

From: Jessica Mertz
Sent: Fri, 11 Jun 2021 16:43:48 +0000
To: T9PublicHearing
Cc: Abigail Boyer
Subject: Written Comment: Title IX Public Hearing
Attachments: Clery Center_Written Comment for Title IX Public Hearing.pdf

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Please find attached written comments for the Title IX Public Hearing submitted on behalf of Clery Center.

Any questions regarding our comments can be directed to the Executive Director at jmertz@clerycenter.org.

Sincerely,
Jessica Mertz

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Submitted via T9PublicHearing@ed.gov

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Written Comment for Title IX Public Hearing (Conflicts with the Clery Act)

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

Clery Center is pleased to submit this comment regarding the Title IX regulations addressing sexual harassment in education in response to the Department of Education's public hearing. Clery Center was founded by Connie and Howard Clery after the brutal rape and murder of their daughter Jeanne in 1986 (after whom the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")¹ is named). As a 501(c)(3) organization, Clery Center works with colleges and universities to create safer campuses. Utilizing 30 years of experience and our comprehensive understanding of the Clery Act, we guide institutions through understanding and implementing its provisions by providing training, support, and technical assistance.

Because of the Clery Act's intersection with Title IX, we feel it is critical to acknowledge potential conflicts and implementation challenges institutions currently face in working to comply with both laws. We laid out concerns with the Title IX regulations in our October 2020 [Statement of Position on the 2020 Title IX Regulations](#)², and continue to see institutions navigating the challenges we summarize below. While serving separate and distinct functions, with Title IX as a civil rights law and the Clery Act as a consumer protection law, these laws share many of the same goals, the most important of which is to create equitable and transparent processes for responding to violence and crime on campus. Any misalignment or complications between these laws ultimately undermines these goals and cause irreparable harm to survivors.

With that in mind, we encourage the Department to:

- **Address the advisor of choice entanglement and complication with well-established Clery Act rules.**

Title IX regulations disingenuously seek alignment with the Clery Act in order to justify adversarial measures that further complicate disciplinary procedures intended to counter

¹ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. §1092(f) [hereinafter "Clery Act"].

² Clery Center. October 25, 2020. *Statement of Position on the 2020 Title IX Regulations* [Position statement]. https://clerycenter.org/wp-content/uploads/2020/10/102120_Title-IX-Position-Paper.pdf



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hostile educational environments. Specifically, the regulations corrupt the Clery Act's advisor of choice requirements, which was designed to provide critical support to complainants and respondents.

The 2013 Violence Against Women Act amendments to the Clery Act first introduced an advisor of choice requirement afforded to student and employee complainants and respondents in cases of dating violence, domestic violence, sexual assault, and stalking (DVSAS)³. An advisor, as defined by Clery Act regulations, means any individual who provides the accuser or accused support, guidance, or advice⁴.

Under the Clery Act, institutions are not permitted to limit the choice of the advisor or their presence in any meeting or institutional disciplinary proceeding, but are permitted to establish restrictions regarding the extent to which an advisor may participate in the proceedings as long as the restrictions apply equally to both parties⁵. In the preamble to the Clery Act regulations, the Department of Education states that, "specifying what restrictions are appropriate or removing the ability of an institution to restrict an advisor's participation would unnecessarily limit an institution's flexibility to provide an equitable and appropriate disciplinary proceeding."⁶ The Title IX regulations, however, do just that by requiring the complainant's and respondent's advisors to conduct cross-examination as a part of a Title IX-required live hearing. Requiring the advisors to perform a certain function does not give institutions the latitude to determine if that role is appropriate within their process, as stipulated in the Clery Act preamble.

The intent of an advisor of choice under the Clery Act is to provide respondents and complainants with appropriate support. This advisor can be anyone of their choosing - a parent, a roommate, or even an attorney. Title IX's requirement for advisors of choice to perform cross-examination during a live hearing now makes them active participants in disciplinary proceedings. This expectation limits who is willing, able, and appropriate to serve in this role.

Lastly, the Clery Act requires institutions to provide the accuser and the accused "with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice"⁷. This creates the opportunity for institutions to allow both parties to have others present in addition to the advisor of choice. However, when individuals and organizations responding to the Title IX Notice of Proposed Rulemaking stated there should be an option for parties to be accompanied by a confidential advisor or advocate in addition to a party's chosen or assigned advisor, the Department at that time responded that "the sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the

³ 34 CFR 668.46(b)(k)(2)(iii)

⁴ 34 CFR 668.46(b)(k)(3)(ii)

⁵ 34 CFR 668.46(b)(k)(2)(iv)

⁶ Violence Against Women Act; 79 Fed. Reg. 62774 (October 20, 2014)

⁷ 34 CFR 668.46(b)(k)(2)(iii)



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Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties' advisors, or other persons for reasons 'required by law⁸.'"

Given the substantial information on Clery Act regulations in the preamble to the Title IX regulations, it is important for the Department to proactively highlight this intersection so institutions are aware it is an option available to them and do not limit the support system available to complainants and respondents to only those willing to conduct cross-examination within the advisor of choice role.

