

ARTICLES

ADDRESSING SEXUAL VIOLENCE IN HIGHER EDUCATION: ENSURING COMPLIANCE WITH THE CLERY ACT, TITLE IX AND VAWA

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I. INTRODUCTION

In recent years there has been increased national attention to the issue of campus sexual violence. In 2010, the Center for Public Integrity (CPI) released the investigative series *Campus Sexual Assault: A Frustrating Search for Justice*,

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which spotlighted the frequent failure of colleges and universities to hold student-perpetrators accountable.¹ This is what happened in my case.² As a freshman at the University of Wisconsin (UW), two students sexually assaulted me. After filing a report, the UW took nine months to investigate. This delay allowed one of the accused students to graduate before I could appeal the UW's decision not to hold a campus disciplinary hearing. In response to CPI's coverage of my case and several others, the U.S. Department of Education (ED) released the "Dear Colleague Letter" (DCL), which outlines requirements for schools to address sexual violence under Title IX.³

Since its release, campus activists have cited the DCL in several high profile Title IX complaints against prominent colleges and universities for their mishandling of sexual assault reports and related disciplinary proceedings.⁴ Between 2011 and 2012, Congress considered the Campus Sexual Violence Elimination Act (Campus SaVE Act),⁵ which proposed further requirements for colleges and universities to prevent and address campus sexual violence while also providing additional rights to victims. Congress passed a version of this legislation as Section 304 of the 2013 Violence Against Women Act (VAWA) Reauthorization to amend the Clery Act.⁶ VAWA now requires colleges and universities to address several types of campus crimes beyond sexual violence.⁷ In 2014, President Obama announced the White House Task Force to Protect Students Against Sexual Assault, which released its first national report on campus sexual violence called "Not Alone."⁸

Unlike ever before, there is national pressure on colleges and universities to address campus sexual violence. The following article provides an overview on the problem of campus sexual violence, current federal laws and obligations that require colleges and universities to address it, and recommendations for

1. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUBLIC INTEGRITY (Feb. 24, 2010), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> (finding that only four out of thirty-three students found responsible for sexual violence during a campus disciplinary proceeding were expelled, leaving the rest to continue receiving their education on campus along with the victim).

2. Kristin Jones, *Sexual Assault on Campus: Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUBLIC INTEGRITY (Feb. 25, 2010), <http://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0>; see also Joseph Shapiro, *Campus Rape Victims: A Struggle for Justice*, NPR (Feb. 24, 2010), <http://www.npr.org/templates/story/story.php?storyId=124001493>.

3. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) [hereinafter "DCL"], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

4. Richard Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES, Mar. 19, 2013, <http://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html?pagewanted=all>.

5. S.834, H.R. 2016, 112th Cong. (2011) (enacted).

6. Pub. L. No. 113-4, § 304, 127 Stat. 54 (2013).

7. 20 U.S.C.A. § 1092(f) (West, Westlaw through 2014).

8. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS AGAINST SEXUAL ASSAULT, NOT ALONE (2014), <https://www.notalone.gov> (last visited Sept. 29, 2014) [hereinafter "NOT ALONE"].

progressive campus policies and proceedings that are comprehensively compliant with federal law while also aimed towards effectively addressing the epidemic of campus sexual violence.

II. THE PREVALENT PROBLEM OF CAMPUS SEXUAL VIOLENCE

In April 1986, Jeanne Clery was tortured, raped and murdered at Lehigh University.⁹ Jeanne had been asleep when a fellow student walked through three propped-open doors in her residence hall to enter her room. Jeanne's body was found mutilated the next day and the student-perpetrator was subsequently criminally convicted. The Clerys believed that this tragedy could have been prevented, not just through the locking of residence hall doors, but also through the public disclosure of campus crimes. After filing a lawsuit against Lehigh, the Clerys learned that over thirty violent offenses had occurred on Lehigh's campus over the previous three years. Without knowledge of these campus crimes, the Clerys had sent their daughter to Lehigh believing that it had a safe campus. After the case settled, the Clerys used the money to found the national non-profit Security On Campus, Inc. (SOC).¹⁰ In 1990, SOC successfully lobbied for the passage of the Campus Security Act, which is now known as the Clery Act, to require colleges and universities to publicly disclose incidents of crime on campus.¹¹

While murder rarely occurs on college and university campuses, sexual violence is endemic. After Jeanne's death, SOC received numerous reports from sexual assault survivors around the country.¹² This outpouring inspired the 1992 amendment to the Clery Act, known as the Campus Sexual Assault Victim's Bill of Rights.¹³ This law was ahead of its time because the nation had not yet realized the prevalence of campus sexual violence. In 2000, the Bureau of Justice Statistics released the groundbreaking study *The Sexual Victimization of College Women*, which confirmed the "rising fear that college campuses are not ivory towers but, instead, have become hot spots for criminal activity."¹⁴ Having surveyed over 4,000 college women, the study found that within a single academic year, 2.8% had experienced a completed or attempted rape, and 15.5%

9. Ken Gross & Andrea Fine, *After Their Daughter is Murdered at College, Her Grieving Parents Mount a Crusade for Campus Safety*, PEOPLE MAG., Feb. 19, 1990, <http://www.people.com/people/archive/article/0,,20116872,00.html>.

10. Now known as the Clery Center for Security on Campus. See <http://clerycenter.org/> (last visited Oct. 8, 2014).

11. 20 U.S.C.A. § 1092(f) (West, Westlaw through 2014).

12. See *Origin of the Campus Sexual Assault Victims' Bill of Rights (1991)*, YOUTUBE (Apr. 22, 2011), <https://www.youtube.com/watch?v=E3N1FbnynSI> (interview with SOC Lead Counsel Frank Carrington).

13. 20 U.S.C.A. § 1092(f)(8) (West, Westlaw through 2014).

14. BONNIE S. FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN I* (Dec. 2000), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

had experienced another form of completed or attempted sexual assault.¹⁵ Based on these findings, the researchers tentatively projected that twenty to twenty-five percent of women may experience an act of completed or attempted rape over the course of an average college enrollment.¹⁶

Despite such high rates of victimization, the study also found that campus sexual violence was vastly underreported.¹⁷ Other campus sexual assault surveys have found similarly low reporting rates, indicating that campus sexual violence is a silent epidemic.¹⁸ While further study is needed, current research suggests that underreporting may result from the inability of victims to identify unwanted sexual contact as a sexual assault or rape.¹⁹ Additionally, underreporting may be the result of a victim's fear to report due to social stigma, related personal feelings of self-blame or embarrassment, hesitancy to label the perpetrator as a rapist, or a belief that the incident was not sufficiently serious to warrant police attention.²⁰ The silence surrounding sexual violence masks the reality of perpetration on campus, which research shows is most often committed by repeat offenders.²¹ To effectively address campus sexual violence, colleges and universities must develop progressive campus policies and procedures to contend with these realities in addition to complying with applicable federal laws.

15. *Id.* at 10-16.

16. *Id.* at 10; *see also* CHRISTOPHER P. KREBS, ET AL., THE CAMPUS SEXUAL ASSAULT STUDY 5-1 (2007) (finding nineteen percent of undergraduate women reporting an attempted or completed sexual assault since entering college), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

17. FISHER ET AL., *supra* note 14, at 23 (noting fewer than five percent of victims reported to police, although about sixty-six percent reported to a friend, family member or college administrator).

