We acknowledge the variety of terms used by Title IX and Clery Act regulations and professions when referring to parties to an act of gender violence. In this paper, we offer that the terms “victim,” “survivor,” “accuser,” and “complainant” are all synonymous, as are “attacker,” “respondent,” and “accused.”
INTRODUCTION – SETTING THE STAGE

Today we stand in the midst of a cultural shift in the way campuses manage the policy violations contained in reports of sexual and gender violence. As support systems for victims evolve on campuses across the nation, we are experiencing a rapid increase in the number of complaints. This increase may translate into higher reporting rates to law enforcement agencies as well. Collaboration between higher education and the criminal justice system, especially sexual assault investigators and prosecutors, must improve to ensure effective and thorough investigation of these crimes. The campus must be able to protect its students and meet its federal obligations within campus disciplinary systems.

Passed in 1972, Title IX states: “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 educational program or activity receiving Federal financial assistance.” The Department of Education’s Office for Civil Rights’ (OCR) April 4, 2011 Dear Colleague Letter (DCL) significantly shifted many institution’s views on Title IX’s wider applicability, which to this point had been focusing on gender equity primarily in athletics. This shift was despite OCR’s earlier guidance in 2001’s Revised Sexual Harassment Guidance, that gender violence crimes were actionable under Title IX (TIX). ED emphasized this in an August 4, 2004 DCL noting it would be “…enforcing Title IX aggressively,” and repeated in a January 25, 2006 DCL that promised “…vigorous enforcement.”

OCR’s April 2011 DCL provided substantial guidance that described responses required by institutions of higher education (IHEs). One of the seminal highlights to campus disciplinary procedures was the further articulation of the expectation of a prompt investigation for each instance of harassment (including sexual assault) that the IHE knew or should have known of. This letter also reminded IHEs they were required to take “… interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency’s fact-gathering is in progress.”

As IHEs wrestled to implement the comprehensive requirements, the President signed into law the Violence Against Women Reauthorization Act (VAWA) of 2013. VAWA amended the Clery Act (which regulates many aspects of campus security policy and safety awareness efforts), codifying some of the key elements of the 2011 DCL (requiring a prompt, fair, and impartial disciplinary proceeding). In 2014, OCR published the “Questions and Answers about Title IX and Sexual Violence” (Q&A) (PDF). Around the same time, the White House published a task force report (PDF) and information at a website entitled www.notalone.gov that provided a unifying source of information for key stakeholders.

1http://www2.ed.gov/about/offices/list/ocr/docs/ix_dis.html
2http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html
We were unable to find research examining factors influencing victims’ choices of whether to use a campus discipline process, a criminal justice process, or both, and anecdotally the number of victims who do use both systems is very small. In this paper, we explore a few challenges faced by IHEs and law enforcement agencies (LEAs) simultaneously undertaking an investigation of a policy violation and a crime of gender violence. The collection of law, regulation, and guidance mentioned above has created special challenges for victims seeking to participate in both the criminal justice process and the campus disciplinary process. It is also important for both processes to remain “victim-centered” as called for by the Not Alone resource documents. IHEs must provide a process that is prompt, fair, and equitable. This issue significantly challenges investigations in two areas, the 60-day timeline and the required interim steps.

DISCUSSION

ED, in the Q&A (pp. 31-32), provided a 60-calendar day “window” as a guide for an IHE to complete its initial proceeding, which they refer to as the “investigation process.” This time frame encompasses fact-finding, hearings (or other determination processes), and remediation of the harassment including sanctioning. In that same document, OCR has also advised (p. 28) that an IHE may delay the investigation only while the LEA undertakes the “evidence gathering” stage of its investigation and understands the variability in duration of this phase from one LEA to another.

Interim steps are actions undertaken by the IHE while the “proceeding” or investigation is underway to eliminate any harassment, and prevent its recurrence. In the case of sexual assault, it is common for an IHE to impose some type of non-disciplinary suspension or removal from housing that may lead to a resident student returning home. That home may be outside the law enforcement’s jurisdiction and may even be outside the United States. It is also common for criminal investigators to seek an initial interview or other investigative technique before the subjects of the criminal investigation are aware they are “suspects,” for example pretext calls. The imposition of an interim restriction, like a non-disciplinary suspension that leads the “suspect” to return home in a different jurisdiction, may prevent the criminal investigator from conducting an interview while “suspects” are unaware they are “suspects.”

