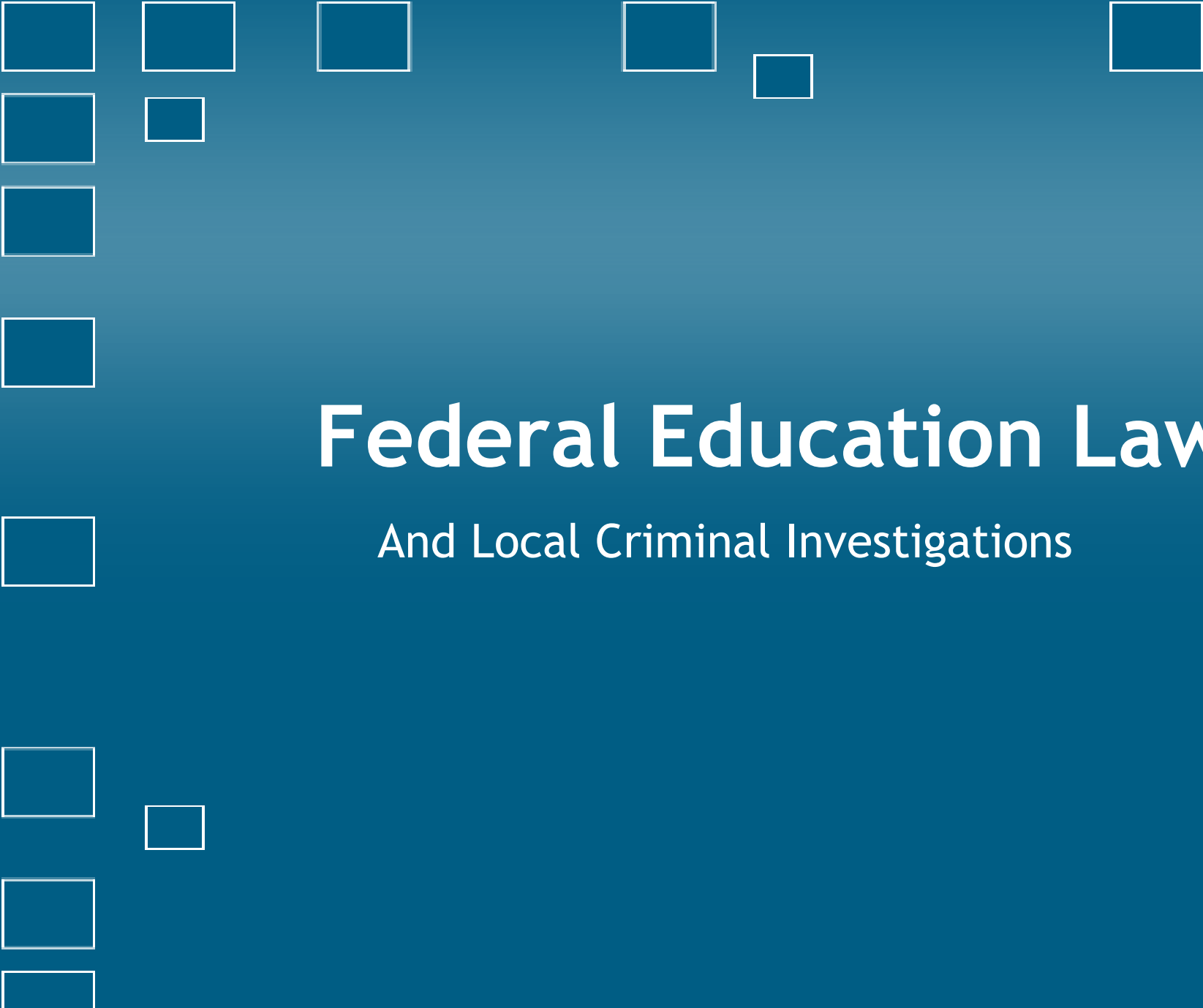




Federal Education Laws

And Local Criminal Investigations

THE JEANNE CLERY ACT

**WHY COLLEGES AND UNIVERSITIES REPORT CRIMES THE
WAY THEY DO.**

JEANNE CLERY

- Jeanne Clery, a second semester freshman at a Pennsylvania University was brutally raped and murdered just after Spring Break in 1986.
- Her murderer, another student living off campus, admitted to drinking that night and specifically going out to steal things.
- He entered Clery's dorm through doors he knew would be propped open with pizza boxes.
- He entered Clery's unlocked room, expecting no one to be there.
- When he saw Clery, he brutally raped then murdered her and stole several of her belongings.