18. *See, e.g.*, KREBS ET AL., *supra* note 16, at 5-1; *contra* MICHAEL PLANTY, ET AL., U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 6 (2013) (finding in the general population that the range of female adult victims reporting went from twenty-nine percent in 1995 to a high of fifty-six percent in 2003, and then decreased to thirty-five percent in 2010), available at <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>.

19. *See* FISHER ET AL., *supra* note 14, at 15 (finding only 46.5% of women who identified as victims of completed or attempted rape labeled the experience as rape, while 48.8% answered it was not rape, and 4.7% said they did not know whether it qualified as rape).

20. *Id.* at 15, 23 (finding that while about two-thirds of victims reported incidents of sexual violence to a friend, less than five percent reported the crime to police citing reasons such as not wanting family or others to know, lack of proof, fear of reprisal, and fear of police hostility or disbelief); KREBS ET AL., *supra* note 16, at 5-22 (calculating from Exhibit 5-8 that 4.1% percent of victims report to police, with lower reporting rates for victims who were incapacitated (2.1%) than for those harmed through the use of force (12.9%)).

21. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 1, 78 (2002) (finding an average of 5.8 campus victims per perpetrator); *see also* Dave Gustafson, *Serial Rapists Commit 9 out of 10 Campus Sexual Assaults, Research Finds*, AL JAZEERA AM. (Oct. 18, 2013), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/28/serial-rapists-commit9of10campussexualassaultsresearchfinds.html> (quoting Dr. David Lisak, who noted that "[t]he vast majority of sexual assaults on campuses, in fact over ninety percent, are being perpetrated by serial offenders").

III. FEDERAL OBLIGATIONS TO ADDRESS CAMPUS SEXUAL VIOLENCE

A. THE JEANNE CLERY DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS CRIME STATISTICS ACT

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, more commonly referred to as the Clery Act, requires colleges and universities to report acts of sexual violence that meet the federal definition of a criminal offense.²² Previously, the Clery Act recognized two categories of sexual violence, forcible and non-forcible sex offenses.²³ While the latter included incest and statutory rape (rare on college campuses),²⁴ the former included “any sexual act directed against another person, forcibly or against that person’s will, or both; or . . . where the victim is incapable of giving consent” to cover a broad range of campus sexual violence.²⁵ When these forms of sexual violence were committed on Clery geography,²⁶ colleges and universities had to publicly disclose their occurrence.²⁷ Public disclosure of crime under the Clery Act come in three forms: a daily crime log on campus,²⁸ statistics in an Annual Security Report (ASR),²⁹ and the issuance of timely warnings when there is a threat to the safety of the campus community.³⁰

22. See 34 C.F.R. § 668.46(c)(7) (2014); KREBS ET AL. *supra* note 16, at 1-3 (noting not all typologies of sexual violence for research purposes may also qualify as a criminal offense).

23. 20 U.S.C.A. § 1092(f)(1)(F)(i)(II) (West, Westlaw through 2014). See *infra* note 56 for VAWA 2013 changes to the Act.

24. 34 C.F.R. Pt. 99, App. A (1988) (defining ‘non-forcible’ to address incest and statutory rape).

25. *Id.* (defining Forcible Sex Offenses to include (a) Forcible Rape—vaginal penetration forcibly or against one’s will (excluding statutory rape), (b) Forcible Sodomy—including oral or anal sexual intercourse forcibly or against that person’s will, (c) Sexual Assault With An Object—penetrating the genital or anal opening of the body of another person forcibly or against that person’s will, or both, and (d) Forcible Fondling—covering the touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person’s will).

26. U.S. DEP’T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 11 (2011) (defining the statutorily specified geography as “Clery Geography”). See also Violence Against Women Act Final Rule, 79 Fed. Reg. 62752, 62784 (proposed Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46 (a)) (defining Clery Geography as including buildings and property that are part of the institution’s campus, the institution’s noncampus property, and public property adjacent to and accessible from campus).

27. See 20 U.S.C.A. § 1092(f)(1)(F) (West, Westlaw through 2014) (limiting Annual Security Report to reports of crimes committed “on campus, in or on noncampus buildings or property, and on [adjacent] public property).

28. See 20 U.S.C.A. § 1092(f)(4) (West, Westlaw through 2014). *But see* Nick Ochsner, *Va. Wesleyan Hiding Sexual Assaults Behind Legal Loophole*, ABC 13 NEWS (Nov. 3, 2014), <http://www.13newsnow.com/story/news/local/13news-now-investigates/2014/11/03/vwc-sex-assaults/18243739/>.

29. See 20 U.S.C.A. § 1092(f)(1) (West, Westlaw through 2014).

30. 20 U.S.C.A. § 1092(f)(3) (West, Westlaw through 2014) (“Each institution . . . shall make timely reports to the campus community on crimes considered to be a threat to other students and employees . . . that are reported to campus security or local law police agencies. Such reports shall be provided to students and employees in a manner that is timely and that will aid in the prevention of similar occurrences.”).

In 1992, the Campus Sexual Assault Victims' Bill of Rights amended the Clery Act.³¹ As a result, the Clery Act went beyond the requirement to publicly disclose the incidence of crime on campus to require that colleges and universities also provide information on campus prevention education and awareness programs.³² Colleges and universities must now include a statement of policy within their ASR on campus efforts to prevent sex offenses and "promote the awareness of [stranger] rape, acquaintance rape, and other sex offenses."³³ Additionally, campus victims must be informed about to whom they can report sexual violence on campus,³⁴ what sanctions the school may impose for sexual violence,³⁵ the availability of any support services,³⁶ and the availability of academic and living accommodations when "requested [and] . . . reasonabl[e]."³⁷ The ASR also must include instructions for victims on how to preserve evidence³⁸ and requires colleges and universities to report how they are "encourag[ing] accurate and prompt reporting of all crimes to the campus police and the appropriate law enforcement agencies."³⁹

B. TITLE IX OF THE HIGHER EDUCATION AMENDMENTS OF 1972

While the Clery Act addresses campus sexual violence as a crime, another federal law addresses it as a civil rights violation. Title IX of the Higher Education Amendments of 1972, known simply as Title IX, broadly prohibits discrimination on the basis of sex within educational programs and activities.⁴⁰ This prohibition applies to all public or private schools that accept federal financial assistance, from elementary schools on up to institutions of higher education.⁴¹ Title IX provides broad protection through its use of victim-centered language:

*"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 . . ."*⁴²

31. 20 U.S.C.A. § 1092(f)(8) (West, Westlaw through 2014).
 32. 20 U.S.C.A. § 1092(f)(8)(B)(i) (West, Westlaw through 2014).
 33. 20 U.S.C.A. § 1092(f)(8)(A)(i)-(ii) (West, Westlaw through 2014).
 34. 20 U.S.C.A. § 1092(f)(8)(B)(ii) (West, Westlaw through 2014).
 35. 20 U.S.C.A. § 1092(f)(8)(B)(iii) (West, Westlaw through 2014).
 36. 20 U.S.C.A. § 1092(f)(8)(B)(vi) (West, Westlaw through 2014) ("Notification of students of existing counseling, mental health or student services for victims of sexual assault, both on campus and in the community").
 37. 20 U.S.C.A. § 1092(f)(8)(B)(vii) (West, Westlaw through 2014).
 38. 20 U.S.C.A. § 1092(f)(8)(B)(iii) (West, Westlaw through 2014).
 39. 20 U.S.C.A. § 1092(f)(1)(C)(i)-(iii) (West, Westlaw through 2014).
 40. 20 U.S.C.A. § 1681 (West, Westlaw through 2014).
 41. See 20 U.S.C.A. § 1681(c) (West, Westlaw through 2014).
 42. 20 U.S.C.A. § 1681(a) (West, Westlaw through 2014) (emphasis added); *United States v. Price*, 383 U.S. 787, 801 (1966) (noting that to give Title IX its proper scope, "we must accord it a sweep as broad as its language").

