

# Centura College, AIM, and Tidewater Tech Title IX and Clery Training

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# The Sexual Misconduct Landscape

# The Landscape

## Clery Act

- Violence Against Women Act (VAWA)

## Title IX

- Dear Colleague Letters
- Case Law
- Regulations
- Resolution Agreements

## Constitutional considerations

# Clery Requirements

- Must provide and publish policies and procedures related to sexual misconduct
  - Clery focuses on VAWA crimes
- Requires interim accommodations
- Requires prompt, fair, and impartial proceedings conducted by trained, unbiased individuals
- Requires advisor of choice for both parties

# Constitutional Due Process Requirements

Due process is comprised of two pieces: substantive due process and procedural due process

Origins: Fifth and Fourteenth Amendment of the U.S. Constitution requiring protections against the deprivation of life, liberty, or property

Important education-related case: *Goss v. Lopez*, 419 U.S. 565 (1975).

# 2020 DOE/OCR Regulations

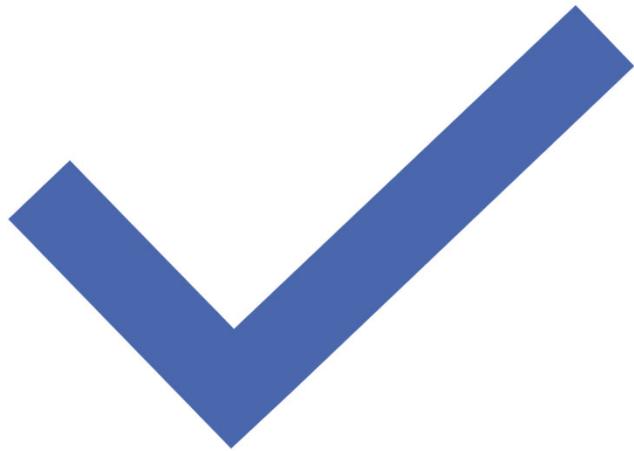
- On May 6, 2020, the Department of Education released new regulations entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” at 34 CFR Part 106.
- Implementation of these regulations was required by August 14, 2020.

“Nondiscrimination on the Basis of sex in  
Education Programs or Activities  
Receiving Federal Financial Assistance.”

# 2020 DOE/OCR Regulations

- The preamble provides that “the final regulations: affirm that the Department’s Office for Civil Rights (“OCR”) may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating the Department’s regulations implementing Title IX, consistent with 20 U.S.C. 1682...”

“Nondiscrimination on the Basis of sex in  
Education Programs or Activities  
Receiving Federal Financial Assistance.”



# Regulatory Requirements

# Policy Definitions

Actual  
Knowledge

Complainant

Formal  
Complaint  
• Grievance Process

Respondent

Sexual  
Harassment

Supportive  
Measures

- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”

# Actual Knowledge

# Formal Complaint

- “Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”

# Complainant

- “Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”

# Respondent

- “Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

- “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - 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;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or...”

# Sexual Harassment

- “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - ...‘Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).”

## Sexual Harassment (part 2)

# Supportive Measures

- “Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”

