Addressing Sexual Violence on College Campuses
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Each year, an average of 237,868 Americans over the age of 12 are sexually assaulted.\(^1\) An estimated 19.3 percent of women and 1.7 percent of men have been raped during their lifetimes.\(^2\) At institutions of higher education (IHEs), one in five undergraduate women\(^3\) and one in 16 men\(^4\) experience attempted or completed sexual assault. Women between the ages of 15 and 24 who are attending an IHE are four times more likely than other groups to be sexually assaulted.\(^5\) Most of these assaults occur during the “Red Zone,” defined as the beginning of a student’s first academic year.

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\(^1\) How Often Does Sexual Assault Occur?, RAINN (last visited Oct. 8, 2014), https://www.rainn.org/get-information/statistics/frequency-of-sexual-assault (compiling data from BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY (2011) (defining sexual assault as “attacks or attempted attacks generally involving unwanted sexual contact between the victim and offender that may or may not include force.”)). “Sexual assault” is defined as any type of sexual contact or behavior that occurs without the explicit consent of the recipient, including forced sexual intercourse, forcible sodomy, child molestation, incest, fondling and attempted rape. http://www.justice.gov/ovw/sexual-assault.

\(^2\) CENTER FOR DISEASE CONTROL AND PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING AND INTIMATE PARTNER VIOLENCE VICTIMIZATION – NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES (2011).

\(^3\) MAJ. STAFF OF S. COMM. ON FINANCIAL & CONTRACTING OVSERISY, 114TH CONG., SEXUAL VIOLENCE ON CAMPUS (COMM. PRINT 2014), available at http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf [hereinafier MCCASKILL REPORT].


through Thanksgiving break. While the average person associates sexual assault with violent attacks by strangers, in reality, close to 90 percent of campus sexual assault victims are acquainted with their attacker. Moreover, most sexual assaults on campus are committed by a small number of “repeat offenders.” In one study, 63 percent of the men who admitted to committing rape in college stated that they had committed an average of six rapes each.

While the commission of sexual assault on college campus is certainly not a new phenomenon, over recent years, this issue has become more widely publicized. The media has focused on the number of schools currently under investigation by the Office of Civil Rights of the U.S. Department of Education (DOE), as well as on “rape culture” and binge drinking on college campuses. The issues surrounding the prevention, investigation and prosecution of college campus sexual assault are varied and sometimes controversial. From the definitions of “consent” and “incapacitation” to the burden of proof that should be used during administrative investigations to the need for improved communication between law enforcement and universities, it is impossible to devise a “one-size-fits-all” solution.

This article examines these sometimes controversial issues and outlines the relevant recent legislative activity. It begins by identifying the common issues encountered by stakeholders and outlines the current federal legislation relating to campus sexual assaults. The article then explores pending legislation and details recent steps taken by the federal actors and the state attorneys general to address these issues, with a focus on the recent NAAG Eastern Region Meeting, which examined these issues from the perspectives of all groups involved. The meeting was hosted by NAAG Eastern Region Chair and Rhode Island Attorney General Peter F. Kilmartin in Providence, Sept. 30 – Oct.1.

Common Issues Encountered by Stakeholders

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Why Don’t Most Campus Sexual Assault Victims Report These Crimes?

A recent U.S. Senate report found that less than five percent of college campus sexual assault victims report their attacks to law enforcement.9 Many victims “experienced confusion over how to report, confusion over acceptable standards of conduct and definitions of rape and sexual assault, and fear of punishment for activities preceding some assaults, such as underage drinking.”10 At least half of campus sexual assaults involve the use of alcohol or drugs by the victim and/or the perpetrator.11 Many victims blame themselves or fear blame from other people because of their drug or alcohol use, their manner of dress or their past sexual history.12 Victims are also often embarrassed and unwilling to share their experiences with their friends and family.13

The nature of campus sexual assaults makes victims particularly reluctant to report. As stated in the introduction to this article, most perpetrators are acquaintances of the victim. Many college campuses are mini-universes of their own and victims are aware that they will encounter those who assaulted them in their classes, dormitories and dining halls. Victims often fear retaliation from the perpetrator or his friends and do not want to become ostracized from this close-knit community.14 Last, many victims do not have faith in the criminal justice system.15

Marginalized groups report at even lower rates. Men often feel guilty for not “protecting themselves” and fear that they will not be believed or that their masculinity will be questioned.16 Members of the LGBTQ community sometimes fear being “outed,” worry that they will be ridiculed

9 SEXUAL VIOLENCE ON CAMPUS, supra note 3, at 1.
10 Id. at 4-5.
13 Id.
14 Id.
because of a campus’ lack of acceptance of their sexual orientation, and do not believe that the campus’ services are inclusive.\(^\text{17}\) Cultural considerations can also cause victims to fear reporting.\(^\text{18}\)

**Special Vulnerabilities of College Sex Crimes Victims**

Not only are college campus sexual assault victims often reluctant to report these crimes, but their uniqueness as a population means that they have to struggle with a host of difficulties beyond those faced by victims of non-campus sexual assaults.\(^\text{19}\) For example, these victims are transient. Many students are living on-campus, away from their permanent home, and often do not have their support system, which likely includes their parents, in the immediate vicinity. Members of this group who may not want their parents to know about the assault may face difficulties in obtaining sexual assault examinations, prophylactic prescriptions, and psychological care, as they are often dependents on their parents’ medical insurance. Moreover, if the victim cooperates in the criminal investigation, and there is enough evidence to move forward with the case, the investigation may take longer than the victim’s time at the IHE or the trial might be scheduled for a time in which school is not in session and the victim is not on campus. Victim advocates, school administrators and prosecutors must be mindful of these special factors and work with the victim to ensure his or her needs are met and that the investigation moves forward in a victim-centered manner.

*How is “Incapacitation” Defined?*


\(^{18}\) Why Don’t All Survivors Report?, supra note 15.

\(^{19}\) These unique circumstances were described by Liam Lowney, Executive Director of the Massachusetts Office for Victim Assistance, during the 2014 NAAG Eastern Region Meeting. See also Sexual Assault on College Campuses: Hearing Before the Boston City Council (April 26, 2011) (statement of Liam Lowney, Chief of Victim Services, Office of the Att’y Gen.), available at http://www.mass.gov/ago/docs/testimonies/bcc-sexual-assault-testimony.pdf.
In many campus sexual assaults in which the victim is acquainted with the attacker, the victim is under the influence of alcohol and/or drugs,\textsuperscript{20} to the point that the victim later felt that he or she had been too incapacitated to consent to the sexual activity. While college campus conduct codes often define “incapacitation,” the campus definition may be quite different from that of the penal code of the state in which the campus resides.

For example, New York’s penal code states that, with relation to incapacitation caused by drugs or alcohol, such drugs or alcohol must have been involuntarily ingested.\textsuperscript{21} If the victim voluntarily ingested drugs or alcohol, in order to prove that the victim was unable to consent to the conduct, the prosecutor must show that the victim was unconscious or asleep at the time of the assault,\textsuperscript{22} which is almost impossible due to gaps in memory.\textsuperscript{23} However, colleges within New York state do not use such a narrow definition of incapacitation.\textsuperscript{24} The result is that there may be cases that cannot be prosecuted criminally, but can be adjudicated through the college grievance procedures, which is why it is so vital that college investigators be well-trained and operate using well-articulated, victim-centered policies.

