“Whistle Blowers”: To What Extent Does Federal Law Impose Mandatory Reporting Obligations on Collegiate Coaches for Allegations of Sexual Misconduct?

Julia Tabat

Follow this and additional works at: https://chicagounbound.uchicago.edu/uclf

Part of the Law Commons

Recommended Citation
Available at: https://chicagounbound.uchicago.edu/uclf/vol2019/iss1/18

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
“Whistle Blowers”: To What Extent Does Federal Law Impose Mandatory Reporting Obligations on Collegiate Coaches for Allegations of Sexual Misconduct?

Julia Tabat†

I. INTRODUCTION

Sexual violence perpetrated by student athletes or within university athletic programs is a recurring theme in the media. Some statistics even suggest that athletes account for a disproportionate amount of sexual assault on college campuses.1 Recent scandals involving the Ohio State, Baylor, Penn State, and Colorado athletic departments (to name a few) illustrate varying fact patterns with the same central concern: a coach who knew about ongoing sexual violence, yet failed to act to stop it.2 These stories raise questions about the extent to which collegiate coaches are mandatory reporters under federal law, including when they impose legal liability on their schools for failing to comply with their obligations. In the era of #MeToo, clarifying the scope of a coach’s duty to report is critical, both to protect collegiate campuses and

† B.S. 2017, The University of Wisconsin-Madison; J.D. Candidate 2020, The University of Chicago Law School. I would like to thank Professor Anthony Casey for his advice, guidance, and feedback. Additionally, I would like to thank the past and present staff and board of The University of Chicago Legal Forum.


to ensure that the coach does not overstep a victim’s right to privacy or an accused’s right to due process.

However, federal laws governing mandatory reporting are scarce and occasionally conflicting, leaving reporting duties unclear. Furthermore, ex post determinations of wrongdoing by a court or federal agency do not provide coaches with clear guidelines regarding their ex ante legal reporting responsibilities. Faced with ambiguity, many universities insert catch-all “sexual misconduct” clauses into their employment contracts, fearing federal liability otherwise. While well-meaning, these clauses are often overly broad and ill-defined, leaving a coach wondering whether even a third-party’s whisper of a player’s sexual activity requires a report. Coaches are left in a difficult position—over-reporting might overstep a victim’s right to privacy and distance the coach from his/her players (thus, deterring future reporting). On the other hand, under-reporting can exacerbate the harm to current or potential victims, deter survivors from coming forward, and lead to liability for the university under federal or state law. Recent federal regulations proposed by the Department of Education (DOE) purport to address some of the general issues with reporting sexual misconduct, but they do not speak specifically to coaches’ role in the process.

This Comment focuses on the scope of mandatory reporting obligations that coaches incur under federal law, specifically Title IX and the Clery Act. It examines whether and how coaches’ reporting obligations change depending on: (1) the type of action brought (administrative enforcement actions v. private lawsuits); (2) the substance of the allegation, including the definition of sexual misconduct that coaches must report; (3) the level of authority the coach possesses; and (4) the source of the allegation and the identity of the parties involved. The

---

6 See, e.g., Jill C. Engle, Where Do We Go from Here?: Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to a Victim-Centric Protocol That Comports with Federal Law, 24 TEMP. POL. & CIV. RTS. L. REV. 401 (2015) (arguing that current reporting procedures do not respond adequately to victims’ choice on how to proceed and right to privacy).
8 This Comment uses “coaches” to mean full-time or part-time university employees who serve as a head or assistant coach on one or more of the school’s sanctioned athletic teams. It will exclude athletic directors from its consideration (because they are often considered separately under Title IX). See, e.g., S.S. v. Alexander, 177 P.3d 724 (Wash. Ct. App. 2008).
Comment concludes by reconciling the substantive and procedural inconsistencies in these four areas and proposing a solution for clearer reporting standards.

Ultimately, this Comment argues that the proposed Title IX DOE regulations should mimic the Clery Act’s substantive definitions for sexual misconduct, with a few exceptions regarding the scope of reporting obligations. The Comment also contends that the DOE’s informal regulation scheme is the proper procedure for implementing and enforcing Title IX reporting requirements. This “hybrid” solution between Title IX and the Clery Act would provide a uniform substantive standard for reporting sexual misconduct under federal law, which would clarify coaches’ and universities’ obligations and maximize their incentives to comply with their duties.

II. REPORTING OBLIGATIONS IN TITLE IX AND THE CLERY ACT

Statutory federal law on mandatory reporting is scarce; one of the few examples is the Federal Child Abuse Prevention and Treatment Act (CAPTA).\(^{11}\) CAPTA sets forth the minimum definitions of child abuse and neglect for reporting purposes, but states are left to designate who counts as a reporter.\(^{12}\) Moreover, CAPTA only requires states to have reporting laws for children up to the age of eighteen.\(^{13}\) Thus, it generally does not apply to the students and university members with whom collegiate coaches tend to interact.

Nevertheless, two pieces of federal legislation—Title IX and the Clery Act—impose reporting obligations on educational institutions, and, by extension, implicate coaches. Although the two acts serve different purposes, they both inform universities of their reporting duties for allegations of sexual violence.\(^{14}\) First, Congress enacted Title IX in 1972 in an effort to prevent sex discrimination in education and athletics.\(^{15}\) Enforced by both administrative agencies and private plaintiffs, Title IX and its corresponding federal regulations provide schools with duties to prevent, report, and investigate sexual misconduct.\(^{16}\)

---


\(^{12}\) Id. at § 5106(g).

\(^{13}\) Id. at § 5106.


\(^{15}\) See David Lanser, Title IX and How to Rectify Sexism Enrenched in NCAA Leadership, 31 WIS. J. L. GENDER & SOCY 181, 184 (2016).

In contrast, the Clery Act arose out of safety concerns after a college student was murdered in her dorm room on campus.\(^{17}\) Her parents argued that had her university published crime statistics revealing a pattern of violence on campus, she would have chosen to attend a different school.\(^{18}\) As a result, the Act requires federally funded schools to “notify [their] constituent campus communities . . . when certain crimes are brought to their attention.”\(^{19}\) Among these crimes are murder, arson, and robbery, as well as sex-based crimes, such as sexual assault, domestic violence, dating violence, and stalking.\(^{20}\) The Act’s purpose is to “aid in the prevention of similar occurrences” and to obligate “campus security authorities” (CSAs) to report crime.\(^{21}\)

Although Title IX and the Clery Act overlap, they take different approaches to reporting, leaving several ambiguities for collegiate coaches as to their responsibilities. These differences are examined in the following section.

A. Title IX Reporting Obligations

Title IX itself does not impose specific reporting requirements on any university employees, much less athletic staff. Instead, it provides 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.\(^{22}\)

Formerly, the only federal regulations governing Title IX (and its corresponding obligations for universities) were promulgated in 1975 by the DOE’s predecessor, the Department of Health, Education, and Wellness. These regulations were replicated and adopted identically by the DOE after its creation.\(^{23}\) The 1975 regulations do not address a university’s reporting duties with respect to sexual misconduct because they were created before the Supreme Court held that such harassment constituted discrimination under Title IX.\(^{24}\)

\(^{17}\) See Havlik v. Johnson & Wales Univ., 509 F.3d 25, 30 (1st Cir. 2007).

\(^{18}\) Id.

\(^{19}\) Id.


\(^{21}\) Id.


\(^{23}\) See Cohen v. Brown University, 991 F.2d 888, 895 (1st Cir. 1993).