JEANNE CLERY

- Clery's attacker, Josoph M. Henry, was convicted of her rape and murder and received the death sentence.
- Clery's Parents, as a result of this brutal attack on their daughter, founded the Security on Campus watchdog and lobbying foundation.
- In 1990, the Jeanne Clery Act was drafted and in 1992, Congress amended and passed the bill.

THE CLERY ACT

- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 USC §1092(f)) requires colleges and universities:
 - Publish an Annual Security Report (ASR)
 - To have a public crime log
 - Disclose crime statistics for incidents that **occur on campus**, in **unobstructed public areas immediately adjacent to or running through the campus** and at **certain non-campus facilities**

THE CLERY ACT

- Clery Geography
- The Clery Act requires the IHE report Clery Crimes that occur on properties owned and controlled by the IHE.
 - This could be a facility that is not on the campus, but a mile or more away.
 - This gets more confusing if the IHE leases or owns one floor of a multi-floor building off campus.
 - The Act also requires reporting of incident adjacent to campus if open to public access.

THE CLERY ACT

- Requirements continued
- The Act requires reporting of crime in seven major categories:
 - Criminal Homicide
 - Murder and Non-negligent manslaughter
 - Negligent manslaughter
 - Sex Offenses
 - Forcible
 - Non-Forcible
 - According to the Clery Handbook, the ability of the victim to give consent must be a professional determination by Law Enforcement.

THE CLERY ACT

- Clery uses the FBI UCR definitions for all crimes except for the Sex Offenses. Clery uses the NIBRS definitions for Sex Offenses:
 - Forcible Rape: the carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.
 - The **UCR** definition of Forcible Rape: The carnal knowledge of a female forcibly and against her will. Rapes by force and attempts or assaults to rape, regardless of the age of the victim, are included. Statutory offenses (no force used—victim under age of consent) are excluded.

THE CLERY ACT

- NIBRS Sex Offenses, definitions:
 - Forcible Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

THE CLERY ACT

- NIBRS Sex Offenses, definitions:
 - Sexual Assault with an object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

THE CLERY ACT

- NIBRS Sex Offenses, definitions:
 - Forcible Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

THE CLERY ACT

- Rape:
 - Penis to Vagina
- Forcible Sodomy:
 - Mouth to Penis, Mouth to Vagina, or Penis to Anus or Mouth to Anus
- Sexual Assault with an Object:
 - Object to Vagina, Object to Anus (requires insertion)
- Forcible Fondling:
 - Hand to Breast, Hand to Vagina, Hand to Buttocks, Hand to Penis (no insertion required)

THE CLERY ACT

- NIBRS Sex Offenses, definitions:
 - Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent.

THE CLERY ACT

- Crime Reporting:
 - Robbery
 - Aggravated Assault
 - Burglary
 - Motor Vehicle Theft
 - Arson
- Schools are also required to report statistics for the following categories of arrest or referral:
 - Liquor Law Violation
 - Drug Law Violations
 - Illegal Weapons Possession

THE CLERY ACT

- Crime Reporting Continued
- Hate crimes must be reported by category of prejudice, including race, gender, religion, sexual orientation, ethnicity, and disability.
- If the following four crimes are deemed to be hate crimes, they must also be reported:
 - Larceny/Theft
 - Simple Assault
 - Intimidation
 - Destruction/Damage/Vandalism of Property

THE CLERY ACT

- Colleges and Universities must:
- Issue Timely Warnings about Clery Act crimes which pose a serious or ongoing threat to students and employees.
- Devise an emergency response, notification and testing policy.
- Compile and report fire data to the federal government and publish an annual fire safety report.
- Enact policies and procedures to handle reports of missing students.

THE CLERY ACT NUMBERS: WHICH SCHOOL IS SAFER?