\textit{What Are the Current Federal Regulations That Apply to College Campuses?}

\textit{The Clery Act}

\textsuperscript{20} The majority of campus sexual assaults occur when women are incapacitated due to their use of substances, primarily alcohol. KREBS, \textit{supra} note 11, at xvii.
\textsuperscript{21} N.Y. PENAL LAW § 130.00(6).
\textsuperscript{22} N.Y. PENAL LAW § 130.00(7).
\textsuperscript{23} This inconsistency was explained by Martha Bashford, Chief of the Sex Crimes Unit of the New York County District Attorney’s Office, who served as a panelist at NAAG’s 2014 Eastern Region Meeting.
\textsuperscript{24} See, e.g., \textit{Definition of Sexual Assault}, SARAH LAWRENCE COLLEGE, http://www.slc.edu/offices-services/security/assault/Definition_of_Sexual_Assault.html (last visited Oct. 8, 2014) (defining mental incapacity “to include those who have consumed any alcohol or drugs”); \textit{Defining Sexual Assault}, ITHACA COLLEGE, http://www.ithaca.edu/sacl/share/definitions (last visited Oct. 8, 2014) (defining sexual violence as “physical sexual acts perpetrated against a person’s will or when a person is incapable of giving consent (for example, due to the person’s...use of drugs or alcohol...))”); \textit{Equity Grievance Policy}, COLGATE UNIVERSITY, http://www.colgate.edu/offices-and-services/deanofthecollege/biassexualmisconductresources/eonondiscriminationpolicy (last visited Oct. 8, 2014) (requiring mutual consent for sexual activity, and adding that “[a] person cannot consent if that individual is unable to understand what is happening or is disoriented, helpless, asleep, or unconscious for any reason, including due to alcohol or other drugs”).
Congress amended the Higher Education Act of 1965 by passing the Crime Awareness and Campus Security Act of 1990, which required all IHEs which receive federal funding for student financial assistance programs to disclose campus crime statistics and security information. The Act was amended in 1992 to require IHEs to provide survivors of campus sexual assaults with certain basic rights, outlined in the Campus Sexual Assaults Victims’ Bill of Rights, and again in 1998, at which time the name of the Act was changed to the Jeanne Clery Disclosure of Campus Sexual Policy and Campus Crime Statistics (Clery Act).

Pursuant to the 1998 amendment, the Clery Act requires IHEs to publish an annual report disclosing campus security policies and three years’ worth of certain crime statistics and make timely warnings to the campus community about crimes that pose an ongoing threat to students and employees. Each IHE which has a police or security department must also ensure that the department maintains a crime log documenting the “nature, date, time and general location of each crime” and its

26 Only three United States institutions of higher education do not receive any federal funding: Hillsdale College in Michigan, Grove City College in Pennsylvania, and Patrick Henry College in Virginia. Katie Jo Baumgardner, Note, Resisting Rulemaking: Challenging the Montana Settlement’s Title IX Sexual Harassment Blueprint, 89 Notre Dame L. Rev. 1813, 1814 n.3 (2014).
27 Campus Sexual Assault Victims Bill of Rights of 1992, Pub. L. No. 102-325, § 486(c), 106 Stat. 622 (1992) (codified at 20 U.S.C. § 1092(f)(1)(F)(ii); see also Understanding the Law, THE CENTER FOR PUBLIC INTEGRITY, http://www.publicintegrity.org/2009/12/01/9049/understanding-law (last visited Oct. 8, 2014). Schools must notify victims of counseling opportunities, make the victim aware that she has the option of reporting the crime to the police and give the victim the ability to change classes or dorms in order to avoid contact with the accused. The guidelines also require that during administrative hearings, the victim and the accused must both be given the opportunity to present witnesses. See OFFICE FOR CIVIL RIGHTS, DEP’T OF ED., DEAR COLLEAGUE LETTER (April 4, 2011), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.
29 20 U.S.C. § 1092(f)(1)(F) (2014). Note that the Clery Act requires disclosure of all reported crime, not just criminal convictions or administrative adjudications of guilty.
30 Notably, the Act’s requirements extend beyond an IHE’s physical campus. Subpart Twelve sets out four separate categories for institutions to use in their reports when classifying incidents: criminal offenses occurring on campus, in or on a non-campus building or property, on public property, and in dormitories or other residential facilities for students on campus. 20 U.S.C. 1092(f)(12) (2014).
The Violence Against Women Reauthorization Act of 2013 (VAWA) constitutes the most recent change to the Clery Act. Section 304 of VAWA, known as the Campus Sexual Violence Act (SaVE Act) provision, not only expands the mandated reporting requirements under Clery to include domestic violence, dating violence and stalking but also requires IHEs to adopt certain disciplinary procedures, and prevention and training programs for students and investigators. Included in the Act are requirements that IHEs articulate a “statement of the standard of evidence” in their disciplinary codes, identify “sanctions or protective measures” that may be imposed after the determination that an offense has been committed, and address how victim confidentiality will be protected. VAWA also identifies certain rights granted to both the complainant and the accused.

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33 Id.
34 Violence Against Women Act, 42 U.S.C.S. 13925(a) (2014); see also Summary of the Jeanne Clery Act, CLERY CENTER, http://clerycenter.org/summary-jeanne-clery-act (last visited Oct. 8, 2014). Note that prior to the VAWA reauthorization, but after the 1998 changes, the Clery Act was further amended on two additional occasions, in 2000 and 2008. These amendments addressed issues relating to sex offender notification, campus emergency responses, and the protection of victims and “whistleblowers” from retaliation.
35 42 U.S.C.S. § 13925(a)(8) (defining domestic violence as violent misdemeanor and felony offenses committed by the victim’s current or former spouse, current or former cohabitant, person similarly situated under domestic or family violence law, or anyone else protected under domestic or family violence law).
36 42 U.S.C.S. § 13925(a)(10) (defining dating violence as violence by a person who has been in a romantic or intimate relationship with the victim. Whether there was such relationship will be gauged by its length, type, and frequency of interaction).
37 42 U.S.C.S. § 13925(a)(24) (defining stalking as a course of conduct directed at a specific person that would cause a reasonable person to fear for her, his or others’ safety, or to suffer substantial emotional distress).
39 20 U.S.C. § 1092(f )(8)(A)(ii). Note that the Act does not prescribe which standard should be used.
41 Requirements include: (1) a statement that the institution prohibits those offenses; (2) the definition of those offenses in the applicable jurisdiction; (3) the definition of consent, with reference to sexual offenses, in the applicable jurisdiction; (4) “safe and positive” options for bystander intervention an individual may take to “prevent harm or intervene” in risky situations; (5) recognition of signs of abusive behavior and how to avoid potential attacks; (6) ongoing prevention and awareness campaigns for students and faculty on all of the above. New Requirements of the VAWA, supra note 38, at 3.
42 VAWA specifies that both are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an
The DOE is required to centrally collect and disseminate the crime statistics and to enforce the Clery Act mandates. If an IHE fails to comply with the Clery Act regulations, it may be fined or may lose eligibility to participate in federal student aid programs. As of the date of publication of this article, approximately 79 IHEs are currently under investigation by the DOE. According to Alison Kiss, executive director of the Clery Center for Security on Campus and a panelist at NAAG’s Eastern Region Meeting, common mistakes made by IHEs when implementing the Clery Act regulations include a failure to report based on proper geography, lack of adequate policy statements, inadequate collection of crime statistics, inconsistent policies, lack of training, poor record keeping, lack of institutional support.

