

Title IX Implications of a Reported Hate Crime



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Why We Count Hate Crimes



“Being selected as a victim because of who you are is more deeply traumatizing than being targeted for economic gain or personal revenge—more frighteningly irrational and inescapable. You can leave your valuables at home, but not signifiers of your identity.”

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Hate Crimes and the Clery Act



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Counting Hate Crimes Under Clery



■ Bias Test—Is it one of 8 bias categories?

- ❑ Race
- ❑ Religion
- ❑ Ethnicity
- ❑ National Origin
- ❑ Disability
- ❑ Gender
- ❑ Sexual Orientation
- ❑ Gender Identity

■ Crime Test—a Clery-countable crime?

- ❑ Murder/Non-negligent Manslaughter
- ❑ Sexual Assault (Rape, Fondling...)
- ❑ Robbery
- ❑ Aggravated Assault
- ❑ Burglary
- ❑ Motor Vehicle Theft
- ❑ Arson
- ❑ Larceny-Theft
- ❑ Simple Assault
- ❑ Intimidation
- ❑ Destruction/Damage/Vandalism

■ Motivation Test—Evidence of perpetrator bias?

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Side Bar—Bias Incidents



In a 2018 survey of IHE Equal Opportunity Professionals, 67% reported at least one bias incident on campus in the last 24 months. Only 19% reported a hate crime. None reported more than one hate crime.

- Hate speech is on the rise on college campuses.
- Hate speech and other bias incidents are not necessary "hate crimes."
- Most hate speech is free speech.
- How do you manage expectations of free speech on campus when speech is deemed "hate speech"?

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Gender Bias



- "a preformed negative opinion or attitude toward a person or group of persons based on their actual or perceived gender, e.g., male or female." (*Clery Handbook*)

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Sexual Orientation Bias



- “a preformed negative opinion or attitude toward a group of persons based on their actual or perceived sexual orientation. Sexual Orientation is the term for a person’s physical, romantic, and/or emotional attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual, and heterosexual (straight) individuals.” (*Clery Handbook*)

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Gender Identity Bias



- A preformed negative opinion or attitude toward a person or group of persons based on their actual or perceived gender identity, e.g., bias against transgender or gender non-conforming individuals. Gender non-conforming describes a person who does not conform to the gender-based expectations of society, e.g., a woman dressed in traditionally male clothing or a man wearing makeup. A gender non-conforming person may or may not be a lesbian, gay, bisexual, or transgender person but may be perceived as such.” (*Clery Handbook*)

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Gender Identity



- **Gender Identity**—may be expressed by:
 - Gender characteristics: clothing, hair, voice, mannerisms
 - Behaviors: non-conforming to traditional gender stereotypes
 - Transitioning: Process to align more closely with internally identified gender. Can be social transition or physical transition (medication and/or surgery)
- **Transgender**—identifying with different gender than that of birth
 - Maybe outwardly expressed all of the time, part of the time, or none of the time
 - Unrelated to sexual orientation. A trans person may identify as straight, gay, bisexual etc.

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Sidebar—Evolving nomenclature



- 2015 FBI's *Hate Crime Data Collection Guidelines and Training Manual*.
 - Referenced in the Clery Handbook
 - Applicable recommendations for investigating and classifying hate crimes
- But...
 - Wording has changed in the LGBTQ+ community
 - Data gathering format lags current linguistic trends

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Associated Terms



- Bisexual
- Gay
- Heterosexual
- ~~Homosexual~~
- Lesbian
- LGBT
- ~~Sexual Preference~~
- ~~Transgendered~~

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Side Bar—Sexual Orientation Language



- **Bisexual:** Emotionally, romantically, or sexually attracted to more than one sex, gender, or gender identity.
- **Genderqueer:** Rejecting the notions of static categories of gender and embracing a fluidity of gender identity and/or sexual orientation.
- **Pansexual:** Someone with potential for emotional, romantic or sexual attraction of people of any gender (but not always in same way)
- **Asexual:** Lack of sexual attraction or desire for other people.

