

VICTIM RIGHTS LAW CENTER

***Navigating Campus Sexual Assault:
Title IX, Clery, VAWA, and FERPA -
Where to Begin***

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The VRLC as a conference trainer will not be providing legal advice and encourages all schools to direct legal questions to their institution's legal counsel.


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Agenda


- ✓ Title IX Overview
 - Brief recap of response protocols from 4/29/14 guidance
- ✓ Clery Overview
- ✓ Basic Comparison of Title IX & Clery
- ✓ Intersections

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Overview of Title IX

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Overview: Title IX

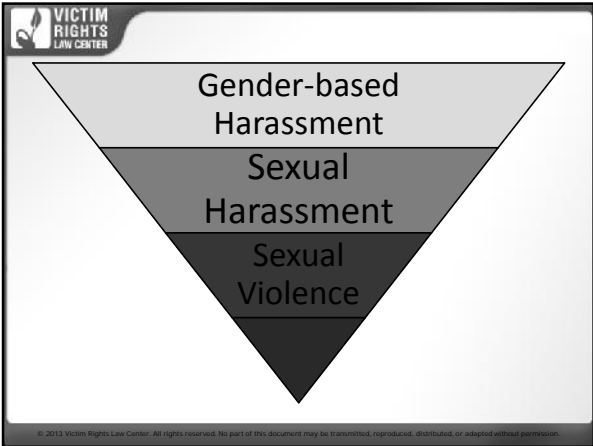
Who is required to comply with Title IX?

- All public & private educational institutions that receive federal funds.
 - What is *receive federal funds* under Title IX?
 - Qualifying federal financial assistance can be in the form of: an award or grant of money; use of rent of federal land or property; and federal training.
 - Federal financial assistance can also be received indirectly
 - » Ex: Accepting students who receive federal financial aid (FAFSA)

What does Title IX say?

- General mandate: Prohibits recipients of federal financial assistance from discriminating on the basis of sex in education programs or activities. ***Sexual harassment of students, which includes acts of sexual violence, can be a form of sex discrimination prohibited by Title IX.***

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Overview: Title IX

How does Title IX protect students?

- Protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school.
- Also protects students who may have been sexually harassed off school grounds, outside a school's education program or activity, if the harasser was a fellow student or employee.

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What is required of schools even *before* a report of sexual violence?

- Publish a notice of non-discrimination.
- Designate an employee to coordinate Title IX compliance.
 - Top (4) Responsibilities:
 - Disseminate notice of nondiscrimination
 - Identify and address systemic patterns of discrimination
 - Educate parties about the policy and answer procedural questions about the logistics of the disciplinary process
 - Oversee the investigation of a complaint
- Adopt and publish grievance procedures.

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A school receives a report of sexual violence...*Now what?*

The school must inform the survivor of their options, including:

- Medical treatment
- Counseling & mental health services*
- Disciplinary complaint
- Criminal complaint/Police report.
- Options to avoid contact with perpetrator and to change living and academic situations*

**Also required under Clery's Victims' Bill of Rights*

Advocacy Tip: One page resource sheets for survivors are helpful tools in helping you understand and advocate for a survivors Title IX rights.

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Overview of Clery

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Overview: The Clery Act

- Originally passed in 1990 as part of the Student Right-to-Know and Campus Security Act.
- Amended in 1992, 1998, and 2008 by the Higher Education Amendments. **VAWA amendments to Clery 2013.**
- Codified at 20 USC 1092f
- Regulations appear at 34 CFR 668.46
- The most recent Final Rules were published in **Oct. 29, 2009 Federal Register (pp. 55902-55969)**, Oct. 31, 2002 Federal Register (pp. 66519-66521), and Nov. 1, 1999 Federal Register (pp. 59060-59073).

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Overview: The Clery Act

General Mandate

- The Clery Act requires participating educational institutions to disclose campus crime statistics and security information in the form of:
 - Ongoing Disclosures:
 - Daily crime logs
 - Timely warnings
 - Emergency notifications
 - Annual security report

Applicability

- All post-secondary institutions, private and public, that participate the Higher Education Act of 1965 (HEA)'s Title IV student financial assistance programs must comply with the Clery Act

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VAWA sec. 304 Highlights

- Addition of domestic violence, dating violence, and stalking
- Prevention and awareness programs (primary prevention)
- Procedures to follow
- Information in writing
- Change in academic/living/transportation/working situation
- Option to notify law enforcement
- Campus disciplinary procedures
- Sanctions following a final determination

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Enforcement

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| <p>Title IX</p> <p>Department of Education's Office of Civil Rights (OCR) : 12 regional offices nationwide</p> <ul style="list-style-type: none"> - Provides free technical assistance & handles complaints from K-12 and higher education - "Prompt and equitable" standard <ul style="list-style-type: none"> • No penalty for violating statute, potential of revoking federal aid • Private right of action against schools | <p>Clery</p> <p>United States Department of Education Clery Compliance Team (past of Office of Federal Student Aid- FSA)</p> <ul style="list-style-type: none"> • Administrative complaint filed with the Department of Education by any party • If DOE finds institution is in violation, \$35,000 fine per violation • No private right to sue |
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Intersections: Reporting

