

The Clery Act Implications of the Proposed Title IX Regulations



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VAWA Final Rule (79 Fed. Reg. 35422)



- “VAWA amended the Clery Act, but it did not affect in any way title IX of the Education Amendments of 1972 (Title IX), its implementing regulations, or associated guidance issued by the Department's Office for Civil Rights (OCR). While the Clery Act and Title IX overlap in some areas relating to requirements for an institution's response to reported incidents of sexual violence, the two statutes and their implementing regulations and interpretations are separate and distinct.”

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Proposed Regs on Clery and Title IX



- “...the definition of sexual harassment under Title IX focuses on sexual conduct that jeopardizes a person's equal access to an education program or activity. Such sexual harassment includes conduct that is also a crime (such as sexual assault) but Title IX does not focus on crimes per se...”
- “By contrast, the Clery Act focuses on particular crimes (stalking, dating violence, domestic violence, sexual assault) and an institution's obligation to disclose information and services to victims, and otherwise respond, to reports of such crimes.”

SECTION 106.44(A) GENERAL; SECTION 106.30

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Proposed Regs on Clery and Title IX



- *Although the Clery Act focuses on crimes that may also meet the definition of "sexual harassment" . . . such crimes do not always necessarily meet that definition (for example, where an incident of stalking is not "based on sex" . . .)*
- *"The proposed regulations set forth definitions and obligations that further the purpose of Title IX with the goal of ensuring that institutions of higher education can also comply with their Clery Act obligations without conflict or inconsistency."*

SECTION 106.44(A) GENERAL; SECTION 106.30

Do the proposed regulations meet that goal?

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Case Scenario



Chris, a student who identifies as transgender male, reports to you that public safety recently told him that he could no longer access the male restrooms on campus. He also tells you that he was sexually assaulted by Sam last week at BAC (a fraternity which is not formally recognized, but still "secretly" operating). He and Sam have been in a dating relationship, and last semester Sam physically abused and stalked Chris, and also forced Chris to perform oral sex on Sam last year when they were abroad in Paris. Chris told his RA about that assault at BAC.

Chris is unsure if he wants to file a formal complaint as he does not want to see Sam. He reports that high stress is traumatic to him, even with accommodations, and he hands you medical documentation regarding his diagnosis (anxiety and neuro-processing).

4 years ago, you spoke with a non-student from a nearby campus, who stated to you that she had been sexually assaulted by Sam while studying in your school's library. She made no report, just wanted "on your radar."

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Reporting Considerations



■ Proposed Title IX Regulations

- "Actual Knowledge"
 - Formal report to Title IX Coordinator or "official who can institute corrective measures"
 - Removes full list of Responsible Employees (RE)

■ Clery Act

- Report to Campus Security Authority (CSA)
 - Campus police department; responsible for security; individuals to whom crimes should be reported; officials with significant responsibility for student and campus activities

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What Conduct is Covered?

■ Title IX Proposed Regulations

- ❑ An employee...conditioning the provision of an aid, benefit, or service...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 ...education program or activity; or
- ❑ Sexual assault as defined in 34 CFR 668.46(a) of the Clery Act

■ Clery Act

- ❑ Sexual assault (rape, fondling, incest, or statutory rape)
- ❑ Dating violence
- ❑ Domestic violence
- ❑ Stalking

*Title IX vs Title VII

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Impact of Location & Party

"...Title IX's "education program or activity" language should not be conflated with Clery Act geography; these are distinct jurisdictional schemes, though they may overlap..."

■ Title IX Proposed Regulations

- ❑ Conduct that occurs within its 'education program or activity' . . .
 - Premises owned, or exercised oversight, supervision or discipline
 - Funded, sponsored, promoted, or endorsed the events
- ❑ Need not apply to persons outside the United States
- ❑ Complainant must be participating in the education program

■ Clery Act

- ❑ On campus; on public property within or immediately adjacent to and accessible from the campus; in or on non-campus buildings or property that your institution (or a recognized student organization) owns/controls
- ❑ May include some study abroad programs
- ❑ For VAWA crimes, must use processes even if occurs off-campus

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Response to Formal Complaint

■ Title IX Proposed Regulations

- ❑ Signed by a complainant or by the Title IX Coordinator
- ❑ Title IX Coordinator acts as gatekeeper, supportive measure coordinator, and complainant

