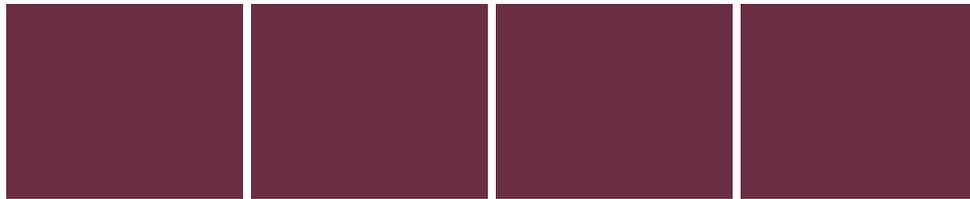


Updated AGB Advisory Statement on
Sexual Misconduct



ABOUT AGB

Since 1921, the Association of Governing Boards of Universities and Colleges (AGB) has had one mission: to strengthen and protect this country's unique form of institutional governance through its research, services, and advocacy. Serving more than 1,300 member boards, 1,900 institutions, and 36,000 individuals, AGB is the only national organization providing university and college presidents, board chairs, trustees, and board professionals of both public and private institutions and institutionally related foundations with resources that enhance their effectiveness.

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Association of Governing Boards of Universities and Colleges

1133 20th St. N.W., Suite 300, Washington, D.C. 20036

www.agb.org



Preface

The Association of Governing Boards of Universities and Colleges (AGB) has long recognized that governing boards are accountable to the mission and heritage of their institutions, with the fiduciary responsibility to promote institutional integrity and quality while advancing their institutional missions.¹ Accordingly, AGB lists among a board's basic responsibilities that of "Remain[ing] informed about institutional issues and the challenges confronting higher education."²

These issues and challenges span a staggeringly broad scope. While boards have increasingly full agendas and, as effective leaders, cannot immerse themselves in the trenches of institutions' day-to-day operations, they must ensure that they are asking the right questions in order to exercise appropriate and effective oversight. Fulfilling this responsibility requires regular review of institutional policies and practices related to issues that affect the institution's mission, culture, and reputation.

One issue that has received high-profile attention in recent years is that of sexual assault. Although most institutions have devoted significant time and energy to addressing sexual assault following the U.S. Department of Education's April 4, 2011, guidance on the issue, the number of institutions facing criticism over the manner in which they have responded to sexual misconduct allegations has increased steadily since that time. Colleges and universities are defending against lawsuits, federal investigations, and negative publicity arising from their response to sexual violence on campus. As they do with other issues related to campus culture, governing boards have a duty to become and remain informed about sexual misconduct affecting their campuses and to satisfy themselves that administrators are addressing the issue in a way that protects their institutions against potential adverse financial and reputational consequences.

The purpose of this advisory statement is to provide governing boards with guidance regarding their fiduciary duty and overall responsibility to collaborate with institutional leadership to address issues related to sexual misconduct.

¹ *AGB Statement on Board Accountability*, Adopted by the AGB Board of Directors, January 17, 2007.

² *Ibid.*

HISTORY AND CONTEXT OF SEXUAL MISCONDUCT

This section provides a brief overview of the laws and guidance related to sexual misconduct, as well as the impact of campus culture on student sexual behavior. Additional information is contained in the Appendix at the end of this advisory statement.

FEDERAL LAWS AND GUIDANCE

The 1972 federal law that most refer to as “Title IX” provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Although Title IX is perhaps best known for requiring gender equity in athletic programming, its protections are much broader, prohibiting sex discrimination in everything from admission standards to housing priority, and from course selection to club funding. Title IX prohibits all forms of sexual discrimination, which includes both non-violent (e.g., slurs) and violent (e.g., rape) sexual harassment (referred to collectively by some institutions as “sexual misconduct”), and applies equally to students, staff, and faculty.³ The United States Department of Education’s (“Department’s”) regulations implementing Title IX have long required that institutions: (1) Publish a statement of non-discrimination, (2) Appoint an employee responsible for Title IX compliance, and (3) Adopt and publish prompt and equitable grievance procedures for those making complaints of sex discrimination.

Title IX further mandates that if a college or university knows or reasonably should know about sexual misconduct that creates a hostile environment, it must eliminate the harassment, prevent its recurrence, and address its effects. The risk posed by an institution’s failure to take appropriate action to do so may take several forms: litigation against the institution brought by the alleged victim or the individual accused of the improper conduct, investigations and enforcement actions brought by the federal government, and negative publicity. These risks are not mutually exclusive and, in the worst of situations, institutions could face all three simultaneously.