In 1982, however, the Supreme Court concluded that an institution’s failure to address sexual harassment can constitute discrimination on the basis of sex, thereby imposing reporting obligations on schools (and, by extension, their employees) for such conduct. The George W. Bush Administration supported this assertion and provided universities with guidelines for defining and investigating sexual misconduct under Title IX (“The 2001 Guidelines”). The Obama Administration went further, supplementing The 2001 Guidelines with a series of Dear Colleague Letters (DCLs) and Title IX “Questions and Answers” to clarify and expand the scope of such reporting obligations. Because both the 2001 Guidelines and the subsequent Obama-era guidance documents were not implemented via either a formal or informal process for promulgating federal executive regulations, they were often considered mere “suggestions” for universities. This also meant that none of these documents were entitled to the “highest deference” that courts typically allow to executive agencies under the doctrine set forth in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*

However, in 2018 the DOE withdrew all previous executive documents and, in their place, issued a set of proposed regulations to govern Title IX compliance. These regulations did follow informal regulation procedures and will take effect after the DOE reviews and considers the public comments submitted to them regarding the new regime. Until that time, reporting obligations under Title IX remain in flux, and are examined in the next section.

---


30 467 U.S. 837, 844 (1984) (holding that courts may give “considerable weight” to an administrative agency’s construction or interpretation of statutes they enforce).


1. Public v. private enforcement actions

Viewed as a contract between the federal government and the recipient school,\(^3^4\) Title IX permits regulatory agencies to conduct investigations and withdraw funding from institutions who are guilty of sex discrimination.\(^3^5\) Accordingly, most of the guidance regarding the scope of Title IX comes from federal regulations and guidelines. However, the Supreme Court established in 1979 that private plaintiffs do have an implied right-of-action under Title IX.\(^3^6\) In so doing, the Court explained that Congress intended for Title IX to prevent federal agencies from funding discriminatory practices, but also “to provide individual citizens effective protection against those practices.”\(^3^7\) Therefore, private enforcement through an implied right-of-action is necessary to ensure compliance among recipients; after all, federal agencies only have limited funding for investigations.\(^3^8\)

In spite of this holding, courts strictly limit plaintiffs’ ability to recover monetary damages under Title IX. For example, in Gebser v. Lago Vista Independent School District,\(^3^9\) the Supreme Court held that an institution could not be vicariously liable for the misconduct of its employees under Title IX.\(^4^0\) It explained that, because the statute requires administrative agencies to advise a school of its noncompliance before initiating sanctions, private plaintiffs could not recover damages until they proved that a school had actual (not constructive) notice of the sexual harassment.\(^4^1\) One year later, the Court enumerated a four-part test for Title IX liability, which requires the plaintiff to demonstrate:

1. the school had actual knowledge of sexual harassment;
2. the school was deliberately indifferent to such harassment;
3. the harassment was “so severe, pervasive, and objectively offensive,” that it
4. deprived the victim of “access to the educational opportunities or benefits provided by the school.”\(^4^2\)

\(^3^6\) Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979).
\(^3^7\) Id. at 704.
\(^3^8\) Id. at 708 n.42.
\(^4^0\) Id. at 285.
\(^4^1\) Id.
Gebser was a 5–4 decision; in dissent, Justice Stevens urged the Court to consider the implications of imposing such a high threshold for plaintiffs to meet in order to bring a Title IX action.\(^{43}\) He also pointed out that, in Franklin (the decision where the Court initially held that sexual harassment could constitute discrimination) the Court permitted the plaintiff to recover damages, despite the fact that the DOE had not withdrawn federal funding from the school for its failure to address the harassment.\(^{44}\) Franklin suggested that courts are free to follow a less stringent standard than federal agencies do to determine whether a school faces Title IX liability. Nevertheless, in the years since Gebser, courts have continued to impose a high barrier to private recovery under Title IX.\(^{45}\) The Tenth Circuit even noted that “actual notice [under Gebser] requires more than a simple report of inappropriate conduct,”\(^{46}\) suggesting that plaintiffs must satisfy additional requirements before they may recover damages.

Administrative proceedings under Title IX, by contrast, generally involve a review of the school’s internal policies and procedures.\(^{47}\) They also require the reviewing federal agency to provide the school with notice of its noncompliance and attempt to help it address any of its shortcomings before withdrawing funding.\(^{48}\) Previous executive guidance made it unclear exactly when a school failed to comply with the statute, so the DOE’s proposed regulations streamline federal investigations by imposing the same liability standard used in Davis and Gebser.\(^{49}\) Thus, under the new rules, in enforcement proceedings—as well as in private lawsuits—universities are not liable for student-on-student sexual harassment unless they have actual knowledge of severe, pervasive, and objectively offensive sexual misconduct and act with deliberate indifference towards it.\(^{50}\)

Schools, rather than coaches, face direct liability for reporting failures under Title IX, both in private and public enforcement proceedings. Nonetheless, the structure of the Act and its standard of liability have implications for the extent to which coaches are mandatory reporters. If the standard of institutional liability is too low or too high,

\(^{44}\) Id. at 303.
\(^{45}\) See, e.g., Doe v. Miami Univ., 882 F.3d 579, 589 (6th Cir. 2018) (requiring plaintiffs’ specific factual allegations of discrimination in a Title IX complaint).
\(^{46}\) Escue v. N. Okla. Coll., 450 F.3d 1146, 1153 (10th Cir. 2006).
\(^{47}\) See 28 C.F.R. § 42.107 (1973).
\(^{48}\) Id.
\(^{50}\) Id.
schools may provide coaches with reporting obligations that are under or overinclusive of what federal law requires.

2. Substance and definitions of reporting obligations (“what and where?”)

Title IX does not define discrimination, so interpretations of what needs to be reported under the statute come from administrative guidance and judicial decisions. For example, in *Davis v. Monroe County Board of Education*,51 the Supreme Court recognized peer-on-peer sexual harassment as actionable against an institution under Title IX.52

However, courts struggle to provide an adequate definition of actionable sexual misconduct. The *Davis* Court looked to *Title VII*53 to define harassment, holding that the sexual misconduct must be so “severe, pervasive, and objectively offensive” as to deprive a student of equal educational benefits.54 It further explained that whether sexual misconduct is actionable depends on “surrounding circumstances, expectations, and relationships . . . including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.”55 Finally, *Davis* also acknowledged that “in theory, a single instance of sufficiently severe one-on-one peer harassment” could suffice to satisfy the severe, pervasive, and objectively offensive standard, but it ultimately concluded that it was “unlikely that Congress would have thought such behavior sufficient to rise to this level.”56 However, this case may be distinguishable from collegiate cases, since the Court was considering the conduct of fifth graders, who it expected would resort to frequent immature conduct.57

The Bush Administration’s 2001 Guidelines embraced the *Davis* approach, refusing to provide a more specific definition of actionable sexual misconduct.58 Courts interpreted the standard narrowly; the Sixth Circuit held that a single incident of alleged non-consensual kissing is insufficient to demonstrate “severe, pervasive, and objectively offensive” behavior depriving a victim of equal opportunities at school.59 It also refused to find actionable misconduct when a male student—on

52 Id. at 650.
53 Title VII prohibits employers from discriminating on the basis of sex.
54 Id. at 651 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).
56 Id.
57 Id.
58 See generally Office for Civil Rights, Revised Sexual Harassment Guidance, supra note 26.
three separate occasions—shoved a female student into a locker, demanded that she perform oral sex on him, and made obscene gestures at her.60 In 2014, in response to mounting pressure to provide clearer criteria and definitions, the DOE’s Office for Civil Rights (OCR) issued its “Title IX Questions and Answers.”61 These guidelines stressed the need for schools to report all allegations of sexual violence, defined as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent . . . including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.”62 However, it left “harassment” intact under Davis, noting that schools had the responsibility to provide more coherent definitions themselves.63

