, “[t]he reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.”83

The most significant additions in the 2017 Q&A included the requirement for written notice of investigation, the requirement for a written investigation report, and the expansion of VAWA’s requirement the parties receive timely and equal access to any information that will be used in the process to all Title IX-related conduct. Ensuring now that policies and procedures include these

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76 Id.
77 Id.
78 Id.; 2001 Guidance at (V)(A)(1)-(2); see also 34 C.F.R. § 668.46(k)(2)(ii).
79 2017 Q&A at 5.
80 2017 Q&A at 4; 2001 Guidance at (X).
81 2017 Q&A at 4; 2001 Guidance at (VII)(B).
82 2017 Q&A at 4.
83 Id.; 34 C.F.R. § 668.46(k)(3)(i)(B)(3).
core elements, which comport with procedural fairness and recent due process case law, is an important step.

The following effective practices will aid in ensuring compliance with current legal and regulatory requirements of a prompt and equitable investigation, and in the investigative space, best position the educational institution to be ready for any rules changes regarding the investigation process.

1. **Training.** The 2017 Q&A does not address training specifically, except to note that an equitable investigation requires a “trained” investigator, and that, “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.”84 VAWA further provides that the proceedings will entail a prompt, fair, and impartial investigation and resolution and be conducted by “officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.”85 This requirement builds on OCR’s 2001 Guidance, which directed schools to “ensure that employees are trained so that those with authority to address harassment know how to respond appropriately,”86 In addition to regular training, the investigator should be knowledgeable about the educational institution’s policy definitions of prohibited conduct, admissibility of evidence (e.g., information related to character or a party’s prior sexual history and character information), and procedural provisions.

2. **Notice of Investigation.** As noted above, in the 2017 Q&A, OCR added procedural requirements to the investigation process. OCR stated at the outset of an investigation, and before any fact gathering has begun, the responding party must receive notice from the school of the allegations, including sufficient details and with sufficient time to prepare a response before any initial interview.87 Sufficient details include “the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.”88 Additionally, each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation.89

With respect to the written notice of investigation, we recommend that educational institutions provide a written notice of investigation to both parties. We also recommend that educational institutions be alert to evolving evidence and the potential that additional policy violations may exist. Where new policy violations are identified through the fact-gathering, we recommend the use of a supplemental notice of investigation.

842017 Q&A at 4.
8534 C.F.R. § 668.46 (k)(2)(ii)
862001 Guidance at 13.
87Id.
88Id.
892017 Q&A at 4.
3. **Privacy Considerations.** It is important to set the parameters of privacy at the outset as often times parties and witnesses confuse privacy with confidentiality and mistakenly believe that the investigation cannot be discussed with individuals who are not the investigator. In the 2017 Q&A, OCR stated, “Restricting the ability of either party to discuss the investigation (e.g., through “gag orders”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable.” From this guidance, it is important to clarify that discussion of the matter is permissible with anyone, including advisors and potential witnesses, provided it does not violate other policy prohibitions, such as retaliation or harassment, and it does not interfere with the integrity of the fact-gathering process. All witnesses should be informed that the information will be shared with the parties and school personnel, and may be shared with law enforcement (depending on state law), but that it will not be shared with others beyond the “need to know” circle, absent a subpoena or court order. There are also relevant FERPA implications that should be discussed, as appropriate.

4. **Investigation Report.** The investigation report is the written summation of the fact-gathering process and should represent a complete, impartial, and thorough investigation. It should be professional, use balanced and neutral language, and fairly summarize the relevant evidence gathered (both inculpatory and exculpatory). We recommend that the investigation report identify the parties and their relationship to one another; provide the procedural history, including how the report was received by the institution; outline the nature of the report as presented by the complainant and the response by the respondent; specify the policy violations at issue; identify by name the witnesses interviewed and the information each witness provided; list and provide all other evidence collected; where applicable, explain reasons for inability or decision to not interview a witness or collect pieces of evidence; reiterate interview protocols; provide a detailed summary of all of the information received, including the source of the information (interview or documentary evidence); tie areas of agreement and disagreement. Both parties should be afforded an opportunity to review the investigation report before a final determination is made, and be permitted to meaningfully provide additional information, request additional investigation, or rebut the information provided by others.