Over the past four years, the Department has taken a much more aggressive stance in its interpretation of educational institutions’ obligations under Title IX. Just shy of Title IX’s 40th birthday, on April 4, 2011, the Department’s Office for Civil Rights (“OCR”) issued a guidance letter to educational institutions detailing its interpretation of institutional

³ While this statement focuses on student conduct and safety, it is important to bear in mind that Title IX, and the obligations discussed here, also apply to the conduct of and claims made by employees. In fact, in limited instances, certain Title IX-related protections may be available to third parties. Additionally, the reach of Title IX may, depending on the circumstances, extend off-campus, or even to cyberspace.

legal obligations under Title IX and, for the first time, expressly addressing sexual violence as a form of prohibited sexual harassment. This “Dear Colleague” letter (“DCL”) alerted institutions to four areas in which OCR thought they needed additional guidance regarding their Title IX obligations: notice, compliance coordination, training, and grievance procedures.⁴

Three years later, on April 29, 2014, OCR issued a document titled “Questions and Answers on Title IX and Sexual Violence” (“Q&A”), which purported to “further clarify the legal requirements and guidance articulated in the DCL” and earlier guidance regarding sexual harassment. The Q&A is longer than the DCL itself and includes significant additional detail about OCR’s position regarding institutions’ Title IX obligations.

Against this backdrop of increased sub-regulatory federal guidance, in January 2014, President Obama commissioned the White House Task Force to Protect Students from Sexual Assault. The Task Force issued its first report on April 29, 2014, simultaneous with OCR’s Q&A. The report made several recommendations of ways in which colleges and universities could more effectively combat sexual violence, including conducting climate surveys and developing prevention strategies.

While carrying out the mandates of Title IX, institutions must also comply with several other relevant laws, including The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (“Clery Act”), a federal statute that requires institutions to maintain and publish information about crime on or near their campuses, and the Campus Sexual Violence Elimination Act (“Campus SaVE Act”), a law that, in part, expands an institution’s Clery obligations to train its constituencies and adds procedural requirements with regard to the manner in which institutions respond to reports of dating violence, domestic violence, and stalking. Institutions must also be cognizant of the Family Educational Rights and Privacy Act (“FERPA”), which protects the privacy of student records. Just as sexual misconduct is part of the broader issue of campus culture, Title IX is part of a larger legal structure governing higher education.

THE ROLE OF CAMPUS CULTURE

In addition to meeting clear legal obligations, institutions have an obligation to examine aspects of campus culture that might contribute to sexual misconduct. At most institutions, student alcohol use is the dominant contributing factor. And while the consumption of alcohol certainly does not excuse, or by itself cause, sexual misconduct, institutions cannot credibly or effectively combat sexual misconduct without also addressing the often-present connection to high-risk drinking, which, according to some sources, contributes to the sexual abuse of 70,000 undergraduate students each year.⁵

⁴ See Appendix for further discussion of these obligations.

⁵ White, Lawrence. *The (Legal) Dangers of Drinking on Campus, Trusteeship* vol. 21 n. 3 (May/June 2013).

Moreover, a culture of casual sexual encounters—known as “hooking up” or “friends with benefits”—may lead to confusion over the participants’ expectations and desires. When alcohol and casual sex combine, determining whether the sexual behavior was consensual can be difficult.

The interplay between sexual behavior and alcohol, when it goes awry, can impact an institution’s economic and non-economic well-being. United Educators (“UE”), an insurance company owned and governed by member educational institutions, conducted a study of student-perpetrated sexual assault claims received from 2011 to 2013. During that time frame, UE received 305 such claims.

In 78 percent of the claims, either the accuser, the accused, or both reported being under the influence of alcohol at the time of the alleged assault; in more than 88 percent of those cases, both parties reported being under the influence. In an earlier study of claims received from 2006 to 2013, 60 percent of the accusers reported being so intoxicated that they had no clear memory of the assault.⁶

As Janice M. Abraham, UE’s CEO and president, has noted, “Institutions that are achieving some success in curbing student alcohol abuse...are incorporating alcohol-related initiatives and goals into their strategic plans to guarantee sustained high-level attention from trustees and senior administrators.”⁷ Institutions should now take that approach one step further by looking at the broader implications of alcohol and drug abuse, particularly when it comes to the relationship between such abuse and sexual behavior, and the potential for those interactions to result in claims of sexual misconduct.

