Regulatory Interplay

An overview of how the Clery Act and Title IX intersect under the Violence Against Women Act, and what that means for your campus

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Interplay or Intersection?

What do you see when you think of today’s topic?
Overview of this Presentation

• Some background

• Overview of the regulations and major guidance:
  • Title IX
  • DCL(s)
  • Major Resolution Agreements
  • CLERY Act
  • Violence Against Women Act amendments to Clery

• Some thoughts on implementation on your campus
Background – Game Changers

• Game changer(s)?
  • Clery Act
  • 2010 OCR Resolution Agreements (Eastern Michigan & NDC)
  • October 2010 Dear Colleague Letter on Hazing and Bullying
  • Landmark April 2011 Dear Colleague Letter on Title IX
  • Major Resolution Agreements:
    • University of Notre Dame (July 2011)
    • Yale (June 2012)
    • Xavier (July 2012)
    • University of Montana (May 2013)
  • Violence Against Women Act Reauthorization in 2013 known as the
    Campus Sexual Violence Elimination Act (SaVE) that amends Clery
  • Questions and Answers on Title IX and Sexual Violence (OCR) April
    2014
Background – CLERY on the Rise

- It should be noted that along with the revolutionary rise in guidance documents and enforcement related to Title IX from the OCR, there has also increased enforcement and fines related to Clery that are connected to issues of sexual misconduct and Title IX
  - Eastern Michigan’s shocking fine of $350,000 in 2010
  - In 2012 the per violation fine increased from $27,500 to $35,000
  - Program reviews and fines have increased yr over yr
  - Notably Lincoln University (Mo) was fined in October 2013 $275,000 for multiple violations including fine for failure to include a statement about potential sanctions of sexual assault in ASR
Background – Rise of Attention

• It should also be noted that much of the attention given to sexual assault on campus is due to the networking and advocacy of victims/victim groups and the media.

• People are waking up to the reality that sexual assault is a real problem on College campuses.

• Increased media attention continues to point out the appalling reality that schools keep getting this wrong.
The Regulations

- Overview of the regulations and major guidance:
  - Title IX
  - DCL(s)
  - Major Resolution Agreements
  - CLERY Act
  - Violence Against Women Act amendments to Clery
Title IX - Basics

- Title IX of the Education Amendments of 1972 (federal law) prohibits discrimination on the basis of sex in education programs, activities, and employment operated by recipients of federal financial assistance
  - Title IX is best known for helping to promote and achieve gender equity in athletics
  - Applies to all forms of sexual misconduct including: sexual harassment, violence, and sexual assault
  - Applies to students, faculty, and staff. Protects students and employees from harassment from other students, employees, and third parties
Title IX - Basics

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<td>Discrimination is prohibited by Title IX</td>
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<td>Harassment is a form of Discrimination</td>
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<td>Sexual Harassment is a form of Harassment</td>
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<td>Sexual Violence is a form of Sexual Harassment</td>
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<td>Rape, Sexual Assault, Battery and Coercion are forms of Sexual Violence</td>
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• Background on the DCL:
  • Education is the civil rights issue of our time
  • “Education is the great equalizer”
  • All students are entitled to an educational environment free from discrimination
  • Sexual harassment and sexual violence interfere with a student’s right to receive an education free from discrimination
  • Sexual violence is a crime

2011 Dear Colleague Letter
Title IX - Enforcement

- Title IX is enforced by the Department of Education Office for Civil Rights (OCR)
  - The OCR’s enforcement activities includes investigation of individual complaints, agency-initiated compliance reviews, and technical assistance
  - Theoretically, negative OCR findings could result in the loss of Title IV funding through the DOE
  - Practically, the OCR negotiates resolutions with investigated schools who then undertake “voluntary remedial action”
  - The 2011 DCL is an enforcement document, not law
Title IX - Documents

• Landmark documents related to Title IX published by the OCR:
  • 2001 Revised Sexual Harassment Guidance
  • April 4, 2011 Dear Colleague Letter
  • Various Major Resolution Agreements

• Prior to the 2011 DCL, OCR documents and guidance were fairly non-controversial. The 2011 DCL’s scope and administrative expansion of Title IX greatly enlarged the reach of non-discrimination principles and anti-harassment language
Title IX – Your Policy

• Are you covering the essential elements of Title IX called for in the 2011 DCL?
  • United Educators Title IX Checklist: https://www.ue.org/Libraries/Shared_RML/Title_IX_Advisory_Checklist_for_Complying_With_OCR_s_Dear_Colleague_Letter.sflb.ashx

• Do you have a sexual misconduct policy that covers Title IX and other related regulations/statutes? Is it published and easily accessible? Is it thorough enough in scope?