Due to the confusion surrounding the substance and scope of reporting obligations under the former guidelines, the Trump Administration’s proposed regulations provide a specific definition of actionable sexual harassment.64 This definition encompasses three different types of conduct.65 First, it includes quid pro quo harassment: when a recipient’s employee conditions receipt of a benefit or service upon a student or coworker’s participation in unwelcome sexual conduct.66 Second, it codifies the standard in Davis, and holds actionable sexual harassment that is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a recipient’s education program or activity.”67 Third, the new regulations incorporate the definition of sexual assault referred to in the Clery Act regulations (“an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program”).68 However, the new rule does not include other sex-based Clery Act crimes, because the DOE believes that Title IX’s focus is not on “crimes per se,” but instead on behavior that deprives university members of equal opportunities based on their sex.69

60 See Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 360, 363–64 (6th Cir. 2012) (finding no liability because the school instituted a “supervision plan” to prevent future incidents, although the victim argued that this plan led to more abuse off-campus).
61 See Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, supra note 28, at *1.
62 See id.
63 Id. at *13.
65 Id.
66 Id. at 61466.
67 Id.
68 Id. (citing 34 C.F.R. 668.46 (2015)).
Equally challenging to define are the geographical and functional limits to coaches’ reporting obligations under Title IX. Originally, some courts insisted that Title IX applied only to “operations of a college or university that are educational in nature,” thus excluding operations such as university dining services.\(^{70}\) However, most courts now agree that Title IX should be read broadly in conjunction with the Civil Rights Restoration Act amendments.\(^{71}\) Passed in 1987, these amendments sought to clarify Title IX’s text—specifically, what it means for sex-based discrimination to occur within an “education program or activity.”\(^{72}\) They explain that Title IX applies to any university-sponsored program, including “traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities.”\(^{73}\) However, in 2014, the Obama Administration changed the analysis by requiring that a school “process all complaints of sexual violence, regardless of where the conduct occurred.”\(^{74}\) For example, reportable misconduct included incidents occurring in fraternities, on field trips (“including athletic team travel”), and during off-campus events for school clubs.\(^{75}\)

To harmonize the conflicting approaches to Title IX’s geographical scope, the proposed regulations clarify what it means for a university activity or program to be within the scope of Title IX.\(^{76}\) Schools are responsible for all misconduct occurring within their “operations,” including activities encompassing “any academic, extracurricular, research, [or] occupational training.”\(^{77}\) There are no geographical constraints on these operations, but when determining whether an activity falls within the school’s sphere of liability, the DOE will use factors developed by courts in their Title IX jurisprudence.\(^{78}\) These factors include: whether the conduct occurred at a location owned by the recipient; whether the recipient exercised oversight, supervision, or discipline over the context in which the misconduct occurred; and whether the recipient funded, sponsored, promoted, or endorsed the event in question.\(^{79}\) Thus, coaches


\(^{72}\) Id. at 1124.

\(^{73}\) Id. at 1125 (citing S. Rep. No. 100–64, at 17 (1987)).

\(^{74}\) Office of Civil Rights, Questions and Answers on Title IX and Sexual Violence, supra note 28, at *29.

\(^{75}\) Id.

\(^{76}\) Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61468 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

\(^{77}\) Id.

\(^{78}\) Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61468.

\(^{79}\) Id. (citing Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629, 646 (1999); Samuelson v. Or. State Univ., 725 Fed. App’x. 598, 599 (9th Cir. 2018); Farmer v. Kan. State Univ., No. 16-CV-2256-
who know of incidents occurring at fraternities housed off-campus or during athletic travel away from the school may still need to report such conduct, since universities often exercise oversight over these activities.80

3. Identity and authority of the coach

Although many coaches’ contracts designate them as mandatory reporters, Title IX jurisprudence and executive interpretations may impose independent reporting obligations on them. For example, in Gebser, the Supreme Court explained that schools have actual notice of sexual misconduct (and thus, incur Title IX liability) when an “appropriate person” knows of the misconduct and fails to report it.81 An “appropriate person” is “an official who, at minimum, has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf.”82 Many courts conclude that determining who has such authority is “necessarily a fact-based inquiry” because of the varying roles of educational officials.83 However, Gebser involved sexual harassment by a school employee; in Davis, the Supreme Court made no mention of an “appropriate person” requirement in cases of peer-on-peer sexual harassment.84 One legal scholar thus concluded that “when the offending party is a student, virtually any employee can be presumed to have authority to take some corrective action.”85 In fact, only the Tenth and Eleventh Circuits have ever applied the “appropriate person” test to situations where a student (rather than an employee) committed the alleged sexual misconduct.86

Despite the language in Davis, OCR previously required that only “responsible employees” be mandatory reporters of peer-on-peer sexual misconduct.87 Federal regulations mandated schools to designate at least one person as such an employee.88 Different from an appropriate

---

80 Id. (citing Farmer, 2017 WL 9804060, at *8).
82 Id.
84 See Brian Bardwell, No One Is an Inappropriate Person: The Mistaken Application of Gebser’s Appropriate Person Test to Title IX Peer-Harassment Cases, 68 CASE W. RES. L. REV. 1343, 1349 (2018).
85 Id.
86 Id. at 1349, 1354.
87 Office of Civil Rights, Revised Sexual Harassment Guidance, supra note 26, at *14.
88 34 C.F.R. § 106.8 (1980).
person, a responsible employee is “anyone who has the authority to re-
dress sexual violence; who has been given the duty of reporting inci-
dents of sexual violence or any other misconduct by students to their
Title IX coordinator or other appropriate school designee; or whom a
student could reasonably believe has this authority or duty.”89 In prac-
tice, however, this standard seemed to sweep just as broadly as the “ap-
propriate person” analysis in Davis—one study examined the reporting
policies of 150 universities and discovered that 69% of them designated
all of their employees as “responsible employees.”90

Unable to reconcile the “responsible employee” and “appropriate
person” standards, courts divide as to whether coaches incur Title IX
reporting obligations. For example, one court decided that an assistant
coach who failed to report the rape of a student equipment manager did
don not possess sufficient authority to qualify as an “appropriate person.”91
However, the court determined that the school’s athletic director was
such a person, but left open whether the head coach would be as well.92
On the other hand, coaches of highly successful programs are almost
certain to incur reporting responsibilities. The Tenth Circuit, for ex-
ample, emphasized that the head coach of the University of Colorado foot-
ball team enjoyed such prestige, influence, and authority that his posi-
tion within the school “was comparable to that of police chief in a
municipal government.”93 Thus, his failure to report and address ongo-
ing sexual violence committed by recruits of the football team was evi-
dence of the entire school’s failure to comply with Title IX.94

The DOE’s proposed guidelines attempt to clarify the responsibili-
ties of university employees by retiring the “responsible person” termin-
ology.95 Instead, schools must designate a “coordinator,” who is re-
quired to inform victims of their right to file a formal sexual misconduct
complaint (which triggers the school’s grievance procedures and can be
done at any time), to handle and process such reports, and to offer sup-
portive measures (i.e., counseling or housing changes).96 In the absence

89 Office of Civil Rights, Revised Sexual Harassment Guidance, supra note 26, at *15.
90 See Merle H. Weiner, A Principled and Legal Approach to Title IX Reporting, 85 Tenn. L.
Rev. 71, 77–78 (2017) (arguing that such “wide-net” reporting policies actually deter victims from
coming forward).
92 Id.
93 Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007).
94 Id. at 1184–85.
95 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Fed-
eral Financial Assistance, 83 Fed. Reg. 61462, 61481 (proposed Nov. 29, 2018) (to be codified at 34
C.F.R. 106).
96 Id.
of a formal complaint, however, the coordinator does not incur an independent obligation to report sexual misconduct.97

Yet the new DOE regulations still adopt the “appropriate person” test from Gebser for the purposes of determining whether a school had actual knowledge of sexual misconduct.98 They also suggest that this analysis applies regardless of whether the sexual misconduct is perpetrated by a school employee or by a peer.99 Under this approach, coaches who have both notice of actionable harassment, as well as the authority to institute corrective measures on the school’s behalf, incur an obligation to report the misconduct. Additionally, although the proposed regulations agree that determining whether an employee possesses such authority is a “fact-specific inquiry,” they also state that “the mere ability or obligation to report sexual harassment” (for example, in an employment contract) is not per se evidence of such authority.100 This language leaves open the possibility that, even when a coach’s contract designates him or her as a mandatory reporter, there are situations where he or she may not trigger the school’s Title IX liability for failing to report an incident.

