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## Article 26

### **Title IX and the Clery Act: What Counselor Educators Must Know**

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#### **Abstract**

Because of the far-reaching legal, monetary, academic, and public relations ramifications of the sex abuse scandal at Pennsylvania State University, campus administrators are reviewing and more strictly enforcing the mandatory reporting requirements of Title IX of the 1972 Education Amendments and the Clery Act related to sexual harassment and sexual violence. This creates challenges in didactic and clinical coursework for counselor educators who must balance adhering to university reporting guidelines with the ethical responsibilities to provide informed consent and maintain confidentiality of information disclosed by students and their clients during training. Issues involved for counselor educators and student counselors-in-training, the process of securing appropriate exceptions to mandatory reporting, and a sample exception policy are presented.

*Keywords:* Title IX, Clery Act, counselor education, policy

The sex abuse scandal at Pennsylvania State University resulted in far-reaching legal, monetary, academic, and public relations ramifications that included criminal charges and dismissal of university personnel, student and alumni outrage, board of trustee resignations, academic accreditation warnings, sports sanctions, a soiled

university reputation, and civil lawsuits estimated to cost the university more than \$100 million (Schackner, 2013). As a result, to avoid a similar situation on their campuses, many university administrators are reviewing and more strictly enforcing the mandatory reporting requirements related to sexual harassment and sexual violence of Title IX of the 1972 Education Amendments and the Clery Act. This creates challenges in didactic and clinical coursework for counselor educators and the student counselors-in-training they supervise, who must balance adhering to university reporting guidelines with the ethical responsibilities to provide informed consent and maintain confidentiality of related information disclosed by students in classroom interactions or by clients of student counselors during clinical training. To assume that counselor education faculty and the student counselors they supervise understand their Title IX reporting responsibilities, and the risks for those who disclose information about sexual harassment and/or violence, creates potential ethical and legal liability for faculty, students, and their university. In this article, the reporting requirements of Title IX and the Clery Act are outlined and issues specific to counselor education, such as informed consent and confidentiality, are discussed. In addition, a process for counselor education faculty to collaborate with university administrators to secure appropriate reporting exceptions and develop a departmental policy related to Title IX reporting is detailed and a sample policy is provided for review.

### **Title IX and the Clery Act**

Title IX protects individuals from “discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX” (Ali, 2011, p. 1). The foundational source of information pertaining to implementation of the original Title IX law and amendments related to sexual harassment is the “Dear Colleague” letter issued by the United States Assistant Secretary for Civil Rights, dated April 4, 2011 (Ali, 2011). The letter calls upon schools to “take immediate and effective steps to end sexual harassment and sexual violence” (Ali, 2011, p. 2). Although the intent of the letter was to provide clarification on issues pertaining to Title IX, it has had varying degrees of success accomplishing these tasks. For example, the Title IX law reaches far beyond the confines of the university property to school related programs and activities off-campus. As noted in the “Dear Colleague” letter (Ali, 2011) and by Carter (2011), the law relates to

...a school’s programs, including off-campus activities such as field trips or athletic events... this is especially true when it rises to the level of sexual violence that originally happened off campus or outside an educational program if a student experiences “the continuing effects of off-campus sexual harassment” in an educational setting. (Carter, 2011, para. 5)

Yet the extent of the Title IX law’s reach off-campus to unrelated school programs and activities is vague to say the least. As discussed in the “Dear Colleague” letter, “Schools *may* have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity. If a student files a complaint with the school, regardless of where the

conduct occurred, the school must process the complaint in accordance with its established procedures” (Ali, 2011, p. 4). The lack of concreteness and firm stance on the reach of Title IX off campus for non-educational activities leaves universities and Title IX administrators confused about the boundaries related to mandatory reporting. Sokolow (2011a), representing The Association of Title IX Administrators (ATIXA), in attempting to call attention to victim rights, stated:

Some campus officials have seized on language in the DCL [Dear Colleague letter] to imply a duty to fully investigate AND remedy all complaints regardless of the wishes of a victim, which is an overreaction to OCR’s [Office for Civil Rights] clarification of its expectations for Title IX compliance. (para. 1)

Sokolow further suggested this extreme interpretation of Title IX may actually “disempower victims and chill reporting” (para. 2), driving them away from more moderate and ultimately supportive solutions to their needs.