# Supportive Measures Examples

Counseling

Extension of  
deadlines

Course-related  
adjustments

Modifications of  
work- or course-  
schedules

Campus escort  
services

Mutual  
restrictions of no  
contact between  
the parties

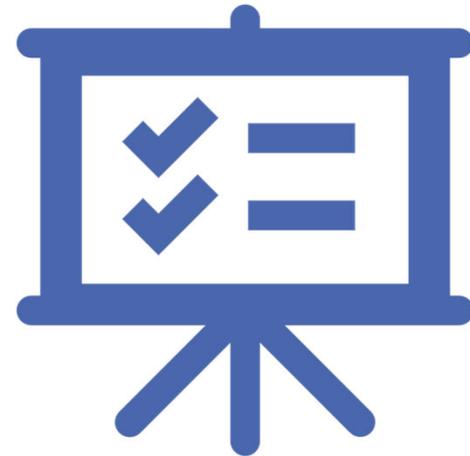
Changes in work  
locations

Leaves of absence

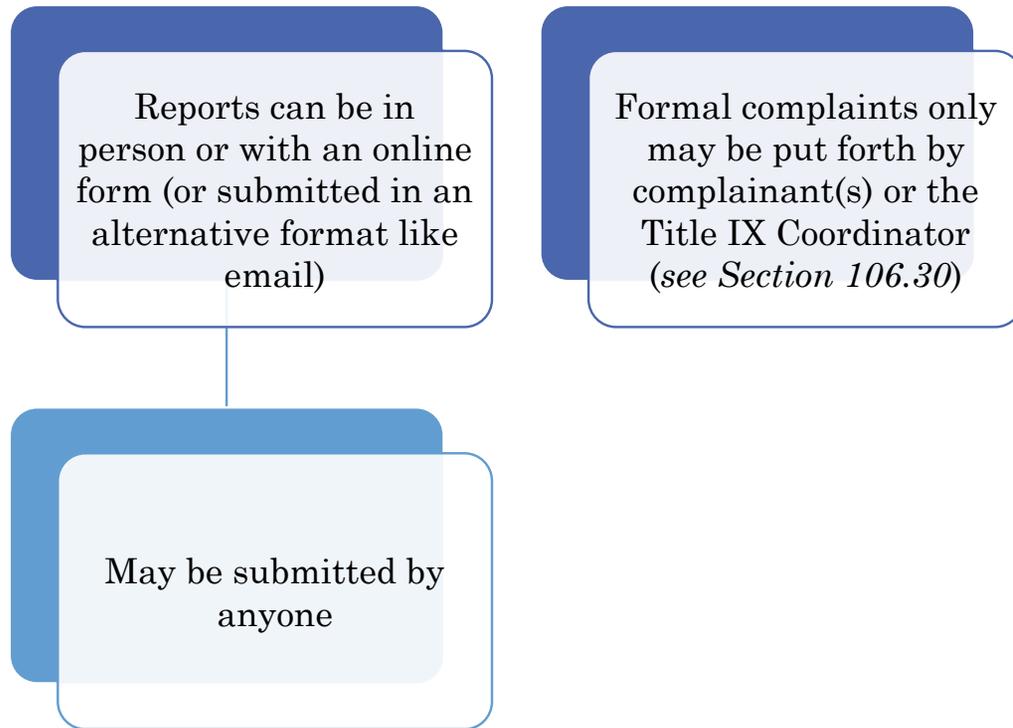
Increased security  
and monitoring of  
certain areas of  
campus

# Resource Identification

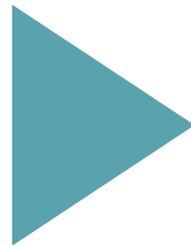
- Required designation of one (1) employee as Title IX Coordinator
  - Must be displayed on the website and in each handbook and catalog available to all applicants for admission and employment, students, parents or legal guardians of minors, employees, etc.
  - Must include name or title, office address, email address, and telephone number of the Title IX Coordinator



# Report Structure



# Jurisdiction



# Required Case Dismissal

If the conduct  
does not  
constitute sexual  
harassment

Did not occur in  
the institution's  
program or  
activity

Did not occur  
against a person  
in the U.S.

# Optional Case Dismissal

Complainant  
withdrawal from  
process

Respondent no  
longer  
enrolled/employed

Insufficient  
evidence available  
to make a  
determination

# Formal Grievance Procedure

Equitable  
Treatment of  
Complainants  
and Respondents

Objective  
Evaluation of All  
Relevant  
Evidence

Presumption of  
Non-  
Responsibility

Reasonably  
Prompt Time  
Frames

## Formal Grievance Procedure (continued)

Describe Range or List of Possible Sanctions and Remedies

Describe Standard of Evidence

Procedures and Bases for Appeal

Describe Range of Supportive Measures

Privileged Information

# Evidence

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Privileged information not permitted unless disclosed by individual holding the privilege

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Evidence may also be restricted based on rape shield-type policy or based on relevance

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No evidence (specifically statements) permitted to be considered if an individual does not present for cross-examination



# Standard of Evidence: Preponderance

- The Legal Information Institute more simply defines preponderance as the burden of proof that “is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.”

