STATEMENT OF POSITION
ON THE
2020 TITLE IX REGULATIONS

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Clery Center was founded by Connie and Howard Clery after the brutal rape and murder of their daughter Jeanne Clery in April of 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 college and university communities 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. Further, since the 1990 passage of the Clery Act, Clery Center has worked with lawmakers to advance campus safety policy and help our nation's colleges and universities meet evolving compliance standards. As a result, we offer unique insight into the requirements of the legislation, and in 2014 served on the Department of Education's negotiated rulemaking committee tasked with recommending final regulations for the 2013 Violence Against Women Act amendments to the Clery Act.

Because of the Clery Act's intersection with Title IX[2], a civil rights law that prohibits discrimination on the basis of sex in educational programs and activities, we feel it is critical to acknowledge potential conflicts and implementation challenges institutions currently face in working to comply with both laws.

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 some of the same goals, namely to create equitable and transparent processes for responding to violence and crime on campus. Any misalignment or complications between these laws will ultimately undermine these shared goals.

This position paper highlights how advisor of choice requirements under Title IX create conflicts with existing Clery Act regulations. Additionally, it provides insight on how requirements related to the jurisdiction of campus policies and reporting standards create unnecessary confusion for institutions working to be in compliance with both laws. It is our hope that this resource educates legislators on these challenges so that they may advocate for additional guidance or regulations to best support institutions.

ADVISORS OF CHOICE

The Title IX regulations disingenuously seek alignment with the Clery Act in order to justify adversarial measures that further complicate disciplinary procedures intended to counter hostile educational environments. Specifically, the regulations corrupt the Clery Act's advisor of choice requirement, 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,

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 Education Amendments Act of 1972, 20 U.S.C. §§1681 [hereinafter "Title IX"].
3 34 CFR 668.46(b)(k)(2)(iii)

means any individual who provides the accuser or accused support, guidance, or advice.[4] 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 parties.[5] 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. This highlights an inherent conflict in the philosophies behind the function of an advisor of choice across both laws, despite the fact that both are enforced by different divisions of the *same department*. 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, an advocate, or an attorney, to name a few. 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 will inevitably limit who is willing, able, and appropriate to serve in this role.

The Clery Act also requires that disciplinary proceedings be conducted by *officials* who do not have a conflict of interest or bias for or against the accuser or the accused.[7] Traditionally advisors of choice would not have been considered *officials*, as their role was not responsible for conducting any part of disciplinary proceedings. As Title IX now requires advisors of choice to conduct cross-examination as part of a required live hearing, advisors of choice could now be considered officials under the Clery Act.

This change in an advisor's role increases the potential of retaliation by or using an advisor of choice against complainants or respondents. The Clery Act statute and regulations include a prohibition against retaliation, stating that "an institution, or an officer, employee, or agent of an institution, may not retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under any provision in this section".[8] Because the Title IX preamble specifies that "the Department does not believe it is necessary to forbid assigned advisors from being persons who exercise any administrative or academic authority over the other party; assigned advisors are not obligated to avoid conflicts of interest and can fulfill the limited role [of an advisor] regardless of the scope of the advisor's other duties as a recipient's employee",[9] both respondents and complainants are at increased risk of experiencing intimidation, retaliation, coercion and discrimination.

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)(3)(i)(C)
8 34 CFR 668.46(m)
9 Title IX; 85 Fed. Reg. 30340 (May 19, 2020)

In addition, the Clery Act requires officials to receive annual training on issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.[10] Given the new function of advisors of choice conducting cross-examination, making them "officials" in the disciplinary process, institutions may require advisors of choice to attend training to satisfy Clery Act requirements. Doing so could be perceived as the institution limiting the choice of an advisor by creating an additional barrier to serving as an advisor, even though the Clery Act regulations specify that an institution may not limit the choice of an advisor or presence for either party in any meeting or institutional disciplinary proceeding.[11] Absent the Title IX rules, an advisor of choice would not have been considered an official of the institution that requires such training under the Clery Act; however, the increased responsibilities of an advisor of choice under the Title IX rules create an inherent conflict within the Clery Act that did not exist before the Title IX regulations. As a result, the function of an advisor of choice conducting cross-examination under Title IX creates entanglement and complication with well-established Clery Act rules.