Also influencing university administrators toward strict mandatory reporting guidelines is the decision in the case of *Davis v. Monroe County Board of Education* (1999). This decision stated that universities can be held monetarily liable for sexual harassment in cases of student-on-student contact under Title IX. This has created hyper-vigilance on the part of university administrations, swinging the pendulum away from confidentiality and victim rights to protecting the University (Sokolow, n.d.). Sokolow suggested that, “Institutional authorities who have notice of alleged sexual assaults/harassment are not likely to be able to keep those incidents completely confidential, as a result of the institution’s affirmative obligation to investigate and act to resolve the incident” (Sokolow, n.d., pp. 6-7). Thus, Title IX creates multiple competing masters; some are tasked with protecting the University from financial liability, others, such as counselor education faculty and the student counselors-in-training they supervise, have the ethical responsibility to maintain confidentiality when students/clients disclose victimization in clinical coursework, and yet others are tasked with assuring victim rights are observed. These competing responsibilities have created a divide in university communities, with “Advocates want[ing] broad rights to preserve privacy while campus attorneys want reporting by every employee, to ensure that no complaint slips through the cracks” (Sokolow, 2011b, para. 2).

In addition to the reporting requirements associated with Title IX, there are reporting requirements associated with the Clery Act, a federal law passed in 1990, that requires universities to annually collect and publish statistics on crimes that take place on and around their campuses, including forcible and non-forcible sex offenses and hate crimes. University officials must issue timely warnings about crimes that pose a serious or ongoing threat to students and employees. In 1992, the Clery Act was amended to include date rape and to afford victims of sexual abuse on campus certain rights (Fossey, 2010). It was further amended in 1998 to expand reporting requirements and again in 2000 and 2008 to add provisions related to campus emergency response, protection for victims, and “whistleblowers” from retaliation, and sex offender notification (Clery Center, 2013). It requires persons who must register as sex offenders to provide notice to the state if they are employed by or are a student at an institution of higher education. Corresponding changes were made to the Family Educational Rights and Privacy Act (FERPA) to make it clear that the privacy rule would not prohibit an institution from

disclosing information about registered sex offenders. Institutional officials understand that failing to comply with the Clery Act can include potential fines and sanctions by the U. S. Department of Education and negative publicity that can affect admissions and staff morale (National Association of College and University Business Officers, 2002).

In order to comply with the Clery Act, any crime reported to local police agencies or campus security authorities must be reported and included in the crime statistics. The term “campus security authority” potentially includes many university personnel. Victims may not always be willing to have their names disclosed or to file a police report, yet any official who has “significant responsibility for student and campus activities” is considered a mandatory reporter. The challenge has been to determine which positions on campus fall into this category. For example, it is not unusual for students in didactic coursework in counselor education training programs to mention past experiences in their lives that would be considered reportable. Furthermore, clients of student counselors-in-training in clinical coursework may also disclose reportable events that happened to them, or a client who is a student may disclose that he or she is a registered sex offender. Are these counselor education faculty and student counselors required to report and potentially divulge the names of students/clients who disclose? Guidance in policy for determining reporting status is limited. The Department of Education included faculty members who advise student groups as mandatory reporters but identified faculty members who teach classes as unlikely to fit the definition (Clery Center, 2013). Yet it has also been suggested that university policies “describe procedures, if any, that encourage pastoral and professional counselors, if and when they deem it appropriate, to inform the persons they are counseling of any procedures to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics” and students be informed about the option to notify authorities, that assistance will be provided to do so, and on- and off-campus counseling and other services are available to victims of sex offenses (National Association of College and University Business Officers, 2002, p. 7). There seems to be a suggestion to act, but a lack of clarity on how to do so or who should do so. Certainly it seems there are issues of informed consent and limits to confidentiality that counselor education faculty need to be proactive in clarifying with regard to how Title IX and the Clery Act will impact those who disclose reportable behavior in classrooms or clinical training settings. It also suggests that knowledge of other available supportive services and an established referral protocol would be important should reportable information be divulged.

### **Issues Specific to Counselor Education**

The ethical codes of the American Counseling Association (ACA; 2005) can quickly come into conflict when applying the Clery Act and the Title IX law as described in the “Dear Colleague” letter. Title IX potentially places counselor educators and the student counselors in training they supervise in an ethical bind. Title IX informs universities, “...Regardless of whether a harassed student... requests action... a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation,” and that “if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the

context of its responsibility to provide a safe and nondiscriminatory environment for all students” (Ali, 2011, pp. 4-5). Said another way, the university may act without the wishes of the victim being honored and require that identifying information be disclosed, even if it was received in a traditionally confidential setting with ethical expectations for non-disclosure unless clients give consent. Ethical issues of informed consent (A.2), respect for client rights (B.1, B.2), and the responsibility to protect clients from harm (A.1) are all potentially at risk of being violated (ACA, 2005).