4. Identity of the victim and perpetrator

The DOE’s webpage for Title IX Frequently Asked Questions states that Title IX protects, not only students, but “all persons from discrimination, including parents and guardians, students, and employees.”101 Nonetheless, the identity of the victim and the perpetrator, as well as the source of a complaint, do seem to matter to a Title IX action. Victims may include, for example, employees of the school,102 although courts are divided as to whether those employees must first exhaust their remedies under Title VII.103

97 Id.
98 Id. at 61466–68.
100 Id. at 61467. (citing Plamp v. Mitchell Sch. Dist. No. 17–2, 565 F.3d 450, 459 (8th Cir. 2009), Santiago v. P.R., 655 F.3d 61, 75 (1st Cir. 2011)) (emphasis added).
103 Compare Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995) (holding that permitting employment claims under Title IX without first exhausting Title VII remedies disrupts federal employment law) with Burton v. Board of Regents of the University of Wisconsin System, 171 F. Supp. 3d 830, 840 (W.D. Wis. 2016), reconsideration denied, No. 14-CV-274-JDP, 2016 WL 3512827, at *1 (W.D. Wis. June 22, 2016) (differentiating Lakoski as limited to employment discrimination, and refusing to extend it to retaliation claims, which do not require Title VII exhaustion).
On the other hand, courts are split as to whether Title IX liability attaches when the victim has no affiliation with the recipient university. For instance, in *Simpson*, the Tenth Circuit explained that, even though one of the victims was not a student (and therefore, not protected by Title IX), “that circumstance [was] irrelevant to evaluation of risk to [other University of Colorado] women.”104 But a recent First Circuit case held that a Providence University student who was assaulted by a student at Brown University could not bring a Title IX suit against Brown.105 The First Circuit explained that, in order to prove discrimination, the victim “must be a participant, or at least have the intent to participate, in the defendant’s educational program or activity.”106 These decisions make it ambiguous whether a coach must report, for example, a player who sexually assaults a student from another school.

The source of an allegation also seems to matter to a mandatory reporting analysis under Title IX. For example, the 2001 OCR Guidelines required a report and investigation when a student’s parent reported an incident of sexual misconduct against his or her child.107 However, they explained that when employees learn about misconduct “through other means . . . [like] a witness to an incident or an anonymous letter or telephone call,” their required response will vary based on several different factors.108 Among these are: (1) “the source and nature of the information,” (2) “the seriousness of the alleged incident,” (3) “the specificity of the information,” (4) “the objectivity and credibility of the source of the report,” and (5) whether the individuals “who were subjected to the alleged harassment” can be identified and “want to pursue the matter.”109

The proposed Title IX regulations, however, simplify matters and do not address the source of an allegation; instead, they only require schools to instigate grievance procedures when a formal complaint is filed or when a university receives multiple complaints about the same individual.110 Thus, the identity and affiliation of the alleged perpetrator may also matter in a Title IX analysis to the extent that the institution has control over the assailant. In fact, the Supreme Court stated in

---

104 Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1181 (10th Cir. 2007). See also *Kinsman v. Fla. State Univ. Bd. of Tr.*, No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *3 (N.D. Fla., Aug. 12, 2015) (explaining that actual knowledge of an incident “does not require knowing exactly who the victim was and the connection with the funding recipient”).


106 *Id.* at 131.

107 *See Office for Civil Rights, Revised Sexual Harassment Guidance, supra note 26, at *18.

108 *Id.*

109 *See id.*

Davis that “the regulatory scheme surrounding Title IX” informs schools that “they may be liable for their failure to respond to discriminatory acts of certain nonagents.”111 There are, of course, limitations to this statement. Title IX liability for damages is limited to “circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”112 Thus, social-media harassment by third parties against a victim who accused the quarterback on her university’s football team of sexual assault is not actionable, “but can bear on the severity and offensiveness” that the victim suffers.113

B. Clery Act Reporting Obligations

Unlike Title IX, the Clery Act explicitly imposes reporting obligations on the universities to which it applies.114 Specifically, it requires schools to disclose their campus security policy and statistics of certain crimes occurring in a defined geographical area.115 Additionally, “although the Clery Act generally does not require particular policies or procedures, a more detailed policy statement is necessary with regard to campus sexual assaults.”116 Thus, schools (and by extension, coaches) may face stricter Clery Act obligations for sex-based crimes than for other crimes covered by the act, such as robbery.

1. Private v. public enforcement actions

No private right-of-action is available under the Clery Act.117 The text of the statute provides that it cannot “be construed to . . . [either] create a cause of action” against a university or its employees or to “establish any standard of care.”118 Courts have honored this provision, barring plaintiffs from asserting any sort of liability for a school’s failure to honor its Clery Act duties.119 However, the DOE permits parties to trigger a noncompliance investigation by filing a complaint with its

---

112 Id. at 645.
115 Id. at § 1092(f).
116 Heacox, supra note 1, at 53.
118 Id.
office. The DOE may also initiate investigations in the following circumstances: (1) after a school conducts an independent audit for compliance, (2) via a review selection process, and (3) “if media attention raises concerns.”

DOE Clery Act investigations are extensive and may include: reviews of university publications, policies, and procedures; sampling of crime reports filed and logged on campus; interviews; and attendance at university meetings. A university who fails to meet its obligations faces fines of up to $27,500 per violation. For example, after Jerry Sandusky (an assistant football coach at Penn State) was arrested for ongoing sexual abuse of young boys attending football camps, the Department imposed a fine of over $2 million on the university for Clery Act violations. It noted the failure of the athletic staff, particularly the head coach Joe Paterno, to report allegations of sexual violence to the campus police. Its findings relied heavily on the investigative procedures, which revealed numerous violations under 34 C.F.R. § 668 (the regulations setting forth the specific requirements and procedures schools must implement to report crime, i.e., keeping records for at least three years).

The Penn State case indicates some of the troubling procedural characteristics of the Clery Act’s mandatory reporting policies. In particular, the Act shields the coaches from personal liability for its violations, as plaintiffs do not have a private right-of-action and the DOE’s only remedy is to fine an institution for its failures. Moreover, the Act does not permit private plaintiffs to seek monetary damages—as discussed later in the Comment, this feature tends to lead the DOE to focus its attention on large-scale violations. Still, the Clery Act “fine” letters issued by the DOE after an investigation do provide coaches and universities with an exact discussion about where reporting failures occurred and how to prevent such mishaps in the future.

