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# USING THE CLERY ACT WHERE THE NEW TITLE IX REGULATIONS FAIL

**Co-Presenters: Laura Dunn & S. Daniel Carter**

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# Agenda

## **Title IX Overview**

- **Rights and remedies**
- **Procedural requirements**
- **Gaps in protection**

## **Clery Act Overview**

- **Rights and remedies**
- **Procedural requirements**
- **Stop-gap measures re: Title IX**

# Title IX



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## 20 U.S.C. 1681(a)

**"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."**

# Title IX Offenses



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## **Sexual harassment, 34 C.F.R. 106.30**

- Dating violence and abuse
- Sexual exploitation
- Stalking

## **Sexual violence**

## **Sex or gender-based discrimination**

## **Sex or gender-based harassment**

## **Sex or gender-based violence**

## **Retaliation**

# Title IX Legal Remedies



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## Civil Liability

**Sex Discrimination** - where school or officials act in a discriminatory, harassing or violent manner

**Deliberate Indifference** - when school or official response is clearly unreasonable under known facts

**Erroneous Outcome** - bias disciplinary process

**Selective Enforcement** - actions by school or officials

**Retaliation** - adverse action taken against participant

# Title IX Legal Remedies



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## **U.S. Department of Education - Office for Civil Rights**

**Paper or electronic email- based filing with OCR regional offices**

**File online by anyone with standing (parents, students, employees)**

**Process: (1) determination whether to investigate; (2) data collection and interviews during investigation; and (3) outcome with appeal**

**Alternative: Facilitated Resolution by Both Parties (a.k.a. mediation)**



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# Title IX Process

**34 C.F.R. 106.8(a) & (b) - designate Title IX coordinator and disseminate policy**

**34 C.F.R. 106.8(c) - "prompt and equitable" grievance process for students and employees**

**34 C.F.R. 106.44 - requires equitable response; allows emergency removal or administrative leave for accused**





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# Title IX Process

## **34 C.F.R. 106.45(b) - formal process**

- **Prompt timeframes with good cause extension**
- **State standard of evidence used (presumption not responsible)**
- **Disability accommodations & language assistance**
- **Notice upon receipt of formal complaint**
- **No confidentiality protections**
- **Equal opportunity for others to be present and present evidence**
- **Notice of hearings and meetings with advisor right**
- **Investigative report 10 days prior to hearing**



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# Title IX Process

## **34 C.F.R. 106.45(b) - hearing**

- **Access to evidence and hearing recordkeeping**
- **Cross-examination during live hearing**
- **Written outcome right**
- **Right to appeal:**
  - **Procedural irregularity to affect outcome**
  - **New evidence not reasonably available**
  - **Conflict of interest or bias**
  - **Other grounds**
- **Right to respond to any appeal**

# Gaps in Title IX

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- **Gender-violence occurring outside educational or school-based programs and activities, 34 C.F.R. 106.45(b)(3)**
- **Actual notice occurring after victimized student has left the educational institution, 34 C.F.R. 106.30(a)**



# Common Issues

- **Dismissing Title IX complaints and proceedings in favor of the general campus disciplinary process, which are allegedly confidential.**
- **Failing to provide victim all relevant evidence or to participate in the general campus disciplinary process.**



# Clery Act – Key Differences

- **Unlike its crime data reporting requirements, recipients must respond to reports of gender violence regardless of the location of the offense.**
- **Students and employees are entitled to participate in the campus disciplinary process regarding gender violence reports.**
- **Any “accuser” (even if they are not a student or employee) is entitled to the enumerated rights under the Clery Act.**



# Clery Act Offenses - VAWA Amendments



## 20 U.S.C. 1092(f) - Annual Security Report

- **Dating violence**
- **Domestic violence**
- **Sexual assault**
- **Stalking**
- **Retaliation**
  
- **"whether the offense occurred on or off campus"**

# Clery Act Process



## 34 C.F.R. 668.46(k)

- **Disciplinary Proceedings Must Be:**
  - **Prompt**
  - **Fair**
  - **Impartial**
- **From Initial Investigation to Final Result**

# Clery Act Process



## 34 C.F.R. 668.46(k)

- **“Advisor of Choice”**
- **Reasonably prompt, designated timeframes**
- **Consistent with written policies**
- **Transparent to parties**
- **Simultaneous written outcome notifications**
- **Broad access to information used**
- **No bias or conflict of interest**



# Clery Act Remedies

- **Online complaint with Clery Group**  
**[CleryComplaints@ed.gov](mailto:CleryComplaints@ed.gov)**
- **No standing required**
- **Process: (1) “Complaint Assessment” or investigation; (2) outcome notice to Complainant; and (3) Formal Program Review**
- **Alternative: No mediation option, but recipients can agree to “Technical Assistance” as part of resolution**



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