# Initiation of Grievance Procedure

- Written Notice of Allegations. Must include:
  - Details of the grievance process, including informal resolution
  - Allegations of sexual harassment including “sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
    - Including party identity, conduct, date and location of the incident
  - Statement indicating Respondent is presumed not responsible and determination regarding responsibility does not occur until the conclusion of the grievance process
  - Information regarding advisor of choice
  - Statement about the relevant section of the code of conduct that prohibits knowingly making false statements/submitting false information



# Pop Quiz 1

## Investigation

- The single investigator model is now prohibited.
- There must be autonomy between the Title IX Coordinator, the investigator(s), the adjudicator(s), appellate decision-maker(s), and facilitator(s) of informal resolution.

## Investigation: Part 2

- Burden of proof and evidence collection is placed upon the institution.
- All parties must have an equal opportunity to present witnesses and other evidence (exculpatory and inculpatory).
- No gag orders permitted.

## Investigation: Part 3

- Advisors of choice must be permitted. Participation in the process can be controlled by the institution, but must be done fairly.
- Written notice of all hearings, meetings, and interviews must be given with adequate time for the individual to prepare.

# Investigation Report

- The investigation report is required to “fairly” summarize “relevant” evidence.
- Parties must be given an opportunity to review and inspect all evidence.
- Additionally, parties must be given ten (10) days to review and comment upon the investigative report prior to finalization.



# Hearings

## Live hearings required

Facilitating technology permitted

No barriers to sight/sound permitted



## Cross-examination required

All cross-examination must be conducted by advisor (either of choice or supplied by the institution)

Relevance determinations must be made prior to any question being answered and decisions to exclude must be placed on record in real time.

- Written Determination Regarding Responsibility Must Include Certain Details
  - Identification of the allegations
  - Description of the procedural steps from the initiation of the process onward
    - Includes determination of responsibility, notifications to parties, interviews with parties and witnesses, site visits, methods to gather evidence, and hearings

# Outcome Determination

- Written Determination also must include:
  - Findings of fact supporting the determination of responsibility
  - Application of the code of conduct to the facts
  - A statement of the result of each allegation and rationale
    - Includes determination of responsibility, sanctions, remedies provided to complainant
  - Notice of appellate process and procedure

## Outcome Determination (continued)

# Appeals

- All parties must be offered the opportunity to appeal from a determination of responsibility or from a dismissal of a formal complaint (in its entirety or in parts) on the following grounds:
  - Procedural irregularity that impacted the outcome
  - New evidence that was not reasonably available
  - Staff/facilitator bias for/against complainants or respondents generally or the parties in the case



- “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

## Retaliation

- Intimidation
- Threats
- Coercion
- Discrimination
- “Charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances” for the “purpose of interfering with any right or privilege secured by title IX.”

## Retaliation Examples

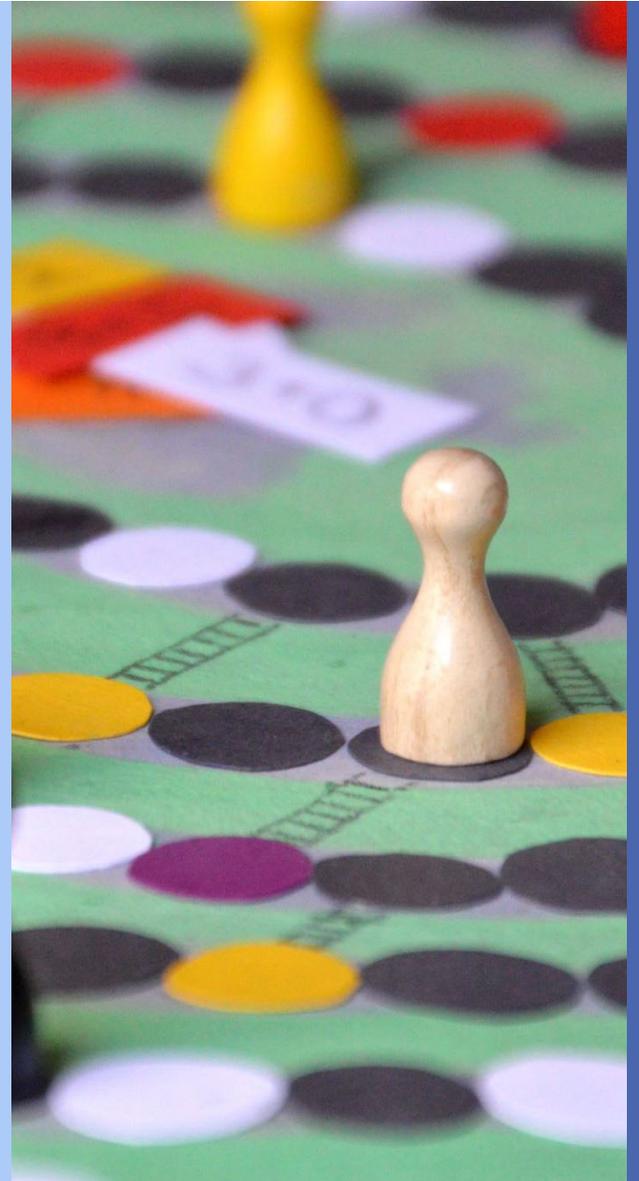
- All individuals involved with the Title IX process (Title IX Coordinator, investigator(s), adjudicator(s), appellate decision-maker(s)) must be impartial and must receive mandatory training.
  - Must be posted on website
  - Must include information regarding relevancy determination and anti-bias

