

Intersection of Title IX and the Clery Act

The purpose of this chart is to clarify the reporting requirements of Title IX and the Clery Act in cases of sexual violence and to resolve any concerns about apparent conflicts between the two laws. To date, the Department of Education has not identified any specific conflicts between Title IX and the Clery Act.

Title IX

The Clery Act

What types of incidents must be reported to school officials under Title IX and the Clery Act?

Overview: Title IX promotes equal opportunity by providing that no person may be subjected to discrimination on the basis of sex under any educational program or activity receiving federal financial assistance. A school must respond promptly and effectively to sexual harassment, including sexual violence, that creates a hostile environment. When responsible employees know or should know about possible sexual harassment or sexual violence they must report it to the Title IX coordinator or other school designee.

- **Sexual Harassment:** Sexual harassment is unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.
- **Sexual Violence:** Sexual violence is a form of sexual harassment. Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol or an intellectual or other disability that prevents the student from having the capacity to give consent). Sexual violence includes rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.

Overview: The Clery Act promotes campus safety by ensuring that students, employees, parents, and the broader community are well-informed about important public safety and crime prevention matters. Institutions that receive Title IV funds must disclose accurate and complete crime statistics for incidents that are reported to Campus Security Authorities (CSAs) and local law enforcement as having occurred on or near the campus. Schools must also disclose campus safety policies and procedures that specifically address topic such as sexual assault prevention, drug and alcohol abuse prevention, and emergency response and evacuation. The Clery Act also promotes transparency and ongoing communication about campus crimes and other threats to health and safety and empowers members to take a more active role in their own safety and security.

Criminal Offenses: Criminal homicide; rape and other sexual assaults; robbery; aggravated assault; burglary; motor vehicle theft; and, arson as well as arrests and disciplinary referrals for violations of drug, liquor, and weapons laws.

- **Hate Crimes:** Any of the above-mentioned offenses against persons and property and incidents of larceny-theft, simple assault, intimidation or destruction/damage/vandalism of property, in which an individual or group is intentionally targeted because of their actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, ethnicity, or disability. 20 U.S.C. §1092(f)(1)(F)(ii). Use FBI definitions, and the

modifications from the Hate Crime Statistics Act. 20 U.S.C. §1092(f)(7).
➤ **VAWA:** The reauthorization of the Violence Against Women Act of 1994 amended the Clery Act to include disclosure of statistics regarding incidents of dating violence, domestic violence, and stalking as defined in 20 U.S.C. §1092(f)(1)(F)(iii) and 20 U.S.C. §1092(f)(7).

Occurring where? (geography/jurisdiction)

Recipients must respond to sexual violence that occurs:

- **In the context of a school's education programs and activities:** This includes academic, educational, extracurricular, athletic, and any other school programs, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. Additional examples include school-sponsored field trips, school-recognized fraternity or sorority houses, and athletic team travel; and events for school clubs that occur off campus.
- **Off-campus:** Even if the sexual violence did not occur in the context of an educational program or activity, a school must process such complaints and consider the effects of the sexual violence when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.

Institutions must disclose crime statistics for Clery-reportable offenses that occur on its so-called "Clery Geography." Clery Geography includes three general categories:

- **Campus:** Any building or property that an institution owns or controls within a reasonably contiguous area that directly supports or relates to the institution's educational purposes. On campus also includes residence halls and properties the institution owns and students use for educational purposes that are controlled by another person (such as a food or retail vendor). The definition of "controlled" includes all such properties that are leased or borrowed and used for educational purposes. 20 U.S.C. §1092(f)(6)(ii)
- **Non-campus building or property:** Any building or property that is owned or controlled by a recognized student organization. And, any building or property that is owned or controlled by the institution that is used in support of its educational purposes but is not located within a reasonably contiguous area to the campus. 20 U.S.C. §1092(f)(6)(iii).
- **Public property:** All public property within the reasonably contiguous geographic area of the institution that is adjacent to or accessible from a facility the institution owns or controls and that is used for educational purposes. Examples include sidewalks, streets, and parking facilities. 20 U.S.C. §1092(f)(6)(iv).

Who must report details of an incident of sexual violence, including personally identifiable information?

Responsible employees

- A responsible employee is any employee who has the authority to take action to redress sexual violence, who has been given the duty to report to appropriate school officials about incidents of sexual violence or any other misconduct by students, or who a student could reasonably believe has this authority or responsibility.
- Schools must make clear to all of its employees and students which staff members are responsible employees.

Campus law enforcement officers, non-law enforcement campus safety officers, and local law enforcement officers

- These individuals are normally required to fully document all operative facts of an incident that are reported or that are developed throughout the course of a criminal investigation. The information collected during such an investigation will normally include personally-identifiable information (PII).

CSAs other than law enforcement/campus safety officers

- Most of these CSAs are not typically required to disclose PII as part of their normal reporting obligations. (see CSA definition below)

Who can provide completely confidential support services to victims of sexual violence?

Professional and pastoral counselors

- A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.
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- A pastoral counselor is a person who is associated with a religious order or

denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.

- Professional and pastoral counselors are not required to report any information regarding an incident of alleged sexual violence. The exemption from reporting obligations for professional and pastoral counselors under Title IX is consistent with the Clery Act.