Over the years, the U.S. Supreme Court has interpreted this civil rights statute to require schools to prohibit sex discrimination in the form of sexual harassment,⁴³ which, at its most severe, includes instances of sexual violence.⁴⁴ Therefore, schools must respond to complaints of sexual harassment and violence under Title IX.⁴⁵ This is required regardless of whether the sex discrimination was committed by a student, staff, a faculty member, or a third party.⁴⁶ Title IX also requires schools to remedy any ongoing hostile educational environment that results from those forms of sex discrimination.⁴⁷ A hostile environment can arise even when an incident of sexual harassment or sexual violence occurs off campus because its effect may continue on campus.⁴⁸

While Title IX has been interpreted largely through case law, ED also provides interpretations through its issuance of guidance materials. One such guidance is the DCL, which explicitly outlines the responsibilities of colleges and universities to address sexual violence.⁴⁹ The DCL defines sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent,” which includes “intellectual or other disability.”⁵⁰ The DCL also acknowledges that perpetration can occur either through the use of force or against an individual who is incapacitated.⁵¹ Through Title IX regulations and guidance materials, ED also requires schools to disseminate campus policies that prohibit sex discrimination.⁵² These policies must also provide for a grievance procedure that will remedy any resulting hostile educational environment after discrimination occurs.⁵³ Specifically, the DCL reiterates that colleges and universities must address sexual violence through such grievance procedures in a

43. See *Franklin v. Gwinnett Cnty. Public Schs.*, 503 U.S. 60, 75 (1992) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

44. DCL, *supra* note 3, at 2-3; see, e.g., *Jennings v. Univ. of N. Carolina*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006).

45. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) (requiring actual notice to trigger a schools obligation to respond to sex discrimination).

46. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX: REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (2001) [hereinafter “2001 GUIDANCE”], available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 630 (1999) (noting the school must “exercise[] substantial control over both the harasser and the context in which the known harassment occurs.”).

47. Alison Renfrew, *The Building Blocks of Reform: Strengthening Office for Civil Rights to Achieve Title IX’s Objective*, 117 PENN ST. L. REV. 563, 568 (2012).

48. DCL, *supra* note 3, at 4; see also U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 29-30 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

49. DCL, *supra* note 3.

50. *Id.* at 1.

51. *Id.*

52. 30 C.F.R. § 106.8(b) (2014); 2001 GUIDANCE, *supra* note 46, at 20 (“A grievance procedure . . . cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated.”).

53. See 2001 GUIDANCE, *supra* note 46, at 4, 14.

“prompt and equitable manner.”⁵⁴ While the DCL and other guidance materials provide valuable instruction to schools on how to address sexual violence, they do not enjoy the force of law.⁵⁵ Such statutory requirements do exist, however, through the 2013 VAWA Reauthorization.

C. SECTION 304 OF THE 2013 VIOLENCE AGAINST WOMEN ACT REAUTHORIZATION

Section 304 of the 2013 VAWA Reauthorization amended the Clery Act to further require colleges and universities to address sexual violence.⁵⁶ Under VAWA, the public reporting requirements for crime statistics have been expanded to include dating violence, domestic violence, stalking, in addition to sexual assault (hereinafter referred to as the “VAWA crimes”).⁵⁷ Within VAWA, the crime of “sexual assault” reflects recent changes to the FBI’s Unified Crime Reporting (UCR) definitions of sex offenses. Specifically, the UCR definitions shed the labels of “forcible” and “non-forcible” to now use the new sex offense categories of “rape” and “fondling, incest, [and] statutory rape.”⁵⁸ The definition of rape is now gender neutral to cover “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.”⁵⁹

VAWA also expands the Clery Act requirement that colleges and universities provide policies in their ASR on campus education and awareness programs. These policies must now also include programs to promote awareness of all the VAWA crimes as part of two different program categories.⁶⁰ The first category is an initial educational program for “all incoming students and new employees” that includes statements that the college or university prohibits the VAWA crimes; definitions of those crimes within the relevant jurisdiction; a definition of consent in reference to sexual activity; “safe and positive options” for bystander intervention; and risk reduction efforts to assist individuals in avoiding attacks and abusive behavior.⁶¹ The second category is ongoing educational prevention

54. DCL, *supra* note 3, at 8.

55. See *Christenson v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (finding that “policy statements, agency manuals, and enforcement guidelines” lack the force of law and are accorded no deference regarding a courts interpretation or application of a federal law).

56. S. 47, 113th Cong. § 304(a) (2013) (enacted).

57. 20 U.S.C.A. § 1092(f)(1)(F)(iii) (West, Westlaw through 2014).

58. Violence Against Women Act Final Rule, 79 Fed. Reg. 62752, 62784 (proposed Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46(a)) [hereinafter “VAWA Rule”] (defining sexual assault as “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.”). Colleges and universities should consider broadening the definition of fondling to ensure that sexual touching for the purpose of humiliation is included in the definition to adequately address sexual violence that occurs during hazing or for other purposes beyond sexual gratification.

59. *Id.* at 62789 (to be codified at 34 C.F.R. § 668.46(d), Appx. A).

60. 20 U.S.C.A. § 1092(f)(8)(A)(i) (West, Westlaw through 2014).

61. 20 U.S.C.A. § 1092(f)(8)(B)(i) (West, Westlaw through 2014).

and awareness campaigns that reinforce those program topics.⁶² Overall, these educational programs should focus on primary prevention of VAWA crimes before they occur “through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality . . . and seek to change behavior and social norms in healthy and safe directions.”⁶³

Furthermore, the VAWA amendments to the Clery Act require colleges and universities to provide victims written information on their rights. These rights cover confidentiality, existing supportive resources on and off campus, and the availability of accommodations.⁶⁴ VAWA also requires new procedures for campus disciplinary proceedings. Under the VAWA amendments, the Clery Act ensures victims experience a “prompt, fair and impartial” disciplinary process that is conducted by officials trained on the VAWA crimes and how to “protect[] the safety of victims and promote accountability.”⁶⁵ Victims are also ensured the same rights as the accused, which now include right for both parties to have others present at a hearing, to receive the results of a hearing in writing simultaneously, and to appeal the results.⁶⁶ These additional procedural and substantive rights complement those under Title IX as interpreted by ED in the DCL. Colleges and universities must therefore work to comply comprehensively with all the aforementioned federal laws and obligations when improving their campus policies and procedures to effectively address campus sexual violence.

IV. PROGRESSIVE CAMPUS POLICIES AND PROCEEDINGS ON SEXUAL VIOLENCE

Outside of the mandates listed above, federal law leaves colleges and universities with broad discretion to address sexual violence.⁶⁷ With the recent VAWA amendments, the Clery Act is now further aligned with federal obligations under Title IX. Colleges and universities should therefore revise their policies and procedures to ensure comprehensive compliance with federal law while also aiming to address effectively the epidemic of campus sexual violence. Progressive policies will integrate an understanding of national research on sexual violence to encourage reporting and implement effective prevention education programs on campus. Progressive procedures will also aim to effectively investigate complaints, hold appropriate disciplinary proceedings, and provide

62. *Id.*

63. VAWA Rule, *supra* note 58, at 62788 (to be codified at 34 C.F.R. § 668.46(j)(2)(iv)).

64. 20 U.S.C.A. §§ 1092(f)(8)(B)(v)-(vii) (West, Westlaw through 2014).

