



at the heart of campus safety

Submitted via regulations.gov

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Catherine Lhamon
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2021-OCR-0166 RIN: 1870-AA16 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Cardona and Assistant Secretary Lhamon:

Clery Center is pleased to submit this public comment regarding the Department of Education's Title IX Notice of Proposed Rulemaking (NPRM).¹ Clery Center was founded by Connie and Howard Clery after the brutal rape and murder of their daughter Jeanne in 1986 (after whom the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")² is named. As a 501(c)(3) organization, Clery Center works with colleges and universities to create safer campuses. Utilizing 30 years of experience and our comprehensive understanding of the Clery Act, we guide institutions through understanding and implementing its provisions by providing training, support, and technical assistance.

Because of the Clery Act's intersection with Title IX, we feel it is critical to acknowledge potential conflicts and implementation challenges institutions currently face in working to comply with both laws. We laid out concerns regarding the current Title IX regulations in our [Statement of Position on the 2020 Title IX Regulations](#),³ and provided live feedback during the Department's public hearings in June 2021.

We are encouraged by changes in these proposed regulations that seek to restore the agency of institutions in determining grievance procedures that best fit their campus communities and eliminate requirements that limit the types of harassment that fall within the bounds of Title IX. However, we still have concerns about implementation of certain components due to their

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter "NPRM"]

² Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. §1092(f) [hereinafter "Clery Act"].

³ Clery Center. October 25, 2020. *Statement of Position on the 2020 Title IX Regulations* [Position statement]. https://www.clerycenter.org/assets/docs/102120_Title-IX-Position-Paper.pdf

misalignment with intentions of the Clery Act. While serving separate and distinct functions, with Title IX as a civil rights law and the Clery Act as a consumer protection law, these laws share many of the same goals, the most important of which is to create equitable and transparent processes for responding to violence and crime on campus. Any complications between these laws ultimately undermine these goals, cause confusion at institutions responsible for implementing them, and in turn harm students they are meant to protect.

With that in mind, we encourage the Department to:

- **Stress the recipient's responsibility in directing reporting obligations.**
 - The proposed rules state that institutions must direct all other employees who are not confidential employees and do not have the authority to institute corrective measures or have responsibility for administrative leadership, teaching, or advising to either notify the Title IX coordinator when the employee has information about conduct that might constitute sex discrimination or provide the contact information of the Title IX coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination under Title IX.⁴ To avoid confusion about the actions these employees must take when they receive information about conduct that may constitute sex discrimination under Title IX, we suggest clarifying the language in the proposed regulations to state that it is incumbent on the recipient to determine the course of action it wants these employees to take - either to notify the Title IX Coordinator directly or to inform the individual of their ability to report to the Title IX Coordinator - and to inform those employees of that expectation. This more closely aligns the reporting responsibility requirements with those of campus security authorities under the Clery Act.⁵ While this expectation was communicated in the preamble ["The determination whether the employee would be required to notify the Title IX Coordinator of information about conduct that may constitute sex discrimination under Title IX or provide the contact information of the Title IX Coordinator and information about how to report sex discrimination would be made by the recipient and not the employee"],⁶ it was not explicit in the proposed rules.
 - Additionally, the proposed rules allow institutions to designate specific roles as confidential resources for the purpose of providing services to persons in connection with sex discrimination.⁷ We recommend requiring institutions to inform individuals they may designate as confidential who are not otherwise protected by state or federal law, that their confidentiality is only particular to the institution, and that they could still be subpoenaed in a criminal or civil case. Further, we recommend requiring that disclosure to students and employees as well under the confidential employee requirements.⁸
- **Restore the role of advisors of choice to its original intent within the Clery Act.**
 - We appreciate that the proposed rules allow for flexibility in an institution's disciplinary procedures. If an institution opts for a live hearing, the proposed rules allow for each party's advisor of choice to ask any party and any witnesses

⁴ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(b)(2)(iv).

⁵ 34 CFR 668.46(a).

⁶ 87 Fed. Reg. at 41439

⁷ 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2.

⁸ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(d).

questions and follow-up questions.⁹ This highlights an inherent conflict in the philosophies behind the function of an advisor of choice across Title IX and the Clery Act,¹⁰ despite the fact that both are enforced by different divisions of the same department. The intent of an advisor of choice under the Clery Act is to provide respondents and complainants with appropriate support. Allowing advisors of choice to perform cross-examination within live hearings makes them active participants in disciplinary proceedings. As we've heard from institutions implementing this requirement under the 2020 Title IX regulations, this expectation limits who is willing, able, and appropriate to serve in this role. We recommend removing the option to allow each party's advisor to ask any party and any witnesses questions and, rather, require that function to be implemented by an impartial, trained individual.

- **Broaden the explanation of the availability of supportive measures.**
 - The proposed rules provide examples of what supportive measures for complainants and respondents may include.¹¹ Although this section provides an example of a transportation measure, we suggest explicitly listing “changes related to transportation” with the other supportive measures examples to align them with accommodations afforded under the Clery Act.¹²
 - Additionally, the proposed rules speak to the importance of supportive measures in restoring or preserving a party's access to education.¹³ We recommend stressing that supportive measures can and should be retroactive and remedial in order to restore and/or preserve access to one's education. The Clery Act states that an institution has the ability to determine if a victim's request for an accommodation is reasonable.¹⁴ Broadening the description of what a supportive measure can be under Title IX can assist campuses in making that reasonability determination.
- **Require a full list of sanctions.**
 - The proposed rules, as well as the current regulations, require institutions to describe the range of, or list, the possible disciplinary sanctions and remedies that they may impose following a determination that sex-based harassment occurred.¹⁵ To align with the Clery Act, instead of giving institutions the ability to include a range or full list of sanctions that could be imposed for being found responsible of sex discrimination under Title IX, we recommend requiring that institutions describe an exhaustive list of sanctions, or, at a minimum, require the complete list of sanctions for dating violence, domestic violence, sexual assault, and stalking¹⁶.
- **Clarify the components of training requirements.**
 - The proposed rules describe training for certain roles on campus.¹⁷ While it is clear that recipients must provide training to all employees as well as those

⁹ 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(f)(ii)).

¹⁰ 34 CFR 668.46(k)(2)(iii).

¹¹ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)(2)).

¹² 34 CFR 668.46(b)(11)(v).

¹³ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)).

¹⁴ 34 CFR 668.46(b)(11)(v).

¹⁵ 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(k)(2)).

¹⁶ 34 CFR 668.46(k)(1)(iii).

¹⁷ 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8 (d)).

conducting investigation and grievance procedures on the requirements of these regulations and how they are incorporated into institutional policy and procedure, we recommend clarifying in detail what is meant by stating that such training “must not rely on sex stereotypes” by providing examples of training materials or subjects that do rely on sex stereotypes. Further, we recommend clarifying whether training materials would include training information on the intersection of Title IX with other laws like the Clery Act, and reporting responsibilities under each law.

Clery Center has the privilege of working with colleges and universities nationwide who are committed to ensuring their campus community members can live and work in an environment free from sex discrimination and to holding perpetrators accountable, as necessary. We appreciate the Department’s willingness to seek input from communities impacted by Title IX regulations and commitment to ensuring equal and nondiscriminatory access to education for all students.

Thank you for your consideration of these recommendations. If you have any questions, please contact Executive Director Jessica Mertz at jmertz@clerycenter.org.