COLLEGE A

- Reports:
 - 0 Homicides
 - 4 Sex Offenses
 - 1 Robbery
 - 0 Agg. Assault
 - 17 Burglaries
 - 1 Motor Vehicle Theft
 - 2 Arson
 - 20 Liquor law arrests 60 referrals
 - 7 Drug Law arrests
 - 0 Illegal Weapons possessions

COLLEGE B

- Reports:
 - 0 Homicides
 - 24 Sex Offenses
 - 1 Robbery
 - 0 Agg. Assault
 - 23 Burglaries
 - 2 Motor Vehicle Thefts
 - 1 Arson
 - 100 Liquor law arrests, 76 referrals
 - 18 Drug law arrests
 - 0 Illegal Weapons Possessions

THE CLERY ACT NUMBERS

- Numbers are numbers. We all deal with numbers: Number of arrests, number of reports, number of prosecutions, number of convictions.
- We all know the truth behind the numbers.
- What I look at is the number of Sex Offenses
 - 1 in 4 women in college have been, are being or will be sexually assaulted
 - Nationally 2/3 of women do not report the assault
 - One study showed 5% of college women ever reported their assault.

THE CLERY ACT NUMBERS

- Each college and university is required to report these crime statistics annually.
- This Annual Security Report usually comes out in October for the previous year.
- Colleges and universities are also required to maintain a crime log.
- The crime log is a current, 60-day history of incidents on campus, and location.
 - The crime log is viewable by anyone at any time, for any request.

THE CLERY ACT NUMBERS

- Since the numbers are made available to anyone who requests them, it is important to understand how a University logs this information and how it is or can be disseminated.

THE CLERY ACT

- Clery and Investigation Intersects:
- Colleges and universities must issue Timely Warnings about Clery Act crimes which pose a serious or ongoing threat to the campus community.
 - There is a 3-pronged test for this part of the legislation:
 - Is the crime a Clery Act crime?
 - Did the crime occur on campus or campus controlled property?
 - Is there a serious or ongoing threat to the community?

THE CLERY ACT – TIMELY WARNINGS

- To issue a Timely Warning, an IHE should answer “yes” to all three questions.
- IHE’s, however, will err on the side of caution because of events like Virginia Tech (which set the bar for “timeliness” in the second shooting incident – 7 minutes).
- A Timely Warning describes:
 - Type of offense
 - Location of offense
 - Date of offense, or date reported
 - Crime prevention tips to protect the campus community

THE CLERY ACT – TIMELY WARNINGS

- There is an exception to putting out a Timely Warning:
 - If the Timely Warning would compromise investigative efforts or breach confidentiality of the victim, the IHE does not have to issue it.
- A school may opt to put out limited information, restricting information that could breach confidentiality or compromise the investigation.

THE CLERY ACT – IMMEDIATE NOTIFICATIONS

- The Act also defines situations in which immediate notifications must be made.
- These Immediate Notifications are usually concerning a natural or manmade event that:
 - Poses an immediate threat to the life or safety of the campus community.
- The IHE is required to update Immediate Notifications as information becomes available.

THE CLERY ACT

- All of this information is compiled and published annually.
- Additionally, IHE's must publish that this compiled information may be examined upon request.

THE CLERY ACT

- Investigation Intersects:
 - Clery Geography
 - Timely Warnings
 - Immediate Notifications
 - Daily Crime Log

THE CLERY ACT

- Questions?

Title IX

It's Not Just About Sports Any More!

Title IX

- Title IX is found in 20 USC §§1681-1688.
- It says (in part):
 - *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.*

Title IX

- Title IX was originally drafted in 1972, and has undergone several revisions and interpretations.
- Initially, schools either received Title IX complaints or were sued over Title IX compliance over athletic programs.
- This law, however, applies to all facets of campus life including education, activities and services.

Title IX

- Fast Forward to April 4, 2011:
 - The Department of Education publishes a “Dear Colleague” letter to all IHE’s.
 - This letter clearly defined Sexual Violence as a form of Sexual Harassment, which is a form of Harassment, which is a form of Discrimination
 - The letter provided guidelines for IHE’s to come into compliance with Title IX

Title IX – The Scramble to Compliance

- The Dear Colleague Letter and the happenings at Penn State were a coincidence in time.
- The Dear Colleague Letter drove complying with the law, while the Penn State scandal provided plenty of examples.
- IHE's are required to Respond To **ALL** known reports of sexual harassment, in whatever form that it takes.

Title IX – Compliance

- OCR took a hard line on student-on-student rape, stating,
 - “. . . *A single instance of rape is sufficiently severe to create a hostile environment*”
- OCR further stated,
 - “If a school **knows or reasonably should know** about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to ELIMINATE the harassment, PREVENT its recurrence, and ADDRESS its effects.”