65. 20 U.S.C.A. § 1092(f)(8)(B)(iv)(I) (West, Westlaw through 2014).

66. *See* 20 U.S.C.A. § 1092(f)(8)(B)(iv)(III) (West, Westlaw through 2014).

67. 20 U.S.C.A. § 1092(f)(2) (West, Westlaw through 2014) (“Nothing in this subsection shall be construed to authorize . . . particular policies, procedures, or practices by institutions of higher education with respect to campus crimes or campus security”); 2001 GUIDANCE, *supra* note 46, at 20 (“Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”).

adequate sanctions for sexual violence when an accused student is found responsible.

A. CAMPUS POLICIES THAT ENCOURAGE REPORTING AND PREVENTION

Under both Title IX and the Clery Act, colleges and universities must provide information on the process for reporting sexual violence and on existing prevention education efforts on campus. Progressive campus policies on reporting should provide survivors with a single process to ensure complaints are received and handled in compliance with federal law. Beyond compliance, these policies should ensure survivors are able to identify nonconsensual sexual experiences as sexual violence and feel encouraged to report because campus officials will believe and support them. Campus policies on prevention education programs should be revised to focus on deterring perpetration and encouraging bystander intervention while also reforming traditional approaches to risk reduction efforts to align with new requirements under VAWA.

1. Policies to Encourage Reporting on Campus

Campus policies on reporting must address all instances of sexual violence, whether perpetrated by students, staff, faculty, or third parties.⁶⁸ While some colleges and universities have developed separate policies for each context,⁶⁹ which is not necessarily prohibited under Title IX, having disjointed policies can confuse survivors and may often result in inequitable grievance procedures that ultimately violate Title IX.⁷⁰ Therefore, a progressive campus reporting policy will develop a single reporting mechanism that provides a consistent process for colleges and universities to receive a complaint of campus sexual violence.

Under Title IX, this reporting policy should make students aware “of what kind of conduct constitutes sexual . . . [violence] or that such conduct is prohibited sex discrimination.”⁷¹ The policy should also provide the definitions of nonconsensual sexual experiences to encourage victims to identify and report the offense to

68. See 2001 GUIDANCE, *supra* note 46; see also 20 U.S.C.A. § 1092(f)(8)(B)(iii) (West, Westlaw through 2014) (noting the VAWA Amendment to the Clery Act struck the qualification of “student” from the reference to victims to ensure similar broad protections for all victims without consideration for the status of the perpetrator).

69. W. SCOTT LEWIS ET AL., NCHERM GROUP, THE TOP TEN THINGS WE NEED TO KNOW ABOUT TITLE IX (THAT THE DCL DIDN’T TELL US) 3 (2013).

70. See, e.g., Resolution Agreement, Univ. of Mont.–Missoula, DOJ DJ No. 169-44-9 (Dep’t of Justice May 9, 2013), OCR Case No. 10126001 (Dep’t of Educ. May 9, 2013) (requiring revision of separate investigative and disciplinary proceedings under the Student Conduct Code and the Student Athlete Conduct Code to provide “the same type of prompt and equitable grievance process”), available at <http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf>.

71. 2001 GUIDANCE, *supra* note 46, at 4, 19-20; DCL, *supra* note 3, at 7. See also Notre Dame College, Voluntary Resolution Agreement, OCR Docket No. 15-09-6001, 1 (Dep’t of Educ. Sept. 24, 2010) [hereinafter “Notre Dame VRA”], available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096001-b.pdf>.

campus officials.⁷² To succinctly accomplish both, colleges and universities should consider providing a single definition of sexual violence that incorporates both the definition of sexual assault under the VAWA amendments to the Clery Act⁷³ and the definition of sexual violence under Title IX provided in the DCL.⁷⁴ This single definition of sexual violence should also provide a clear definition of consent, which is discussed *infra*, to ensure survivors can properly identify instances of sexual violence. Colleges and universities should then ensure that this campus reporting policy is the same under the Title IX grievance procedures as in its ASR to capitalize on the overlapping dissemination requirements under Title IX and the Clery Act.

Beyond dissemination of a single campus policy on reporting, colleges and universities should strive to have this policy overcome the common issue of underreporting. To encourage reporting on campus, a progressive policy should assure survivors that campus officials will believe and take reports of campus sexual violence seriously, both per policy as well as in practice. This is essential because one of the “most important barriers” to addressing instances of sexual violence is the prevalent myth of false reporting that discourages reports by survivors for fear of being disbelieved.⁷⁵ This myth has been debunked by a recent meta-analysis finding that only two to eight percent of sexual violence reports are in fact false.⁷⁶ Colleges and universities should therefore frame a campus reporting policy as supportive of victims first and foremost to help overcome a victim’s fear of being disbelieved by campus officials. Colleges and universities can also encourage reporting by providing information about the availability of accommodations for victims, regardless of whether they access the campus disciplinary process.⁷⁷ Additionally, an amnesty clause should be included for victims who report an incident of sexual violation that may have occurred while the victim was otherwise committing an institutional infraction, such as underage drinking or using illicit drugs.⁷⁸ Such assurances to victims that they will both be believed and supported by campus officials can encourage increased reporting of sexual violence.⁷⁹ Additional information about confiden-

72. See VAWA Rule, *supra* note 58, at 62788 (to be codified at 34 C.F.R. 668.46(j)).

73. *Id.* at 62784 (to be codified at 34 C.F.R. 668.46(a)).

74. See DCL, *supra* note 3, at 1.

75. See KIMBERLY A. LONSWAY ET AL., NAT’L CTR. FOR PROSECUTION OF VIOLENCE AGAINST WOMEN, FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 1 (2009).

76. *Id.* at 2.

77. 20 U.S.C.A. § 1092(f)(8)(B)(vii) (West, Westlaw through 2014).

78. KREBS ET AL., *supra* note 16, at 2-9 (“[S]ome policies may discourage victims from reporting, such as campus policies on drug and alcohol use . . . and policies requiring victims to participate in adjudication.”) (internal citation omitted).

79. ANN FLECK-HENDERSON, FUTURES WITHOUT VIOLENCE, BEYOND TITLE IX: GUIDELINES FOR PREVENTING AND RESPONDING TO GENDER-BASED VIOLENCE IN HIGHER EDUCATION 9 (2012); see also LONSWAY ET AL., *supra* note 75, at 6 (“The most important objective is to create a safe and nonjudgmental environment that encourages honesty even for unflattering or illegal behavior.”).

tial or anonymous reporting options may likewise encourage a victim to seek out support and information about making a report of campus sexual violence.⁸⁰

