

Collegiate Compliance of Title IX and Clery Act

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Abstract

This paper will give a historic background of Title IX and the Clery Act in regards to higher education, as well as provide discussion on compliance (or lack thereof) that higher education institutions have demonstrated. Furthermore, there will be discussion on the direction of guidelines given to institutions under the current administration, and my thoughts about suggestions on being ethical within compliance. Title IX and the Clery Act are initiatives that were passed as a means of accountability from the United States government for higher education institutions that receive federal funding. While the initial causes for and protections provided by each respective law and act differ, they have come to cohesively exist to protect students from gender discrimination and institutions that place public relations over ethical and moral decisions. Included in this paper will be various articles to support historical analysis, explain the current state of compliance that is lacking, and bolster suggestions for how higher education should proceed and put ethics at the forefront in the handling of sexual violence on campuses.

"If it were GM or McDonald's that had made no real progress in fixing a serious product defect that's been illegal for three decades, people would rightly be angry" (Olivarius, 2014, as cited in Wilson, 2014). This quote is taken from Ann Olivarius, a student that joined a group suit against Yale University in 1977. She faced pressures and threats from perpetrators of sexual violence against students she was advocating for due to an inept system that left zero guidance for those attempting to file a sexual assault complaint. This was one of the first cases ever brought to court using violation of Title IX as legal reasoning. Olivarius' frustrations provides metaphorical verbiage for feelings of frustration that are experienced by countless individuals and communities that have suffered at the hands of discrimination, sexual violence, and self-serving institutions. With national spotlight and pressures on higher education at an unseen-before levels to combat discrimination and sexual violence on campuses, it is important to be critical and attentive to compliance mandates set by governmental entities and incentives that currently drive higher education institutions to operate at a level that has been deemed subpar at best (Hartle, 2017; Yung, 2015). Understanding both the Clery Act and Title IX, as well as evaluating the circumstances of which universities are compliant with both protections for students can give way to discussion and general recommendations about proceedings in regards to discrimination and sexual assault at the collegiate level.

The history of Title IX found its beginnings in battling gender discrimination towards students as well as staff. Stipulations were written to prevent decisions in 12 total areas such as admissions, recruitment, and financial assistance among others on the basis of gender in federal fund receiving higher education institutions in 1972 (Stromquist, 2013). Title IX was more publicly known for its reputation developed around gender equity in intercollegiate sports.

Higher education institutions that received federal funding by the interpretation of Title IX in 1979 were concerned with demonstrating gender equity in three different areas to maintain compliant with Title IX (Cheslock & Eckes, 2018). The first consideration was with the correlation between enrollment numbers of female identified students and male identified students. This first area of compliance required higher education institutions to indicate that the number of female identified students maintain a correlated number of female athletes and teams and as a result, the number of male identified students would also maintain a similarly level of correlation by means of standards within the gender binary (Cheslock & Eckes, 2018). A second option for higher education institutions to prove compliance was by presenting evidence that the institution had made a meaningful effort to expand opportunities for a specific, binary-permitted (male or female), gender group that was currently underrepresented in intercollegiate athletics. The third and final method to remain compliant with early 1979 mandates, was for higher education institutions to formally indicate that members of a gender group (again, binary-permitted) that were underrepresented had been fully accommodated by other means. Examples of this included scholarship opportunities and equitable facilities (Stromquist, 2013). These guidelines set forth by the Department of Education and Office of Civil Rights were greatly criticized as no standardization was set forth and many felt they did not have the understanding to be entirely sure that they were being compliant with new mandates. Despite the controversy that Title IX brought about in its infancy, the level to which the law would prove to be influential and used in the future was unimaginable.

Title IX can be found in articles also talking about about the Clery Act (Yung, 2015). The Clery Act was passed in 1990 during the George H.W. Bush administration. This Act requires

federally funded higher education institutions to submit reports of crime and statistics, including crimes related to sexual violence on October 1 every year to the Department of Education (DOE) (Yung, 2015). The thought was that it would be an additional measure to hold higher education institutions compliant, but the degree of enforcement and auditing has led to lackluster results and higher education institutions that have been able to skirt around compliance mandates (Yung, 2015). After the DOE receives the submissions, higher education institutions are audited at random, and are also audited due to complaints or reported violations. These audits include a physical visit from a federal employee with the DOE that typically lasts around 2 to 3 days (Yung, 2015). During these visits, they conduct interviews with administrators that directly responsible for student conduct and campus safety and carefully inspect the institution's crime statistics, reports, and any other relevant information. After this process is complete, the DOE might choose to conduct further interviews with other staff, faculty, and even students depending on the findings within their previous proceedings in the audit. Once the process completed and the university has been cooperative with information, the auditor can decide to conclude and release the findings. Should the DOE determine that any given higher education institution is in violation of the Clery Act, they are able to issue fines up to \$35,000 per violation (Yung, 2015). An example of a violation that is pertinent to this paper is the finding that a higher education institution has under-reported sexual assault cases in their statistics submitted in an attempt to avoid a public relations nightmare. The stakes are high for universities because a piece of the Clery Act requires the submission of crime logs and incident reports to be made entirely public. This can push administrators at higher education institutions to not be forthcoming about the true nature of crime at their institution for a variety of reasons (Yung, 2015).