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Side Bar—Gender Identity Language

- **Cisgender:** person whose gender identity or expression aligns with sex at birth (assigned gender)
- **Gender non-conforming:** someone who does not conform to traditional expectations of gender.
- **Gender Non-binary:** Person who does not identify exclusively as a man or woman (both/between/neither)
- **Agender/Androgynous:** Identifying as neither male or female
- **Gender Fluid:** Fluid or unfixed gender identity
- **Pangender:** More than one gender or a member of all genders.

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Transgender

- Gender reassignment laws vary from state to state
 - New York—only a doctor's note is required to officially change gender for legal purposes
 - New Jersey—requires medical certificate indicating the sex of the person "has been changed by surgical procedure."

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Labeling as a Mental Illness

- The American Psychiatric Association's DSM-5 states:
 - **Gender Dysphoria:** involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender.
 - The original name—"gender identity disorder"—has been changed but still associated stigma.

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Crime Test

■ Crime Test

- ❑ Murder/Non-negligent Manslaughter
- ❑ Sexual Assault (Rape, Fondling...)
- ❑ Robbery
- ❑ Aggravated Assault
- ❑ Burglary
- ❑ Motor Vehicle Theft
- ❑ Arson
- ❑ **Larceny-Theft**
- ❑ **Simple Assault**
- ❑ **Intimidation**
- ❑ **Destruction/Damage/Vandalism**

**And remember—
must have
Geography and
a report to a CSA
for it to count!**

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Hate Crimes by Category (on Campus)

Category	2015				2016				2017			
	Total	G	SO	GI	Total	G	SO	GI	Total	G	SO	GI
Murder	0				0				1			
Rape	5	1	3	1	2	1	1		2	2		
Fondling	3			1	7	5	0	1	6	4		2
Robbery	3			3	3	1			3		1	
Ag Assault	18		7	1	37	2	8	2	16		2	
Burglary	5			4	7	3	2		4	1		
Motor V T	1				3	1			1			
Arson	2			1	2		1		1			
Larceny	33	9	1	3	38	8	5	3	24	7	6	1
Simple As.	86	7	18	5	105	14	18	2	87	4	18	5
Intimidation	364	35	78	11	436	33	87	20	396	26	67	21
Vandalism	370	11	62	8	473	42	69	22	442	24	61	24

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Motivation Test-- Clery Handbook...

"The mere fact the offender is biased against the victim's actual or perceived race, religion, disability, sexual orientation, ethnicity, gender, and/or gender identity does not mean that a Hate Crime was involved. Rather, the offender's criminal act must have been motivated, in whole or in part, by his or her bias."

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Motivation Test



- The bias must be attributed to the perpetrator
- A victim believing a crime was motivated by bias is not enough—the reported crime must have enough information to show the bias of the perpetrator
- Specifically challenging if the perpetrator has not been identified
- Unlike most Clery crimes, Hate Crimes require some level of investigation to determine the crime occurred and the motivation of bias was present

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The Offender “Profile”



- Rarely pre-motivated, more often “reactive”
- Sometimes thrill seekers
- Occasionally mental illness
- Profile from NYPD Hate Crimes Task Force:
 - White, male, 18-24
 - Emotionally juvenile, impulse control issues
 - Often already have criminal record
 - Crime scene is chaotic—because not planned
 - Perpetrator is stranger to victim

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LE Response to Hate Crimes




- **Two-Tier Decision-Making**
 - **Preliminary Investigation:** Train all responding officers in initially recognizing incidents as possible hate crimes
 - Training on recognizing hate crimes
 - Training on working with LGBTQ communities
 - **Follow-up Investigation:** Possible hate crimes forwarded to second-level officer (ideally trained in hate crime matters).
 - Second-level reviews facts
 - makes final determination as to hate crime count

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Title IX

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Title IX (from the 2001 DCL)

- **“Sexual harassment** is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”
- **“Gender-based harassment** may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping.”