The Q&A, in several places, mentions the importance of a Memorandum of Understanding (MOU) between the IHE and the LEA (among other local resources). This critical document is also well discussed in the White House Task Force Resource Guide (p. 3). One important goal of the MOU should be anticipation of challenges to an effective and victim-centered investigation by both the IHE and the LEA and the development of processes that serve both the victim and the offender, preserve the criminal and disciplinary cases, and are “prompt, fair, and equitable.” The MOU is a critical component that aligns both processes and preserves the victim’s right to access both processes at some future time.

MOUS: THE ARGUMENT FOR COOPERATIVE INVESTIGATION

ISSUE 1

Challenge: Separate investigations will require multiple interviews and yield multiple statements from the victim. The neurobiology of trauma’s confounding effect on recall is well-researched and documented in a variety of clinical journals. Additionally, this “retelling” significantly re-traumatizes some victims each time and should be minimized throughout the process. Among the

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2. [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3182004/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3182004/)
challenges produced, these shuffled memories have traditionally been perceived as indicators of deception, not only by the public at large, but by investigators who are not “trauma-informed.” Unlike Title IX investigators, LEAs and prosecutors have no requirement that their investigators be specially trained in sexual assault investigation, and in many jurisdictions, sadly this is the case.

**Solution:** Cooperative training between IHEs and LEAs that provide trauma-informed training, ideally formalized under an MOU.

### ISSUE 2

**Challenge:** The IHE’s timeline runs much more quickly than the public criminal justice system. There may be a need for the IHE to impose “interim steps” at the time the victim reports. Some of these “interim steps” may lead to the suspect becoming aware a report has been filed. Criminal investigators, at times, want the element of surprise on their side when meeting with a suspect to reduce the likelihood of time to fabricate statements or collude with “witnesses” to develop untrue alibis. Circumstance may require that an IHE temporarily suspend a student who then returns home to another state or country, complicating the LEA’s attempts to obtain forensic evidence. The removal of the suspect from the campus can also happen when a suspension or expulsion is imposed as a sanction based upon the preponderance of evidence standard the IHE is applying. This standard, only more than 50%, and commonly applied in civil law, is substantially lower than the standards used in criminal proceedings.

**Solution:** Joint training in the procedural requirements of Title IX and the Clery Act related to both law enforcement and campus investigations and campus disciplinary proceedings, and the establishment of an MOU that characterizes each signatory’s needs and pledges cooperation and support by other signatories.

### ISSUE 3

**Challenge:** Law enforcement is understandably reluctant to allow additional people into an interview setting. LEA investigators, for a variety of valid reasons, minimize the number of people with whom an interviewee interacts. The idea of admitting a non-police Title IX campus investigator into the interview is foreign but not without parallel. Twenty years ago, investigations of child abuse may have been undertaken without a member of the child protective services agency present, and today the presence of these social service investigators is nearly universal. It is also common today that advocates from sexual assault support centers are present while victims are interviewed. Increasingly, these advocates are becoming common on our nation’s campuses. A related issue arises when a party to the proceeding declines an interview but provides a copy of a statement given in the criminal investigation.

**Solution:** Collaboration between criminal and Title IX investigators. If a two-person interview is not appropriate, consider remote participation in the interview (after appropriate consent by the interviewee) by campus investigators via a closed circuit video system. Campus investigators could then communicate with the LEA investigator during the interview in real time by text or even an ear-bud. Outline such cooperative techniques in an MOU.

### SUMMARY

Title IX requires immediate action to eliminate sexual harassment (including gender violence), prevent its recurrence, and address its effects. It is a maxim in emergency planning that “If it can be predicted, it can be prevented.” As IHEs and LEAs learned after mass casualty incidents, it is potentially disastrous to respond without a plan. We can predict investigatory challenges, and while they may not be fully preventable, their responses can be considered in advance. It is imperative that colleges and universities initiate a thorough conversation, including Title IX and Clery Act training, with their law enforcement agencies and prosecutor’s offices on the requirements imposed by those laws. The dialog should lead to a comprehensive memorandum of understanding that establishes not only the broad goals sought, but the anticipation of each operational challenge and methods undertaken to resolve it.

### SUGGESTIONS FOR FUTURE RESEARCH

As campus climate surveys become more common, two questions suggested by this paper are raised;

- Are victims more likely to use the campus discipline system than the criminal justice system and why?
- Will cooperative investigations undertaken with guidance from well-considered and thorough MOUs improve the rates at which victims choose both processes concurrently?