2. Policies on Prevention Education Programs

While no federal law or obligation requires colleges and universities to offer educational programs to prevent campus sexual violence, both Title IX and the Clery Act strongly encourage it. The Clery Act specifically requires statements of policy on available educational programs within an ASR,⁸¹ while Title IX guidance only encourages it as a proactive way to prevent violence before the campus becomes a hostile environment.⁸² Beyond federal law, prevention education has been encouraged indirectly through judicial scrutiny and ED's own administrative enforcement of Title IX through voluntary resolution agreements. To date, at least one court has considered the lack of prevention education as evidence of deliberate indifference towards sexual violence under Title IX.⁸³ Additionally, within ED enforcement of Title IX through the issuance of voluntary resolution agreements, preventative education has been a mandatory requirement for schools to avoid sanctions.⁸⁴ Progressive colleges and universities should therefore implement policies that include significant prevention educational efforts to avoid noncompliance with federal law and actually seek to prevent sexual violence on campus before it occurs. Taking a cue from the VAWA amendments to the Clery Act, schools should offer incoming and ongoing educational programs that deter perpetration, encourage bystander intervention, and improve risk reduction efforts.⁸⁵

a. Prevention to Deter Perpetration. To prevent sexual violence, college and universities must understand the realities of perpetration. Research has shown that perpetrators of sexual violence often lack empathy, possess hyper-masculine norms, accept traditional notions regarding gender roles, harbor feelings of hostility towards women, and have peers who endorse sexist beliefs and excuse violent behaviors towards women.⁸⁶ Educational efforts that address these behaviors or characteristics may help deter perpetration while also furthering the purpose of Title IX by preventing sex discrimination more generally. The harmful behaviors and characteristics associated with perpetration are often cultivated in

80. NOT ALONE, *supra* note 8, at 11-12.

81. *See supra* Part II.A.

82. DCL, *supra* note 3, at 14-15.

83. *Simpson v. Univ. of Colo.*, 500 F.3d 1170, 1173 (10th Cir. 2007) (reversing a summary judgment in favor of the University of Colorado and remanding for trial due in part to the school's lack of preventative education even after a local district attorney recommended such education due to the high rates of sexual violence during campus athletic recruitment events).

84. *See, e.g.*, E. Mich. Univ. Resolution Agreement, OCR Docket No.15-09-6002, 6-8 (Dep't of Educ. Nov. 22, 2010).

85. 20 U.S.C.A §§ 1092(f)(8)(B)(i)(I)(aa)-(ff) & 1092(f)(8)(B)(i)(II) (West, Westlaw through 2014).

86. *See* KREBS ET AL., *supra* note 16, at 2-11 (citations omitted); Lisak & Miller, *supra* note 21, at 73.

male-only spheres on campus, such as male athletic teams and fraternities, which have higher rates of perpetration.⁸⁷ The increased risk of sexual violence within such communities should push colleges and universities to focus on mitigating the increased risk of perpetration with targeted and specialized prevention education programs. An important element in these programs should be the topic of consent, including appropriate ways to obtain it and identification of when it is not or cannot be present.

Under the VAWA amendments to the Clery Act, colleges and universities must “defin[e] . . . consent in reference to sexual activity” within an ASR.⁸⁸ A careful definition of consent should be crafted to deter coercive sexual practices and put potential perpetrators on notice regarding what behavior is prohibited.⁸⁹ Specifically, progressive campus policies should adopt definitions of consent as requiring an affirmative response from a sexual partner,⁹⁰ as well as one that ensures the presence of consent both at the “initiation and throughout the duration of sexual activity.”⁹¹ Beyond a definition of consent, colleges and universities should provide a comprehensive educational program on obtaining consent, especially when alcohol or another impairing substance is involved. Excessive use of alcohol, or “binge drinking,” is a significant issue on college and universities campuses that has warranted previous judicial notice.⁹² It is also a factor in the majority of campus sexual assaults.⁹³ Research has shown that some perpetrators use alcohol to facilitate sexual violence because it decreases the use of force necessary to subdue a victim and, as a result, lowers the risk of detection by authorities.⁹⁴ Without educational efforts that specifically focus on consent when alcohol is involved, members of the campus community and campus

87. KREBS ET AL., *supra* note 16, at 2-11 (citations omitted).

88. 20 U.S.C.A. § 1092(f)(8)(B)(i)(I)(cc) (West, Westlaw through 2014).

89. *See, e.g.*, MODEL PENAL CODE § 213.1 (Proposed Tentative Draft No. 1 2014) (defining rape in the first and second degree without reference to consent, but noting prohibited coercive and violent measures of securing sexual intercourse).

90. *See, e.g.*, S.B. 967, 2013-2014 Reg. Sess. § 1(a)(1) (Cal. 2014) (defining affirmative consent as “affirmative, conscious and voluntary agreement to engage in sexual activity”).

91. Letter from Laura Dunn & Rory Gerberg, SurvJustice, to White House Task Force on Protecting Students Against Sexual Violence (Apr. 15, 2014) (on file with author); *see also* NOT ALONE, CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES 4 (2014), available at <https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf>.

92. *See generally* Joseph Beckham & Douglas Pearson, *Negligent Liability Issues Involving Colleges and Students: Does a Holistic Learning Environment Heighten Institutional Liability?*, 175 ED. LAW. REP. 379, 392-95 (2003).

93. KREBS ET AL., *supra* note 16, at 5-3 (noting that physical force was used in 4.7% of incidents of sexual violence and victims were incapacitated in 11.1% of sexual assaults); Lisak & Miller, *supra* note 21, at 78 (indicating that in a study of rapists and attempted rapists from a university, 80.8% of participants reported victimizing incapacitated women).

94. Lisak & Miller, *supra* note 21, at 81 (noting that rapists are less often detected and prosecuted when they are predatory within their own social group); KREBS ET AL., *supra* note 16, at 1-4 (“Substance use can incapacitate a victim or make it difficult for her to consent to or refuse sexual activity. It may also decrease a perpetrator’s sense of responsibility or awareness of his behavior, lead to the misinterpretation

officials may wrongly perceive alcohol as an excuse for, rather than a facilitator of, sexual violence. Progressive prevention education policies can deter perpetration by clarifying consent in an effort to distinguish sexual violence and clearly prohibit it within the campus community.

b. Programs that Encourage Bystander Intervention. The VAWA amendments to the Clery Act require colleges and universities to develop campus policies on prevention that specifically include “safe and positive options for bystander intervention.”⁹⁵ While few victims report campus sexual violence to authorities, many informally disclose it to others, such as friends or family.⁹⁶ Those receiving such a disclosure would benefit from bystander intervention training, as they are in the best position to encourage victims both to preserve evidence as well as to report the incident to campus officials. These bystanders also have the ability to report an instance of sexual violence to colleges and universities under both Title IX and the Clery Act.⁹⁷

To ensure effective bystander intervention, student groups and non-profit organizations can work with colleges and universities to develop programs and messaging that ensure student engagement. Such programming should include information on the realities of alcohol-facilitated sexual violence and the norm of repeat perpetration.⁹⁸ Similarly, these programs and materials should prepare bystanders for the reality that most perpetrators are known to the victim and therefore may be within the same social circle.⁹⁹ In addition, VAWA requires bystander intervention in training the campus community on how to “recogniz[e] situations of potential harm, [and] understand[] institutional structures and cultural conditions that facilitate violence” as part of primary prevention efforts geared towards “chang[ing] behavior[s] and social norms in healthy and safe directions.”¹⁰⁰ By empowering bystanders with knowledge about the realities of campus sexual violence, as well as the proper mechanism about how to respond to disclosures from victims or intervene to prevent violence, bystander intervention prevention education can meaningfully address campus sexual violence.

of cues, diminish the victim’s ability to prevent an assault, or lead to women taking risks they might otherwise avoid.”) (internal citation omitted).

95. VAWA Rule, *supra* note 58, at 62788 (to be codified at 34 C.F.R. § 668.46(j)(1)(i)(D)).

96. See FISHER ET AL., *supra* note 14, at 23; KREBS ET AL., *supra* note 16, at 5-21 (seventy percent of force victims and sixty-four percent of incapacity victims report to friend, family, or partner).