■ Clery Act

- ❑ A student or employee who reports DVDVSAS, whether the offense occurred on or off campus, shall be provided with a written explanation of the student or employee's rights and options including:
 - procedures to follow;
 - information about confidentiality;
 - existing: counseling, mental health, victim advocacy, legal assistance, visa and immigration assistance, financial aid, services in and outside community;
 - Access to law enforcement;
 - changes to academic, living, transportation and working situations, institutional procedures

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Response if NO Formal Complaint

■ Title IX Proposed Regulations

- Actual reports by multiple complainants, Title IX must file a formal complaint
- Implement supportive measures if reports but not signed complaint
- Title IX Coordinator to act as gatekeeper, supportive measure coordinator, and complainant (when multiple complainants)

■ Clery Act

- A student or employee who reports DVDVSAS, whether the offense occurred on or off campus, shall be provided with a written explanation of the student or employee's rights and options including:
 - procedures to follow;
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 - existing: counseling, mental health, victim advocacy, legal assistance, visa and immigration assistance, financial aid, services in and outside community;
 - Access to law enforcement;
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Supportive Measures

■ Title IX Proposed Regulations

- Non-disciplinary, non-punitive individualized ...offered as appropriate, as reasonably available, and without fee to both parties...
- designed to restore or preserve access to education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the ...educational environment; and deter sexual harassment.
- Examples: counseling, extensions of deadlines, course-related adjustments, modifications of work/class schedules, campus escorts, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring
- Emergency Removal – can remove respondent ...on emergency basis after safety and risk-analysis determines an immediate threat ... and provides R with notice and opportunity to challenge the decision

■ Clery Act

- Counseling, mental health, victim advocacy, legal assistance, visa and immigration assistance, financial aid, services in and outside community ... changes to academic, living, transportation and working situations

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Grievance Procedures

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Informal



■ Title IX Proposed Regulations

- May facilitate an information process, such as mediation,
 - Written notice of the allegations to parties
 - When not allowed
 - Possible consequences
 - Information on recordkeeping and sharing

■ Clery Act

- Written information about procedures will follow for any VAWA incident (does not differentiate formal vs informal)

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Formal



■ Title IX Proposed Regulations

- Treat equitably with goal to restore/preserve access to education for complainant; due process for respondent;
 - Annual training for coordinator, investigator and decision maker (cannot rely on sex-stereotyping)
 - Include presumption of not responsible; reasonably prompt timeframes*; describe the range of sanctions; describes the standard of evidence; appeal procedures; supportive measures

■ Clery Act

- Prompt, fair and impartial investigation and resolution
 - Conducted by officials who receive annual training
 - Advisor present
 - Anticipated timeframes
 - List all possible sanctions

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Formal (Notice)



■ Title IX Proposed Regulations

- Written notice with "sufficient details"
 - Identities of the parties if known
 - Section of code violated
 - The alleged conduct that violated conduct code and Title IX
 - Date and location of the incident;
 - Sufficient time to prepare
 - Statement that respondent is presumed not responsible;
 - Can request to review any evidence;
 - Statement regarding submitting false information

■ Clery Act

- Timely notice

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Formal (Investigation)



■ Title IX Proposed Regulations

- ❑ Burden of proof on recipient;
- ❑ Give both parties the opportunity to present witnesses and inculpatory and exculpatory evidence;
- ❑ No restrictions on discussing allegations with others;
- ❑ Be accompanied by an advisor of choice;
- ❑ Notice of date, time, location, participants, and purpose of all hearings/meetings;
- ❑ Access to all information, including that in which the recipient does not intend to rely;
- ❑ Create an investigative report which parties can submit written response;
- ❑ Reasonably prompt timeframes and can delay for good cause.

■ Clery Act

- ❑ Prompt, fair, and impartial investigation and resolution;
- ❑ Same opportunity to have advisor of choice present

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Formal (Live Hearing)



■ Title IX Proposed Regulations

- ❑ In Higher Education: Provide a live hearing
- ❑ Cross-examine of other party and witnesses by advisor of choice (If a party does not have an advisor, the recipient must provide that party an advisor)
- ❑ Limitations on questions regarding prior sexual history
- ❑ Either party can request parties being located in separate rooms via technology
- ❑ If a party or witness does not submit to cross-examination at the hearing, the decision maker must not rely on any statement of that party in reaching a determination of responsibility
- ❑ Accommodations? (silent except for questions)

