Congress of the United States
Washington, DC 20515

December 8, 2020

The Honorable Joseph R. Biden, Jr.
Office of the President-Elect
1401 Constitution Avenue, NW
Washington, DC 20230

Dear President-Elect Biden,

As your incoming administration considers initiatives to combat campus sexual violence and reforms to the Trump Administration's Title IX rule published May 19, 2020 (34 CFR 106), we wish to call to your attention how that rule creates conflicts and discrepancies with full and proper enforcement of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). We urge you to ensure these issues are rectified in any reforms your Administration proposes to Title IX.

As outlined in the Clery Center's Position Statement on this matter, although the Clery Act is a consumer protection law and Title IX is a civil rights law, both laws share a common purpose of creating safe campuses and equal access to education. The National Association of Clery Compliance Officers and Professionals (NACCOP) asserts a similar viewpoint and emphasizes that the diversity of colleges and universities and the challenges these proscriptive regulations place upon them to safeguard their students' safety while maintaining compliance.

The goals of the Clery Act and Title IX can only be achieved when accusations of violence are adjudicated in a fair and transparent way, and when data concerning the prevalence of these incidents is reported and made accessible to the school community. Unfortunately, the Trump Administration's rule sets up several conflicts between these laws that will ultimately require correction in order for schools to successfully meet their obligations to protect students.

The 2013 Violence Against Women Act reauthorization amended the Clery Act to allow both the accuser and the accused in Title IX cases involving dating violence, domestic violence, sexual assault, and stalking to select an "advisor of choice" who can provide support, guidance, or advice. The law prevented educational institutions from limiting the choice of who this advisor could be. Yet the Trump Administration's rule requires these advisors to conduct cross-examinations of the opposite party during live hearings, which are themselves newly mandated by the Trump rule in collegiate level Title IX cases. Due to their elevated role in the formal discipline process, some institutions may deem advisors subject to the annual training requirement under the Clery Act for all officials involved in these types of disciplinary proceedings, effectively limiting the pool from which survivors could choose an advisor. This is problematic, as this interpretation would a violation of the codified language of the Clery Act, as would any limits on an individual's choice to an advisor. Some individuals may also be unwilling or unable to serve as an advisor because of the cross-examination responsibility. By limiting advisor options for students, the rule undermines a critical support mechanism for both parties involved in a report of violence and violates the spirit of existing law.

The rule also limits schools to activating their Title IX response only if the report involves students within the United States and on campus. This policy ignores the approximately 10% of American college students who participate in study abroad programs and establishes inconsistencies wherein a school may be permitted to adjudicate some types of off-campus misconduct, but not under the auspices of Title IX. Additionally, it contradicts geographical categories established in the Clery Act, which covers off-campus and international properties owned or controlled by student organizations officially recognized by the educational institution. The waters are muddied further if a complaint involves multiple incidents at different locations, some of which may be applicable to Title IX within the rule's standard while others are not. The rule sets up inherent confusion that risks undermining an institution's ability to fairly arbitrate complaints of sexual violence and undermines trust amongst the institution's community of students and staff.

Lastly, while both Title IX and the Clery Act mandate separate reporting obligations for pertinent school employees, the rule contains problematic language that frees institutions of their Title IX obligations unless the complainant reports an incident to an "official with authority to institute corrective measures." Yet the rule does not offer institutions much guidance as to what roles would fall under this definition. In some cases, campus security authorities (CSAs), those designated to comply with Clery Act requirements, may not be considered such authorities for the purpose of Title IX and therefore would not trigger the institution's Title IX obligations nor coordinate with the Title IX coordinator. This presents the risk of isolating Title IX coordinators and campus security authorities, who should instead be encouraged to connect and collaborate to ensure public safety on campus.

We believe it is essential to align Title IX rules and procedures with the Clery Act in order to foster safe, equitable campuses across our nation. The Clery Act is rooted in a strong bipartisan consensus and benefitted from close coordination with subject matter experts in the field. We believe the standards set by the Clery Act can be an important guide to your Administration as you take steps to improve and strengthen Title IX. One in five women and one in sixteen men experience sexual violence during their college years, but it remains the most underreported crime on our campuses. We appreciate your attention to this matter as you prepare to assume the presidency, and we stand ready to work with your administration to address these challenges.

