



National Campus  
Safety Awareness Month. 2017.



# THE EVOLVING LANDSCAPE OF TITLE IX AND CLERY COMPLIANCE: UPDATES ON THE 2017 INTERIM GUIDANCE, TITLE IX AND CLERY ENFORCEMENT, AND THE NCAA POLICY ON SEXUAL VIOLENCE

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ABIGAIL BOYER, CLERY CENTER

# TODAY'S PRESENTERS



Gina Maisto Smith,  
Chair, Institutional  
Response Group



Leslie Gomez,  
Vice Chair,  
Institutional  
Response Group



John DiPaolo,  
Member,  
Institutional  
Response Group



Steven Healy,  
Chief Executive  
Officer



Abigail Boyer,  
Associate Executive  
Director of Programs





**JEANNE ANN CLERY**

# CLERY CENTER: MISSION & VALUES

## Mission Statement

Working together with college & university communities to create safer campuses

## Values & Distinguishing Characteristics

- We honor our organization's history by leading with mind and heart.
- We are collaborative & pursue strong partnerships that are based on joint success and open, constructive communication.
- We believe that prevention is critical to campus safety.
- We are persistent, action-oriented, and deliver results that have real impact.

# CLERY CENTER: PROGRAMS & INITIATIVES

- Clery Center Membership
- National Campus Safety Awareness Month
- Policy
- Jeanne Clery Act Training Seminars



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## TAKE THE FIRST STEP

- Professional development
- Tools & resources
- Webinars
- Networking with peers

Visit [www.ncsam.clerycenter.org](http://www.ncsam.clerycenter.org) for more information

# TODAY WE WILL

- Review recent interim guidance released by the Department of Education related to Title IX enforcement
- Examine a recently released policy from the NCAA addressing responding to incidents of sexual violence
- Discuss promising practices in the field in response to Clery and Title IX implementation

# POLL

Who's in the room?

- A. Title IX
- B. General Counsel
- C. Campus Police/Security
- D. Residence Life
- E. Greek Life
- F. Athletics
- G. Human Resources
- H. Student Conduct
- I. Other

# CLERY ACT: REFRESHER

- **WHO:** Campus Security Authorities (CSAs) and local law enforcement
- **WHERE:** Clery Act geography
- **WHAT & HOW:**
  - Annual
    - Annual security report (statistics, policy statements)
    - Statistics to Department of Education
  - Ongoing
    - Timely warnings
    - Emergency notification
    - Daily crime log
    - Rights & options for survivors of sexual assault, domestic violence, dating violence, & stalking
- **ENFORCEMENT:** U.S. Department of Education Clery Compliance Team

# TITLE IX: REFRESHER

- **WHO:** Responsible Employees
- **WHERE:** In connection with an education program or activity (regardless of location)
- **WHAT & HOW:**
  - Federal civil rights law prohibiting discrimination on the basis of sex, including sexual and gender-based harassment and violence
  - Requires schools to investigate or otherwise determine what occurred when a school knows or reasonably should know of possible sexual harassment
  - Requires schools to provide interim measures and to address patterns, trends and campus climate
  - Requires schools to eliminate, prevent and address hostile environment that arises from sexual harassment
- **ENFORCEMENT:** U.S. Department of Education Office for Civil Rights (OCR)
- **CIVIL REMEDY:** Private right of action under Title IX

# KEY RESOURCES: CLERY

- The Clery Act – Statute and Implementing Regulations
- The Handbook for Campus Safety and Security Reporting (June 2016)
- Westat
  - [campussafetyhelp@westat.com](mailto:campussafetyhelp@westat.com)
  - 800-435-5985
- Department of Education (ED) Program Review Findings

# KEY RESOURCES: TITLE IX

- 1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties
- 2001 Revised Sexual Harassment Guidance
- October 2010 Dear Colleague Letter on Bullying and Hazing
- ~~April 4, 2011 Dear Colleague Letter (Rescinded)~~
- April 2013 Dear Colleague Letter on Retaliation
- ~~April 29, 2014 Questions & Answers on Title IX and Sexual Violence (Rescinded)~~
- April 24, 2015 Dear Colleague Letter to Title IX Coordinators and Title IX Resource Guide
- September 22, 2017 Dear Colleague Letter
- September 22, 2017 Q&A on Campus Sexual Misconduct

# KEY RESOURCES: NCAA

- Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses (September 2014)
- Sexual Violence Prevention Tool Kit (October 2016)
- Policy on Campus Sexual Violence (August 2017)
- NCAA Board of Governors' Policy on Campus Sexual Violence FAQ (August 2017)