In an investigative model, where the investigator may be charged with making determinations of credibility or findings of fact, this means that a preliminary report should be shared with the parties before any credibility determinations, findings of fact, or determinations as to policy violations have occurred. After reviewing the preliminary investigation report, if the investigator will be the decision-maker, the investigator should prepare a final written report that assesses credibility, and makes the determination as to whether there is sufficient evidence to determine responsibility. A final report should: include the elements of the potential policy violation; identify the evidence that supports or rebuts the establishment of the elements; and include an evaluation and analysis of the credibility factors considered by the investigator. If the investigator is charged with making a determination of responsibility, the report must tie the evidence gathered to the policy elements and make a finding as to sufficiency, by a preponderance to support a finding of responsibility (i.e., talk in terms of sufficient or insufficient evidence as opposed to a

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90 [https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf](https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf)
finding by a preponderance that the event did not occur). A rationale must be provided that communicates the salient elements of the finding.

5. **Timely and Equal Access to Information.** Both VAWA and the 2017 Q&A provide that the parties, and appropriate officials, must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings. We understand this provision to mean that the investigation report must include the names of witnesses, and that the investigation report must be shared with the parties prior to the investigator or decision-maker reaching any determinations or conclusions.

6. **Advisors.** VAWA provides that parties are entitled to an advisor of their choice, including an attorney advisor. VAWA provides that institutions may restrict an advisor’s role, such as prohibiting the advisor from speaking during the proceeding, addressing the disciplinary tribunal, or questioning witnesses. School can independently determine the participation level of the advisor, but must ensure that both parties have the same access to their advisor. For example, an investigator should not accept written communication from the advisor of one party, but reject it from the other party.

V. **Adjudication and Hearings**

While an investigation may include a hearing to determine whether the conduct occurred, neither VAWA nor Title IX currently require a hearing. OCR’s most recent guidance states only, “The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy.” OCR also reiterated that, “The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.” OCR also stated, “Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).”

Recently, a number of federal and state courts have weighed in on the hearing requirement and, in some jurisdictions, held that where the credibility of witnesses is central to the adjudication of the allegation, the accused student must be permitted to cross-examine the witness before a neutral fact-finder. Implementers should know and understand the legal precedent applicable to their institution’s jurisdiction.

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91 34 C.F.R. § 668.46(k)(2)(iii) and (iv).
92 2017 Q&A at 5; 2014 Q&A at 25.
93 2017 Q&A at 5.
94 2017 Q&A at 5.
95 Id.
96 See Doe v. Baum, 872 F.3d 393 (6th Cir 2017) at 578 (holding “where a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witness in the presence of a neutral fact finder.”). See also Doe v. Claremont McKenna College, 25 Cal. App. 5th 1055, (Cal. Ct. App. 2018), (holding, in the context of a private institution, that the procedures should have included an opportunity to assess the accuser’s credibility by her appearing at the hearing.
The following effective practices will help to ensure the hearing process is compliant with legal and regulatory requirements.

1. **The Decision-Maker.** An institution’s policy may call for the decision-maker to be the investigator, a single adjudicator, a hearing panel, or an external professional. Many schools use a decision-maker who is separate and distinct from the investigator; others use a hearing panel to review a recommended finding by the investigator. The salient point is that the decision-maker must know and understand their role in the resolution process and be sufficiently trained. Specifically, the decision maker must be familiar with the format of the hearing, the definitions and elements of the prohibited conduct, and the applicable standard of review and evidentiary standard. The role of decision-maker can be filled by either an internal or external professional, or a combination of both (in the case of a hearing panel).