FERPA

The Family Education Rights and Privacy Act (FERPA) protects the rights of students to access education records, challenge the content of these records, and to have control over the disclosure of personal identifying information contained in the records. Under FERPA, “education records” are defined as records, files, documents and other materials which contain information directly relating to a subject and are maintained by an educational agency or institution or by a person acting for an agency or institution. All IHEs which receive federal funding must comply with FERPA.

advisor of their choice, and both must be notified simultaneously and in writing of the outcome, appeal procedures, and when the result becomes final. Id.

43 The loss of federal aid is commonly known as “the nuclear option.” It has never been used, but it serves as a strong incentive to cooperate. Currently, additional, less severe penalties are being considered, but opponents to the addition of such penalties argue that with the implementation of lesser penalties, the threat of loss of funding won’t mean as much to the institutions. See Tyler Kingkade, Senators Eye New Penalties for Colleges Mishandling Sexual Assault Cases, Huffington Post (June 27, 2014, 12:59 PM), http://www.huffingtonpost.com/2014/06/27/colleges-mishandling-sexual-assault-penalties_n_5535458.html.


There are certain exceptions to the FERPA regulations which relate to campus sexual assault. For example, campus law enforcement records do not fall into the category of “education records.” Additionally, an exception applies when the release of the education records is necessary to protect the health or safety of others. The application of FERPA exceptions to complainant confidentiality is discussed later in this article.

**Title IX**

Title IX of the Educational Amendments of 1972 states that “[n]o person...shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving [federal] financial assistance.” Courts have interpreted the language of Title IX to prohibit sexual violence as a form of sex discrimination. The conduct at issue will be deemed prohibited by Title IX if it is sufficiently serious that it interferes with a student’s ability to participate in or benefit from a school’s program. Title IX applies to all programs,

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48 20 U.S.C.S. §1232(g)(a)(2)(4)(B)(ii) (“Records maintained by a law enforcement unit of the educational agency or institution that were created by the law enforcement unit for the purpose of law enforcement” do not constitute “education records.”).
50 20 U.S.C.S. § 1681(a). However, note that military schools are not subject to Title IX. See 20 USCS § 1681(a)(4).
51 Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, other verbal, non-verbal or physical conduct of a sexual nature, sexual misconduct or violence, and other verbal, non-verbal or physical conduct of a sexual nature. See OFFICE OF CIVIL RIGHTS, U.S. DEP’T. OF ED., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS OR THIRD PARTIES 2 (2011), available at https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf. Sexual violence includes physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent, such as rape, sexual assault, sexual battery, sexual abuse and sexual coercion. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (holding that sexual harassment can constitute discrimination).
services and opportunities offered by schools, on or off campus, and protects students, employees, third parties and minors.

An IHE violates a student’s Title IX rights when it has been given notice of the alleged sexual violence and “fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence and, as appropriate, remedy its effects.” An IHE is deemed to have notice of the assault if a “responsible employee” knew or should have known about the incident. A “responsible employee” is defined as “any employee who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this duty or authority.” Responsible employees have a duty to report all relevant details of a sexual assault to the IHE’s Title IX coordinator.

Under Title IX, institutions are also required to adopt and publish policies prohibiting sex-based discrimination, designate a Title IX coordinator and publish notice of discrimination. The Office on Constitutional Rights (OCR) of the DOE, which is responsible for the enforcement of Title IX, also recommends that schools implement education and training programs.

53 Dear Colleague Letter, supra note 27, at 2.
54 See Office for Civil Rights, Dept. of Ed., Questions and Answers on Title IX and Sexual Violence, at B-5, available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf, B-5 (April 29, 2014) [hereinafter Title IX and Sexual Violence]. Title IX protects third parties from sexual violence in a school’s education program/activity. See note 11, which provides the example of a high school student participating in a college recruitment program. An appropriate institutional response, when the accused is not affiliated with the IHE, differs “depending on the level of control the school has over the alleged perpetrator,” but that regardless of this level of control, the school must still make sure that the victim and the entire school community is provided with appropriate remedies, which can include support services and the issuance of policy statements.”
55 Id. at A-2.
56 Id. at A-4. Notably, according to the OCR, a resident advisor is not automatically a “responsible employee,” but that is still subject to the Clery Act reporting requirements as they are considered “campus security authorities.” Id. at D-5, n.24. The school is tasked with much responsibility in this regard. For example, even if the victimized student did not utilize the school’s grievance procedures, and the assault was featured by the media and on social network sites, the school is deemed to have known or should have known about the activity and is therefore required to take “prompt and effective corrective action.” Id. at A-4.
57 Id. at D-2.
58 34 C.F.R. § 106.8 (2014).
59 Id.
60 Title IX and Sexual Violence, supra note 54, at J.
The OCR can perform compliance reviews, even if an allegation of a Title IX violation has not been lodged, and can also refer cases to the U.S. Department of Justice (DOJ).61 Students can lodge complaints directly with the Civil Rights Division of DOJ and can also bring private causes of action against schools.62

The OCR also issues rules and regulations relating to Title IX compliance in the form of “Dear Colleague” letters.63 These letters are considered by the DOE to be “significant guidance document[s]”64 which “[do] not add requirements to applicable law, but provide information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”65

The first “Dear Colleague” letter relating to sexual assaults on college campuses was issued in 2003.66 The letter aimed to clarify which type of conduct fell under Title IX, stating that the prohibited harassment “must include something beyond the mere expression of views, words, symbols, or thoughts that some person finds offensive in order to be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program.”67

DOE’s 2011 “Dear Colleague Letter” served as the DOE’s first formal opinion on the standard of proof that schools should use in disciplinary proceedings, mandating that schools use the

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62 In order for a student to prevail in a private suit against an IHE, the student must demonstrate that the IHE acted with deliberate indifference to known acts of harassment in its programs or activities and that the harassment was so severe, pervasive and objectively offensive that it effectively barred the woman access to an educational opportunity or benefit. See Davis v. Monroe Cnty. Bd. of Ed., 526 US 629 (1999); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998).
63 See, e.g., DEAR COLLEAGUE LETTER, supra note 27.
64 A significant guidance document means that it “sets forth statements of general policy and interpretive rules of broad, prospective applicability to regulatory and statutory issues.” Lavinia M. Weizel, Note, The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints, 53 B.C. L. Rev. 1613, 1616 (2012).
65 DEAR COLLEAGUE LETTER, supra note 27, at n.1.
67 Id.
“preponderance of the evidence” standard, under the theory that Title IX is a civil rights standard and therefore OCR has to require schools to use a civil burden of proof. The letter strongly encouraged universities to take proactive measures to prevent sexual assault and to establish procedures that will ensure that complainants are protected and can continue to participate in educational opportunities. The letter also prohibited schools from requiring a victim to abide by a non-disclosure agreement in order to obtain information which must be disclosed pursuant to the Clery Act.