- **Clearly outline boundaries around whether and how off-campus behavior falls within an institution's educational programs and activities.**

Title IX regulations specify that Title IX response to reports of sexual harassment is limited to only students within the United States. This ignores the reality of the many U.S.-based institutions with international campuses and educational programs, with approximately 1 in 10 students participating in a study abroad program during their undergraduate career⁹. The Clery Act affords specific rights and options for reporting parties and establishes requirements for disciplinary procedures for incidents of dating violence, domestic violence, sexual assault, and stalking. Most institutions' disciplinary procedures, at minimum, apply to incidents within Clery Act geography categories defined under the Clery Act, which include off-campus properties owned or controlled by student organizations officially recognized by the institution as well as locations abroad.¹⁰ In our experience many institutions interpret these Clery Act regulations to extend to incidents that occur off campus beyond Clery Act geography. This is supported by language in the Clery Act regulations¹¹.

By not providing clear boundaries around whether and how off-campus behavior falls within an institution's educational programs and activities and therefore Title IX requirements, the Title IX regulations create inconsistency in how institutions address these civil rights violations in their communities. As a result, campuses have had to create policies that address offenses to meet Clery Act requirements, but are independent of the Title IX process, even though addressing the

⁸ Title IX; 85 Fed. Reg. 30339 (May 19, 2020)

⁹ USA Study Abroad. *U.S. Study Abroad Continues to Increase and Diversify*. <https://studyabroad.state.gov/value-study-abroad/highlights-and-activities/us-study-abroad-continues-increase-and-diversify>

¹⁰ The regulations (34 CFR 668.46(a)) define Clery Act geography as "buildings and property that are part of the institution's campus; the institution's noncampus buildings and property; and public property within or immediately adjacent to or accessible from the campus". Noncampus is a Clery-specific term to represent "any building or property owned or controlled by a student organization that is officially recognized by the institution or 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".

¹¹ The regulations specify that an institution must include a clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as defined in paragraph (a) of the regulations. The language does not establish geographical boundaries for which these policy requirements apply but rather states that they are applicable for institutional disciplinary action for incidents meeting the Clery Act definitions; therefore, nothing in the regulations limits the policy requirements to Clery geography specifically or excludes off-campus behaviors.



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same behavior. This is in direct opposition to a stated goal of the Title IX regulations which was to streamline processes to create more efficient systems.

- **Provide guidance on simultaneous implementation of Clery Act and Title IX reporting requirements.**

Historically the Clery Act and Title IX have had separate reporting obligations for employees, both requiring certain roles to report information to the institution but often with different responsibilities and procedures. The Clery Act requires institutions to designate employees with significant responsibility for student and campus activities as campus security authorities (CSAs)¹². CSAs must then report Clery Act crime allegations to the official or office designated by the institution to collect crime report information. ¹³

The 2020 Title IX regulations narrowed reporting under Title IX, shifting from a reporting process where individuals titled “responsible employees” reported all information that was reported to them to the Title IX coordinator to one in which the institution is only deemed to have actual knowledge of sexual harassment if such information is reported directly to the Title IX coordinator or officials with the authority to institute corrective action¹⁴.

While this does not create inherent conflict between Title IX and the Clery Act, this does complicate how institutions implement both requirements simultaneously. If an institution determines that the individuals in the department collecting Clery Act crime reports are *not* officials with the authority to institute corrective measures then their receipt of reports of dating violence, domestic violence, sexual assault, and stalking will not be considered actual knowledge of sexual harassment under Title IX resulting in a lack of obligation to inform the Title IX Coordinator. As a result, the Title IX coordinator would not reach out to provide information on supportive measures or options for filing a formal complaint as required under Title IX.

This creates challenges in an institution’s overall response to dating violence, domestic violence, sexual assault and stalking because regardless of whether the institution is now required to respond under Title IX, the institution will still have obligations under the Clery Act, such as providing the written explanation of rights and options to the victim, disclosing the report in campus crime statistics, and analyzing whether or not a timely warning should be issued if there is a serious or ongoing threat.

While individual institutions may address these concerns in how they establish their own reporting protocols on campus, it is important that both the Office for Civil Rights and the Clery Compliance Division are able to provide shared and consistent guidance that does not undermine or overcomplicate the existing Clery Act regulations.

¹² 34 CFR 668.46(a)

¹³ 34 CFR 668.46(c)(1)

¹⁴ 34 CFR 106.30(a)



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Clery Center has the privilege of working with colleges and universities nationwide who are committed to ensuring their campus community members can live and work in an environment free from sex discrimination and to holding perpetrators accountable, as necessary. Institutions do not benefit from regulations that create confusion about their responsibility or ability to address safety concerns on campus while, in some areas, directly contradicting other laws—state and federal—designed to support a prompt, fair, and impartial process. We appreciate the Department’s willingness to seek input from communities impacted by Title IX regulations and commitment to ensuring equal and nondiscriminatory access to education for all students.

Thank you for your consideration of these recommendations. If you have any questions, please contact Executive Director Jessica Mertz at jmertz@clerycenter.org.