97. 2001 GUIDANCE, *supra* note 46, at 13 (stating third party reports provide sufficient notice to schools of a hostile environment under Title IX); see also 20 U.S.C.A. § 1092(f)(8)(B)(i)(I)(dd) (West, Westlaw through 2014).

98. See Lisak & Miller, *supra* note 21, at 78, 80.

99. KREBS ET AL., *supra* note 16, at 2-3 (citing the National Survey of College Women (1999), which notes that over ninety-three percent of sexual assault victims knew the perpetrator); Lisak & Miller, *supra* note 21, at 81.

100. VAWA Rule, *supra* note 58, at 62788 (to be codified at 34 C.F.R. § 668.46(j)(2)(iv)).

c. Improved Risk Reduction Efforts. Historically, colleges and universities offered prevention education programs on sexual violence that focused on risk reduction. These programs were often geared towards women as potential victims and encouraged them to avoid behaviors that increase the risk of stranger rape, such as not walking alone at night.¹⁰¹ Such risk reduction programs may be more ineffective than effective for several reasons. For one, victims already report high rates of self-blame after sexual violence,¹⁰² which is only furthered by prevention messages focused on adjusting one's own behavior to avoid violence. Additionally, victims that experience acquaintance rather than stranger rape may be left unable to identify the experience as sexual violence, which is already cited by victims as a common reason for not reporting to authorities.¹⁰³ Colleges and universities are required under VAWA to develop risk reduction programs that "decrease perpetration, bystander inaction, and . . . increase empowerment for victims to promote safety."¹⁰⁴ These risk reduction programs should focus on preventing acquaintance rape and dating violence in addition to efforts to decrease the risk of stranger sexual violence.¹⁰⁵ Such efforts tie back to the primary prevention requirement under VAWA that colleges and universities promote "positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality."¹⁰⁶ These programs aim both to prevent sexual violence and ensure those who become victims are better able to identify sexual violence and take appropriate action to preserve evidence and report to appropriate officials.¹⁰⁷ Through the provision of preventative education, colleges and universities can ensure their compliance with federal law while also offering meaningful prevention to protect members of the campus community.

101. See, e.g., Kimberly A. Lonsway et al., *Rape Prevention and Risk Reduction: Review of the Research Literature for Practitioners*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE (2011), available at http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1655; Kimberley K. Goodwin, *Origins and Evolution of Campus Sexual Assault Prevention and Policies*, 16 THE VT. CONNECTION 22-31 (1995), available at <http://www.uvm.edu/~vtconn/v16/goodwin1.html>.

102. KREBS ET AL., *supra* note 16, at 5-26 (noting self-blame is prevalent in incapacitated victims of campus sexual violence); see also Laura Dunn, *The High Cost of Silence*, SURVJUSTICE BLOG (Aug. 1, 2011, 7:21 PM), <http://survjustice.blogspot.com/2011/08/high-cost-of-silence.html>.

103. See FISHER ET AL., *supra* note 14, at 23.

104. VAWA Rule, *supra* note 58, at 62788 (to be codified at 34 C.F.R. § 668.46(j)(2)(v)).

105. See KREBS ET AL., *supra* note 16, at 2-3 (finding that ninety-three percent of sexual assault victims knew their perpetrator (according to the National Survey of College Women in 1999), and that about forty percent of assaults occurred in the context of a date).

106. VAWA Rule, *supra* note 58, at 62788 (to be codified at 34 C.F.R. § 668.46(j)(2)(iv)).

107. KREBS ET AL., *supra* note 16, at 5-25; see also FISHER ET AL., *supra* note 14, at 23 ("Victims gave a number of reasons for not reporting their victimization to law enforcement officials . . . Some reasons indicated they did not see the incidents as harmful or important enough to bring in the authorities. Thus, the common answers included that the incident was not serious enough to report and that it was not clear that a crime was committed.").

B. CAMPUS PROCEDURES THAT EFFECTIVELY INVESTIGATE, ADJUDICATE AND
SANCTION PERPETRATION

Federal law requires colleges and universities to provide campus procedures that address complaints of campus sexual violence from the receipt of a report, through the initiation of an investigation, on up to its final resolution.¹⁰⁸ Under Title IX, the procedures must develop a grievance process that is “prompt and equitable”¹⁰⁹ and under the VAWA amendments to the Clery Act the process must be “prompt, fair and impartial.”¹¹⁰ In particular, the central requirement for structuring a progressive campus procedure is equity under Title IX. This means that victims must have rights that are equitable to those offered to the accused as part of due process.¹¹¹ Progressive campus procedures will ensure complaints of sexual violence are promptly investigated and, when appropriate, lead to equitable disciplinary proceedings with adequate sanctions.

1. Initial Response to and Investigation of Complaints

Upon receiving a report of sexual violence, colleges and universities must inform victims of their option to report the incident to law enforcement.¹¹² Although a campus investigation may be delayed to allow a criminal investigation to proceed first, the DCL states that colleges and universities “should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation.”¹¹³ Title IX therefore embodies an independent federal obligation for schools to resolve a complaint of sexual violence,¹¹⁴ even when an incident qualifies as a crime within a certain jurisdiction.¹¹⁵ This resulting duty allows colleges and universities to ensure the safety of both the victim and the broader campus community through its own procedures.¹¹⁶ In addition to safety, campus procedures need to include interim measures that address any hostile educational environment resulting from sexual violence according to Title IX.

108. DCL, *supra* note 3, at 9-10.

109. *Id.* at 6.

110. 20 U.S.C.A. § 1092(f)(8)(B)(iv)(I)(aa) (West, Westlaw through 2014).

111. LEWIS ET AL., *supra* note 69, at 4 (finding Title IX’s equity requirements removes “one-sided due process protections,” such as those found in employment discrimination complaints under Title VII).

112. DCL, *supra* note 3, at 10 (“A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school’s internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.”).

113. *Id.* (suggesting ten days may be sufficient for deferring a campus investigation to allow a criminal investigation).

114. *Id.* at 4, 10.

115. See 2001 GUIDANCE, *supra* note 46, at 21 (noting an independent duty for a school to respond to sexual harassment that may constitute both sex discrimination and criminal conduct because police reports may not be determinative of a Title IX violation, given the different legal standards for criminal investigations and Title IX).

116. See DCL, *supra* note 3, at 10.

When initially responding to a complaint of sexual violence, colleges and universities must determine whether to investigate. Under Title IX, schools must consider the totality of the circumstances to determine the presence of a hostile educational environment resulting from sexual violence.¹¹⁷ This review considers the unwanted nature of the sexual contact without mistaking acquiescence as sufficient consent to sexual contact.¹¹⁸ Thus, having a progressive campus policy defining consent as an affirmative act present throughout the duration of any sexual contact or activity assists in such a determination.¹¹⁹ When a report of sexual violence is supported by the totality of the circumstances, colleges and universities should then undertake a prompt investigation within a sixty-day window.¹²⁰ To promptly interview relevant parties, colleges and universities should establish expedient timelines during which the accused and relevant witnesses can schedule and attend investigatory interviews. To ensure individuals are cooperative with the campus investigation, academic and co-curricular eligibility can be leveraged, in addition to other campus privileges. Given the overlap of the Title IX and the Clery Act requirements that campus investigations must be prompt, progressive investigative procedures should be a priority for colleges and universities.