Although previous interpretation of those who are mandatory reporters under the Clery Act seems to exclude faculty who teach didactic classes, faculty who advise student groups are expected to report. It is unclear whether faculty who teach clinical counseling coursework would be considered “professional counselors” by university policy who should follow the steps outlined in the policy for supporting students. In addition, if students, or clients of student counselors-in-training, who attend or are employed by the university, disclose in clinical coursework counseling sessions that they are registered sex offenders, it raises the conflict between the lack of privacy rights designated in the Clery Act for these individuals and confidentiality for the client. Protocols for supervising faculty are not clearly designated in these cases.

The precedent to exempt some individuals from mandatory Title IX reporting exists. According to Swinton (2012), The Office for Civil Rights recognizes “. . . the privilege for licensed counselors, clergy, health care professionals, etc., [and has] approved policies on many campuses that explicitly exempt privileged professionals from reporting” (para. 3). Communications are considered privileged and exempt when it is, “made to a licensed mental health professional...employed by the institution to engage in counseling...[and it] is learned in the context of the counselor-client...relationship” (para. 5). For counselors, this would typically take place in session. Universities are beginning to acknowledge the balance between protecting their financial liability in cases of sexual abuse and the rights of victims under these circumstances. For example, the University of California Santa Cruz (2013) has a current policy that if a report of a sexual offense is made to a “confidential resource,” such as a university conflict resolution office, counselor, or student health official, that report is deemed confidential and is a safe place to discuss options, concerns, and possible outcomes. Further, victims are fully in control of the report rising to the university for action and law enforcement for criminal prosecution. In contrast to more extreme interpretations of Title IX and the Clery Act, university policies such as this send the message that the spirit of the law will be honored, however, the rights of victims are equally, if not more so, valued.

Although the exceptions discussed here clearly apply to licensed counselors employed by the university to provide services to students, they fall short in extending this privileged communication to counselors-in-training or the counselor education faculty who supervise them. It is unclear whether information disclosed to faculty supervisors or counselors-in-training during a counseling session in clinical coursework is exempt from reporting. Counselor educators also need to be aware that although Title IX may not necessarily require faculty members to whom this type of information is disclosed to report it, university policy might. As Sokolow (2011b) pointed out, Title IX mandates reporting only from “responsible employees.” It is then the responsibility of the university to designate who these responsible employees are. As many institutions review their policies and make them more far-reaching, a blanket decision is often made that all

faculty are considered “responsible employees” for reporting purposes., Counselor educators need to be proactive in working with university administrators to craft policy that will allow them, and the student counselors-in-training they supervise, to simultaneously be compliant with Title IX, the Clery Act, and the ACA Code of Ethics in order to avoid being caught in a bind between ethical expectations of confidentiality and university reporting requirements.

### **Suggestions for Counselor Education Programs**

As universities form policies around these laws, counselor education programs must not be moved by alarmist “one size fits all” approaches to complying with the law. Instead, counselor education faculty must educate themselves about what the law is, what it mandates, and what flexibility it affords them to honor both the laws and the counseling code of ethics. In addition, exploring what other training programs are doing in response to these laws and gathering examples of exemption policies can enrich faculty understanding of the potential areas where exemptions may be warranted.

If faculty members deem the process of seeking an exception is a potentially worthwhile endeavor, beginning a dialog with the individual assigned as the university compliance officer about the university’s existing policy is the next logical step. This individual can clarify the university policy reporting requirements and provide an understanding of the type of investigations they are being charged with as well as investigatory procedures. This perspective can help faculty better understand the complexity of implementing these laws and the reasons for the administration’s fears of being found in non-compliance. Establishing a positive relationship can be critical as securing an exception will, in large part, depend on securing this individual’s trust and cooperation to move the proposed policy exception up the chain of administration within the university.