Title IX - Compliance

- OCR expanded the boundaries of a school's authority concerning sexual harassment.
 - If an incident occurs off-campus, but the severity of the incident can impact the victim on-campus, and the school knows or should reasonably know about the incident, the school should process the incident using established administrative procedures.

Title IX - Compliance

- OCR said that schools can get reports from the victim, or the victim's parents, or a third party, and the school has a duty to respond.
- OCR did differentiate between Title IX investigations and Criminal Investigations.
 - *“A investigation by Law Enforcement does not relieve a school of its independent Title IX OBLIGATION to investigate the conduct.”*

Title IX - Compliance

- OCR did say that schools SHOULD obtain consent from the complainant before starting the investigation.
- Further, the school should take all reasonable steps to protect confidentiality of the victim, but inform the victim that its ability to respond [to a request of confidentiality] may be limited.
 - The school should tell the complainant that Title IX prohibits retaliation, and will take steps to prevent it and take strong responsive action if it occurs.

Title IX - Compliance

- Compliance with Title IX includes but is not limited to:
 - Publishing a notice of nondiscrimination
 - **Designating an employee to coordinate Title IX compliance**
 - Adopting and publishing grievance procedures

Title IX Coordinator

- All schools (receiving federal funding) will have a person designated to coordinate all Title IX complaints.
- The Title IX Coordinator should instruct campus law enforcement in Title IX grievance procedures and any other procedures for investigations complaints of sexual violence.
- The Title IX Coordinator should be given access to school law enforcement investigation notes and findings as necessary for the Title IX investigations, as long as it does not compromise the criminal investigation.

Title IX and Criminal Law

- *“Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are NOT determinative of whether sexual harassment or violence violates Title IX.”*
- Conduct may constitute unlawful sexual harassment under Title IX, but not be a criminal violation.
- A criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve the complaints promptly and equitably.

Title IX and Criminal Law

- Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation.
- Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably.

Title IX and Criminal Law

- A school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are GATHERING EVIDENCE.
- Once notified the police department has completed its GATHERING OF EVIDENCE (not the ultimate outcome of the investigation or filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.

Title IX and Criminal Law

- Nothing in an MOU or criminal investigation should prevent a school from notifying complainants of their Title IX rights, and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress.

Title IX – Prompt and Equitable

- OCR says that Title IX investigations should be prompt and equitable.
 - **Prompt** – investigations should not normally take more than 60 days (that is 60 total days)
 - Law Enforcement can, if they have an investigation, ask the Title IX Coordinator to hold investigation for up to 10 days. (These timeframes are guidelines)
 - **Equitable** – both the complainant and the accused have a right to the complaint, response and information concerning the administrative process.

Title IX – Grievance Hearing

- Boards that hear Title IX grievances may only use a “*preponderance of the evidence*” standard when deciding cases. Schools may not use a higher evidentiary standard in administrative hearings.

Title IX - Equity

- OCR has stated that what the school allows for the complainant, it must allow for the accused, and vice versa.
 - If the accused has an attorney to represent his/her interests in an administrative hearing, the complainant is also entitled to an attorney. If there is no attorney for the complainant, the accused may not have his or her attorney in the hearing.

Title IX for Criminal Justice Practitioners

- If you provide law enforcement for a school that receives federal funding, and a person reports sexual harassment to you, you must:
 - Inform the complainant of their right to file a Title IX complaint with the school.
 - You may, depending on MOU or other agreement, also notify the Title IX Coordinator for the school, this, however, does not take place of the complainant making their own complaint to the school.

Title IX for Criminal Justice Practitioners

- You may be notified by a school's Title IX Coordinator of an offense on behalf of a victim.
- IHE's are required to carry, as a Clery Statistic, any reports of sexual violence.
- Title IX Coordinators should have access to any investigatory notes that do not compromise an investigation, but do not have to share their notes with Law Enforcement.
 - FERPA protects Title IX investigations from anyone but the complainant.

Title IX for Criminal Justice Practitioners

- Title IX is separate and apart from Clery, though there is an intersect.
 - The Clery Handbook clearly states that the ability of the victim to give consent must be a professional determination by a law enforcement agency.
- This does not stop a school from discharging its Title IX responsibilities, though.