SUGGESTED PRACTICES FOR GOVERNING BOARDS AND INSTITUTIONAL ADMINISTRATIVE LEADERSHIP

This statement offers specific suggestions for governing boards as they work with administrators and others at their institutions. It also offers suggestions for administrative leadership, including presidents, general counsel, and chief student affairs officers, as they work with governing boards to address this issue. The statement is advisory and is not intended to be prescriptive. It is left to governing boards, and the institutional leadership with whom they work, to determine whether the suggested practices are of value at their individual institutions and how to make use of the suggestions in a manner that best fits the specific culture and needs of each college, university, or system.

⁶ AGB thanks United Educators for sharing the statistics and other important information from its articles titled *Student Sexual Assault: Weathering the Perfect Storm* (2011) and *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015).

⁷ Abraham, Janice M., *Risk Management: An Accountability Guide for University and College Boards* (AGB Press, 2013).

FOR GOVERNING BOARDS

Unlike a commercial business, a college or university's overall well-being is measured not only by financial indicators, but also by several non-economic factors, including the quality of campus life.⁸ As a result, boards have a fiduciary duty to address issues of overall campus culture, including sexual misconduct. Generally, governing boards should monitor sexual misconduct issues consistent with their oversight of all institutional risk. Fulfilling this obligation demands striking a delicate balance. As AGB has noted, effective governance requires "avoiding micromanagement while being sufficiently informed to assess...institutional effectiveness."⁹ As with any significant institutional risk, boards should request regular, formal reports by the responsible administrator outlining the nature of the risk, the likelihood of its occurrence, and the existence and effectiveness of internal controls, including any plans for risk mitigation. These reports should take place against the backdrop of the institution's overall obligations, as opposed to specific student situations.

Beyond the standard review of reports, policies, and procedures, a board that is engaged with its administration can be effective in encouraging productive dialogue on sexual misconduct and other issues critical to institutional well-being. Studies show that increased board engagement—characterized by, for example, scrutinizing information, asking difficult questions, challenging assumptions, and introducing innovative ideas—improves the quality of institutional outcomes.¹⁰

Armed with an understanding of the context of and potential institutional risk posed by sexual misconduct and noncompliance with Title IX and related laws, board members should consider the following questions related to board engagement on this issue:

- Has the full board discussed legal developments and national trends regarding Title IX and sexual misconduct?
- Has the board discussed sexual misconduct and related issues (as they manifest themselves on campus and in the broader higher education community) with the institution's administrative leadership?
- In what manner will the board engage in an ongoing discussion with institutional leadership regarding sexual misconduct and related issues? Is engagement of the full board most appropriate, or should the responsibility be delegated to an existing committee? If a committee, which one? Under what circumstances will institutional leadership keep the committee apprised of relevant issues? Likewise, when and how will the committee keep the full board apprised of the discussions?

⁸ *AGB Statement on Board Responsibility for Institutional Governance*, Adopted by the AGB Board of Directors on January 22, 2010.

⁹ *Ibid.*

¹⁰ Johnston, Susan Wheeler, et al., *The Changing Landscape of Trustee and Board Engagement*, *Trusteeship* vol. 18 n. 4 (July/August 2010).

- Does the board know which administrators are primarily responsible for Title IX compliance and under what circumstances it is appropriate for the board (or appropriate board committee) to meet with those administrators?
- Has the board reviewed the institution's policies regarding sexual misconduct and discussed their implementation by appropriate administrators? How often should the board discuss the efficacy of those policies with the appropriate administrators?
- Has the board discussed how issues of sexual misconduct relate to the overall institutional climate?
- Has the board received sufficient information and data, such that it feels it can make inquiries and have informed discussions with appropriate administrators regarding the culture on campus as it relates to sexual misconduct?

Board members should also consider asking the following substantive questions of their institutional leadership:

- Has the institution named a Title IX Coordinator and devoted appropriate resources to carrying out that function?
- Is the institution properly and regularly training its students and employees to identify, report, and respond to alleged sexual misconduct? Is it also covering the myriad other areas of Title IX and Clery-related training required by the federal government?
- Has the institution implemented policies that protect the interests both of students who bring allegations of sexual misconduct and those against whom allegations are brought? Does the institution's process ensure that all parties receive fair treatment and adequate support?
- How often is the institution reviewing the currency and efficacy of the relevant policies, and who is responsible for doing so?
- What is the institution doing to monitor its overall climate relative to issues related to sexual misconduct?