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What gets reported: Relation to Institution

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| <p>Title IX <u>Relation to the institution relevant</u></p> <ul style="list-style-type: none"> Title IX protects male and female students from sexual harassment by a school employee, another student or a non-employee third party (e.g. visiting speaker or visiting athletics). <ul style="list-style-type: none"> 2001 DOE Guidance Letter pg. 3 | <p>Clery <u>Relation to the institution irrelevant</u></p> <ul style="list-style-type: none"> The institution should count all Clery Act crimes within the Clery geography even if they involve individuals not associated with the institution. <ul style="list-style-type: none"> (Pg. 54 Handbk for Clery Report.) Clery Crimes: Include sexual assault offenses, both forcible and non forcible. <ul style="list-style-type: none"> (Handbook for Clery Reporting pg. 33; 34 CRF 668. 46(c)) The Campus SaVE Act expands Clery crimes to include intimate partner violence, including stalking, dating violence and domestic violence offenses. |
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What gets reported: Geography

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| <p>Title IX Geography</p> <ul style="list-style-type: none"> Can be off campus, as long as the activity is related to the institution (i.e. between two students, on a school trip, etc.) | <p>Clery Geography</p> <ul style="list-style-type: none"> A covered institution must only disclose statistics for <u>reported Clery crimes</u> that occur: <ol style="list-style-type: none"> on campus, on public property within or immediately adjacent to the campus, and in or on non-campus buildings or property that your institution owns or controls. (Handbook for Clery Reporting pg. 54). Would not cover overnight sponsored trips, study abroad programs |
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Reporters

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| <p>Title IX – Responsible Employee</p> <ul style="list-style-type: none"> • A school has notice if a responsible employee “knew or in the exercise of reasonable care should have known” about the harassment. • Includes: <ol style="list-style-type: none"> 1. “any employee who has the authority to take action to redress the harassment, 2. who has the duty to report to appropriate school officials sexual harassment or 3. any other misconduct by students or employees, or an individual who a student could reasonable believe has this authority or responsibility.” | <p>Clery – Campus Security Authority CSA</p> <ul style="list-style-type: none"> • A campus police department or a campus security department of an institution. • Those responsible for campus security but who does not constitute a campus police department or a campus security department (gate monitor) • Those specified in an institution’s statement of campus security policy as source to which students and employees should report criminal offenses • An official of an institution with significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline and campus judicial proceedings • <small>If someone has significant responsibility for student and campus activities, he or she is a campus security authority. (Handbook for Clery, pgs. 74-75)</small> |
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Reporters

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| <p>Title IX – Responsible Employee</p> <ul style="list-style-type: none"> • Faculty are permissible • Persons with privilege do not have to report • Persons designated by campus as confidential do not have to provide identifying information | <p>Clery - CSA</p> <ul style="list-style-type: none"> • Faculty are not included (unless specified by the institution) • Sexual assaults that are only reported to faculty and are not subject to further proceedings (e.g. the student doesn’t go on to press charges) are not reported under the Clery Act. <ul style="list-style-type: none"> • However, if SA reported to CSA, the institution is required to include it as part of its Clery statistics regardless of whether the student decides to press charges or the lack of any further legal proceedings. (Handbook for Clery reporting pg. 76) • Timely warning requirement |
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Reporters Ctd.

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| <p>Title IX: Responsible Employee Examples</p> <ul style="list-style-type: none"> • Resident Assistants • Student Conduct • Title IX Coordinators • Campus Security/Police | <p>Clery: CSA Examples</p> <ul style="list-style-type: none"> • Professional staff in a dean of students office (including leaders in student affairs/housing) • Staff in student center building • Student Activities Staff • Faculty or staff advisors to student organizations • Resident Assistants • Coaches |
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Q: What must an institution do when it receives a report of sexual violence?

| | What triggers school's obligation? | Response obligations |
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| Title IX | Upon notice of possible sexual assault. | School should take "immediate and appropriate" steps to provide a remedy. "Must promptly investigate" – DCL 2011 |
| Clery | Clery crime occurs on your Clery geography that is (1) Reported to CSAs or local police agencies; and (2) is considered by the institution to represent a serious or continuing threat to students and employees. Exempt Cases: Crimes reported to pastoral or professional counselors or information protected by state law does not trigger a timely warning. | Timely warning must be issued to the campus community. Should include info that promotes safety, allows people to protect themselves, time, location and type of crime. Should withhold names of victims as confidential |

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Intersection: Balancing Victim Confidentiality and Campus Safety Risk

Q: What happens if a victim reports a sexual assault, but asks for confidentiality? Does that relieve a school of its obligation to investigate under Title IX? Does that relieve a school of its obligation to send a timely warning under Clery?