Lastly, although the preamble frequently references Clery Act responsibilities, the Department chose to remain silent on how Clery Act regulations inform an individual's ability to request the support of a confidential advisor or advocate in addition to an advisor of choice. 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 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 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 law".[12]

As 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",[13] it creates the opportunity for institutions to allow both parties to have others present in addition to the advisor of choice.

Given the substantial information on Clery Act regulations in the preamble to the Title IX regulations but the Department's silence on this intersection in particular, institutions may not consider that to be an option, therefore limiting the support system for complainants and respondents to only those willing to conduct cross-examination within the advisor of choice role.

10 34 CFR 668.46(b)(k)(2)(ii)
11 34 CFR 668.46(b)(k)(2)(iv)
12 Title IX; 85 Fed. Reg. 30339 (May 19, 2020)
13 34 CFR 668.46(b)(k)(2)(iii)

Campus Example: Advisor of Choice

A respondent hires an attorney to serve as their advisor of choice who will conduct cross-examination during the institution's live hearing.

A complainant cannot afford to hire an attorney and is unable to find an attorney who can support them pro bono, so they ask multiple professors and staff members who decline, saying that they're uncomfortable conducting cross-examination and don't feel they'd be the best option. The complainant winds up having a friend, another student at the university, serve as their advisor.

As a result of the vast difference in experience and skill-set of the advisors of choice, the process feels inequitable to the complainant.

Note: Campus examples are hypothetical. Any similarity to an actual occurrence is coincidental.

JURISDICTION OF DATING VIOLENCE, DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING POLICIES

Title IX regulations specify that Title IX response to reports of sexual harassment is limited to only students within the United States, which ignores the reality of many U.S. institutions today who have campuses and educational programs across the world with approximately 1 in 10 students participating in a study abroad program during their undergraduate career.[14] Further, 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.

Should a campus determine that off-campus behavior does not fall within the institution's education programs and activities and therefore it will not adjudicate off-campus behavior under Title IX, yet still adjudicate other off-campus behavior under separate policies, there will be disparity in the institution's response to violence. For example, an institution could address physical assaults or drug referrals that took place at an off-campus party under the institution's code of conduct and yet not address an incident of reported sexual violence at the same party.

This position also contradicts policies required under the Clery Act. 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 a 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

14 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

by the institution as well as locations abroad.[15] 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 regulations.[16] For example, the jurisdiction of an institution's policy may state that the disciplinary process will apply to any incident where the alleged respondent is a registered student regardless of where the incident occurred.

The preamble to the Title IX regulations states that institutions may address incidents occurring at locations not covered by Title IX through the institution's code of conduct. However, as Clery Center noted in our initial response to the proposed regulations, this results in the potential for institutions to meet Clery Act requirements by having institutional policies and procedures that address the offense but that are independent of the Title IX process, even though addressing the same behavior. This undermines the ability of the Title IX Coordinator to implement a consistent response to sex discrimination and identify patterns that could put individuals and the community at risk. It also is in direct opposition to a stated goal of the Title IX regulations which was to streamline processes to create more efficient systems.

Campus Example: Jurisdiction of Policy

The scope of Institution Y's policy addresses both on- and off-campus behavior. The institution's procedures for adjudicating incidents are divided into two sections: one process for if the behavior falls under Title IX guidelines (sexual harassment as defined under Title IX that occurred within the institution's educational programs or activities, within in the U.S) and another for if the behavior falls outside of Title IX guidelines (addresses behaviors or locations not captured under Title IX).

In the midst of an investigation, the institution learns that while the initial report took place at a location the institution owns abroad, related incidents then occurred when the parties were back in the United States. The institution must then apply the Title IX procedures mid-process, requiring both the respondent and the complainant to restart the process with a different set of procedures and campus personnel.

Note: Campus examples are hypothetical. Any similarity to an actual occurrence is coincidental.

15 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".

16 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.

Campus Example: Jurisdiction of Policy

As part of required training for students, an institution provides information on the importance of Title IX as a civil rights law that protects students from discrimination within the institution's educational programs and activities. The Title IX coordinator describes the resources and options available under Title IX and how they can be a resource for students who want to report sexual harassment, dating violence, domestic violence, sexual assault, and stalking. At the end of the session, a student reaches out to the Title IX coordinator and discloses they were sexually assaulted by another student, sharing a lot of detail about what happened and how it impacted them. They then share that the incident took place at one of the institution's international branch campuses. The Title IX coordinator informs the student that because the incident occurred outside the U.S., they cannot pursue a campus adjudication under Title IX, but instead can make a report to the Office of Student Conduct. The student inquires about making a police report, but learns they could only do that in the location the assault occurred, which given language barriers and geographic distance does not feel like a feasible option. The student concludes that despite what they were told at the training they attended, Title IX does not protect them, and feels frustrated and upset that they'd need to talk to someone else to pursue adjudication after they finally felt comfortable reporting to someone at the institution. They tell the Title IX coordinator they'd rather not share any more details with anyone else on campus and will look to connect with off-campus resources.