FOR INSTITUTIONAL ADMINISTRATIVE LEADERSHIP

Governing boards that work and communicate well with their chief executive and other members of the administrative leadership team will have greater success in addressing not only the issue of sexual misconduct, but also other challenging issues on campus. The following are suggestions for administrative leaders—often including key student affairs staff—as they work with their boards to address and prevent sexual misconduct at their institutions:

- The institution’s chief executive, with support from appropriate members of the administrative leadership team, should ensure that the board receives relevant information on matters related to overall institutional campus culture and sexual misconduct, engaging the board in a periodic briefing about the various laws, compliance requirements, and institutional policies.
- The institution’s chief executive, with support from appropriate members of the administrative leadership team, should ensure that the board or designated committee is receiving updates on policies and relevant data to facilitate effective board review of institutional response to sexual misconduct issues.
- In conjunction with the chair and chief executive, the appropriate members of the administrative leadership team should ensure that the board’s agenda (or designated committee agenda) includes relevant issues for board discussion and action on matters related to campus safety policies, including sexual misconduct.
- In conjunction with the chair and chief executive, the appropriate members of the administrative leadership team should ensure that board orientation programs for new board members include a review of policies related to campus safety, including sexual misconduct.
- The chief executive should ensure that staff, faculty, and students are made aware of the governing board’s commitment to campus safety and oversight of related policies.

General counsel can assist the board in the following ways:

- With the chief executive, the general counsel should work to support the board’s (or appropriate committee’s) education concerning policies, risk, and legal obligations related to sexual misconduct, informing them of developments in the law as appropriate.
- The general counsel should serve as a resource to the board and any relevant board committees on matters related to sexual misconduct.

- Board members should be reminded that the general counsel represents the institution, not individual members of the board or administration, in matters related to allegations of sexual misconduct.

A meaningful assessment of institutional effectiveness is particularly important when it comes to sexual misconduct, because a coordinated and integrated response is the key to Title IX compliance and, of course, student safety. Institutions must thoroughly assess their policies and procedures—and the implementation of those policies and procedures—to explore issues of effectiveness, equity, and institutional values. As fiduciaries of their institutions' missions, reputations, and economic well-being, it is the responsibility of governing boards to make certain that administrators carry out such a review, to empower those individuals to make the changes necessary for Title IX compliance, and, most importantly, to ensure that students' best interests are being served.

Appendix

The United States Department of Education’s (“Department’s”) regulations implementing Title IX require that institutions: (1) Publish a statement of non-discrimination, (2) Appoint an employee responsible for Title IX compliance, and (3) Adopt and publish prompt and equitable grievance procedures for those making complaints of sex discrimination. Over the past four years, however, the Department has taken a much more aggressive stance in its interpretation of educational institutions’ obligations under Title IX. This Appendix contains additional information regarding the evolving nature of Title IX interpretive guidance.

THE APRIL 4, 2011, DEAR COLLEAGUE LETTER

Just shy of Title IX’s 40th birthday, on April 4, 2011, the Department’s Office for Civil Rights (“OCR”) issued a lengthy guidance letter to educational institutions detailing its interpretation of institutional legal obligations under Title IX and, for the first time, expressly addressing sexual violence as a form of prohibited sexual harassment. While this “Dear Colleague” letter (“DCL”) does not in and of itself carry the force of law, the reality is that guidance interpreting a law issued by the very agency that is empowered to enforce that law warrants significant attention and action.

Speaking the day the Department issued the DCL, Vice President Joe Biden announced, “Students across the country deserve the safest possible environment in which to learn. That’s why we’re taking new steps to help our nation’s schools, universities, and colleges end the cycle of sexual violence on campus.” Thus began higher education’s recent focus on sexual misconduct.

The DCL alerted institutions to four areas in which OCR thought they needed additional guidance regarding their Title IX obligations: notice, compliance coordination, training, and grievance procedures. Each area is discussed briefly below.

1. Notice Requirements

Institutions must adopt and widely publish a notice of nondiscrimination, stating that they do not discriminate in educational programs or activities on the basis of sex and advising readers that, in fact, doing so would violate Title IX. Additionally, the notice must clearly identify the institution’s Title IX Coordinator (discussed below).