2. **Preparation.** The decision-maker should be provided and allot for sufficient time to prepare for the hearing. The investigation report, along with the accompanying exhibits, attachments, and any responses to the investigation report should be reviewed in advance of the hearing. In advance of the hearing, the decision-maker should review the applicable policy definitions and outline the elements; identify necessary witnesses and areas of inquiry of those witnesses; outline the areas of contested and uncontested information from the investigation report; and prepare questions. It is also important to include a formal mechanism to identify actual bias or conflict of interest and to allow the parties to raise concerns about bias or conflict of interest prior to the hearing.

3. **Ensure Equitable Treatment.** Federal law and regulations require that the hearing process be equitable. The parties must have timely and equal access to all information. The hearing must provide a meaningful opportunity for the parties to be heard and respond to the information gathered in the investigation. Hearing facilitators should ensure that what is offered to one party is offered to the other party during every phase of the resolution either in-person or by video conference); Doe v. Allee, 30 Cal. App. 5th 1036 (Cal. Ct. App. 2019) (holding, in the context of a private institution, when “a student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means (such as means provided by technology like videoconferencing) before one or more neutral adjudicator(s) with the power independently to judge credibility and find facts.”); Doe v. Rhodes College, 2:19-cv-02336 (Western Dist. Tennessee, June 14, 2019) (“In cases involving sexual misconduct, an accused student must have the right to cross-examine adverse witnesses. To adequately assess credibility, which concerns both the accused and the accuser, there must be some form of live questioning of the accuser in front of the fact-finder; written statements of the accuser will not suffice. Even more, the accused, specifically, has the right to confront his or her accuser through cross-examination, via an agent or otherwise.”). In contrast, see Haidak v. University of Massachusetts-Amherst, 933 F.3d 56 (2019) (holding that constitutional due process principles were satisfied by having a neutral party interview the complainant and respondent in a Title IX student disciplinary matter; also holding “[W]e have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation [of appropriate process] . . . If we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury waived trial would be near complete.”)
process, including access to information, reasonable accommodations (e.g., participating remotely), time to prepare and respond, hearing breaks, and opportunity to participate.

4. **Advisors.** The Notice of Proposed Rule Making published in November 2018 expands the VAWA provision regarding advisors by providing that cross-examination at live hearings “must be conducted by the party’s advisor of choice,” and “if a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.” This is not, however, a current requirement under federal guidance or law. Currently, VAWA requires an equal opportunity for the parties to have an advisor of their choice present during the hearing, but does not require that the advisors be permitted to conduct cross-examination.

5. **Hearing Format.** The format of the hearing should be outlined in the institution’s policy. A hearing often begins with preliminary instructions provided by the decision-maker, and is then followed by opening statements by the parties, questioning of the complainant by the decision-maker(s), questioning of the complainant by the respondent (questions are generally submitted in writing to the decision-maker for review first, then read by the decision maker), questioning of the respondent by the decision-maker(s), questioning of the respondent by the complainant (questions are generally submitted in writing to the decision-maker for review first, then read by the decision-maker), questioning of witnesses by the decision-maker, then by the parties individually (questions by the parties are generally submitted in writing to the decision-maker for review first, then read by the decision maker), and concludes with closing statements by the parties.

6. **Outcome letter.** The outcome letter is typically written by the decision-maker and should include: all factual findings; credibility determinations and the credibility factors relied on by the decision maker in making the determination; a finding, by a preponderance of the evidence, of whether the conduct violated the institution’s policies by tying the evidence gathered to the policy elements; the sanction; and the rationale for the sanction. Like the investigation report, the outcome letter should state that there is either sufficient or insufficient information of a policy violation, as opposed to a finding by a preponderance that the event did not occur. A rationale must be provided that communicates the salient elements of the finding and the sanction. This written notice of outcome must be provided to both parties simultaneously.

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97 [https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf](https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf) at 52.