---

120 Heacox, supra note 1, at *55.
121 Id.
123 34 C.F.R. § 668.84 (2015).
124 See Penn State Fine Letter, supra note 122, at *1.
126 See generally Penn State Fine Letter, supra note 122.
128 See generally Penn State Campus Crime Final Program Review Determination, supra note 125.
2. Substance and definitions of reporting obligations (“what and where?”)

In comparison to Title IX, the Clery Act provides much more specific definitions for the crimes that it requires coaches to report, often cross-referencing other federal law. For example, it explains that sexual assault is a “forcible or nonforcible sex offense,” as classified by the FBI’s uniform crime reporting system. This includes “penetration, no matter how slight of the vagina or anus with any body part or object, or oral penetration . . . without the consent of the victim,” as well as attempted penetration. The Clery Act also requires reports for domestic violence, dating violence, and stalking, which are defined in section 12291(a) of Title 34. This section, known as the Violence Against Women Act (VAWA), defines domestic violence as “felony or misdemeanor crimes of violence committed by [among other things] a current or former spouse or intimate partner of the victim.” Similarly, dating violence is “violence committed by a person who is or has been in a social relationship of romantic or intimate nature with the victim.” Finally, stalking means “engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or suffer substantial emotional distress.”

Furthermore, unlike Title IX, the Clery Act has specific geographical constraints on reporting. Initially, the Act required universities to report violent crimes occurring: (1) on campus; (2) off-campus in buildings “owned or controlled” by the institution; and (3) on public property within the area “reasonably contiguous to the institution and adjacent to a facility owned or controlled by the institution.” However, Congress expanded the law to include crimes committed on “non-campus” property “adjacent to a facility owned and controlled by the institution,” so long as such property is used by the institution in some way to further its academic goals.
Helpfully, the DOE provides a Handbook with examples to help schools understand the practical meaning of these definitions and boundaries.\textsuperscript{138} For example, it explains that hospitals and medical associations count as institution property for the purposes of the act, as do off-campus buildings that students “consider to be, and treat as” part of the campus, such as art studios.\textsuperscript{139} It also provides detailed scenarios to illustrate the scope of reportable sexual violence, including dating violence, domestic violence, and stalking.\textsuperscript{140} For example, a heated argument between a husband and wife on campus is not considered domestic violence if neither party reports physical harm or intimidation.\textsuperscript{141}

3. Identity and authority of the coach

The Clery Act requires university actors to report sexual violence when they are acting as “campus security authorities” (CSAs).\textsuperscript{142} The DOE’s Handbook on reporting explains that a CSA is “an official who has significant responsibility for student and campus activities." It includes in its examples of CSAs “director[s] of athletics, [and] all athletic coaches (including part-time employees and graduate assistants).”\textsuperscript{144} However, reporting is only mandatory when the coach receives the allegation in his or her “capacity as a CSA.”\textsuperscript{145} This means that coaches do not have the obligation to report incidents that they overhear or learn about indirectly.

During the Penn State Sandusky investigation (discussed in Section II(B)(1)), the DOE used these definitions to determine whether CSAs at the school failed to report the violence.\textsuperscript{146} The investigation emphasized the failure of both Penn State’s head football coach (Joe Paterno) and a graduate assistant (Mike McQueary) to report McQueary’s eyewitness account of Sandusky sexual assaulting a child in the locker room to anyone beyond the athletic director.\textsuperscript{147} According to the DOE,

\begin{itemize}
  \item 139 Id. at ch. 2, 3–4.
  \item 140 Id. at ch. 3.
  \item 141 Id. at ch. 3, 37–38.
  \item 143 The Handbook for Campus Safety, supra note 137, at ch. 4, 2–3.
  \item 144 Id. at ch. 3.
  \item 145 Id. at ch. 4, 5.
  \item 146 See Penn State Campus Crime Final Program Review Determination, supra note 125, at *24.
  \item 147 Id.
\end{itemize}
both McQueary and Paterno were mandatory reporters under the Clery Act, and thus they should have reported the incident to Penn State University Police Department to include in its annual crime statistics. This was true even though Penn State itself did not designate McQueary as a Clery Act reporter and only conceded that Paterno was a reporter after conducting an internal investigation.

4. Identity of the victim and perpetrator

The text of the Clery Act itself does not specify whether it applies only to victims and perpetrators who are associated with the university. However, the Campus Crime Reporting Handbook issued by the DOE states that, for reporting purposes, it does not matter “whether or not the individuals involved in the crime, or reporting the crime, are associated with the institution.” Thus, a coach does not need to know much about the victim or perpetrator’s identity—only that the coach learned of the crime while in his or her official capacity as a CSA.

The official capacity requirement is the greatest limitation on the Clery Act in this sense. Coaches do not need to report, for example, assaults and violence that students mention in settings like “Take Back the Night” events. They also do not need to report overheard conversations or other indirect ways of learning about an incident. However, if the coach has no reason to believe that a direct allegation was not made in good-faith, he or she must report it, even if it came from a third party. For example, a coach must report a sexual assault that he or she learns about through a local mental health counselor who calls to inform the coach that a student on campus sought treatment for the assault.

The Clery Act Handbook makes it much more straightforward for collegiate coaches to understand their reporting obligations. However, because it is merely a handbook, it is not “law.” Furthermore, the Clery Act’s purpose is to require institutions to keep accurate statistical crime

---

148 Id.
149 Id. at *23.
150 The Handbook for Campus Safety, supra note 137, at ch. 4, 1.
151 See id. at ch. 4, 5.
152 “Take Back the Night” is a non-profit, international organization whose mission is to end sexual violence by creating “safe communities and respectful relationships through awareness events and initiatives.” See Take Back the Night Foundation, https://takebackthenight.org/about-us/ [https://perma.cc/QR6U-LYFZ].
153 Id. at ch. 4, 6.
154 Id. at ch. 4, 5.
155 Id.
156 The Handbook for Campus Safety, supra note 137, at ch. 4, 6.
data; therefore, it only requires university employees to report allegations “to the official or office designated by the institution to collect crime report information.” These reports do not need to include the names or information of the alleged victim or perpetrator and do not require further action on the part of the coach.

III. PROPOSAL TO CLARIFY AND HARMONIZE COACHES’ REPORTING OBLIGATIONS

Although sexual misconduct in collegiate athletics is by no means a new problem, the #MeToo Movement highlights the prevalence of sexual violence on college campuses. Unfortunately, ambiguities in federal reporting laws and executive regulations result in a body of inconsistent jurisprudence. Unable to untangle these inconsistencies, universities often attempt to solve the problem and avoid liability by inserting all-encompassing reporting clauses into their employment contracts, requiring coaches to report all instances of “sexual misconduct.” Coaches are left to their own devices to understand their reporting obligations under such broad and vague terms. This leads to both under-reporting (and increased sexual violence on campus) and over-reporting (and inadequate protection for both victims and alleged assailants). Clarifying the scope of coaches’ reporting obligations under federal law is thus critical and overdue in order to ensure the appropriate balance of safety and confidentiality for victims, as well as due process for the accused.