In addition to clarifying university policy and procedures, the compliance officer can provide information about any exceptions that may already exist at the university so that those can be gathered and reviewed. Along with policies gathered from other counselor education programs, these documents can provide a starting point for drafting a proposed policy that can be discussed by faculty and modified at the departmental level to fit the particular needs of the program. For example, if the on-campus student counseling services clinic already has been exempted from mandatory reporting, the counselor education faculty could lobby to expand the policy to include student counselors-in-training in advanced clinical courses who are closely supervised by a licensed counselor.

Should an exception policy not exist on campus, there is tremendous value in co-constructing a policy with different departments or programs at the university. In this instance, the counselor education program faculty could spearhead the effort with the support of others such as on-campus student counseling services, student affairs, student health services, sexual abuse response teams, other academic departments, and even campus security. This collaboration would serve to call attention to changes needed and demonstrate a willingness to respond to these events in a more comprehensive, effective, and victim friendly manner.

When discussing an exemption to the existing policy created by the university, it is important to note and join with the individual tasked with implementation of these laws where ethical dilemmas for counselor educators do not exist. This serves to de-escalate potential conflict and demonstrates a willingness to honor the needs of the university. Agreeing to report statistics of how many times the exemption policy has been used within a given time frame is an example of demonstrating this willingness. In doing so, the ethical dilemma is removed as no identifying information of the victim is divulged and the university official tasked with adherence to the laws is provided with the statistical information needed. The importance of follow through in reporting these statistics cannot be overstated for those counselor education programs who have sought, and been given this exemption, as exemption policies can be reversed or modified at any time by the university.

In crafting a policy, counselor education faculty should also consider its use within the department. For example, is there a responsibility to provide informed consent to all students by including the policy in program handbooks, on program Web sites, and in all course syllabi? Should it be standard procedure in all clinical coursework to teach about these laws and the agreed upon response and referral protocol specified in the department policy?

Finally, counselor educators are encouraged to be proactive in the process of securing an exemption to the mandatory reporting requirements under Title IX and the Clery Act to avoid being caught in an ethical dilemma. The process generally takes four to six months, yet could possibly exceed one year. Working together with administration officials, counselor educators can create a policy that is comprehensive, protects students, respects the intent of the laws, and honors the ethical obligations of the profession. The following sample policy can serve as a starting point for counselor educators interested in developing their own policy.

### **Sample Policy**

#### University Mandatory Reporting Policy Related to Title IX and the Clery Act

##### As it Pertains to the Department of Counseling and School Psychology

Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. §1681 *et seq.*, is a Federal civil rights law that prohibits discrimination on the basis of sex in education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal funds must comply with Title IX. Under Title IX, discrimination on the basis of sex can include sexual harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion.

The Clery Act of 1990 is a federal law with the original purpose of providing both students and parents with needed information on the safety of the University campus they were considering attending. To accomplish this task, the Clery Act required Universities to collect and publish crime statistics annually, which took place both on campus and in adjacent areas. Included in the list of events to be reported under the Clery Act are forcible and nonforcible sex offenses. In 1992, the Clery Act was amended to include victims of date rape (Fossey, 2010).



Title IX and the Clery Act impact graduate students of the Department of Counseling and School Psychology in ways that must be fully understood. If a student divulges in the presence of a faculty member that he or she has been the victim of sexual violence while a student enrolled at UNK, a report, including identifying information, has to be made to a university representative for compliance with Title IX and the Clery Act. This information will not be divulged to law enforcement unless the victim is a minor. Title IX reports at UNK will be forwarded to the University's Sexual Assault Response Team (SART), within the next business day. The SART Team will then proceed to ensure steps are taken to provide necessary services and safety measures in a manner consistent with federal law and as deemed appropriate. Whenever possible, identifying information of the student will remain confidential. Mandatory reporting of Title IX is designed to increase student safety by ensuring the university's response to reports of sexual violence and to assist the victim in accessing resources.

If a student of the Department of Counseling and School Psychology is taking part in clinical courses within the department (Techniques of Counseling, Practicum in Counseling, Advanced Practicum in Clinical Mental Health, and Internship in Clinical Mental Health) and as the client divulges in the therapeutic setting being sexually victimized while a student at UNK, that exchange is deemed privileged communication and confidential. In accordance with the Clery Act, this will be reported for statistical purposes only, with no client identifying information being divulged, and no report being forwarded to the SART Team. However, if that client divulges this victimization occurred prior to the age of 19, mandatory reporting requirements for sexual abuse of a minor still apply.

For more information regarding Title IX or the Clery Act, contact the Director of Human Resources.

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