Most recently, the DOE released a 53-page Frequently Asked Questions (FAQs) relating to Title IX, which endeavored to provide IHEs with additional direction regarding prevention efforts, adjudication procedures, and investigatory policies. The FAQs also provide specific guidance regarding disabled students, international and undocumented students, and lesbian, gay, bisexual and transgender (LGBT) youth who are victims of sexual assault.

According to some reports, more than 40 percent of IHEs have not conducted a single investigation into sexual assault in the past five years and more than 30 percent do not provide sexual assault training for students. More than 70 percent do not have protocols for how they collaborate with local law enforcement, and law enforcement officials at 30 percent of institutions did not receive any training on how to respond to reports of sexual assault. Currently, OCR is investigating approximately 79 IHEs to in connection with sexual assaults that have occurred on their campuses.

While OCR has seen an 88 percent rise in Title IX complaints over the past year, officials do not believe that there has been an 88 percent increase in campus sexual assaults. Rather, as explained by

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68 DEAR COLLEAGUE LETTER, supra note 27, at 3. This evidentiary standard is used in civil cases involving monetary damages.
69 Id. at 2.
70 TITLE IX AND SEXUAL VIOLENCE, supra note 54.
71 Id. at B-2 through B-4.
72 MCCASKILL REPORT, supra note 3, at 1.
73 Id. at 2.
Anurima Bhargava, section chief of the Educational Opportunities Section of DOJ and a panelist at NAAG’s 2014 Eastern Region Meeting, the surge in complaints is likely due to efforts to bring this issue to light, including student activism.

Additional Federal Regulations

DOJ can also investigate whether campus police and local law enforcement have engaged in discrimination against sexual assault victims under the Violent Crime Control and Law Enforcement Act of 1994\(^75\) and the Omnibus Crime Control and Safe Streets Act of 1968, 42 USC 3789d (Safe Streets Act).\(^76\)

Do the Current Federal Regulations Protect the Confidentiality of the Complainant?\(^77\)

So often, a complainant recounts the details of her campus sexual abuse experience with a campus employee or administrator and then requests that her account remain confidential. Under the current federal regulations, such employee may not be able to comply with the complainant’s request.

As explained in the previous section, under Title IX “responsible employees” are required to report all relevant details of any sexual violence allegation to the IHE’s Title IX coordinator. These details can include the names of the victim, the accused, and witnesses.\(^78\) If a student wants to remain anonymous and does not want the school to pursue an investigation into the assault, the IHE may be...

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\(^77\) Note that the next two subsections discuss the interplay between Title IX, FERPA and the Clery Act.  In addition to reviewing the federal regulations and laws, I consulted a chart, found on the notalone.gov website, which provided helpful analysis.  See Intersection of Title IX and the Clery Act, NOT ALONE, available at https://www.notalone.gov/assets/ferpa-clerychart.pdf [hereinafter Title IX and the Clery Act].
\(^78\) TITLE IX AND SEXUAL VIOLENCE, supra note 54, at D-3.
able to comply with that student’s request. However, certain situations, a school is required to “override” a student’s request in order to comply with Title IX, though this information “should only be shared with individuals who are responsible for handling the school’s response to incidents of sexual violence.”

In order to determine whether the IHE can honor the confidentiality request while still complying with Title IX, administrators must consider whether doing so will provide a safe and nondiscriminatory environment for both that student as well as for the entire student community. The FAQs also provide examples of some steps the school can take to comply with Title IX while still respecting the student’s wishes, including providing increased monitoring, supervision or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school’s policies on sexual violence; and conducting climate surveys regarding sexual violence and as well as putting an alleged perpetrator on notice and counseling him or her without revealing the name of the complainant.

However, this “responsible employee” may also have reporting obligations under the Clery Act if he or she falls into the category of “campus security authority” (CSA). Under Clery, those who are designated as CSAs are required to issue public security reports and maintain the public crime log. CSAs include campus police and security personnel, any other individual who has responsibility for campus security, individuals or organizations specified in a IHE’s statement of campus security policy as one to which students and employees should report criminal offense, and officials of an IHE who have

80 TITLE IX AND SEXUAL VIOLENCE, supra note 54, at E-1. The FAQs recognize the chilling effect that comes with not respecting the students’ request for confidentiality.
81 Id. Some factors that the OCR guidance suggests that schools consider include circumstances that suggest an increased risk of the alleged perpetrator committing additional acts of violence; circumstances that suggest an increased risk of acts of sexual violence under similar circumstances at a given location or by a particular group; whether the sexual violence was perpetrated with a weapon; the age of the complainant; and whether the school possesses other means to obtain relevant evidence (e.g. security cameras or personnel, physical evidence).
82 Id.
83 34 C.F.R. § 668.46 (2014).
significant responsibility for student and campus activities, including but not limited to student housing, student discipline and campus judicial procedures.84

There are exceptions to those who fall into the categories of “responsible employee” under Title IX and “CSAs” under Clery. The first exception applies to professional and pastoral counselors, which are defined identically under both statutes, and can provide completely confidential support services.85 However, under Clery, “institutions are strongly encouraged to establish voluntary, confidential reporting processes so that incidents of crime that are reported exclusively to professional and pastoral counselors will be included in the annual crime statistics.”86

The second exception is more limited, in that the individuals who fall within the exception can keep a complainant’s personal identifying information confidential, but still have a duty to report under both Clery and Title IX. This category includes those who do not fit into the category of professional or pastoral counselors but who work in on-campus sexual assault center, victim advocacy offices, women’s center, or health centers and provide assistance to victims.87 Under Title IX, these individuals should report “aggregate data” but are not required to report incidents of sexual violence to the school in a way that personally identifies the victim without the victim’s consent.88

In order to ensure that complainants are aware of the lack of confidentiality when reporting to “responsible employees” who do not fall into the above exceptions, or who are also considered to be CSAs, the OCR recommends that IHEs clearly designate which employees fall into each of these

84 Title IX and the Clery Act, supra note 77, at 5.
85 Under both statutes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition, meaning that a pastor or priest who acts as an athletic director or student advocate would not be exempt from the reporting requirements. Both statutes define a professional counselor as a person whose official responsibilities include providing mental health counseling to members of the institution’s community and who is functioning within the scope of his or her license or certification. This applies to professional counselors who are not employees of the institution but are under contract to provide counseling at the institution, as well as individuals who are not yet licensed or certified as counselors, but are acting in that role under the supervision of an individual who is licensed or certified. See id. at 3-4.
87 Title IX and the Clery Act, supra note 77, at 3-4.
88 Id.
categories\(^9\) and then advise the employees warn potential complainants prior to the disclosure.