After a report of sexual violence, colleges and universities also must gain the consent of the victim to proceed with an investigation or determine that it must proceed regardless to ensure the safety of the broader campus community.¹²¹ This determination must occur even when a victim reports sexual violence either anonymously or confidentially.¹²² Normally, such limited reporting of campus sexual violence would prevent a college or university from undertaking an investigation,¹²³ however, a school may weigh a victim's request for confidentiality against the following factors regarding campus community safety: the seriousness of the sexual violence; the victim's age; and whether there have been other complaints about the same accused individual.¹²⁴ When factors exist to authorize a school to investigate without a victim's consent, colleges and universities must still protect confidentiality to the furthest extent possible.¹²⁵ An alternative approach that respects a victim's lack of consent to an investigation,

117. See 2001 GUIDANCE, *supra* note 46, at 7.

118. See *id.* at 8; see also Notre Dame VRA, *supra* note 71, at 5 (finding a violation of Title IX when a campus procedure allowed an associate dean or designee to "dispose of the charges against the accused prior to the disciplinary hearing if he deemed the claim lacking in merit" rather than using a prompt and equitable campus process).

119. See Dunn & Gerberg, *supra* note 91.

120. DCL, *supra* note 3, at 12.

121. *Id.* at 5.

122. *Id.*

123. *Id.* ("If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.")

124. *Id.*

125. See LEWIS ET AL., *supra* note 69, at 13.

and may still protect the campus community, may include implementation of a responsive prevention education program targeting the problem individual, group, or area of campus noted in the complaint of sexual violence. Colleges and universities must therefore approach every complaint of sexual violence with consideration both for the victim's wishes as well as the safety needs of the community.

After determining that a report of sexual violence should be investigated, both Title IX and the Clery Act require colleges and universities to take interim steps prior to the conclusion of any campus disciplinary proceeding. Title IX specifically requires schools to take "immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects" after an incident of sexual violence.¹²⁶ To protect victims and the community, colleges and universities may even suspend the accused pending a final determination of the complaint.¹²⁷ This interim step must be followed by a prompt campus disciplinary hearing and is most appropriate in circumstances where a complaint of sexual violence is supported by evidence.¹²⁸ Academic and other campus accommodations are also required as interim efforts that enable victims to continue their education free from the effects of the ongoing hostile environment created by sexual violence.¹²⁹ Such interim measures should not disproportionately burden a victim through only changing his or her academic or living arrangements, given Title IX's requirement of equity.¹³⁰ To complement the obligation for accommodations under Title IX, the VAWA amendments to the Clery Act require campus policies to include written notification of available "academic, living, transportation, and working" accommodations for victims.¹³¹ Such interim steps should be present in all progressive campus procedures as part of an initial response and investigation into a complaint of sexual violence.

2. Campus Disciplinary Hearings and Final Resolutions

During campus disciplinary hearings addressing complaints of sexual violence, an accused perpetrator must be provided due process and the victim must be offered an equitable process pursuant to Title IX.¹³² Progressive campus

126. DCL, *supra* note 3, at 15; *see also* 2001 GUIDANCE, *supra* note 46, at 4.

127. John Friedl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701, 712 (2000) (noting that "where the alleged violator, the victims, and potential witnesses all live together in the same campus environment, the justification for immediately suspending the accused student can be strong;" and finding immediate sanctions for the threat of rape appropriate as long as a prompt proceeding is provided, given the public safety risk).

128. *Id.*

129. DCL, *supra* note 3, at 16-17 (noting that remedies may include escorts between classes and activities, separate classes, different residence halls, academic support, victim services, etc.).

130. *Id.* at 15-16.

131. 20 U.S.C.A. § 1092(f)(8)(B)(vi) (West, Westlaw through 2014) (noting accommodations are available regardless of whether a victim reports the incident of sexual violence to law enforcement).

132. *See, e.g.*, LEWIS ET AL., *supra* note 69, at 4 (discussing how according to Title IX, requiring multi-tiered faculty appeals means requiring the same equity for accusing campus members).

procedures must structure hearings to provide both considerations while also seeking to prevent interactions that perpetuate any ongoing hostile environment resulting from an incident of sexual violence. Upon the conclusion of such a hearing, if an accused perpetrator is found responsible, colleges and universities must impose appropriate sanctions to fully remedy the hostile environment created by the sexual violence.

Regarding due process, courts have held that in campus hearings, an accused perpetrator should be given notice and the opportunity to be heard.¹³³ In *Osteen v. Henley*, Judge Posner wrote for a Seventh Circuit panel reaffirming these minimal due process standards in public college and university disciplinary hearings.¹³⁴ The court went on to reject the contention that further procedural safeguards were needed for the accused perpetrator, such as the right to counsel or to cross-examine witnesses, by averring that the “danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsion is slight. The relation of student to universities is, after all, essentially that of customer to seller.”¹³⁵ Even when the disciplinary hearing may result in a sanction of either suspension or expulsion these minimum due process standards for the accused hold.¹³⁶

In providing these minimum standards for due process, colleges and university procedures must also give an equitable process to victims. One equitable requirement is that schools use the preponderance of the evidence standard during disciplinary hearings.¹³⁷ The VAWA amendments to the Clery Act add specific equitable requirements for campus disciplinary hearings, such as both parties having the same right to have witnesses and an “advisor of . . . choice” present during the campus disciplinary proceedings, as well as the ability to

133. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (“Among other things, the State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”).

134. *Osteen v. Henley*, 13 F.3d 221, 225-26 (7th Cir. 1993) (“We are reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings, mindful also that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference.”) (internal citation omitted). But see Collin Eaton, *Jury Verdict in Sex-Assault Case at Sewanee Sends Warning to Private Colleges*, CHRON. HIGHER EDUC., Sept. 2, 2011 (noting that private universities are not bound by the same due process rights that apply to public institutions); see also *Doe v. Univ. of the South*, No. 4:09-cv-62, 2011 WL 1258104, at *13 (E.D. Tenn. March 31, 2011).

135. *Osteen*, 13 F.3d at 226.

136. Friedl, *supra* note 127, at 710 (“Even when the possible punishment is suspension or permanent expulsion from an institution, students may not have a number of protections available to them, including the right to confront and cross-examine witnesses under oath, the right to compel testimony of witnesses, the right to have an attorney examine witnesses and speak on behalf of the student, and the right to refuse to testify without having one’s silence used against one.”).

137. DCL, *supra* note 3, at 10-11 (“Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.”).

appeal the results of the hearing.¹³⁸ Ensuring that victims have equitable rights puts both parties in a campus hearing on equal footing to ensure both due process as well as an appropriate process aimed at effectively addressing sexual violence.

Beyond equitable considerations, progressive campus procedures will ensure campus disciplinary hearings do not perpetuate a hostile environment, such as might be created when an accused is allowed to cross-examine a victim.¹³⁹ Rather than opting for such an adversarial model for campus proceedings, colleges and universities may better assure equity and prevention of any ongoing hostile environment under Title IX, as well as impartiality under the Clery Act, through an inquisitorial approach to the campus disciplinary hearing.¹⁴⁰ An inquisitorial model requires adjudicators to have knowledge to guide the hearing inquiry, which matches the requirement under VAWA for campus officials to receive annual trainings that ensure hearings “protect the safety of victims and promot[e] accountability” for VAWA crimes on campus.¹⁴¹ Such trainings should also ensure officials avoid needless inquiry into a victim’s private life, which would perpetuate a hostile environment, and instead properly focus on an accused student’s alleged behavior, as recommended by the White House Task Force on Protecting Students against Sexual Assault.¹⁴²

Upon the conclusion of the campus disciplinary process, the VAWA amendments to the Clery Act require that both the victim and accused receive the final results simultaneously and in writing.¹⁴³ Such a disclosure does not violate FERPA,¹⁴⁴ which authorizes victims to receive results regarding sexual violence complaints if the offense either involves the use or threat of physical force or

138. 20 U.S.C.A. §§ 1092(f)(8)(B)(iv)(II) & (III) (West, Westlaw through 2014); *see also* BRETT A. SOKOLOW, NAT’L CTR. FOR HIGHER EDUC. RISK MGMT., *INSIDE AN OCR TITLE IX INVESTIGATION* 6, (2006) (noting that an appeal process must give due deference to an initial campus disciplinary hearing to avoid a possible violation of Title IX).