■ Clery Act

- ❑ Clery is silent regarding live hearing

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Standard of Evidence



■ Title IX Proposed Regulations

- ❑ Either the preponderance of the evidence standard or the clear and convincing standard . . .
- ❑ Can only employ preponderance if that is the standard for conduct code violations and for employees, including faculty

■ Clery Act

- ❑ Any standard of evidence . . . just must include in policy
- ❑ Would not prohibit using different standards for different groups

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Written Determination

Title IX Proposed Regulations

- Simultaneous written determination to both parties including:
 - Code of conduct alleged to have been violated
 - A description of the procedural steps (notifications to parties, interviews, site visits, methods used to gather other evidence, hearings held)
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's policy to the facts
 - A statement, rationale, and result as to each allegation (determination, sanctions, remedies designed to restore or preserve access ...)
 - Appeal procedures and bases
 - When become effective (depending on appeal)

Clery Act

- Written, simultaneous notification to both parties including:
 - Result (include any sanctions and rationale for results and sanction)
 - Appeals procedures
 - Any change to the result;
 - When such results become final.

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Appeals

Title IX Proposed Regulations

- Not required (but if does, must offer to both parties)
- Complainant cannot appeal regarding sanction imposed on respondent
- Notify other party in writing when appeal is filed
- Appeal decision-maker cannot have participated in process
- Issues simultaneous written decision describing the result and rationale

Clery Act

- Not required (but must provide notice if allowed along with appeal procedures)
- Simultaneous written decision describing result, sanction, any changes to the result, when becomes final

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Recordkeeping

Title IX Proposed Regulations

- Make available and maintain for a period of **3 years** records of sexual harassment
 - Investigation
 - Determination
 - Sanctions
 - Remedies
 - Appeals
 - Informal resolutions
 - All training materials
 - Supportive measures
 - Any actions taken after a formal complaint
 - Why response was not clearly unreasonable
 - Supportive measures

Clery Act

- Retain all records used in compiling ASR for three years from the latest publication of the report to which they apply (in effect 7 years)

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Retaliation

■ Title IX Proposed Regulations

- Silent as to retaliation

■ Clery Act

- No officer, employee, or agent of an institution participating in any program under this title shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual exercising their rights or responsibilities under any provision of this subsection

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Other General Thoughts/Concerns

- Religious exemption(s)
- Staffing considerations
- Multiple policies governing different demographics on campus
- Challenges between definitions that currently exist in Title VII and proposed definitions under Title IX
 - Which office would conduct the investigation into sexual harassment (Title VII vs Title IX)? Clery compliant?
- State law implications (DE, TX....)

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Case Scenario

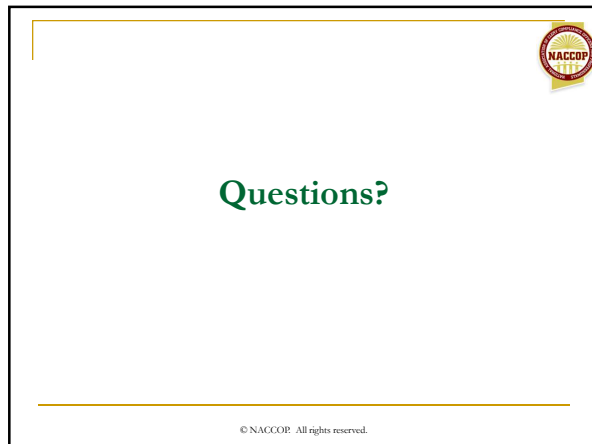
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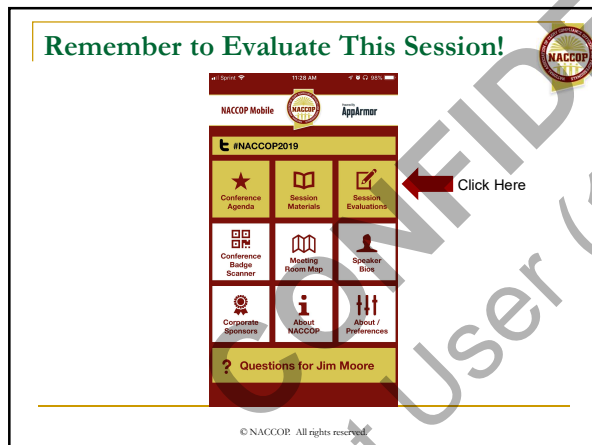
4 years ago, you spoke with a non-student from a nearby campus, who stated to you that she had been sexually assaulted by Sam while studying in your school's library. She made no report, just wanted "on your radar."

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