Specifically, the OCR recommends that these individuals warn the student of the employee’s obligation to report any information that the school reveals to the Title IX coordinator, explain to the student his or her option to ask that the institution consider maintaining the confidentiality of the information, though the school may not be able to guarantee confidentiality, and advise the student of the ability to instead share information with counseling, advocacy, health, mental health or other sexual assault-related resources who are not obligated to report the disclosure to the Title IX coordinator.\(^{90}\)

\textit{Are Title IX and the Clery Act Consistent with FERPA?}

At first glance, it appears that the Clery Act’s timely warning mandate is at odds with FERPA, but FERPA provides that in the case of an emergency, this information can be released to protect the health or safety of others, as long as the notification withholding the names and other identifying information of the complainant.\(^{91}\)

The Title IX requirements must also be examined with FERPA in mind. For example, Title IX mandates that both parties be notified, in writing, of the outcome of the investigation as well as any appeal and the Clery Act mandates that all IHEs develop and distribute procedures for simultaneously notifying the complainant and the accused of the outcome of disciplinary proceedings.\(^{92}\) In contrast, as noted earlier in this article, FERPA prohibits the non-consensual disclosure of personally identifying information from an education record.

\(^{89}\) John Gaal & Laura Harshbarger, \textit{Responsible Employees and Title IX}, Higher Education Law Report (May 12, 2014), \url{http://www.higheredlawreport.com/2014/05/responsible-employees-and-title-ix/}. In this way, students can make informed decisions about in whom to confide and employees can understand their reporting requirements.

\(^{90}\) \textit{TITLE IX AND SEXUAL VIOLENCE}, \textit{supra} note 54, at D-5. Of course, this assumes that the responsible employee will be able to anticipate that the student to whom he or she is speaking is on the verge of reporting an incident of sexual violence.

\(^{91}\) \textit{See FERPA STUDENT DISCLOSURES, \textit{supra} note 49.}

\(^{92}\) 20 U.S.C. § 1092(1)(J)(8)(B)(iv)(III)(aa); \textit{see also TITLE IX AND SEXUAL VIOLENCE, \textit{supra} note 54, at H-3.}
Once again, there are a number of exceptions to the FERPA prohibition. For example, IHEs can disclose to the complainant sanctions imposed on the accused that directly relates to the complainant.\(^93\) If it has been determined that the accused committed a violation of the school’s policies that constitutes a crime of sexual violence, the school may disclose the sanctions to anyone.\(^94\) FERPA also specifically allows schools to disclose to the victims the final results of any disciplinary proceeding conducted by the institution, to include the name of the perpetrator, findings, any sanctions imposed, and the rationale for the findings and sanctions, if any. Notably, this disclosure cannot contain the name of any other student, including the complainant or witnesses, without the consent of that student.\(^95\)

Additionally, if there is a direct conflict between FERPA and Title IX such that enforcement of FERPA would interfere with the purpose of Title IX, Title IX will overrule the conflicting FERPA provision.\(^96\)

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**Does the Current Federal Guidance Adequately Address the Due Process Rights of the Accused?**

The 2011 Dear Colleague letter was not universally well-received. Many readers believed that the DOE overlooked the accused’s procedural due process rights by focusing solely on the Title IX rights of the complainant.\(^97\) Much of the backlash focused on the low “preponderance of the evidence” burden of proof advocated by the letter, arguing that the burden should be the same as that of a criminal trial, as the conduct at issue, sexual violence, is the same.\(^98\) Moreover, questions were raised

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\(^93\) 20 U.S.C.S. § 1232g(a)(4). Examples of sanctions include restraining orders, the suspension of the perpetrator, or the transfer of the perpetrator to another residence hall, other classes, or another school.

\(^94\) 20 U.S.C.S. § 1232g(a)(6).

\(^95\) 20 U.S.C.S. § 1232g(a)(6)(C).

\(^96\) *Title IX and the Clery Act,* supra note 77, at 7.


\(^98\) *Id.*
regarding whether the OCR, by the issuance of the letter, was exceeding its authority and acting as a legislative rather than executive body.99

Accusations of sexual violence, even when made solely within a college administrative proceeding, can no doubt seriously damage the reputation and academic future of the accused student.100 While college students are not entitled to substantive due process during administrative proceedings,101 when an IHE is a “state actor,” such as a state university, its students are entitled to procedural due process at administrative hearings.

In Mathews v. Eldridge, the Supreme Court held that, at minimum, procedural due process requires notice and an opportunity to be heard.102 The Court emphasized that this is a flexible standard that requires consideration of competing interests.103 Courts considering such claims must weigh the individual private interest that will be affected by the state action (such as the accused’s reputation and academic good standing) and the risk of erroneous deprivation of that private interest against the public interest implicated, including the substantive social costs and the administrative burdens that would arise from the implementation of more procedure.104

While courts are still split regarding certain rights of the accused at administrative hearings, such as whether the accused has a right to cross examine witnesses, it is clear that an accused student

99 Susan Kruth, Senators Ask Key Questions at Hearing on Campus Sexual Assault, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (June 30, 2014), http://www.thefire.org/senators-ask-key-questions-at-hearing-on-campus-sexual-assault/.
100 This was made clear in the Duke lacrosse case, when the accused students were alienated and protested against before any adjudicative or criminal proceeding determined their guilt. For example, on-campus protestors carried posters with photos of the accused that read “WANTED” and “CASTRATE” and Duke faculty members took out an ad in a local newspaper excoriating the accused students. Dan Subotnik, The Duke Rape Case Five Years Later: Lessons for the Academy, the Media and the Criminal Justice System, 45 AKRON L. REV. 883, 886 (2012) (citing K.C. Johnson, The Perils of Academic Group Think, INSTITUTIONAL FAILURES 67, 71, 18 (Howard M. Wasserman ed., 2011)).
101 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).
103 Id. at 334 (citing Morrison v. Brewer, 408 U.S. 471, 481 (1972)).
104 Id.; see also Weizel, supra note 64, at 1623.
must be afforded notice and a hearing\textsuperscript{105} and college disciplinary proceedings need not be as formal as proceedings in a court of law.

Students attending private schools do not have the option of lodging a due process claim, unless the school’s procedures are found to be “fundamentally unfair,”\textsuperscript{106} or the student can prevail on a contractual due process claim. While courts have not been consistent in allowing such claims to proceed, some courts have found a breach in contractual due process by holding that the student’s relationship with the IHE includes the terms of the student handbook, which “promis[ed] that [the IHE] would abide by certain procedures to ensure impartial proceedings and fundamental fairness.”\textsuperscript{107}

As the number of OCR investigations continues to rise, and IHEs modify their existing policies relating to the investigation and adjudication of these cases, dozens of students have brought such causes of action against their schools,\textsuperscript{108} arguing that the IHEs violated the accused’s Title IX rights during an administrative hearing.\textsuperscript{109} It is unclear how these cases will be resolved, but the increase in filing is a reminder to schools and law enforcement that prevention and investigative policies cannot overlook the constitutional rights of the accused.

