



**Executive Order 12866 Meeting**  
**Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving**  
**Federal Financial Assistance (RIN:1870-AA16)**  
**March 3, 2022**

**Introduction**

SAFE Campuses, LLC, a social entrepreneurship devoted to safer learning environments, appreciates this opportunity to provide insights into the forthcoming Title IX Notice of Proposed Rulemaking currently under review by the Office of Management and Budget. Our comments are focused on EO 12866 principle 10 that "Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies."

We work with institutions of higher education to help them use compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 USC § 1092(f); 34 CFR 668.46) as a foundation for a multidisciplinary campus safety framework. The Clery Act as amended by the Violence Against Women Reauthorization Act of 2013 (VAWA) significantly intersects with Title IX's requirements addressing dating violence, domestic violence, sexual assault, and stalking.

Consistency across implementing regulations for Title IX and the Clery Act, as envisioned by principle 10, is essential to provide clarity to institutions of higher education that must comply with both laws. Such clarity will better enable institutions to not only meet their compliance obligations, but most importantly to provide their communities with learning environments free from sex discrimination including gender-based violence.

**Definitions**

While we believe that the "unwelcome" standard is the most appropriate one for a civil rights requirement rather than the "consent" standard in criminal law, if terms adapted from the criminal law are to be used they should be consistent across federal requirements.

The Clery Act statute requires the U.S. Department of Education (ED) to define "sexual assault" based on terms from the Federal Bureau of Investigation's Uniform Crime Reporting system. ED's current Clery Act regulations, which took effect in 2015, utilize the most inclusive definition of rape found in that program and we believe that the Title IX regulations should be consistent.

Specifically, 34 CFR §668, Subpt. D, App. A defines "Rape" as "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." Other potential definitions are far less inclusive and may require the use of "force", may be limited to female victims, and or require that an offender be of the "opposite sex of the victim".

Additional definitions for fondling, incest, and statutory rape are also found at 34 CFR §668, Subpt. D, App. A. Dating violence, domestic violence, and stalking are defined at 34 CFR §668.46 (a).

Institutions of higher education are required to use these definitions pursuant to the Clery Act in both defining prohibited conduct and in determining when to afford specific procedural safeguards to both complainant and respondent in disciplinary proceedings "whether the offense occurred on or off campus". While the scope of Title IX grievance proceedings may differ, the use of consistent definitions will help avoid potential conflicts between two interrelated federal directives with similar goals.

### **Disciplinary Proceedings**

Clery Act regulations, at 34 CFR §668.46 (k), mandate certain minimum requirements for "Procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking." Institutions are given wide latitude in how they implement these proceedings including procedural safeguards for both complainants and respondents. We believe that this type of approach rather than a very prescriptive one will better enable the diverse array of institutions across the United States to protect their communities.

It is also important to recognize, as held by the U.S. District Court for the District of Columbia in 2015, that the VAWA amendments to the Clery Act "had no effect on Title IX." (*Doe v. U.S. Dept. of Health and Human Services*, 85 F. Supp. 3d 1, 5 (2015)). Accordingly, we believe that while any Title IX regulation should be as consistent as possible with the Clery Act these considerations cannot limit Title IX in any way. Rather they are parallel laws that are best served by being as consistent as possible but differing when necessary.

### **Additional Considerations**

For your further reference, we have appended our prior commentary from the EO 12866 review of RIN:1870-AA14 and the EO 14021 review of Title IX.

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## **Executive Order 14021 Input on Title IX – April 6, 2021**

The 2020 Title IX Rule (85 FR 30026), hereinafter “2020 Rule”, enacted burdens that are contrary to the Title IX statute’s requirement, at 20 USC § 1681(a), that “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”. This discrimination covers sexual harassment including gender-based violence, the latter of which is the primary focus of the SAFE Campuses, LLC comments offered herein.

### **Title IX Guidance Should Not Be Overly Prescriptive**

Beyond any specific policy issues associated with the 2020 Rule the extensive scope of the prescriptiveness of the requirements has made it profoundly difficult for federally funded educational programs including institutions of higher education, hereinafter “institutions”, to comply with. No similar law, including Titles VI and VII of the Civil Rights Act of 1964 or the Jeanne Clery Act, requires anything of this magnitude. This has the effect of discriminating against women and girls who are the principal beneficiaries of Title IX of the Education Amendments of 1972, hereinafter “Title IX”.

Perhaps the single most significant example of prescriptiveness is the evidentiary rule that the “statements” of parties are inadmissible in disciplinary proceedings unless they submit to cross-examination by advisors for both the complainant and respondent. This moves proceedings far closer to a “full-dress judicial hearing” than ever before and creates logistical challenges that aren’t necessary. In most jurisdictions relaying questions through a hearing officer or other neutral party in real-time will provide the information needed for a credibility-assessment.