Pressure was further exerted on higher education institutions with the release of the, “Dear Colleague” letter from the Office of Civil Rights in 2011 under the Obama Administration (Block, 2012). On April 4, 2011, the Office of Civil Rights drastically changed the conduct processes of around 7000 institutions when it announced without much warning that mandates for federally funded higher education institutions were going to be altered for these institutions to remain compliant (Johnson & Taylor, 2017). One of these requirements include a requiring higher education institutions to have the name and contact information published for the institution’s Title IX Coordinator. The Title IX position is a position that was made mandatory in 1972 with the passing of the Title IX law, but many schools still to this day are without a person fulfilling this role, or have just recently been hiring for it (Block, J., 2012). While this requirement does not seem particularly erroneous for an institution that should have already had a filled Title IX Investigator position, the “Dear Colleague” letter continued on. The letter lowered the evidentiary standard for only cases of sexual assault to “preponderance of evidence” despite not lowering the evidentiary standard for other conduct code violations. It proposed that the timeline of sexual violence conduct cases be adjudicated within 60 days, allowed accusers to appeal in cases where a respondent was found not responsible (issue of double jeopardy) and all about outlawed cross examination of the accuser (Johnson & Taylor, 2017). An additional change to policies included requiring higher education institutions to include a policy that would allow a university to investigate a sexual violence case if there was any connection to the university in the act of the misconduct, such as one or both parties being currently enrolled students and/or physical location of misconduct. There have been many criticisms on both sides of the political sphere about the “Dear Colleague” letter and its seemingly generalizing approach

to sexual violence cases, and many universities were caught in an abrupt change that threatened their funding if they were not prompt in making changes (Hartle, 2017).

There have been arguments and statistical proof that regardless of the mandates in place and auditing practices from the Department of Education, that higher education institutions are still able to misrepresent the true nature of sexual violence on their respective campuses (Yung, C., 2015; Stromquist, N., 2013). In Stromquist's (2013) article, they state that, "...machinery set up by the State to enforce Title IX was poorly funded and weakly staffed, making its monitoring and enforcing activities more symbolic than real" (pg. 12). In an article by Yung (2015) evaluating sexual violence reporting under the Clery Act mandate, statistical evidence backs these claims. In comparison to other crimes, such as aggravated assault, robbery, and burglary, sexual violence reports have drastic percentage increases in times of auditing when also compared to prior and post auditing. During times of audit, higher education institutions report 44% more sexual assault cases than in the time period before auditing occurs (Yung, C., 2015) Yung (2015) goes on to state that post-auditing reports mirror pre-auditing reports indicating that reports seemingly drop down to a number that is previously seen, raising the question of what is the reason behind this difference of reports. While many alternative answers are given, Yung concludes that auditing is necessary for a more accurate number of reports which gives statistical evidence in the call for better funding for these offices responsible for auditing universities in regards to Title IX and Clery Act mandates.

While one research study might not be sufficient to conclude that all colleges are inherently bad and always trying to work the system, it does beg the question of what can these institutions do to ethically comply and actually protect students? "Although Title IX and Clery

Act both mandate beneficial actions, the only way to be considered non-compliant is by not updating information regarding crimes on campus” (Buzo, 2017, pg. 215). Buzo (2017) goes on to say that, “universities cannot fully support survivors until we commit to action beyond compliance” (pg. 219). One area of potential improvement is a seemingly generic approach that many schools have taken in preventative measures (Vendituoli, 2014). One mandate from the Obama administration prompted for preventative educational courses that are required for new and incoming students, as well as faculty and staff members (Vendituoli, 2014). Popular programs that higher education institutions have purchased are programs such as *Haven*, a module-based course that requires the student to engage with videos and quizzes (Vendituoli, 2014). Vendituoli (2014) continues that the primary criticism is that colleges are taking rather “prescriptive” stances to remain compliant.

“Inaccurately reporting numbers of assaults is one form of silencing survivors” (Buzo, 2017, pg. 215). Many higher education institutions are getting caught up in the issue of remaining compliant to maintain sources of funding. This predisposes institutions to make damaging decisions in regards to lying about the number of sexual assaults and adds additional harm to survivors of sexual assault by sending the message that funding is more important to a higher education institution rather than protecting and serving students that have innocently found themselves in utter distress. We must, “...overcome tolerance that has been institutionalized to accept certain dehumanizing and spirit-damaging behaviors as acceptable or not worthy of confrontation” (Roper, 2015, pg. 52). It is my recommendation that if higher education institutions can simultaneously work to get at the root of the problem by going beyond the call to action that mandates prescribe and willing to learn from, rather than run away from

auditing and legal matters, institutions have the capabilities to do right by anyone that might be involved in sexual assault student conduct cases.

The ability for institutions to succeed in regards to student conduct cases dealing with sexual assault, however does rely on the current presidential administration guidelines. With the Trump administration directing things currently, the head of the DOE, Betsy DeVos has since rescinded Obama era guidelines as issued in the “Dear Colleague” letter and has very recently issued to new guidelines in relation to Title IX compliance (Green, E. L., 2018). Green goes on to note that these new guidelines which have currently entered a 60 day public comment period are drastically different from previous guidelines from other administrations. Notable changes in these guidelines include a differing definition of what is considered sexual assault, the right of respondents to cross-examine accusers, the jurisdiction of the misconduct in relation to the responsibility of the university, as well as whom reports of sexual assault can be made through (Green, E. L., 2018). While the goal of Title IX is to end gender discrimination, Betsy DeVos and the Trump administration have sent the message that they are pursuing changing processes of sexual misconduct cases in higher education institutions under Title IX (Green, E. L., 2018). “As vital members of our campus communities we cannot ignore our responsibility to answer the call for ending sex discrimination on campuses that includes creating an environment free from sexual violence” (Landreman, L. M. & Williamsen, K. M., 2018, 43-44). Regardless of political climate and regardless of what role you play on a campus, as student affairs professionals, we must do right by our students, while remaining compliant to Title IX and Clery Act mandates in order to better serve our respective campuses and communities.

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