2. Compliance Coordination

Although the Department’s Title IX regulations have always required that institutions designate someone responsible for coordinating Title IX compliance, OCR formalized this role through the DCL, dubbing the responsible person the “Title IX Coordinator.” OCR stressed that the position is of importance to the entire campus community, not

only the athletics department. OCR expects that the Title IX Coordinator will be the institution's central repository of Title IX knowledge. As such, the Coordinator should be well-versed in the institution's policies, procedures, and resources relevant to sexual harassment and violence.

3. Training

OCR emphasized the need for institutions to train their constituencies on Title IX and related issues, but did not provide a training module or template for institutions to use, with the expectation that training should be tailored to a particular institution's policies and reporting structure.

4. Grievance Procedures

Good grievance (or complaint resolution) procedures are an institution's best defense when it comes to avoiding the litigation, federal enforcement, and publicity risks identified above; consistently implementing those procedures is a key weapon in the institution's arsenal for combating sexual misconduct. Title IX requires that an institution's procedures allow for the prompt and equitable—two important and distinct terms—disposition of complaints of sexual misconduct. Having checks and balances in place to ensure that an institution is following those procedures serves to protect all students involved, including the accused, the accuser, and third-party witnesses.

OCR has said that in order to meet Title IX obligations, an institution's sexual misconduct grievance procedures must: (1) Be publicized and clearly indicate where and how to file a complaint, (2) Cover complaints alleging harassment by employees, students, and third parties, (3) Provide for adequate, reliable, and impartial investigation of complaints, (4) Include designated and reasonably prompt time frames for the major stages of the complaint process, (5) Provide for notification to the parties of the outcome, and (6) Include an assurance that the college or university will take steps to prevent recurrence of any harassment, and to correct its discriminatory effects on the complainant and, if applicable, the campus community at large. Administrators at institutions across the country have evaluated and, as necessary, revised their procedures for addressing complaints of sexual misconduct, since the DCL was issued, to ensure that they meet these requirements.

Three years after issuing its DCL, on April 29, 2014, OCR issued a document titled "Questions and Answers on Title IX and Sexual Violence" ("Q&A"). The Q&A, which was longer than the DCL itself, purported to "further clarify the legal requirements and guidance articulated in the DCL." While the Q&A is too lengthy and substantive to summarize here, significant areas addressed by OCR included:

- The identification of “responsible employees,” that is, those employees who are responsible for reporting sexual misconduct to appropriate individuals on campus, and the extent to which knowledge of sexual violence by a responsible employee constitutes notice to the institution.
- The details to be included in an institution’s procedures for responding to reports of sexual violence.
- What to do when an alleged victim wishes for the report to be kept confidential.
- Extensive training expectations for students and employees.

VAWA REAUTHORIZATION AMENDMENTS TO THE CLERY ACT

The reauthorization of the Violence Against Women Act (“VAWA”) in 2013 amended the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”) in an effort to more effectively address, and ultimately reduce, sexual violence on college campuses.

While the major objective of Clery is to collect and publish information about a broad range of campus safety- and security-related requirements, the amendments, which took effect in 2014, focused on the following:

- Adding gender identity and national origin as two new categories of bias that may serve as the basis for a determination that a hate crime has taken place.
- Ensuring that institutions fully describe the disciplinary procedures used in cases of alleged dating violence, domestic violence, sexual assault, and stalking, including the steps, anticipated timelines, and decision-making process for each, and how the institution determines which procedures to use.
- Requiring institutions to include in their annual security report a statement of policy regarding the institution’s programs to prevent dating violence, domestic violence, sexual assault, and stalking as well as the procedures that the institutions will follow when one of these crimes is reported.
- Requiring that an institution’s disciplinary proceedings afford the accuser and the accused the same opportunities to have others present during the institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.¹¹

¹¹ U.S. Department of Education press release, October 17, 2014. <http://www.ed.gov/news/press-releases/us-department-education-announces-final-rule-help-colleges-keep-campus-safe>.

RESOLUTION AGREEMENTS

Beyond the language of Title IX, OCR's interpretations in the DCL and Q&A, and the White House Task Force report, colleges and universities can take some cues regarding where to focus their Title IX compliance discussions from the resolution agreements that OCR has entered into with institutions across the country. It is important to understand, however, that these resolution agreements—which are meant to resolve an institution's alleged noncompliance with Title IX—are specific to a particular institution, including its policies and the unique set of facts that served as the impetus for the investigation into alleged noncompliance. Thus, while the agreements are informative, they are by no means binding legal mandates, nor should they automatically dictate another institution's actions.



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1133 20th St. N.W., Suite 300 • Washington, D.C. 20036
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