Sincerely,

Ann McLane Kuster
Member of Congress

Gwen Moore
Member of Congress

Eddie Bernice Johnson
Member of Congress

Carolyn B. Maloney
Member of Congress

Peter Welch
Member of Congress

André D. Carson
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Katie Porter
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Clery Act - Title IX Position Statement

November 2020

The National Association of Clery Compliance Officers and Professionals ("NACCOP") serves over 1,100 members who have responsibilities under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"). NACCOP provides comprehensive training, resources, and professional development opportunities to members across the United States, including a Clery Compliance Officer (CCO) Certification Program, and is the only organization founded by past and current practitioners who have engaged in the daily work of Clery Act compliance.

NACCOP has always been attuned to the relationship between the Clery Act and Title IX, but particularly so after the passage of the Violence Against Women Reauthorization Act of 2013 (VAWA) which amended the Clery Act and broadened and bolstered the rights of victims in cases of sexual assault, domestic violence, dating violence and stalking ("VAWA Offenses"). With the passage of the new 2020 Title IX Regulations, the intersections of the Clery Act and the newly-imposed Title IX regulations are substantial. This position statement briefly describes several major areas that appear to be in conflict between the two laws and the challenges our members face with regard to meeting the compliance requirements.

Jurisdiction-Location and Persons

Title IX utilizes the same definitions as Clery when defining the VAWA offenses. However, the jurisdiction of Title IX is limited to when and where an incident has occurred. The institution has to exercise some control over the respondent and the incident has to have occurred in the United States and within the institution's Clery specific geography or during an educational program or activity of the institution in order for there to be some jurisdictional control.

The limited jurisdiction under Title IX does not include a VAWA offense that occurs within an institution's study abroad program merely because it is outside of the borders of the United States despite it being part of an institution's program or activity. Title IX would also not apply if a student reported to the Title IX Coordinator the day after they graduated from the institution about an alleged rape occurring the night before their graduation. Another example would include a staff member reporting that a student was stalking them, and the stalking behaviors occurred off-campus, even if only by a few yards off campus on otherwise Clery-reportable Public Property. One can easily argue that those behaviors impacted or would impact a person's ability to participate in the institution's program or activity. This leads to separate processes for essentially the same behavior. To explain to a student that Title IX protects them if they are raped in the institution's residence hall in a state such as Colorado but not in the institution's residence hall in Italy is counter-intuitive to Title IX's espoused goals of providing an environment that is free from sex-based discrimination and its pernicious and deleterious effects.

In addition, it appears that the Title IX regulations were written with a traditional, four-year residential college experience in mind and therefore, may negatively impact those institutions and communities that do not embody that profile. The majority (60%) of full-time college students at public institutions do not live on campus while a significant percentage (36%) at private institutions also do not live on campus.[1] Community colleges make up

[1] https://www.reference.com/world-view/percent-college-students-live-campus-d1d5a0fac8718894

nearly half of all undergraduates [2] and have an older and more diverse population.[3] A one-size-fits-all approach does not allow institutions to effectively respond to the various nuances of their institution and their contrasting constituencies.

Protective and supportive measures and interim actions

The Clery Act requires that any student or employee who reports being the victim of a VAWA offense, no matter where that offense is reported to have occurred, be provided with a written explanation of their rights and options by their institution. This written document is intended to provide succinct and timely required information to victims and includes a laundry list of compliance requirements. The new Title IX regulations require that once the institution's Title IX Coordinator receives actual knowledge (or other person who would constitute someone to whom actual knowledge could be provided), the Coordinator should provide information on supportive measures the institution may offer as well as explain the process for filing a formal complaint.

Though both the Clery Act and Title IX discuss a range of services and options that institutions may initiate upon notification of an alleged offense, Title IX clearly states that supportive measures mean "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. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment."[4] As stipulated by Title IX, supportive measures must be "non-disciplinary" which removes the option for an institution to take reasonable interim actions. An example might include the temporary or interim prohibition of a respondent from entering a certain location on campus (e.g., a particular residence hall) while the case is being managed. Interim actions, a common practice, allows for an institution to impose a temporary action for the health and safety of those involved in the community until a final decision is made. Title IX regulations limit the ability of an institution to make a reasonable temporary decision that enhances the general wellbeing of its students and community.