\textit{Tensions in Parallel Investigations and Proceedings}

The investigation of sexual assault claims involving acquaintances is a complicated and sensitive endeavor that necessitates an investigative team with specialized training. For example, sexual assault victims often act very differently than victims of other violent crime. Rape trauma syndrome, which can include everything from expressive grief, terror and denial can lead to counterintuitive behaviors like

\begin{flushleft}
\textsuperscript{105} \textit{Id.} at 1628.
\textsuperscript{106} See Gross v. Lopez, 419 U.S. 565, 576 (1979); Weizel, \textit{supra} note 64, at 1645.
\textsuperscript{109} \textit{Id.}
\end{flushleft}
refusing to report the rape or experiencing “emotional flatness.” 110 If the investigators are not aware of the existence of this syndrome, they can be quick to discount the victim’s narrative of the assault, particularly when there are no other eyewitnesses, as often occurs with an intimate encounter. The pervasiveness of the attitude that acquaintance rape is not “real rape” can also factor into the ability of untrained investigators to properly handle these types of cases.111

The investigation becomes more difficult when it involves a college campus sexual assault. Often, campus law enforcement is the first responders to a complaint of sexual assault. If the officers have not received training on how to work with victims and investigate this case, the complainant may not feel comfortable moving forward with the investigation and valuable evidence may be lost. The same holds true for local law enforcement, who will likely respond later in time.

If there are simultaneous investigations conducted by campus administrators and the local prosecutor’s office, there may be a lack of evidence sharing, due to the campus’ concerns regarding student confidentiality under FERPA and the prosecutor’s ethical obligations and rules of evidence. The resolution of one investigation raises more issues regarding whether prior administrative testimony can be obtained and used by those involved in the second proceeding.

Each group of stakeholders in an institution has a unique role to play in the investigation of campus sexual assault, as the state laws and jurisdiction of campus law enforcement vary widely.112 It is therefore very difficult to devise a “blueprint” for all schools to follow regarding memoranda of understanding or written policies. However, planning and continuous collaboration will lead to more

110 Yxta Maya Murray, Essay, Rape Trauma, the State, and the Art of Tracey Emin, 100 CAL. L. REV. 1631, 1633 (2012).
112 Jamie P. Hopkins & Kristina Neff, Jurisdictional Confusion that Rivals Erie: the Jurisdictional Limits of Campus Police, 75 MONT. L. REV. 123 (2014). For example, not all campus police have the authority to make arrests. Some states, including Pennsylvania, Georgia, and Massachusetts, have specific provisions relating to the policing powers of campus law enforcement. Id. at 129-130.
effective investigations and the protection of both the campus community as well as the rights of the complainant and the accused.

**Steps Taken to Address Sexual Assaults on College Campuses**

**Federal Action**

In January 2014, the White House issued its *Council on Women and Girls Rape and Sexual Assault: A Renewed Call to Action* report, which was prepared by the White House Council on Women and Girls and the Office of the Vice President. The report examined the most recent data relating to sexual assault and the actions taken by the criminal justice system, identified those groups most at risk, and identified areas for further action. The report called campus sexual assaults “a particular problem” and highlighted the fact that college sexual assault survivors suffer from high levels of mental health problems, such as post-traumatic stress disorder (PTSD) and drug and alcohol abuse, and also report at “particularly low” levels.

During the same month, President Obama also established the White House Task Force to Protect Students from Sexual Assault (Task Force), which is co-chaired by the Office of the Vice President and the White House Council on Women and Girls. The first report issued by the Task Force, entitled, *Not Alone*, provides educational institutions with best practices for preventing and responding to rape

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114 Id. at 1.

115 Id. at 2, 14.

116 The objectives of the Task Force are to: (1) provide educational institutions with best practices for preventing and responding to rape and sexual assault; (2) build on the federal government’s enforcement efforts to ensure that educational institutions comply fully with their legal obligations; (3) improve transparency of the government’s enforcement activities; (4) increase the public’s awareness of an institution’s track record in addressing rape and sexual assault; (5) enhance coordination among federal agencies to hold schools accountable if they do not confront sexual violence on their campuses.” Id. at 26.

and sexual assault and specifically recommends the implementation annual campus climate surveys.\footnote{Opponents have balked at this requirement, arguing that this is an unfunded mandate that will require additional staff. See Tyler Kingkade, \textit{Proposal to Require Campus Climate Surveys on Sexual Assault Faces Quick Opposition}, THE HUFFINGTON POST (April 29, 2014, 9:59 PM), http://www.huffingtonpost.com/2014/04/29/campus-climate-surveys-sexual-assault_n_5235457.html.}

Among other recommendations, the Task Force advises that IHEs implement effective, confidential responses to allegations, including a comprehensive sexual misconduct policy, trauma-informed training and partnerships with the community, among other recommendations.\footnote{Id.}

Most recently, President Obama and Vice President Biden, together with a number of IHEs, media companies, members of the sports industry, and grassroots organizations, released the It’s On Us campaign, which asks students to take a pledge to help prevent sexual assaults.\footnote{It’s On Us, http://ituson.org (last visited Oct. 8, 2014).} Students who sign the pledge promise to (1) recognize that non-consensual sex is sexual assault; (2) identify situations in which sexual assault may occur; (3) intervene in situations where consent has not or cannot be given; (4) create an environment in which sexual assault is unacceptable and survivors are supported.\footnote{The Pledge, It’s On Us, http://ituson.org/#thepledge (last visited Oct. 8, 2014).} Those who make this pledge can post notice of it on Facebook or Twitter. Over 230 campuses have joined the campaign, which also provides IHEs with organizing tools to create public service announcements.\footnote{Kyle Leirman, \textit{It’s On Us, a Growing Movement to End Campus Sexual Assault}, \textsc{The White House Blog} (Sept. 24, 2014, 3:00 PM), http://www.whitehouse.gov/blog/2014/09/24/its-us-growing-movement-end-campus-sexual-assault.}

U.S. Senator Richard Blumenthal (D-CT) engaged in roundtable discussions with over 450 stakeholders throughout Connecticut, including students, faculty, administrators, advocates and women’s groups, before drafting his College Sexual Assault: Bill of Rights, which is a set of proposals that the Senator hopes is included in new legislation.\footnote{Hugh McQuaid, \textit{Blumenthal Touts ‘Bill of Rights’ for Victims of Sexual Assault}, NEW HAVEN REGISTER (May 12, 2014, 3:20 PM), http://www.nhregister.com/general-news/20140512/blumenthal-touts-bill-of-rights-for-victims-of-campus-sexual-assault. Many of these proposals were included in the legislation sponsored by Senator McCaskill. See MCCASKILL REPORT, supra note 3.} The Bill of Rights provides students with the right to a safe and secure campus, a fair and impartial investigation, confidentiality and clear notice of and
access to available services. The text of the Bill of Rights contains a “preliminary list” of the federal legislative proposals that he and his fellow Senators have developed as well as a list of best practices suggested by roundtable participants and model programs currently in place at various Connecticut IHEs. Senator Blumenthal’s goal is to help to increase safety and accountability on college campuses.

**Proposed Federal Legislation**

Over the past six months, legislators and agencies have proposed a number of new bills, with the goals of strengthening reporting requirements and providing services and support to sexual assault victims.

The Campus Accountability and Safety Act (CASA), Senate Bill 2692, is bipartisan legislation co-sponsored by Senator Clair McCaskill and touted by sponsors as a bill with “stiff fines and real teeth.” The legislation was drafted after a recent survey found that one in ten campuses did not have a Title IX coordinator and that 41 percent of institutions had not conducted a sexual assault investigation within the past five years. The legislation mandates that each IHE that receives federal funding

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125 See [The Campus Accountability and Safety Act, infra note](#) Error! Bookmark not defined.