Title IX for Criminal Justice Practitioners

- A Title IX investigation may be long over while criminal investigators are still in a fact-finding phase.
- Title IX investigations may be suspended or withheld for a reasonable period of time, but the current guidelines suggest 10 days.
- Additionally, you may get the report AFTER the Title IX investigation has concluded, and administrative hearing completed.

Title IX for Criminal Justice Practitioners

- You may subpoena Title IX records, just be cautious with this.
- These records fall under the Federal Education Records Protection Act (FERPA), and students have certain rights under FERPA, even when a subpoena for records has been issued.

Title IX

- Questions?

Family Education Records Privacy Act

Overcoming the mountain of FERPA



•FERPA

- The Family Education Records Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

•What are Records?

- Education records are any records maintained by school officials a university or college, or an agent of the university or college which are directly related to a student and contain information from which an individual student can be personally identified.
- Examples include, but are not limited to:
 - Handwritten notes
 - Printed materials
 - Electronic materials
 - Tapes
 - Film
 - Other formats

•What are Records?

• Education Records are not:

- Personal notes not shared with anyone else (such as notes to jog one's memory), which could be used to refer back to about a student.
- Employment records (unless contingent on attendance).
- Law enforcement records created and maintained by law enforcement units for law enforcement purposes.
- Medical records made and maintained in the course of treatment and disclosed only to those individuals providing treatment.
- Post-attendance records.

• **Directory and Non-Directory Information**

- Directory Information: considered not to be confidential and may be released without a student's consent.
- Non-directory information: personally identifiable information that is protected and may not be released without a student's written consent.

•Directory Information

- Name
- Addresses: permanent, campus, local (off-campus), email, campus computer network (IP) address, and network ID (UR Specific).
- Associated telephone numbers
- Date and place of birth
- School or college
- Major and/or minor fields of study
- Degree sought
- Expected date of completion of degree requirements and graduation

•Directory Information

- Degrees conferred
- Awards and Honors (e.g. Dean's list)
- Full or part time enrollment status
- Dates of attendance
- Previous institutions attended
- Participation in officially recognized activities and sports
- Weights and heights of athletic team members
- Photograph

• **Non-directory Information**

- Registration forms
- Transcripts
- Student information displayed on a computer screen
- Grades
- Student schedules
- Class rosters
- Any paper with the student's SSN or Student ID

• **Non-directory Information**

- Religious affiliation
- Race
- Gender
- Country of citizenship

• **How is a Student Defined Under FERPA?**

- A student is defined as any person who attends or has attended a college or university.
- Attendance begins on the first day of classes.

•What is Attendance?

- Attendance is defined as a student who attends an educational institution:
 - In person
 - By correspondence
 - Video conference
 - Satellite
 - Internet (online courses)
 - Other electronic information and telecommunications technologies

•FERPA

- FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

•FERPA

- Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.

•FERPA

- Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.

•FERPA

- Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):

•FERPA

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- **Appropriate officials in cases of health and safety emergencies;** and
- State and local authorities, within a juvenile justice system, pursuant to specific State law.

• FERPA Subpoenas

- When a subpoena is issued for FERPA records, unless the subpoena is sealed, the school must:
 - Notify the student whose record has been subpoenaed; and
 - Allow the student 10 days to respond to the notice to either challenge the subpoena or review and “correct” any thing contained in the record.

•FERPA and Title IX

- Title IX records are considered FERPA records, and therefore can be subpoenaed.
- Title IX allows the release of the Title IX complaint and administrative hearing outcome to the complainant and respondent. This is specific to Title IX and not allowed for any other FERPA record.
 - The victim can, if they so chose, provide you a copy of their record. You should not, however, request it from them.

- **FERPA and Student Health Records**

- Currently, there is debate about Student Health Records and HIPPA versus FERPA.

- The DOE has stated:

- If the Student Health Center does not electronically bill the student's or student's parent's private health insurance, any records maintained by Student Health are protected by FERPA and not HIPPA.

- **FERPA and Student Health Records**

- Additionally, DOE has stated that the Director of Student Health, by definition of the position, has the duty to report any Clery crime made known to them (through report or record) and the Director may also have the duty to report Title IX complaints.

- FERPA

- Questions?

Questions or Comments?

“Everything you say, everything you do is a chance to help me or hurt me. Make the choice to help. Please help me.”

- ▶ 24 year-old Bi-racial sexual assault Survivor

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