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Hostile Environment (2001 DCL)

- “conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment”), the definitions are consistent.
- “under Title IX, the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program.”

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Problems with the 2001 DCL



- "Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.
 - If a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual.
 - On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

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Title IX Proposed Regs Definition



- "The Department defines "sexual harassment" to mean either
 - an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
 - or sexual assault."

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Case Law Impact



- CA Federal District Court case found distinction between "gender stereotyping" and "sexual orientation" to be "illusory and artificial" and found Title IX does protect against sexual orientation discrimination (2015)
- 7th Circuit case allowed suit under Title VII based on sexual orientation in a faculty case (2017)
- 2nd Circuit case decided sexual orientation falls under Title VII (2018)
- SCOTUS declines to hear appeal of transgender bathroom policy, upholding ruling in favor of school's policy allowing for bathroom of choice.
- AND NOW...SCOTUS has 3 cases addressing sexual orientation and gender identity which may impact Title IX...

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Crime Test (for Counting Hate Crimes)



■ Crime Test

- ❑ Murder/Non-negligent Manslaughter
- ❑ Sexual Assault (Rape, Fondling...)
- ❑ Robbery
- ❑ Aggravated Assault
- ❑ Burglary
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- ❑ **Simple Assault**
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*How do these fit
under Title IX?*

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Your Policy and Process



- Most schools include gender identity and sexual orientation under the Title IX policy umbrella
- If included—follow YOUR policy in providing ...
 - ❑ Victim accommodations and protective measures
 - ❑ Options for proceeding
 - ❑ Notice documents
 - ❑ Formal and informal adjudication options

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Managing & Investigating Hate Crimes Under Title IX



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The Occidental Clery Audit



"Incident No 12-0607 Classified as Harassment – should have been classified as Hate Crime Offense/Intimidation. Complainant was surrounded by five or six males who started to call him sexually orientated slurs. This placed the complainant in "reasonable fear" causing him to quickly retreat from the area. Intimidation occurred when the suspect was surrounded, which unlawfully placed the suspect in reasonable fear of bodily harm, even though no weapons were displayed and the complainant was not physically attacked. This would result in an underreporting of Hate Crime/Intimidation (FPRD p. 17)."

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Elements of Sexual Harassment



1. Is it gender-based?
2. Was it unwelcome?
3. Effect work or education?
 - a) Did it directly impact work or education? or
 - b) Is it severe and/or pervasive to the victim creating a hostile environment (constructive impact on work or education)?
4. Would it be considered severe and/or pervasive to a reasonable person?
5. or Sexual Violence

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Investigating Title IX Complaints



- Start with the Complainant
 - What does the Complainant believe motivated the behavior?
 - Are the elements to sexual harassment present?
 - If school policy includes gender identity and sexual orientation—it can be considered "gender-based"
 - Is the conduct also a crime? (if so—gets us closer to "severe" and also easier to prove "unwanted")
- What evidence is present to prove the motivation of the Respondent?

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Evidence of “bias”

■ Bias-related language:

- Comments, written statements or gestures made by the offender, that indicate the offender's bias. Can include anti-gay language, specific gender-identity language, or general gender language aimed to hurt such as calling a transgender female a “man.”

■ Location:

- Incidents targeting a LGBTQ center, Women's Center, a Health Clinic known to serve the LGBTQ community, or residence of victim.

■ Timing:

- Incidents that occur subsequent to an event or while a victim was engaging in a particular activity. For example, an LGBTQ advocacy group meeting, training programs, rallies, Pride parades, Transgender Day of Remembrance etc.

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Campus Response to Hate Crimes

- Draft Bias Response Protocols
- Create a Bias Response Team
- Educate and involve key campus constituencies
- Formalize communications between LE and Title IX
- Test protocols in emergency planning exercises

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Recognizing our Biases


- When a report first comes in--What and who do we imagine?
- What has impacted that perspective?



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Questions?

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