126 Blumenthal Bill of Rights, supra note Error! Bookmark not defined.

127 Id.


131 [McCaskill Report, supra note](#) 3.
conduct an annual anonymous survey of students’ experiences and publish the results online.\footnote{132}{\textit{The Bipartisan Campus Accountability and Safety Act}, U.S. SENATOR CLAIRE McCASKILL, \url{http://www.mccaskill.senate.gov/imo/media/doc/CampusAccountabilityAndSafetyAct.pdf} (last visited Oct. 8, 2014) [hereinafter McCaskill CASA].}

The results of the survey would also be compiled into a database by the federal government.\footnote{133}{Id.}

The bill also provides for a penalty of up to one percent of an IHE’s operating budget as well as an increase of Clery Act penalties from $35,000 to $150,000 per violation.\footnote{134}{Id.} IHEs would be required to provide complainants with confidential advisors, coordinate investigative plans with local law enforcement, and provide specialized training for on-campus personnel.\footnote{135}{Id.} IHEs would be prohibited from sanctioning students who reveal campus conduct violations, such as underage drinking, when reporting sexual violence.\footnote{136}{Id.} Last, the legislation forbids any department within the IHE, such as the athletic department, from conducting an investigation into the allegations.\footnote{137}{This provision is noteworthy as the aforementioned survey also found that twenty percent of IHE athletic departments had oversight over sexual assault investigations involving athletes. See McCASKILL REPORT, supra note 3.}

The Survivor Outreach and Support Campus (SOS) Act, Senate Bill 2695,\footnote{138}{Survivor Outreach and Support Campus (SOS) Act, S. 2695, 113th Congress (2014), available at \url{https://www.congress.gov/bill/113th-congress/senate-bill/2695/text} [hereinafter SOS Act].} is sponsored by Senator Barbara Boxer, would amend Title IX to mandate that colleges designate an independent advocate for campus sexual assault survivors, who will represent the interests of the student even when such interest conflicts with that of the college.\footnote{139}{Press Release, U.S. Senator Barbara Boxer, Senator Boxer, Congresswoman Davis Introduce Bill to Provide Survivors of Sexual Assault with an On-Campus Advocate (July 30, 2014), available at \url{http://www.boxer.senate.gov/en/press/releases/073014.cfm}.} This advocate’s appointment must be based on experience and a “demonstrated ability of the individual to effectively provide sexual assault victims’ services.”\footnote{140}{SOS Act, supra note Error! Bookmark not defined..} The Secretary of Education is directed to prescribe regulations for IHEs to follow in
appointing advocates. The advocate would also be required to conduct a public information campaign in order to educate the students as to the existence of and services provided by the advocate.¹⁴²

Last, the Hold Accountable and Lend Transparency on Campus Sexual Violence (HALT) Act,¹⁴³ sponsored by House Representatives Jackie Speier and Patrick Meehan, would also amend Title IX, to require that the DOE to publicly disclose all resolution agreements between itself and IHEs, as well as compliance reviews.¹⁴⁴ IHEs would face increased penalties for Clery Act violations but would receive more funding for Title IX and Clery investigators.¹⁴⁵ The bill mandates annual climate surveys and the annual publication of a school’s sexual assault policy, written in clear and understandable language, to be posted on its website and provided to its student groups, teams and organizations.¹⁴⁶ It allows for a private cause of action for students harmed by schools that do not protect the safety of their campuses.¹⁴⁷

The HALT Act bill also directs the U.S. Attorney General and the Secretary of the Department of Education to create a joint interagency Campus Sexual Violence Task Force to develop recommendations for how complainants can be best supported.¹⁴⁸ The Task Force would be required to submit to Congress a plan for recruiting, retaining and training a highly qualified workforce employed by

¹⁴² SOS Act, supra note Error! Bookmark not defined.. These services include providing complainants with information about how to report assaults to law enforcement as well as regarding medical care, forensic examinations, counseling, referrals to support services and information regarding legal services.
¹⁴⁶ HALT Act, supra note Error! Bookmark not defined..
¹⁴⁷ Id.
¹⁴⁸ Id.
DOE to carry out the investigation of Title IX complaints within 270 days of the date of the enactment of
the Act.

Recent State Legislation

In late September, California Governor Jerry Brown Senate Bill 967, colloquially known as the
“yes means yes” legislation, into law. It requires all IHEs which receive public funds for student
financial assistance to set an “affirmative consent standard” that could be used to investigate and
adjudicate sexual assault allegations. The standard is defined as an “affirmative, unambiguous and
conscious decision by each party to engage in sexual activity.” Specifically, silence or lack of protest
or resistance does not qualify as consent. The legislation also requires IHEs to establish
comprehensive prevention and education programs that address campus sexual assault, domestic
violence, dating violence and stalking and to adopt certain sexual assault policies and protocols.

Opponents to the legislation argue that the law shifts the burden of proof to the accused to
show that the complainant affirmatively consented to the sexual conduct at issue and that the
legislation constitutes a “micromanage[ment of sexual conduct].”

Recent Actions of State Attorneys General

Maryland

149 Student Safety: Sexual Assault, S. 967, 2013-14 Sess. (Ca. 2014), available at
150 CAL. EDUC. CODE § 67386(a)(1) (West 2014).
151 Id. Note that while California is the first state in the country to enact such legislation, many schools already have
similar policies, including the University of Texas and Yale. See Richard Pérez-Peña & Ian Lovett, California Law
on Sexual Consent Pleases Many but Leaves Some Doubters, N.Y. TIMES (Sept. 29, 2014),
http://www.nytimes.com/2014/09/30/us/california-law-on-sex-consent-pleases-many-but-leaves-some-
doubters.html. Some of the State University of New York (SUNY) campuses utilize this definition of consent. On
October 2, 2014, New York Governor Andrew Cuomo mandated that all SUNY schools implement this standard on
all 64 campuses. Id.
152 CAL. EDUC. CODE § 67386.
153 See Deborah J. Saunders, Bad Law on Campus Rape Deserves Governor’s Veto, S.F. GATE (Sept. 11, 2014, 9:11
AM), http://www.sfgate.com/opinion/saunders/article/Bad-law-on-campus-rape-deserves-governor-s-veto-
5746930.php.
Maryland Attorney General Doug Gansler has urged state IHEs to update their campus sexual assault policies by the end of the year. Following the Attorney General’s request, the Board of Regents of the University System of Maryland, which includes 11 four-year universities, began drafting new policies addressing the prevention of assault and reporting procedures. The draft policies include requirements that IHEs act quickly upon receipt of a Title IX complaint and enter into memoranda of understanding with local law enforcement, as well as identify a Title IX coordinator. The draft policy also provides an updated, lengthier definition of consent.