# 2017 INTERIM GUIDANCE

- September 22, 2017 Dear Colleague Letter
  - Rescinds April 4, 2011 Dear Colleague Letter and April 29, 2014 Questions and Answers on Title IX and Sexual Violence
  - Specifies that future policy will be subject to rulemaking process with public notice and comment
- September 22, 2017 Q&A on Campus Sexual Misconduct

# 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Questions and answers provide information about how OCR will assess a school's compliance with Title IX
- Provides that schools should also be guided by the 2001 Revised Sexual Harassment Guidance
- Does not address the impact on other guidance documents, including the 2015 Dear Colleague Letter to Title IX Coordinators and Title IX Resource Guide
- Incorporates some requirements of the Clery Act, as amended by the Violence Against Women Reauthorization Act of 2013

# 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Adds new procedural requirements:
  - Should provide written notice to the responding party of the allegations, including the identities of the parties
  - The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence
  - The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility
- Explicitly places the burden on the school – not on the parties – to gather sufficient evidence to reach a fair, impartial determination

# 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Adds institutional choices that deviate from the 2011 and 2014 guidance:
  - May use preponderance of the evidence or clear and convincing evidence standard
  - Right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses
  - May choose to allow appeal solely by the responding party or by both parties

# 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Provides guidance that specifically deviates from the 2011 and 2014 guidance:
  - Allows for informal resolution, including mediation, that does not involve a full investigation and adjudication in appropriate cases if all parties voluntarily agree
  - States that a school may not rely on fixed rules or operating assumptions that favor one party over another in imposing interim measures and should make every effort to avoid depriving any student of their education
  - States that there is no fixed time frame under which a school must complete a Title IX investigation

# 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Introduces amorphous concepts that may be difficult to interpret and implement:
  - May use informal resolution if the school determines the particular Title IX complaint is **appropriate** for such a process
  - Schools should ensure that **institutional interests** do not interfere with the impartiality of the investigation
  - Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent **institutional interests** from interfering with the impartiality of the adjudication
  - Training materials, investigative techniques and approaches, and decision-making techniques and approaches that apply **sex stereotypes or generalizations** may violate Title IX and should be avoided

# 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Does not address key aspects of 2011 and 2014 guidance:
  - Discussion of responsible employee reporting responsibilities, including the ability to exclude confidential resources from Title IX reporting obligations
  - Expanded discussion of risk factors to consider when evaluating how to evaluate a complainant's request for anonymity or that no investigation take place
  - The use of prior sexual history

# 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Makes broad statements:
  - Restricting the ability of either party to discuss the investigation is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable
  - When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided
  - In imposing interim measures, every effort should be made to avoid depriving any student of their education

# ON THE HORIZON

- Rulemaking with public notice and comment period
- Shift in OCR enforcement approach
  - Individual, not systemic approach
  - Return to the use of early complaint and resolution and voluntary resolution options
  - Return of authority to the regional offices
  - Signals greater deference to institutional authority
- Intersection of Title IX enforcement with Clery enforcement process based on VAWA provisions

# CLERY ACT: ENFORCEMENT

- No indication that enforcement is slowing
- In fact, enforcement appears more aggressive in some ways
  - Compliance checks still occurring
  - Increasing focus on provisions related to VAWA amendments
- Department of Education (ED) attempting to clear backlog
  - 10 Final Program Review Determinations (FPRDs) issued in 2017
  - Fine Letters issued September 27, 2017:
    - Occidental College \$83,000
    - University of St. Thomas \$172,000
- Current Clery fine per violation: \$54,789

# CLERY ACT: ENFORCEMENT: USUAL SUSPECTS

1. Geography
2. Reporting Burglary & Sexual Assault
3. Inadequate policy statements
4. Incomplete ASR or notice
5. Inadequate statistics collection
6. Referrals
7. Inaccurate data to OPE
8. Deficient daily crime log
9. Inaccurate hate crimes
10. Failure to follow policies

# CLERY ACT: WHAT YOU SHOULD DO NOW

1. Formally appoint a Clery Act Coordinator
  - Capable of influencing multiple stakeholders
  - Establish a Clery working group
2. Develop an institutional Clery Act Compliance Policy
3. Identify, notify, and certify your CSAs
4. Reconcile your Clery data and assess geography at least monthly
5. Identify and track your prevention programming
6. Ensure compliance with on-going requirements
  - VAWA provisions
  - Timely Warning/Emergency Notification process
  - Daily crime log

# NCAA POLICY ON CAMPUS SEXUAL VIOLENCE

- Each University must attest annually that:
  - Athletics department is fully knowledgeable about, integrated in, and compliant with institutional policies and process regarding sexual violence prevention and proper adjudication and resolution of acts of sexual violence
  - Institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX Coordinator are readily available within the department of athletics and are provided to student-athletes
  - All student-athletes, coaches, and staff have been educated on sexual violence prevention, intervention, and response

Feedback/Questions?



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