# Training Requirements

# Record Retention

- An institution must maintain records for seven (7) years, including:
  - Sexual harassment investigation including determination regarding responsibility
  - Sanctions imposed
  - Remedies issued
  - Appeals, including results
  - Informal resolutions, including results
  - Training materials

# Pop Quiz 2



A black and white photograph of three praying mantises perched on a leaf. The mantises are facing forward, with their large, bulging eyes and raptorial front legs clearly visible. The background is a soft, out-of-focus grey. The image is framed by a blue border on the left and right sides.

# Other Compliant Process Considerations

- Oxford Languages defines bias as “prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”
- The regulations hone in on both generalized bias against parties and specific bias against a particular, named party.

# Bias

## Documentation

All reports should be formal and, when relevant, written in the third person.

Neutrality is critical in all documentation.

- Policy
- Notice of investigation
- Email correspondence
- Investigator inquiries
- Adjudicator questions/interactions



## Documentation (continued)

- Establish clear guidelines on language to be used. It is advisable to use the language set forth in the regulations, particularly “complainant” and “respondent.”



# Pop Quiz 3

# Title IX/Sexual Misconduct Policy Discussion



# Journey of a Complaint

- Formal complaint filed with Campus Executive Director
- Notification of Regional Director and Corporate Director of Student Affairs
- Review of complaint
- Initiation of formal investigation
  - Supportive measures
  - Evidence gathering
  - Report preparation
  - Report review
  - Report finalization
  - Hearing (when applicable)

# Clery Compliance



# Overview

- Institutions have ongoing crime reporting obligations.
- As part of that obligation, the ASR typically must be distributed by October 1 each year. That includes statements of policy related to safety and security as well as crime statistics.

# Geography



**On Campus Property:** Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes including residence halls.



**Residential Facilities:** Any student housing facility that is owned or controlled by the institution.

# Geography



**Non-Campus Property:** Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.



**Public Property:** All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.

# Reportable Crimes: Criminal Offenses

- Criminal Homicide
  - Murder
  - Non-negligent manslaughter
  - Manslaughter by negligence
- Sexual Assault
  - Rape
  - Fondling
  - Incest
  - Statutory Rape
- Robbery
- Aggravated Assault
- Burglary
- Motor Vehicle Theft
- Arson