• Have you designated a Title IX Coordinator, deputies, Title IX team? Is this information well known?
Title IX – Your Campus

• Do you have a clear non-discrimination statement? Is it easily accessible on your website and disseminated annually? Have you made any efforts to convey this in multiple languages, and is the information accessible to people with disabilities?

• Do you cover options for assistance following an incident of sexual misconduct, including immediate support measures and on-going assistance like counseling, interim remedies and academic accommodations?
Title IX – Your Campus

• Do you clearly define all aspects of discrimination and harassment (are they VaWA compliant too?)
  • Have you given special attention to consent and incapacitation?

• Have you worked out the various aspects of reporting?
  • Formal reporting options, including law enforcement
  • Confidentiality and confidential resources on your campus
  • Anti-retaliation and amnesty provisions
Title IX – Your Campus

- Do you have the proper investigation procedures and protocols in place? How often are they violated? Does everyone know their role and have adequate training to carry it out?
- Is your Grievance procedure fully aligned with the DCL and consistent?
Title IX – Your Campus

- Have you outlined your approach to and examples of prevention and education on sexual misconduct, including bystander intervention training? Have you conducted a climate survey?

- Have you held any training for faculty and staff in general, or at least trained your Title IX coordinator, law enforcement, “responsible employees,” victim advocates, etc.?
  - Is your Title IX Coordinator training documented, held annually?
Clery Act – the Basics

• Applies to schools that receive federal funds

• The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act is a federal statute, enacted in 1990, that requires all schools to collect and publish campus crime statistics, and publish numerous policy statements in a Annual Security Report
  • The purpose of the Clery Act is to provide students, their families, and employees with accurate, complete, and timely information about campus safety to better inform
Clery Act – the Basics


- Clery Act requirements:
  - Publish an Annual Security Report by October 1
  - Maintain a public crime log
Clery Act – Crime Statistics

- Criminal homicide
  - Murder and non-negligent manslaughter
  - Negligent manslaughter
- Sex offenses
  - Forcible and non-forcible sex offenses
- Robbery
- Aggravated Assault
- Burglary
- Motor Vehicle Theft

- Arson

- Arrests and disciplinary referrals for:
  - Liquor law violations
  - Drug law violations
  - Illegal weapons possessions

- Hate Crimes
  - Also includes larceny-theft, simple assault, intimidations, destruction/damage and vandalism of property
Clery Act – the Basics

• Clery Act Requirements (continued):
  • Issue timely warning about Clery Act crimes that pose a serious or on-going threat to students or employees
  • Devise an emergency response, notification, and testing policy
  • Compile and report fire data and publish an annual fire safety report
  • Enact policies and procedures to handle reports of missing students
The Campus Sexual Violence Elimination Act (SaVE Act) was passed in March 2013 as part of the Violence Against Women Reauthorization Act (VAWA)

- Applies to all institutions who receive federal funds
- Amends the Clery Act
- Codifies some aspects of the April 2011 OCR DCL
- Became effective March 7, 2014 – DOE held negotiated rulemaking sessions in January, February, and March of 2014. Final section 304 language was released Monday October 20th
- Schools were expected to give “good faith effort” to include new crime categories for calendar year 2013 in October 2014 ASR and were reminded to do so again with the final release of the regulation
- Rules officially go into effect on July 1, 2015
Clery Act & VAWA

- From the DOE press release:
  - “The department has the responsibility to ensure that all of our students have the opportunity to learn and grow in a safe environment,” Arne Duncan, U.S. Secretary of Education, stated. “These new rules require institutions to ensure that students and employees have vital information about crime on campus and the services and protections available to victims if a crime does occur, which will be significant assets in addressing the growing problems of sexual assault, domestic violence, dating violence, and stalking on our nation’s campuses.”
Clery Act & VAWA

- **VAWA Key Requirements:**
  - Add reporting of domestic violence, dating violence, and staking to Clery crimes
  - Develop procedures for student conduct to include notification to victims of their rights, allow advocates
  - Adopt additional policies and procedures to address prevention, reporting, and investigation of campus sexual violence, including extensive training of faculty and staff regarding notification and reporting requirements both on and off campus
  - Does not include a definition of consent
    - Second NRM session introduced language that defined consent as: “the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter.”
VAWA – New Categories

• New Hate Crime Reporting Categories:
  • National Origin
  • Gender Identity

• Keep in mind:
  • Hate crimes are counted separately from Part I crimes and Drug/Alcohol/Weapons arrests and referrals.
  • All Part I crimes, plus Larceny-Theft, Simple Assault,
  • Intimidation and Destruction/Damage/Vandalism of Property are counted as hate crimes if motivated by bias
The categories of bias are changed by VAWA:

- Race (2008 HEOA)
- Gender (2008 HEOA)
- Religion (2008 HEOA)
- Sexual Orientation (2008 HEOA)
- Disability (2008 HEOA)
- Gender Identity (2013 VAWA)
- National Origin (2013 VAWA)
VAWA – New Categories