As the law currently stands, both Title IX and the Clery Act fall short of achieving a consistent standard. Title IX itself is broad, necessitating executive guidance and regulations, as well as adjudication, to guide its interpretation. The Clery Act, on the other hand, contains more specific and extensive reporting regulations within its statute and regulatory scheme. However, its failure to provide for a private right-of-action directs DOE resources towards large-scale violations (like the Penn State scandal), leaving inadequate remedies for individual plaintiffs. Therefore, to maximize the efficacy of federal reporting law, the proper solution is to enact Title IX regulations that mimic the substance

---

157 Id. at ch. 4, 5.
158 Id.
160 See Bernstein & Dillon, supra note 3.
161 See Heacox, supra note 1, at 50–51 (discussing how inadequate reporting and grievance procedures deter victims from coming forward).
162 See Bernstein & Dillon, supra note 3.
of the Clery Act and its Handbook. Such a solution would preserve the procedure and structure of Title IX proceedings (including the private right-of-action) and also minimize inconsistency in judicial enforcement of Title IX, since courts would likely defer to DOE interpretations under *Chevron*.\(^{163}\)

A. Proposed Substance of Reporting Obligations

To harmonize the requirements of these two statutes governing federal reporting obligations, the regulations and jurisprudence guiding Title IX enforcement should mirror the substance of the Clery Act (with a few exceptions). Specifically, Title IX interpretations should include Clery Act sex-based crimes (such as sexual assault, dating violence, and stalking) in their definition of actionable discrimination. They should also clarify the boundaries of the *Davis* sexual harassment standard and the “appropriate person” test by mimicking the Clery Act Handbook. However, Title IX should continue to take its own approach to defining (1) the geographical scope of reporting obligations and (2) which allegations require a report. This approach respects the differing goals of the two statutes while also availing Title IX of the Clery Act’s specificity and clarity.

1. Title IX interpretations should mimic the Clery Act’s substantive definitions of sex-based crimes.

The Trump Administration’s proposed regulations define sexual harassment as (1) conduct that satisfies the *Davis standard* (“severe, pervasive, and objectively offensive” behavior), or (2) conduct that satisfies the standard for quid pro quo sexual harassment and assault, as defined by the Clery Act.\(^{164}\) However, this definition fails to include other sex-based Clery Act crimes—such as dating violence and stalking—and also does nothing to clarify the *Davis* standard. These deficiencies result in an incomplete understanding of sex-based discrimination, and require coaches to disentangle two different definitions of sexual misconduct in order to determine whether the Clery Act or Title IX requires a report.

To remedy the problem, the Title IX regulations should adopt a definition of actionable sexual misconduct that incorporates not just sexual


\(^{164}\) *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462, 61466 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).
assault, but also the other VAWA crimes listed in the Clery Act (domestic violence, dating violence, and stalking). The DOE explains the omission of these crimes in its proposed regulations by pointing out that Title IX is a contract that requires federally funded universities to comply with anti-discrimination law on the basis of sex—not to prevent all crimes related to sex. However, this interpretation misunderstands Title IX’s text and purpose. Title IX prevents federal funding recipients from discriminating “on the basis of sex” in order to promote equal educational opportunities for university members. Consistent with this language, it follows that if sexual harassment and sexual assault can constitute actionable discrimination, other sex-based crimes (like dating violence) can have a similarly discriminatory effect, discussed in detail later in this section. Thus, the proposed Title IX regulations should expand their definition of actionable sexual misconduct to include domestic violence, dating violence, and stalking as defined by the Clery Act. Doing so would harmonize federal laws for reporting sex-based crimes, minimizing confusion and promoting compliance. Until such amendments are made, however, courts should interpret the Davis “severe, pervasive, and objectively offensive” standard of sexual harassment to presumptively include conduct that meets the Clery Act definition of dating violence, domestic violence, or stalking.

The Davis standard also requires some clarification, given its inconsistent application by courts. Although it is likely impossible for the DOE to articulate exactly what behavior is “severe, pervasive, and objectively offensive” without being over or under inclusive, the suggested Title IX regulations could benefit from including a few examples of the boundaries of the definition. The best way to do so would be to model the Clery Handbook, providing examples of behavior that must and must not be reported within the federal regulations. For instance, the regulations could clarify whether “severe, pervasive, and objectively offensive” behavior can ever include a single incident of harassment and whether the conduct present in Pahssen (three separate incidents of harassment, including pushing a student against a locker, demanding oral sex, and making obscene gestures) would ever be actionable. Setting such limits would not only clarify the scope of coaches’ reporting obligations, but also help universities draft future sexual misconduct

165 Id. at 61467–68.
166 See Lanser, supra note 15, at 184.
167 Although, helpfully, the Davis court suggests a number of factors that will weigh on this consideration, including the ages of the harasser and the victim, as well as the number of individuals involved (see Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629, 651 (1999) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998))).
168 A question raised in Davis; see Davis, 526 U.S. at 653.
clauses in employment contracts. Because schools would be more aware of the limits to their own Title IX obligations, they would have a better sense of how to define any additional reporting obligations that they wish to impose on their staff. Thus, coaches would face fewer all-inclusive “sexual misconduct” clauses, and have a clearer idea of what behavior they need to report.

A potential objection to this expanded Title IX definition might be that it is overly broad, given that domestic violence, dating violence, and stalking do not necessarily have to be motivated by the victim’s sex (and thus are not per se discriminatory). This certainly seems to be one of the DOE’s concerns in excluding such crimes. However, this argument overlooks both the statistics behind these crimes, as well as the potential solutions to limit concerns about Title IX capturing crimes that are not “on the basis of sex.”

First, like sexual assault—which is included in the DOE’s definition of actionable misconduct—dating violence, domestic violence, and stalking are empirically sex-based. Second, the proposed regulations (or judicial interpretations of them) could remedy the problem by creating a “rebuttable presumption” that these crimes are sex-based. Thus, schools would be allowed to demonstrate that a certain instance of domestic violence, sexual assault, dating violence, or stalking was not in fact based on the victim’s sex.

There may also be concerns that this approach will constrain the flexibility of the Davis standard, rendering it unable to respond to varying fact patterns and new forms of sexual harassment (i.e., cyberbullying). Again, this fear is groundless. Providing general limitations as to whether behavior is “severe, pervasive, and objectively offensive” does not preclude courts from exercising discretion and evaluating where specific conduct should fall along the spectrum. Rather, boundaries can serve to harmonize federal law as to broad questions (like whether a single instance of misbehavior can meet the Davis standard), while leaving the majority of cases somewhere in the middle. Indeed, courts will still be able to conduct their own case-by-case analysis for

---


171 See Jennifer James, We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault, 65 DEPAUL L. REV. 1321, 1331 (2016) (discussing the history of VAWA and explaining that it includes “domestic violence . . . dating violence, sexual assault, and stalking” because they involve higher rates of targeting victims due to their sex than other crimes); Shannon Cleary, Using Title IX and the Model of Public Housing to Prevent Housing Discrimination Against Survivors of Sexual Assaults on College Campuses, 30 COLUM. J. GENDER & L. 364, 366 (2016) (explaining that sexual assault, particularly on college campuses, disproportionately affects women and that 19.3% of women have been raped during their lifetime, compared with 1.7% of men).
actionable harassment using the factors that Davis suggests they consider—the age of the harasser, the age of the victim, the number of individuals involved—as well as any other unique circumstances they find relevant to the situation at hand. This approach is optimal for coaches and universities; they will understand what conduct definitely is and is not actionable, and be allowed to tailor their contractual policies accordingly.

2. Title IX’s “appropriate person” test requires clarification that parallels the “CSA” examples in the Clery Act Handbook.

Perhaps the most ambiguous element of Title IX guidance and jurisprudence is the “appropriate person” test and its application to university employees, like collegiate coaches. The proposed DOE regulations recognize that categorically designating school employees (like coaches) as “reporters” or “non-reporters” is not optimal, given the varying roles these individuals might play depending on the school. Nevertheless, the regulations still lack any meaningful criteria or limitations to guide universities, coaches, and courts in interpreting who has the responsibility to report sexual misconduct. Accordingly, Title IX guidance should provide concrete examples of the “appropriate person” test’s boundaries by following the Clery Act Handbook’s format for determining the scope of CSA authority. Additionally, courts applying the “appropriate person” test should enumerate a series of factors to guide their analysis from case to case.