139. *See, e.g.*, DCL, *supra* note 3, at 12 (“OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”).

140. *See generally* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636 (2009) (“What makes a system adversarial rather than inquisitorial . . . [is] the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and argument pro and con adduced by the parties.”) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991)).

141. 20 U.S.C.A. § 1092(f)(B)(iv)(I)(bb) (West, Westlaw through 2014).

142. NOT ALONE, *supra* note 8, at 13-14.

143. 20 U.S.C.A. § 1092(f)(8)(B)(iv)(III) (West, Westlaw through 2014) (“Both the accuser and the accused shall be simultaneously informed, in writing, [of hearing outcomes].”).

144. 20 U.S.C.A. § 1232g(b)(1)(6)(A) (West, Westlaw through 2014) (“Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence, or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.”); VAWA Rule, *supra* note 58, at 62789 (to be codified at 34 C.F.R. § 668.46(l)).

qualifies as a felony involving a “substantial risk” of physical force,¹⁴⁵ which is met in a complaint of sexual violence. The final rule for the VAWA amendments to the Clery Act further requires colleges and universities to provide the reason for the findings as well as for the sanction imposed.¹⁴⁶ This complements the Title IX guidance, which likewise authorizes victims to receive information on the results of disciplinary hearings.¹⁴⁷ Colleges and universities cannot impose a “gag order,” or non-disclosure agreements, on victims as a condition of receiving these final results under FERPA.¹⁴⁸

Regarding the final results, colleges and universities historically have imposed minimal sanctions on an accused perpetrator found responsible for campus sexual violence.¹⁴⁹ While Title IX does not require specific sanctions when an accused student is found responsible through a campus disciplinary hearing,¹⁵⁰ ED does state that sexual violence is the most severe form of sex discrimination to suggest it warrants the highest of sanctions.¹⁵¹ Colleges and universities already have the authority to impose significant sanctions on those found responsible for sexual violence given their duty to the broader campus community. Even sexual violence that occurs off campus may warrant significant sanction when it “impacts the [institution’s educational] mission.”¹⁵² Since

145. 20 U.S.C.A. § 1232g(b)(1)(6)(A) (West, Westlaw through 2014) (citing 18 U.S.C.A. § 16 (1984)); 34 C.F.R. § 99.39 (West, Westlaw through 2014)).

146. VAWA Rule, *supra* note 58, at 62789 (to be codified at 34 C.F.R. § 668.46(k)(3)(iv)).

147. DCL, *supra* note 3, at 13 (noting FERPA permits victims to receive information when a student is found responsible under Title IX when the sanction “directly relates” to the victim); 2001 GUIDANCE, *supra* note 46, at vi-viii.

148. DCL, *supra* note 3, at 14 (“Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act. Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of the information.”); SOKOLOW, *supra* note 138, at 1.

149. *See generally* Jones, *supra* note 2; SOKOLOW, *supra* note 138, at 5 (recounting Georgetown University rejecting a hearing recommendation of expulsion for a student, found responsible for drugging and sexually assaulting a fellow student in favor of a one-year suspension, with no co-curricular restrictions, to allow him to return to campus while the victim continued her education). *See also* Lombardi, *supra* note 1 (recounting a summer suspension for an accused student found responsible for sexual contact without consent (for a complaint of sexual assault) at Indiana University); Tyler Kingkade, *Brown University Will Allow Rapist Who Choked His Victim Back on Campus*, HUFFINGTON POST (Apr. 23, 2014), http://www.huffingtonpost.com/2014/04/23/brown-university-rapist-strangle_n_5201644.html (recounting how a student found responsible for choking and raping a fellow student was allowed to return to campus while the victim was still attending).

150. 2001 GUIDANCE, *supra* note 46, at iii (noting that while “there may be more than one right way to respond” to Title IX complaints, campus officials should respond to sexual harassment and violence “in the same reasonable, commonsense manner as they would to other types of serious misconduct”).

151. *Id.* at 6 (clarifying that a single instance of sexual assault is sufficient to create a hostile environment); *see also id.* at 21 (stating that severity of sexual violence means informal mediation between parties is never appropriate under Title IX).

152. J. Wes Kiplinger, *Defining Off-Campus Misconduct that “Impacts the Mission:” A New Approach*, 4 ST. THOMAS L.J. 87, 89 (2006). The standard of “impacts the mission” considers four factors within its totality of the circumstances inquiry: (i) the university’s mission, (ii) the nature of the misconduct, (iii) the university’s culture, and (iv) the risk of university liability for such misconduct.

courts have supported extreme campus sanctions in response to the mere threat of sexual violence,¹⁵³ progressive college and university procedures should create a default sanction of expulsion in response to sexual violence. This matches the educational role that colleges and universities have “long accepted . . . [in] shaping tomorrow’s leaders. Inherent in that role is the obligation to discipline students for violations of rules promulgated by university administrators, as well as for violations of federal, state, and local law.”¹⁵⁴ A default sanction of expulsion would also protect the broader campus community from the known risk of repeat perpetration¹⁵⁵ while also effectively preventing an ongoing hostile educational environment for the victim, which is perpetuated when a perpetrator is allowed on campus.¹⁵⁶

V. CONCLUSION

Now more than ever, colleges and universities must address the prevalent problem of campus sexual violence. Given the increased attention to campus sexual violence from the federal government, colleges and universities need progressive campus policies and procedures to comply comprehensively with Title IX and the Clery Act. While the Clery Act has historically focused on exposing the prevalence of campus crime, the VAWA amendments have expanded its focus to further require preventative education and specific equitable rights for both the victim and the accused in campus disciplinary processes. This expansion complements existing Title IX obligations to promptly and equitably address sex discrimination in the form of sexual violence. Colleges and universities aiming for comprehensive compliance with federal law should go further and incorporate an understanding of research on campus sexual violence to ensure resulting policies and procedures prevent and adequately address instances of sexual violence. Through these concerted efforts, colleges and universities can properly address the ongoing epidemic of campus sexual violence that has cost so much to victims like me.

Such an inquiry weighs heavily in favor of disciplinary action when sexual violence is present, given the risk to the campus community. *Id.*

153. *See, e.g.*, *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995) (upholding a suspension that turned into a permanent expulsion after a student electronically communicated threats to kidnap and rape a fellow student despite federal charges being dropped, noting the reasonableness of university action to protect the female student even if these were just fantasies).

154. Kiplinger, *supra* note 152, at 88.

155. *See* Gustafson, *supra* note 21.

156. *See* Tom House, *Brown Faces Federal Complaint after Sexual Assault Controversy*, USA TODAY, June 2, 2014, <http://college.usatoday.com/2014/06/02/brown-university-allows-rapist-back-on-campus-faces-federal-complaint/>.