• New reportable incidents and definitions:
  • Domestic Violence
  • Dating Violence
  • Stalking

• These are NEW and in addition to the crimes previously requires to be reported under Clery
VAWA – New Categories

- Domestic Violence - The term “domestic violence” includes felony or misdemeanor crimes of violence committed
  - by a current or former spouse of the victim,
  - by a person with whom the victim shares a child in common,
  - by a person who is cohabitating with or has cohabitated with
    the victim as a spouse,
  - by a person similarly situated to a spouse of the victim under
    the domestic or family violence laws of the jurisdiction in
    which the crime of violence occurred, or
  - by any other person against an adult or youth victim who is
    protected from that person's acts under the domestic or family
    violence laws of the jurisdiction in which the crime of violence
    occurred.
VAWA – New Categories

• Dating Violence
  • The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  • The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of
    • the length of the relationship,
    • the type of relationship,
    • and the frequency of interaction between the persons involved in the relationship
  • Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
VAWA – New Categories

• Stalking
  • The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to
    • (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress
  • Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property
VAWA – New Categories

- Names of victims are to be withheld from timely notification warnings for crimes considered to be a threat to students and employees
  - No objections stated to using names of alleged perpetrators however.

- Some questions related to the new categories:
  - Definitions are broad – but defined
  - Note that (confusingly), VAWA also requires that we notify students of the definition of these crimes in the applicable jurisdiction, but count statistics of sexual assault using the Unified Crime Reporting System of the FBI
  - Schools should “count” crimes under FBI UCR hierarchy according to severity
  - Does this indicate a shift in Clery away from concern only about location and time of crime to more details about identifying who was involved and what occurred, which has typically been the concern of Title IX?
  - There is lack of guidance as to how internet crimes fit into expanded definitions and geography requirements
  - All reported Clery Act crimes that occur within Clery geography must be part of statistics, rare “unfounded” crimes must be noted separately
VAWA – Policy & Education

- Written statement of policy
  - The ASR must include a Statement of Policy on school’s:
    - Programs to prevent domestic violence, dating violence, sexual assault, and stalking
    - Procedure in place for school to follow when responding to a report of the above
  - Prior to VAWA, schools were required to notify students of the policy and procedures for victims to follow in reporting sexual assault, including the importance of preserving evidence to be used in future proceedings
VAWA – Policy & Education

• Schools must have education programs:
  • To promote prevention and awareness of offenses of domestic violence, dating violence, sexual assault, and stalking
  • This must be offered to all incoming students and new employees
    • Example of VAWA taking 2011 DCL further, DCL recommends preventative ed programs
    • Does not state that schools should mandate attendance, use specific programs, etc.
VAWA – Policy & Education

- **Education programs** must include:
  - Statement that the school prohibits these offenses
  - Definition of these offenses in applicable jurisdiction
  - Definition of consent with reference to sexual activity, in applicable jurisdiction
  - Safe and positive options for bystander intervention that person may take to prevent harm or intervene where there is risk of the offenses
  - Information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks
  - On-going prevention and awareness campaigns for students and employees
VAWA – Policy & Education

• Notification to Victims
  • Schools must provide written notification to victims (following report of sex offense, domestic violence, dating violence, sexual assault, stalking) of:
    • Importance of preserving evidence that may be necessary proof
    • To whom the incident should be reported
    • Process to obtain protective orders such as no contact orders (by school) or restraining order and similar court orders
  • Victims option to:
    • Notify law enforcement authorities on-campus and local police
    • Be assisted by campus authorities in notifying law enforcement authorities if victim wishes
    • Decline to notify law enforcement authorities (does not absolve duty of institution to report)
VAWA – Policy & Education

• Student Conduct:
  • Schools must have a student conduct policy and process in place to respond to reports of sex offenses, domestic violence, dating violence, rape, acquaintance rape, sexual assault, and stalking
  • The conduct process must provide a prompt, fair, and impartial investigation and resolution, and not be conducted by those with bias
  • Conduct proceedings must be conducted by officials who receive annual training on:
    • issues related to domestic violence, dating violence, sexual assault, and stalking, and how to conduct an investigation and hearing process that protects the “safety of victims and promotes accountability.”
• **Student Conduct**
  - Student conduct proceeding to be conducted based upon the “statement of the standard of evidence [or proof]” included in the written policy
  - VAWA does not require a specific standard
    - OCR DCL requires a standard of “preponderance of the evidence”
Student Conduct

Provide the complainant and respondent with same opportunities to have others present during the conduct proceedings, including opportunity to be accompanied to related meetings or proceedings by an advisor of their choice. Schools can designate the role of advisors, but not mandate who serves or does not serve in that capacity.