Note: Campus examples are hypothetical. Any similarity to an actual occurrence is coincidental.

REPORTING AUTHORITIES

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).[17] CSAs must then report to the official or office designated by the institution to collect crime report information allegations of Clery Act crime that they receive.[18]

The new 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 to the Title IX coordinator or officials with the authority to institute corrective action.[19]

17 34 CFR 668.46(a)
18 34 CFR 668.46(c)(1)
19 34 CFR 106.30(a)

While this does not create inherent conflict between Title IX and the Clery Act, this does complicate how institutions implement both requirements simultaneously.

Under Title IX, if notice of sexual harassment or allegations of sexual harassment are reported to the Title IX coordinator or any official with the authority to institute corrective measures, the Title IX Coordinator must then contact the complainant to discuss the availability of supportive measures and explain the process for filing a formal complaint. In order for this to be fulfilled, if an official with the authority to institute corrective measures receives a report of sexual harassment, they would presumably inform the Title IX Coordinator directly so they could provide this information to the complainant. The Title IX preamble doesn't give institutions much guidance on determining who should or should not be considered an official with authority to institute corrective measures.

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.

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 reported victim, reflecting 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.

In this circumstance, an institution could have a report that would result in a timely warning because campus decision-makers determine the incident to be a serious or ongoing threat without the Title IX coordinator even knowing that the incident occurred.

The preamble to the Title IX regulations addresses this by stating that "a recipient that issues a timely warning also creates actual knowledge of sexual harassment because the timely warning would go to the entire campus community, including to officials who have the authority to institute corrective measures on behalf of the recipient".[20] While accurate, such a practice is not conducive to establishing streamlined reporting practices that provide for rapid response to reports on campus and cross-departmental collaboration and coordination that can protect the individual and the institution overall.

While individual institutions may address these concerns in how they establish their own reporting protocols on campus, and Title IX gives them the flexibility to determine that any CSA is an official with the authority to institute corrective measures, the Title IX preamble shows a lack of comprehensive understanding of actions the institution must take under Clery Act regulations and how they intersect with Title IX regulations.

20 Title IX; 85 Fed. Reg. 30526 (May 19, 2020)

The Department is relying on institutions to interpret and untangle the web of intersecting reporting requirements, despite its ability and authority to comprehensively examine the regulations it is responsible for enforcing and give institutions guidance and strategies to holistically implement such regulations. Although there are separate divisions enforcing Clery Act and Title IX rules, the onus still remains on the Department of Education to be proactive about the ways its regulations influence institutions and provide needed clarity and resources to institutions. In order to do so, it's 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.

FOR MORE INFORMATION

After the release of the unofficial version of the regulations on May 6, 2020, institutions were given until August 14, 2020 to implement these policy changes. The implementation date for these regulations was careless; it ignored the reality of institutions managing response to the COVID-19 pandemic and set an unrealistically short timeline for policy implementation in general. In comparison, the most recent Clery Act regulations, the Violence Against Women Act amendments to the Clery Act, which also required changes to an institution's dating violence, domestic violence, sexual assault, and stalking policy, gave institutions three times the amount of time to implement changes. The timing of the regulations ignored the vulnerable state of institutions dependent on federal funding during the COVID-19 global pandemic, who would be hard-pressed to challenge regulations connected to federal funding during such a difficult time. Even if institutions felt the regulations were inequitable, they would be unwilling or unable to raise such concerns for fear of impacting their ability to provide access to higher education for all.

Clery Center has the unique privilege of working with many colleges and universities nationwide who are committed to ensuring campus community members can live and work in an environment free from sex discrimination and to holding individuals accountable, as necessary. Institutions do not benefit from regulations that create additional 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. It is our hope that legislators can support institutions by advocating for additional guidance or even Title IX regulation changes to address the conflicts and challenges described above. If you have any questions regarding the above comments, please do not hesitate to contact Clery Center at **(484) 580-8754** or emailing Executive Director Jessica Mertz at **jmertz@clerycenter.org**.