Title IX allows for an emergency removal "provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal." While we agree that no person should be separated from educational opportunities without due process/fundamental fairness, limiting removal to only cases in which the respondent represents an actual immediate physical threat to the safety of a person considerably ties the hands of an institution in protecting their campus population and requires them to devote considerable resources to monitoring changes to safety situations potentially on a minute-by-minute basis.

However, the Clery Act requires institutions to issue a timely warning for Clery Act crimes that occurred in an institution's Clery Geography which are "considered by the institution to represent a threat to students and employees."[5] Potential conflicts may arise when an institution is unable, because of Title IX, to temporarily

[2] https://www.napicaacc.com/docs/AACC_Fact_Sheet_2016.pdf
[3] https://ccrc.tc.columbia.edu/Community-College-FAQs.html
[4] 34 CFR 106.30(a)
[5] 34 C.F.R. §668.46(e)(1)(iii)

remove an individual from the community because the individual did not pose an *immediate* threat, but whose reported actions have been determined by the institution to pose an ongoing threat for which a Timely Warning has been issued. It is feasible that an institution may release a timely warning and yet not be in a position to effectively manage the situation temporarily through an appropriate interim action. This would send a mixed message to the campus community and undermine the institution's ability to protect its community beyond issuance of a notification.

Prompt, fair, and impartial proceedings

The Clery Act expects institutions to have a prompt, fair, and impartial proceeding.[6] Prompt, fair, and impartial proceedings are the foundation of student conduct codes. One of the tenets of such a proceeding, also indicated in the Clery Act, is having reasonably prompt timelines. The prescriptive nature of the Title IX regulations includes two required timeframes that will elongate the process and prevent a proceeding from being "prompt." Title IX requires that each party receive a copy of all evidence, which would include all interview statements, and the parties have ten days to provide a response. Once the final investigative report is complete, the parties must have another ten days prior to a hearing to prepare a written response. This is twenty days beyond the time it will take to do intake, interview the parties, collect evidence, interview witnesses, write the investigative report, hold a hearing, and conduct an appeal. This will likely lead to cases taking a semester or more to resolve which is not prompt as required by the Clery Act, nor does this delay serve the academic interests of either party during this time.

Advisor of choice and cross-examination

The Clery Act allows for an advisor of choice to accompany a respondent or complainant to any meeting or disciplinary proceeding in which the party is required to be present.[7] Institutions may "not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties."[8]

Title IX also allows for an advisor of choice but also *requires* an advisor to be present at the hearing for the purpose of conducting cross-examination. If a party does not have an advisor, the institution must provide an advisor at the hearing for the purposes of cross examination. This means the institution selects the advisor, not the party, thus undermining the party's ability to select an advisor on their own.[9] The advisor also receives the evidence and final report from the institution regardless whether the party wishes to have an advisor or for them to have direct access to the records.

Providing for a support person or advisor is a common practice in student conduct. Student conduct processes are meant to resolve complaints within the institution's community. They determine policy violations and are meant to be educational in nature. They are not meant to be quasi-judicial systems which are inherently adversarial. The

[6] 34 CFR 668.46(k)(3)(i)
[7] 34 CFR 668.46(k)(2)(iii)
[8] 34 CFR 668.46(k)(2)(iv)
[9] Footnote 294 in the May 19, 2020 final Title IX implementing regulations makes this point when it notes, in part, that "if a party does not have their own advisor of choice at the live hearing, the postsecondary institution must provide that party (at no fee or charge) with an advisor of ***the recipient's*** choice, for the purpose of conducting cross-examination" (emphasis added).

purpose of an advisor is to allow the party to have someone present to give them advice and overall support but not to actively participate in the proceeding. Part of the educational environment is for the parties to engage in the process themselves and not have someone speak on their behalf.