The Clery Act Handbook employs a bright-line rule that says coaches always have the duty to report sexual violence when acting in their official capacity as a CSA. While this approach is straightforward, holding coaches to be per se appropriate persons under Title IX is inconsistent with Gebser, which rejected automatic vicarious liability for schools. On the other hand, the Clery Act Handbook provides examples of the limitations to a coach’s “official capacity” status. The proposed Title IX regulations could implement a similar series of examples that explain, for instance, whether a graduate-student coach can ever be an appropriate person with respect to employee misconduct (presumably, student coaches do not have the authority to institute corrective measures against their superiors and thus cannot be appropriate persons under Gebser). Doing so would provide clearer boundaries for courts to assist their “case-by-case” analyses. Additionally, the judicial

---

172 Davis, 526 U.S. at 651 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).
branch itself should enumerate a series of factors that weigh on the Title IX appropriate person analysis for coaches. These factors could include the coach's level of authority, employment status at the university (full-time or part-time), and the coach's relationship with the victim and/or alleged assailant.\footnote{ Universities may already consider some of these factors when writing their reporting policies. For example, the University of Oregon designates "all coaches of any team on which the accused student is a member" as mandatory reporters, "but only the head coaches of any team on which the complainant is a member." See Weiner, supra note 90, at 144–45 (emphasis added).}

One might argue that the approaches discussed above do not provide coaches or universities with adequate notice ex ante about which employees constitute appropriate persons. This might appear particularly concerning because courts sometimes refuse to defer to a school's designation of whether the employee is such a person.\footnote{ See, e.g., Kinsman v. Fla. State Univ. Bd. of Tr., No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *2 (N.D. Fla., Aug. 12, 2015) (refusing to defer to Florida State's contention that it considered neither its head coach nor athletic director to be appropriate persons under Title IX).} This fear is overstated, however, when considered in conjunction with the DOE's other proposed regulations. Specifically, the regulations now require a coach (or other appropriate person) to report misconduct when (1) the victim files a formal report directly or (2) the alleged offender is a repeat perpetrator.\footnote{ See Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61469.} If courts interpret these provisions to also apply to private lawsuits, a coach will only be a Title IX mandatory reporter in those two circumstances. Accordingly, universities will understand when crafting their employment contracts which employees (and coaches) are most often in these situations, and thus more likely to be appropriate persons in a judicial analysis.

3. Title IX should maintain its distinct approach to the scope and source of reporting obligations.

Although the Trump Administration's proposed Title IX guidelines would generally benefit from harmonization with the substance of the Clery Act, they should continue to maintain a distinct approach to (1) the geographical scope of educational liability and (2) the source and origin of complaints requiring reports. In particular, Title IX should continue to employ a broader conception of geographical liability than the Clery Act, but require reports from a narrower set of circumstances. Doing so would promote the separate purposes of the two statutes by differentiating them in a way that is easy for coaches and universities to understand and apply.

The Clery Act only requires coaches (in their role as CSAs) to report sexual misconduct on or near campus, but\footnote{ See The Handbook for Campus Safety, supra note 138, at ch. 2, 3–4.} also mandates that they
report all good-faith allegations of such crimes.\textsuperscript{180} In contrast, the proposed Title IX regulations do not have any geographical constraints (and, in this sense, are broader than the Clery Act), but they also only require universities to address formal complaints filed directly by victims affiliated with the school, as well as complaints that implicate a repeat offender.\textsuperscript{181} These differences are appropriate given the distinct purposes of the two laws, and, moreover, they are straightforward for universities, coaches and courts to apply.

The Clery Act serves to provide transparent and accurate statistical data about crimes on college campuses in order to allow prospective students and university members to evaluate the school’s safety.\textsuperscript{182} It is therefore sensible for the reach of the statute to be limited in its geographical scope (the data would lose its meaning if it extended too far away from the university’s boundaries), but broad in its reporting sources (refusing to report a crime because it was filed by the victim’s parent, rather than the victim him or herself, would again impede statistical accuracy). On the other hand, Title IX exists to address sex-based discrimination in federally funded universities.\textsuperscript{183} It follows that off-campus programs or activities controlled or funded by the university should trigger liability, but that these reports should come from those directly affected by the discrimination.

Nevertheless, one might contend that imposing two sets of reporting duties based on the source of the complaint and the location of the incident creates undue confusion for coaches. However, the two sets of obligations are actually straightforward for coaches to follow, as well as for the DOE and courts to evaluate. Coaches who receive word of or are witness to sexual misconduct only need to answer two questions to determine whether the Clery Act and/or Title IX requires them to file a report. The first is \textit{where} the conduct took place and the second is \textit{who} filed the allegation (including whether the complaint was filed directly by the victim or whether the complainant is affiliated with the school). If the conduct took place within the boundaries specified by the Clery Act, the coach will know to follow Clery Act procedures regardless of the source of the complaint. On the other hand, the coach need not evaluate whether a program is “university sponsored or affiliated” for Title IX reporting; he or she has the obligation only to address incidents filed directly by victims, or those which he or she knows implicates a repeat offender. This will relieve pressure for coaches to determine whether

\begin{itemize}
\item \textsuperscript{180} Id. at ch. 4, 1.
\item \textsuperscript{181} Id. at 61469.
\item \textsuperscript{183} See Lanser, supra note 15, at 184.
\end{itemize}
they must file a Title IX report, for example, in the case of an unsubstantiated incident they learned about indirectly or an incident unaffiliated with the university’s programs.

Another counterargument to this approach might be that Title IX will deter reporting and lead to increased sexual violence by limiting coaches’ responsibilities to only those instances where the victim of sexual misconduct files a formal report. However, this harm is mitigated in a few ways. Most importantly, the formal report only matters for triggering grievance procedures against the accused; it does not relieve the university of its obligation under Title IX to provide supportive measures to the victim to allow her or him to continue to obtain equal benefits to education. Thus, universities have the incentive to contractually require their coaches not to report all incidents, but rather to refer the victims to the school’s coordinator to make sure they receive support and learn of their right to file a complaint. Moreover, the coach must still file a report under his or her Clery Act obligations if the event occurred on or near campus buildings.

Another potential problem with the divergent scopes of the two acts relates instead to Clery Act reporting; coaches may be uneasy about reporting sexual misconduct that they learn about indirectly from a source other than the victim him or herself. However, the Clery Act’s Handbook permits—indeed, requires—coaches to file Clery Act reports without giving the name of the victim or the accused. This allows the coach to file a report with less worry about implicating either party’s privacy interests and respects the decisions of victims who choose not to file a formal complaint.

B. Proposed Procedure for Reporting Obligations

Although some of the substantive reporting suggestions discussed above could theoretically be incorporated into either Title IX or the Clery Act, they belong under the structure and regime of Title IX, due to its private right-of-action.

The Clery Act’s fatal flaw to ensuring sufficient compliance with its reporting laws is its procedural structure—it does not permit individual plaintiffs to bring a private lawsuit. Accordingly, and understandably, administrative enforcement agencies tend to direct resources towards Remedying the most egregious violations of the Act, like the Penn State

---

184 See Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61469 (“[S]upportive measures may include, among other things, ‘counseling, extension of deadlines . . . campus escort services . . . [and] changes in work or housing locations.’”).

185 The Handbook for Campus Safety, supra note 137, at ch. 4, 5.
Unfortunately, this tendency has the possible unintended consequence of overlooking smaller-scale violations, providing no individual remedy when a coach fails to adhere to his or her reporting duties. This becomes more problematic if the coach does not view him or herself as a campus security authority in settings outside the Clery Act’s scope, like during team travel, recruiting trips, or post-game celebrations.