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- Crimes reported to a pastoral or professional counselor are not required to be reported by an institution under the Clery Act; however, institutions are strongly encouraged to establish voluntary, confidential reporting processes so that incidents of crime that are reported exclusively to professional and pastoral counselors will be included in the annual crime statistics. 34 C.F.R. §668.46(b)(2)(iii).

Who can provide services and keep personally identifiable information about incidents of sexual violence confidential?

Non-professional counselors or advocates

- Individuals who are not professional or pastoral counselors, but work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers, including front desk staff and students, and provide assistance to students who experience sexual violence, should report aggregate data, but are not required to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student.

Most non-law enforcement/campus safety officers who are CSAs because of they have significant responsibilities for student and campus activities.

- The definition of campus security authority includes campus police and/or security personnel; any individual who has responsibility for campus security but is not part of a campus police or security department; an individual or organization specified in an institution's statement of campus security policy as one to which students and employees should report criminal offenses; and an official of an institution who has a significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. Most of these mandatory reporters are specifically not required by the Clery Act to disclose PII. 34 C.F.R. §668.46(a).
- Because specific occupational titles, descriptions and statements of duties vary so significantly, each institution must conduct a substantive review of all of its officials, including students with official duties for example, resident assistants, and evaluate whether the Clery Act designates the individual a CSA and thereby confers reporting obligations. CSAs must be identified, notified of their reporting obligations, be properly training, and provided with a mechanism for communicating reported incidents to the appropriate officials. (Handbook, 75).

What should non-professional counselors, advocates, and CSAs report about incidents of sexual violence?

Aggregate Data

- In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers.
- Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting information that would personally identify a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

Aggregate Data

- Typically, most non-law enforcement/campus safety officer CSAs must only report the nature, date, time, general location, and the current disposition of the incident, if known.
- Most non-law enforcement/campus safety officer CSAs typically are not required to disclose PII or other information that would have the effect of identifying the victim.

What must a school tell the complainant about the outcome of a sexual violence complaint and how does FERPA apply?¹

Notice of the Outcome

- Title IX requires a school to tell the complainant whether or not it found that the sexual violence occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, and prevent recurrence.
- Sanctions that directly relate to the complainant include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending

Results of Institutional Disciplinary Proceedings

- The Clery Act specifically mandates that “each institution shall develop and distribute procedures for simultaneously notifying the accuser and accused of the outcome of institutional disciplinary proceedings.” 20 U.S.C. §485f(1)(J)(8)(B)(iv)(III)(aa).
- FERPA includes a provision that specifically allows schools to disclose to alleged victims of any crime of violence or rape and other sexual assaults, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator of the offense. 20 U.S.C.

¹ This chart also addresses how the Family Educational Rights and Privacy Act (FERPA) applies to Title IX and the Clery Act. Once again, the Department of Education has not identified any specific situations where compliance with Title IX or the Clery Act will cause an institution to violate FERPA.

<p>school for a period of time or transferring the perpetrator to another residence hall, other classes, or another school.</p> <ul style="list-style-type: none"> ➤ The Department of Education interprets FERPA as not conflicting with the Title IX requirement that the school notify the complainant of the outcome of its investigation, <i>i.e.</i>, whether or not the sexual violence was found to have occurred, because this information directly relates to the victim. FERPA also permits the school to notify a complainant of sanctions imposed upon a student who was found to have engaged in sexual violence when the sanction directly relates to the complainant. ➤ The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act. 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information in any Title IX complaint that involves a Clery Act offense, such as sexual violence. 	<p>§1232g(b)(6).</p> <ul style="list-style-type: none"> ➤ The “final results” of any proceeding are defined as: the name of the student, the findings of the proceeding board/official, any sanctions imposed by the institution, and the rationale for the findings and sanctions (if any). The presence of names of any other student, such as a victim or witnesses, may be included only with the consent of that student. 20 U.S.C. §1232g(c). ➤ The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act. 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information.
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How does FERPA apply to other obligations under Title IX and the Clery Act?

<p><u>All Other Title IX Obligations</u></p> <ul style="list-style-type: none"> ➤ FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. 	<p><u>Timely Warnings</u></p> <ul style="list-style-type: none"> ➤ The Clery Act requires institutions to issue timely warnings to the campus community about crimes that have already occurred but may continue to pose a serious or ongoing threat to students and employees. Timely warnings are only required for Clery-reportable crimes that occur on Clery Geography although institutions are encouraged to issue appropriate warnings regarding other criminal activity that may pose a serious threat as well. 20 U.S.C. §485f(1)(J)(3); Handbook, 118. ➤ FERPA does not preclude an institution’s compliance with the timely warning provision of the Clery Act. FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a). Further, if
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institutions utilize information from the records of campus law enforcement to issue a timely warning, those records are not protected by FERPA. 20 U.S.C. §1232g(a)(4)(B)(ii).

- However, timely warning reports must withhold the names and other identifying information about victims as confidential. 34 C.F.R. §668.46(e).

Emergency Response Procedures

- The Clery Act requires institutions to have and disclose emergency response and procedures. As part of these procedures, institutions must immediately notify the campus community about *any* significant emergency or dangerous condition that may pose an immediate threat to the health or safety of students or employees occurring on the campus. 20 U.S.C. §485f(1)(J)(1)(i).
- An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed. 34 C.F.R. §668.46(e)(3).
- FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a).