Title IX removes a party's ability to decide whether they want an advisor. The expectation that the advisor receives the documents directly from the institution also bypasses the party's right to choose who sees their records. Because the institution is expected to provide an advisor, concerns about equity will arise. If an institution hires an attorney, are they "stacking the deck" against the other party? If the institution uses a staff member, are they putting the party at a disadvantage? The advisor issue should be as the Clery Act intended - a person's choice to have an advisor rather than a requirement of their active participation in the process, which includes direct cross-examination in live hearings.

Having an opportunity for the parties to have questions posed to each other is an important element in fact-finding; however, we respectfully disagree with the opinion that cross-examination is the only way to get to the truth. Utilizing well-trained investigators and hearing boards who are effective questioners and providing for the parties' questions to be asked is arguably just as effective, if not more so. We agree with the court in Haidak v. University of Massachusetts that "This is not to say that a university can fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account. Rather, we are simply not convinced that the person doing the confronting must be the accused student or that student's representative."[10]

In addition, Title IX's expectation that if a party refuses to answer even one question on cross-examination then the decision-maker must not rely on any statements[11] is a restriction not seen in any other type of resolution process. It would seem to be a fundamental right for an individual to be able to refuse to answer a question and for a decision-maker to be able to analyze the refusal in their decision-making process. Not only could this harm complainants, but respondents with concurrent criminal charges arising from the same set of facts who opt not answer a specific question out of concerns for how their statements may be used in a subsequent criminal trial will also be adversely affected by this rule.

Employee proceedings

The Clery Act requires that institutions publish their proceedings for responding to and resolving a VAWA Offense for both student and staff respondents and every procedure that an institution utilizes to resolve a VAWA offenses be compliant with the Clery Act There is not a requirement that those proceedings be identical. Title IX does have such a requirement. Student and employee situations, experiences, and circumstances are often very different and as long as their processes are fair and impartial, they should not need to be identical.

Under the new Title IX regulations, a significant challenge arises for human resource practitioners, who have requirements under Title VII to resolve incidents of sex-based harassment, including sexual assault, that occur in the context of employment and could constitute sex-based harassment. Consider this example: If an employee is alleged to have engaged in nonconsensual sexual contact/touching (fondling) of another employee, but at a bar

[10] Haidak v. University of Massachusetts-Amherst, No. 18-1248 (1st Cir. 2019)

[11] 34 CFR 106.30(b)(6)(i)

off campus, even though the two employees would see each other on campus and at work, Title IX would not attach. In the past, HR would have funneled such complaints to their institution's Title IX Coordinator for investigation and resolution. However, due to the jurisdictional limitations of Title IX, HR now must investigate and resolve those complaints under Title VII or another employee misconduct policy (versus Title IX). Such policies used by HR must ensure that whatever policy and procedure they utilize is Clery Act compliant since the alleged constitutes a VAWA Offense. The level of expertise in policy and procedure construction alone is significant and the notion that during the time of the sexual assault, the institution must have had substantial control of the respondent for the behavior to constitute sex-based harassment protected by Title IX is absurd.

Clery Handbook

The Clery Act is perceived by those in the regulated community as a complex law, and the recent rescission of the 2016 Handbook for Campus Safety and Security Reporting[12] ("handbook") exacerbates this complexity. Though the handbook is in need of revision and simplification in key areas, the absence of the handbook's guidance will frustrate the ability of institutions to apply the Clery Act's statutory and regulatory requirements to real-world scenarios, resulting in varying levels of non-compliance and potentially jeopardizing campus safety in the process.

The rescission has significant implications for the VAWA amendments. The handbook provided guidance on classifying VAWA Offenses. It addressed the components needed for disciplinary proceedings, and the implementation of educational programs and campaigns. The issue of sexual violence and the need to provide a fair and transparent process to all involved will be best served by reinstating the handbook.

Conclusion

The Clery Act and Title IX intersect and are important components to institutions as they strive to provide equitable and safe educational environments; therefore, the laws should complement each other and not be in conflict.

NACCOP, which prides itself on utilizing experts who are practitioners from human resources, student affairs, Title IX, and public safety looks forward to assisting the new administration to strengthen the opportunities for higher education institutions to provide for the safety of their students and staff through fair and impartial processes, policies, procedures, and disclosures in fulfillment of the laudable goals of both laws.