### **Title IX Guidance Should Afford Flexibility**

As the U.S. Department of Education, hereinafter “Department”, reviews the 2020 Title IX Rule we believe that the goal ought to be developing agency actions, including regulations, that are sustainable and stand the test of time. In order to accomplish this, they need to afford regulated parties with the flexibility to employ evolving best practices and adapt to changing legal precedents, and carefully balance the needs of all parties involved including through the provision of “due process”, “fair process”, and “procedural safeguards” guaranteed by the Constitution, other laws, and institutional policy.

### **Title IX Guidance Should Address Prevention & Accommodations**

We also encourage the Department to carefully consider the impact that the focus on disciplinary proceedings is having to the exclusion of prevention and response work under Title IX. Eliminating hostile environment sexual harassment is not the sole province of disciplinary action. Programming geared towards preventing it, and accommodations provided when it is reported are equally essential.

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## **Title IX Administrative Enforcement v. Money Damages**

The U.S. Supreme Court set a high bar for money damages in Title IX “sexual harassment” cases that was carefully differentiated from administrative enforcement standards. By aligning the 2020 Rule with standards for money damages it made it more difficult than necessary to accomplish the goal of Title IX to prohibit sex-discrimination undermining the purpose of the law.

We recommend restoring the longstanding administrative definition stating that “Sexual harassment is unwelcome conduct of a sexual nature...Sexual violence is a form of sexual harassment prohibited by Title IX.” This includes sexual assault, dating violence, domestic violence, and stalking, although it should be noted that the appropriate burden in civil-rights matters is “unwelcome” not a criminal consent standard. Further, we recommend requiring an institution to take reasonable steps to end the harassment when “the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”

## **The Nexus Of Title IX Harassment On & Off Campus**

While Title IX does not apply to all acts of sexual misconduct that a member of an educational community may engage in, including conduct outside the United States, the 2020 Rule improperly narrows the scope of jurisdiction to solely underlying “conduct within its education program or activity” or harassment that continues within it. Where off-campus harassment causes a hostile environment in the educational setting, it creates a nexus between off-campus misconduct and the educational program. (See *Crandell v. New York College, Osteopathic Medicine*, 87 F. Supp. 2d 304, 315-316 (S.D.N.Y. 2000).)

With respect to the most serious sex-based harms, such as rape, Courts have consistently held in after-the-fact claims that educational programs may be liable for damages for the hostile education environment that may exist within the program in which both the victim and their assailant participate. Accordingly, we recommend that the Department apply Title IX in instances where there is a nexus of activity, especially in the most serious of matters.

## **Constructive v. Actual Knowledge**

We recommend restoring the “constructive knowledge” standard in use by the Department between 1997 and 2020. As explained in both 1997 and 2001 this means “A school has notice if a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment.”

The “Formal Complaint” requirement of the 2020 Rule is particularly onerous on both institutions and complainants. It is unnecessary and should be eliminated. Institutions, however, should still assess whether or not a complainant wishes to move forward with any formal action, with the goal of honoring their wishes when possible, and whether or not there may be a threat to other parties warranting action.

## **Title IX Is A Contractual Obligation**

It is important that any agency actions remind institutions that complying with Title IX is a contractual obligation with the federal government. It is not a blanket source of authority, rather it obligates

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institutions to prevent and remedy sex-discrimination. This obligation cannot and does not in any way conflict with obligations to provide due process, fair process, and or procedural safeguards.

### **Resources & Training Are Essential**

While it will differ from institution-to-institution, the provision of adequate resources to fairly implement Title IX's requirements is essential. It is our observation that many of the gaps we continue to see in both eliminating hostile environments and affording adequate process are due to a lack of resources, communication, and training. We recommend that any guidance address the need to provide adequate resources. We also recommend that the Department consider establishing national standards for training, that among other things include training specific to each institution's policies and procedures.

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**Executive Order 12866 Regulatory Planning and Review  
Nondiscrimination on the Basis of Sex in Education Programs or Activities  
Receiving Federal Financial Assistance – RIN:1870-AA14  
November 14, 2019**

## **Introduction**

This input of SAFE Campuses, LLC, a social entrepreneurship organization devoted to safer learning environments, on proposed Title IX regulations is focused on EO 12866 regulatory principle 10 “Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.” Specifically we review key regulations implementing the Jeanne Clery Act’s disciplinary requirements for sexual violence, 34 CFR §668.46(k), with the goal of ensuring that any new regulations not be redundant and or inconsistent which could lead to significant confusion.