Montana

After allegations that the University of Montana, the Missoula County Police Department, and the Missoula County Attorney’s Office mishandled the investigation and prosecution of sexual assault cases, the U.S. DOJ announced an investigation into all three institutions in May of 2012. While the University of Missoula and the Missoula County police department entered into agreements with DOJ to reform their practices, questions arose as to the jurisdiction of the DOJ to investigate the County

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155 Id.
157 Wells, supra note Error! Bookmark not defined..
159 The DOJ’s investigation of the University of Montana, in conjunction with the DOE, concluded in a Resolution Agreement which requires the University to clarify its policies and procedures for dealing with sexual assault, to fully investigate and appropriately respond to reports of sexual assault, and to eliminate any hostile environments that contribute to and arise from sexual assault, and to use a third-party consultant to evaluate its efforts to comply with the agreement. Resolution Agreement, OCR Case No. 10126001, DOJ DJ Number 169-44-9 (May 9, 2013), available at http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf.
Attorney’s Office. Missoula County Attorney Fred Van Valkenburg eventually filed a lawsuit disputing that jurisdiction.

The Montana Attorney General’s office has oversight authority over all county attorneys in Montana. Pursuant to that authority, Montana Attorney General Tim Fox stepped in as the mediator between the DOJ and Missoula County and helped the parties to reach an agreement. The agreement specifies that the Attorney General’s Office will oversee the development and implementation of new standards and procedures for how the County Attorney’s office handles sexual assault cases. The new standards and procedures will encompass attorney and staff training, the development of policies and guidelines for sexual assault cases, strategies for improving collaboration with law enforcement and the community, and funding for expert witnesses. The Attorney General will monitor the implementation of the standards, retain a technical advisor and review sexual assault cases that the County Attorney has declined to prosecute. Additionally, Mr. Van Valkenberg agreed to dismiss his claim against DOJ and DOJ agreed to not file any claims against the Missoula County Attorney’s Office.

New Jersey

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164 Id.


166 Id.
This summer, Acting Attorney General John J. Hoffman revised the evidence retention guidelines released by his office relating to the retention of sexual assault evidence kits to require that the kits be retained for five years while victims decide whether or not they wish to proceed with a criminal investigation.\(^{167}\) Prior to General Hoffman’s actions, some counties only retained such evidence for 90 days.\(^{168}\) At the conclusion of the five years, the Attorney General’s Office can take custody of the kit and continue to preserve the evidence contained within.\(^{169}\)

**Virginia**

Governor Terry McAuliffe has ordered a review of policies on sexual violence at the state’s campuses.\(^{170}\) As a result, a state task force has been created, which is chaired by Attorney General Mark Herring.\(^{171}\) The task force will identify best practices for investigating sexual assaults and resolving complaints and provide a final report by June 1, 2015. The task force will then make recommendations on an ongoing basis.\(^{172}\) General Herring has also begun a review of each Virginian IHE’s current policies and procedures for prevention and response\(^{173}\) and will begin an extensive training program for college and university staff.\(^{174}\)


\(^{171}\) *Id.*

\(^{172}\) *Id.*


Wisconsin

Wisconsin Attorney General J.B. Van Hollen heads the Wisconsin Department of Justice, which has spearheaded a number of projects geared towards supporting sexual assault victims and the prosecutors who handle these cases. For example, the Department of Justice’s Violence Against Women Resource Prosecutor (VAWRP) project provides technical assistance to local district attorneys’ offices in the investigation and prosecution of these crimes, “using best practices and collaborative community models.” General Van Hollen also recently commended the University of Wisconsin-Madison for its use of a new, interactive online bystander prevention program and encouraged other schools to implement the program and ongoing faculty and staff training as well as protocols that include “solid partnerships with community service providers,” in order to ensure a “supportive and respectful response” for the victims of these crimes.176

Takeaways from NAAG’s 2014 Eastern Region Meeting

As noted throughout this article, NAAG’s 2014 Eastern Region Meeting provided a forum for all stakeholders involved in issues relating to campus sexual assault to share information, debate difficult topics, and learn from each other. Moderators included Rhode Island Attorney General and NAAG Eastern Region Chair Peter F. Kilmartin, Connecticut Attorney General George Jepsen, Maryland Attorney General Doug Gansler, Montana Attorney General Tim Fox, and New Hampshire Attorney General Joseph Foster, as well as Peter Neronha, the U.S. Attorney for Rhode Island. A keynote address was given by U.S. Senator Sheldon Whitehouse.

176 Id.
Given the varying backgrounds of the panelists,\textsuperscript{177} attendees heard many viewpoints. However, there were certain fundamental ideas on which all parties seemed to agree.

First, all involved should ensure that victims are made aware of all options and services at their disposal. Victims must also be informed as to the importance of seeking medical treatment after an incident of sexual violence, both in order to protect the victim’s health and to preserve vital forensic evidence if the victim chooses to move forward with a campus and/or law enforcement investigation. Victims must be told that the lack of an investigation at the onset may lead to the destruction of valuable electronic evidence, DNA and video footage. Last, victims should be educated as to when their reporting is confidential under the Clery Act and Title IX.

All participants also agreed that early and constant collaboration between local law enforcement, prosecutors, school administrators and campus law enforcement is vital. While each of these stakeholders may have different goals and different ethical and regulatory obligations, the groups must work together in order to implement consistent policies that will lead to the prevention and successful investigation of these crimes to ensure the safety of the campuses for which they are responsible. Many ideas for additional collaboration were posed, from the signing of memoranda of understanding (MOUs) to all IHEs forwarding their annual campus safety reports to all local law enforcement groups and prosecutors.

The participants also agreed that effective prevention and education programs are just as important as communication and collaboration. Education and training for law enforcement, campus personnel\textsuperscript{178} and students must debunk myths and generalizations to prevent “victim blaming,” promote understanding of rape trauma syndrome, and emphasize that acquaintance sexual assault is just as serious of a crime as “stranger rape.”

\textsuperscript{177} Participants included state attorneys general and attorney general staff with varying forms of criminal and civil jurisdiction, U.S. Senator Sheldon Whitehouse, representatives from federal agencies, district attorneys, law enforcement, school administrators, campus police, victim advocates and at least one forensic nurse.

\textsuperscript{178} This includes training for professors, resident advisors and first responders.
Many of the panelists touted bystander intervention strategies as key to changing the culture of a campus. Bystander intervention programs urge students who believe that there is a risk for sexual violence to intervene by teaching the students safe and positive ways to do so.\textsuperscript{179} For example, Connecticut College has implemented the Green Dot violence reduction program, which has been embraced by the student body, including the athletic community.\textsuperscript{180}

Last, the participants focused on ensuring that all investigations and adjudicative proceedings find a balance between protecting the victim and ensuring that the accused receives due process, and that prevention and investigation efforts recognize that men can be victims of sexual violence as well.

\textit{Conclusion}

While the current statistics show that there is much to be done to reduce campus sexual violence and to change the societal mindset as it relates to acquaintance rape, all involved are beginning to work together to protect the safety of all college students. Collaboration between stakeholders, with a focus on protecting the rights of the complainants as well as the rights of the accused, is necessary to foster a safe environment that is conducive to learning.

\textsuperscript{179}\textsc{Mississippi Coalition Against Sexual Assault}, \url{http://mscasa.org/bystander-intervention/} (last visited Oct. 8, 2014).