# Reportable Crimes: Hate Crimes

Any of the First-Tier Criminal Offenses

Larceny-Theft

Simple Assault

Intimidation

Destruction/Damage/Vandalism of Property

**Reportable  
Crimes:  
VAWA  
Offenses**

**Domestic Violence**

**Dating Violence**

**Stalking**

# Reportable Crimes: Arrests and Referrals for Disciplinary Actions

## Weapon Law Violations

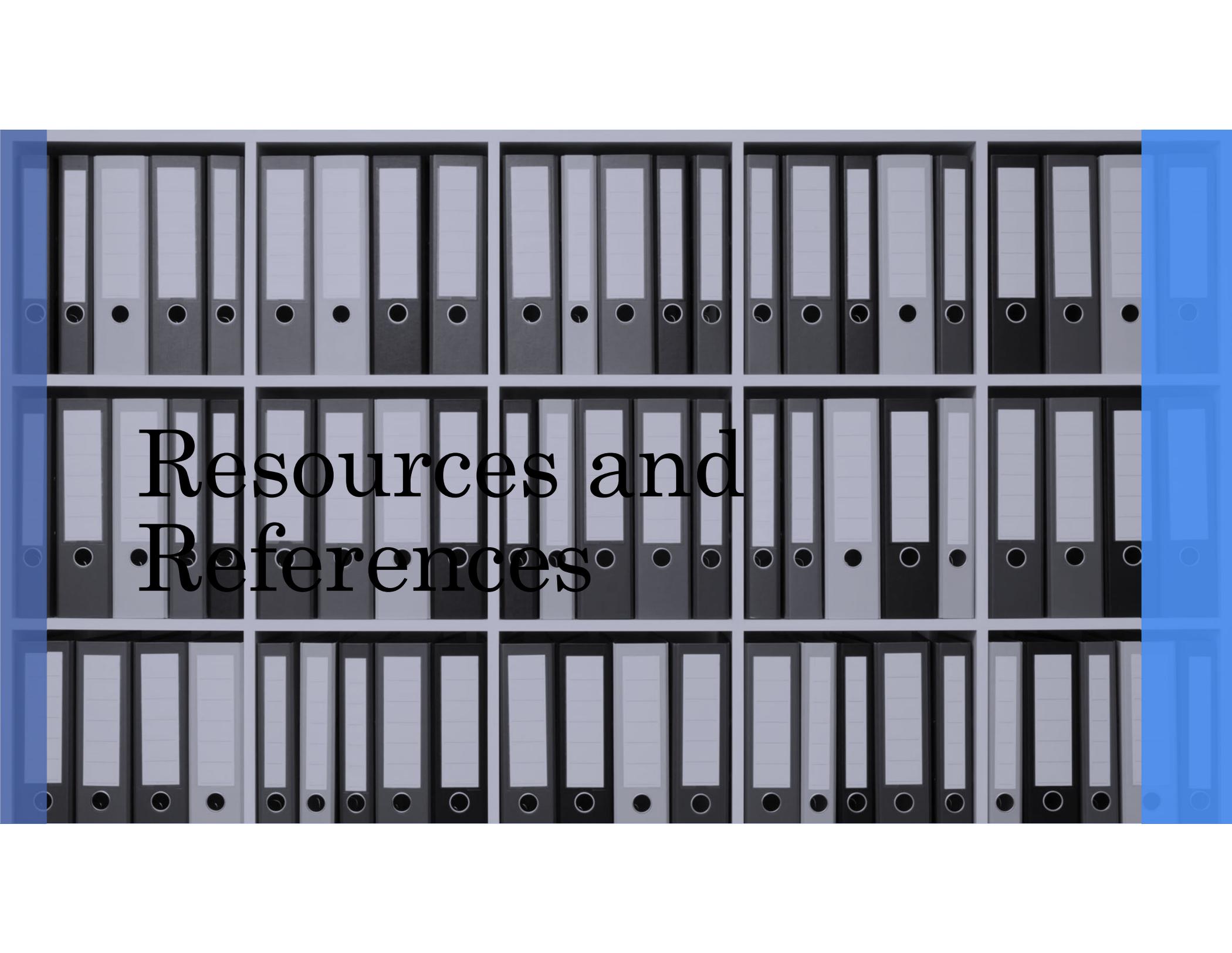
- Manufacture
- Sale
- Purchase
- Possession

## Drug Law Violations

- Possession
- Sale
- Use
- Manufacture/growing

## Liquor Law Violations

- Manufacture
- Sale
- Purchase
- Transportation



# Resources and References

## Resources and References

“Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” 34 CFR Part 106. Department of Education. 05.06.2020.  
<https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>

“Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency.” Office for Civil Rights. 05/12/2020. [\*Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency\*](#)

# Resources and References

“FACT SHEET: U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations.”  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>

“Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972.”  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>

“Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking.”  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

## Resources and References

[Clery Act Appendix for FSA Handbook](#) (October 2020).

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, [34 CFR 668.46](#).