In 2013 the federal government enacted the “Violence Against Women Reauthorization Act of 2013” (VAWA) which updated the 1992 “Campus Sexual Assault Victims’ Bill of Rights” portion of the Jeanne Clery Act (Clery Act). In addition to providing expanded reporting and prevention requirements, the intent was to help facilitate the creation of ***sustainable disciplinary proceedings that are fair to all parties*** in “cases of alleged dating violence, domestic violence, sexual assault, or stalking” at institutions of higher education. ***Clery Act regulations are based on express statutory requirements and afford institutions wide latitude in how to meet compliance requirements, aspects which are absent from the proposed Title IX regulations.***

In reviewing VAWA policies it is important to note that they are separate and distinct from Title IX of the Education Amendments Act of 1972 (Title IX). As held by the U.S. District Court for the District of Columbia in 2015 the ***VAWA amendments “had no effect on Title IX.”*** (*Doe v. U.S. Dept. of Health and Human Services*, 85 F. Supp. 3d 1, 5 (2015)). Further, the U.S. Department of Education’s Office for Civil Rights (OCR) stated in their 2017 Title IX Q&A that “when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.”

Despite the U.S. Department of Education (ED) issuing implementing regulations for the VAWA amendments that took effect July 1, 2015 we have continued to identify gaps in implementation of them by institutions as part of our work with multiple constituencies that they affect. In addition to ensuring consistency across regulations, it is essential that ED also fully resource ensuring proper implementation of the VAWA regulations as they provide for equal procedural safeguards that will engender much needed confidence in proceedings.

## Clery Prohibited Conduct & Geographic Scope

“A statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking, as those terms are defined in paragraph (a) of this section;” – 34 CFR §668.46 (j)(1)(i)(A)

“A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, **whether the offense occurred on or off campus**, the institution will provide the student or employee a written explanation of the student’s or employee’s rights and options”. – 34 CFR §668.46 (b)(11)(vii)

“As required by paragraph (b)(11)(vi) of this section, an institution must include in its annual security report a clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as defined in paragraph (a) of this section”. – 34 CFR §668.46 (k)

## Disciplinary Proceeding Procedural Safeguards

“Describes the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking;”. – 34 CFR §668.46 (k)(1)(ii)

“Include a prompt, fair, and impartial process from the initial investigation to the final result”. – 34 CFR §668.46 (k)(2)(i)

“Be conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process”. – 34 CFR §668.46 (k)(2)(ii)

“Provide **the accuser and the accused** with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice”. – 34 CFR §668.46 (k)(2)(iii)

“Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties”. – 34 CFR §668.46 (k)(2)(iv)

“Require simultaneous notification, in writing, to both the accuser and the accused, of-The result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking; The institution’s procedures for **the accused and the victim to appeal** the result of the institutional disciplinary proceeding, if

such procedures are available; Any change to the result; and When such results become final.”  
– 34 CFR §668.46 (k)(2)(v)

### **Prompt, Fair, and Impartial Proceeding Defined**

“Completed within reasonably prompt timeframes designated by an institution’s policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay”. – 34 CFR §668.46 (k)(3)(i)(A)

“Is consistent with the institution’s policies and transparent to the accuser and accused”. – 34 CFR §668.46 (k)(3)(i)(B)(1)

“Includes timely notice of meetings at which the accuser or accused, or both, may be present”.  
– 34 CFR §668.46 (k)(3)(i)(B)(2)

“Provides **timely and equal access** to the accuser, the accused, and appropriate officials **to any information that will be used during informal and formal disciplinary meetings and hearings**”. – 34 CFR §668.46 (k)(3)(i)(B)(3)

“Conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.” – 34 CFR §668.46 (k)(3)(i)(C)

### **Disclosure of Results**

“Result means **any initial, interim, and final decision** by any official or entity authorized to resolve disciplinary matters within the institution. The result must include any sanctions imposed by the institution. Notwithstanding section 444 of the General Education Provisions Act (20 U.S.C. 1232g), commonly referred to as the Family Educational Rights and Privacy Act (FERPA), **the result must also include the rationale** for the result and the sanctions.” – 34 CFR §668.46 (k)(3)(iv)

“In explaining the rationale for the result and sanctions, the official or entity must explain how it weighted the evidence and information presented during the proceeding, and explain how the evidence and information support the result and sanctions. You must describe how the institution’s standard of evidence was applied. It is not sufficient to say only that the evidence presented either met or did not meet the institution’s standard of evidence.” – *The Handbook for Campus Safety and Security Reporting, 2016 Edition, Page 8-22*