Inform the complainant and respondent simultaneously, in writing, of:

- The outcome of a conduct proceeding that arises from allegations of domestic violence, dating violence, sexual assault, or stalking
- The school’s procedures (if any) for the complainant and respondent to appeal the outcome of the institutional conduct proceeding
  - Does not mandate an appeal process
- Any change to outcome that occurs before outcome becomes final
- When outcome becomes final
VAWA – Policy & Education

- **Student Conduct**
  - Address how victims' confidentiality will be protected, including recordkeeping that excludes personally-identifiable information of victims
  - Provide for timely warnings to campus community on crimes that are a threat to students or employees. Report should withhold the names of victims as confidential
    - *FERPA* recognizes that in cases of emergency, information can be released without consent when needed to protect health and safety of others
    - *OCR DCL* requires institutions to respect requests for confidentiality to the extent possible while addressing obligation to investigate and respond
    - *OCR DCL* does not mandate that school’s written policy address victim’s confidentiality
VAWA – Policy & Education

• Student Conduct
  • Identify possible “sanctions or protective measures” the school may impose following a final determination of the reported incident
  • Include written notification to students and employees about existing resources (e.g., counseling, health, mental health, victim advocacy, legal assistance, financial aid) available for victims on campus and in community
  • Include written notification to victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if requested by the victim and if such accommodations are reasonably available
  • Written notice must be distinct from the ASR
Compliance Recommendations

- VAWA amendments to Clery call for campus-wide collaboration, schools should publicize the act as widely as possible
  - Do you have information about this on your website? Is it easy to find and follow?

- Schools should collect data about the new categories immediately or have already started
  - Do the right people on your campus know what is required of them?
April 2011 DCL & VAWA

• DCL embedded in VAWA:
  • Investigations and resolutions must be prompt, fair, and impartial;
  • Equal access and opportunities for the complainant and respondent, including to the appeal procedures, if any, and support of an advisor
  • Simultaneously inform the parties in writing of the outcome and appeal process, if any
  • Institutional retaliation is prohibited
April 2011 DCL & VAWA

• DCL and VAWA differences:
  • VAWA requires institutions to publish the standard of evidence that will be used in a conduct proceeding;
  • DCL requires institutions to use “preponderance of the evidence” as the standard sex discrimination cases
  • VAWA requires institutions to publish information about the availability of confidentiality for victims
  • DCL requires institutions to respect requests for confidentiality to the extent possible while following through with the obligation to investigate and respond
  • VAWA prohibits institutional retaliation
  • DCL requires institutions to respond to retaliation by and among college community members including the complainant and respondent
Practical Guidance

• Moving from policy interplay to implementation is an immense undertaking, especially for small, private institutions

• Coordination between school’s constituents is crucial
  • Who should be involved?
    • Campus Public Safety
    • Clery Coordinator
    • Campus Security Authorities
    • Title IX Coordinator
    • Student Affairs/Housing
    • Investigators & Conduct hearing board members
    • Human Resources
    • Academic leadership
    • Advocates in general
    • Threat Assessment Team
    • Counsel
Practical Guidance

• Who needs to be at the table and when? Who has ownership of what? Should/can someone take the lead?

• Reexamine roles in context of Section 304 changes to Clery Act and on-going Title IX obligations

• Focused review of institutional policy and practice
  • Use checklists
  • Who’s good at compliance, how can they help?
  • Identify all of school’s policies, publications, and procedures related to crime prevention, reporting and investigation, sexual assault and other sexual misconduct, sexual harassment, alcohol and drug rules and penalties, and student conduct
  • Will an omnibus policy work for students and employees?
Practical Guidance

• Since schools are required to describe educational programs and make policy statements, some of you still may have to create these programs and implement them. Get to work

• Walk through school’s website and links to understand how a student, employee, DOJ, OCR, etc. will navigate and access the school’s policies

• Effective communication internally and to campus constituents is key
• The OCR DCL is an enforcement document, the Clery Act is a legal statute
  • You cannot ignore either

• Efforts should be focused on creating an environment that is free from harassment

• Focus on mission. We cannot escape the fact that we work in a burdensome regulatory environment. But it is not what we do as a core enterprise, it’s not what defines us as independent colleges. Master compliance so that it doesn’t interfere with mission
Key Resources

- OCR Website: http://www2.ed.gov/about/offices/list/ocr/index.html
  - Reading Room: http://www2.ed.gov/about/offices/list/ocr/publications.html


- Not Alone: https://www.notalone.gov/

- 1 is 2 Many: http://www.whitehouse.gov/1is2many

- UE Campus SaVE Act Compliance Checklist: https://www.ue.org/Libraries/Corporate/The_Campus_SaVE_Act_A_Compliance_Guide.sflb.ashx
Thank you

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