On the other hand, the proposed Title IX regulations purport to remedy the former procedural problems with Title IX enforcement, while avoiding the pitfalls of the Clery Act. Instead of taking the form of a guidance document or a DCL (with no legal effect), the DOE’s suggested regulations follow an informal rulemaking procedure, complete with a public notice and comment period. The rationale for departing from the previous approaches taken by other administrations is to legitimize the executive branch’s interpretation of Title IX—the new regulations are not meant to be mere suggestions. By developing and adopting informal regulations instead of publishing guidance letters, the hope is that schools will have a better understanding of the standard that they must adhere to in formulating reporting policies. In theory, universities will be less likely to ignore rules than guidelines and will thus follow a uniform standard in Title IX compliance, which provides more consistency and stability for collegiate coaches.

Furthermore, while the DOE does not explicitly mention it, the new regulations may also have the effect of promoting uniform decisions across courts by availing themselves of judicial deference under *Chevron*. Previous courts rarely deferred to or even referenced executive guidance documents and DCLs when interpreting Title IX; they often looked instead to Title IX’s text and purpose, as well as the original 1975 federal regulations, even in cases of sexual harassment. In some

---


188 Id. at 61465 (“[N]otice-and-comment rulemaking is a transparent, participatory process that results in procedures with greater legitimacy and buy-in from universities subject to the resulting rules.”).

189 See id. at 61464–65.


191 See, e.g., *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 640–45 (1999) (holding that Title IX permits recipient liability for third-party misconduct in limited circumstances and that such an interpretation is consistent with the contractual nature of Title IX, with the plain language of the statute, and with the 1975 regulatory scheme).
circumstances, they also analogized Title IX to its “model” statute, Title VI.\textsuperscript{192} The courts’ failure to cite the previous administrations’ DCLs and guidelines is not conclusive proof that they did not defer at all to their formulations of Title IX. However, it does suggest that the rescinded guidance documents were not entitled to the “highest” deference that is generally afforded to executive interpretations of federal statutes under \textit{Chevron}.\textsuperscript{193} Several Title IX cases unrelated to sexual misconduct support this theory. For example, many courts have held that \textit{Chevron} applies to the original 1975 regulations on athletic and educational discrimination.\textsuperscript{194} In contrast, the Supreme Court has held (in a FLSA case) that executive agency letters and guidelines are \textit{not} entitled to \textit{Chevron} deference,\textsuperscript{195} a holding which at least one court has extended to the former Title IX interpretations and DCLs.\textsuperscript{196}

Thus, by transitioning to informal regulations (rather than guidance documents) as the primary means for executive interpretations of Title IX, the Trump Administration’s proposed rules should receive greater deference from future courts who are evaluating a university’s compliance with the statute. This minimizes the risk of inconsistent judgments for Title IX cases across circuits. Accordingly, private plaintiffs will have more reliable expectations for liability and be able to demonstrate a university’s noncompliance using this uniform standard. Coaches will also benefit from the increased transparency and predictability of the standard, because it minimizes the guesswork that they must do to comply with the law. Thus, informal regulations under Title IX will ensure a better balance of the victim’s safety with the need for confidentiality and due process.

There is a caveat, though. Recently, Justice Breyer took the position in a dissent that deference to federal regulations is limited when

\begin{itemize}
  \item \textsuperscript{192} Canon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (permitting a private right-of-action under Title IX based in part on its resemblance and relationship to the Title VI regulatory scheme).
  \item \textsuperscript{193} See \textit{Chevron}, 467 U.S. at 844.
  \item \textsuperscript{194} See, \textit{e.g.}, Cohen v. Brown Univ., 991 F.2d 888, 895–96 (1st Cir. 1993) (granting the 1975 regulatory scheme of Title IX “considerable deference . . . because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs”); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002) (holding that the 1975 Title IX regulations were entitled to deference under \textit{Chevron}). See \textit{also} Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 965 n.9 (9th Cir. 2010) (agreeing with the deference granted to the regulations by other circuits).
  \item \textsuperscript{195} See Christensen v. Harris Cty., 529 U.S. 576, 586–87 (2000) (“[W]e confront an opinion contained in an opinion letter, not one arrived after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant \textit{Chevron}-style deference.”).
  \item \textsuperscript{196} See Weckhorst v. Kan. State Univ., 241 F. Supp. 3d 1154, 1166 (D. Kan. 2017) (explaining that the “‘Dear Colleague Letters’ and ‘Questions and Answer’ documents issued by the OCR, which . . . purport to interpret [Title IX] . . . do not carry the force and effect of law are not entitled to \textit{Chevron} deference”).
\end{itemize}
an executive agency implements an unexplained or poorly explained policy change. This echoes Justice Stevens’ dissent in *Gebser* and his concern that unduly high standards for institutional liability (such as requiring a school to have “actual knowledge” of harassment) would deprive plaintiffs of their statutory rights. If courts begin to accept this argument and believe that the proposed Title IX regulations represent a dramatic, politically motivated, or unexplained shift in policy, there is a possibility that the regulations would receive less deference.

However, this outcome is unlikely; Justice Scalia’s majority response to Justice Breyer largely dismisses the idea that “unexplained” policy shifts would receive less deference than other regulations. Thus, coaches should expect that, should the proposed Title IX regulations take effect, courts will grant them highest deference, which is the optimal outcome. Future administrations who disagree with the proposed regulations may of course amend them, but will now need to give schools the benefit of a notice and comment period to allow them time to adapt their policies and to voice their opinion on any changes. Thus, even if the *substantive* executive guidelines for mandatory reporting change under Title IX, the *process* of implementing those guidelines will be more stable and slower to change, allowing coaches and universities time to get up to speed. There will also be a more consistent body of law for schools to rely upon when crafting sexual misconduct policies.

Courts interpreting the proposed DOE regulations should therefore feel at ease adopting Justice Scalia’s position and deferring to the executive’s interpretation of Title IX.

IV. CONCLUSION

Sexual violence on college campuses and in collegiate athletics is not a new phenomenon, but the #MeToo Movement helped reveal the extent of the problem and the existence of reporting failures prevalent under the current federal laws, particularly Title IX and the Clery Act. To remedy the problem and to strike the appropriate balance of confidentiality, safety, and due process, the optimal solution is to amend the interpretation of Title IX (in both executive regulations and judicial opinions) to closely parallel the substance of the Clery Act. Doing so would create a consistent standard of liability for universities, allowing

---

197 See *FCC v. Fox Television Stations*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting) (arguing that the “law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them . . . to rest them primarily upon unexplained policy preferences”).


199 See *Fox Television Stations*, 556 U.S. at 514–15.
them to understand and predict the types of sexual misconduct for which they may face liability. Title IX’s procedural structure would also permit recovery for wronged parties, regardless of whether the university’s noncompliance is large enough to trigger a DOE investigation or confined to a single lawsuit.

Accordingly, colleges will be able to write more precise reporting policies for their coaches. The universities will benefit from this by being better able to evaluate whether a coach is failing to comply with his or her duties (thus exposing the school to liability). Coaches, in turn, will benefit by understanding their specific responsibilities ex ante and not needing to guess what is expected of them. Most importantly, the substantive changes and the potential for judicial deference will lead to more consistent recovery across courts for survivors in private rights-of-action. With the potential for increased financial liability for noncompliance, schools will have the incentive to hold their coaches accountable and to craft policies that encourage them to comply with reporting obligations.