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| Title IX | Balancing Test (FAQ) "When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors." |
| Clery | When to issue a timely warning? Determination of "serious or continuing threat" when there is on a case-by-case basis (Handbook for Clery Reporting 11; 34 CRF 668.46(e)) |

Practice Tip: FERPA does not preclude an institution's compliance with the timely warning provision of the campus security regulations 34 CFR 99.31(b)(6) and 99.36

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Title IX Safety Risk Factors

- Whether there have been other sexual violence complaints about the same alleged perpetrator
- Whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence
- Whether the alleged perpetrator threatened further sexual violence or other violence against the student or others
- Whether the sexual violence was committed by multiple perpetrators
- Increased risk of future acts of sexual violence under similar circumstances (i.e. pattern of perpetration – use illicit drugs/alcohol at a given location or by a particular group)
- Whether the sexual violence was perpetrated with a weapon
- The age of the student subjected to the sexual violence
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)

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Hypo

Mary was introduced to Kevin at an on-campus party by another girl in her class. Initially she really enjoyed hanging out with Kevin and they talked and drank for several hours. Much of Mary's memory about the rape is blurred by alcohol, but she has numerous cuts and bruises on the back of her head and back. She feels that she may have been dragged by the hair at one point. During the conversation that night, Kevin made several joking references to keeping guns in his dorm room, but Mary didn't take him seriously at the time. Mary believes Kevin had no weapons on him at the time of the rape, but she's afraid that he may have told her those stories earlier in the night for a reason. Mary reports to a faculty member, but asks for confidentiality.


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Hypo

- Proceed with an investigation under Title IX?
- Proceed with a timely warning under Clery?


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Hypo

Mary was introduced to Kevin at an on-campus party. They began dating and were in a relationship for over a year. The first six months, Mary was really happy. Then, Kevin became abusive – first emotionally, then physically and sexually. He was always nice around other classmates and friends. He told her that if she ever reported, he would know. She understand this to mean she was in physical danger if she told someone else. After one particularly bad fight, Mary told her RA about what happened, but asked her not to tell anyone else.

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Hypo

- Proceed with an investigation under Title IX?
- Proceed with a timely warning under Clery?

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Policy Intersections

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Q: What should you name your gender-based misconduct policy?

| Title IX | VAWA Amendments |
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| Refers to substance only. Following the DCL, many schools use "Sexual Misconduct Policy" | Require either (3) separate policies for DV, SA and Stalking or the entire policy will be broadly named i.e. Gender Based Misconduct |

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Q: What should you include in your gender-based misconduct policy?

| Title IX | VAWA Amendments |
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| Dissemination of Policy Designation of Title IX coordinator Adoption of Grievance Procedures | Policy Statement (Sex Offenses) Must include: <ul style="list-style-type: none"> • Description of educational programs to promote SA awareness • Procedures students should follow if a SA occurs • Information on notifying appropriate authorities • Information about available mental health resources • Notification of option to change living situation • Procedures for campus disciplinary action |

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Victim assistance or "interim measures"

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| Title IX | Clery: Campus Sexual Assault Victims' Bill of Rights |
| Requires a school to promptly take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. School should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. | Survivors shall be notified of their options to notify law enforcement Both parties shall be informed of the outcome of any disciplinary proceeding. Survivors shall be notified of counseling services. Survivors shall be notified of options for changing academic and living situations. |

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Intersection: Disciplinary Process

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Q: Can a student use an attorney as an advisor?

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| Title IX | Requires equitability. (Hint: What you do for one, you must do for the other.) Policies often indicate that Respondent may bring an attorney, without addressing the Complainant's rights. |
| Clery | Accuser and accused must have the same opportunity to have others present. |
| VAWA (Looking ahead...) | Amendments will require that both parties be able to choose any person as their advisor. Advisor may be an attorney (based on draft regulations and statute), "advisor or choice". Advisor may attend ANY meeting, informal or formal |

Practice Tip: Consider the roles of advisors in your process when drafting your policy. You may consider limiting advisor participation.

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Q: How and in what ways do sexual violence victims receive notice of a disciplinary outcome?

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| Title IX | Both parties must be notified concurrently in writing about the outcome of both the complaint and any appeal |
| Clery | V & P must be simultaneously informed of campus court proceedings results. Both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense. (§668.46(11)6B). Outcome of a disciplinary proceeding means only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused |
| FERPA | DOE "currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation." Permits disclosure of the decision or determination, made by an honor court or entity authorized to resolve disciplinary matters within the institution regarding violent or non-forcible sex offenses. Institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion. 34 CFR §99.39 |

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Questions?

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RESOURCES

Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. §1092(f). Student Right-to-Know § 1092(f)(7).

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99.

Bonnie S. Fisher, et al., *The Sexual Victimization of College Women*, 10 NIJ Bureau of Justice Statistics (2000).

Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613-690 (2009).

Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Assault*, 43 Loy. U. Chi. L.J. 205 (2011).

Educational Rights of Sexual Assault Victims, Sexual Violence Law Center (April 2008).

NPR/Center for Public Integrity (CPI) pieces on SA and Education (there are 7 stories with corresponding interviews).

David Lisak, *The Undetected Rapist* ("Frank Video").

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