
Establishing a campus confidential advisor program for acts of sexual violence

The purpose of the confidential advisor is to ensure students will seek the help they need. A campus confidential advisor program should include counselors who may be members of the campus staff or made available through community resources. Advisors may be licensed professionals, but are not required to be. Before establishing a confidential advisor program campus administrators should consult with legal counsel on what state and federal regulations, guidelines and procedures require with respect to reporting incidents of sexual assault to either police or campus authorities.

UNDERSTANDING THE OHIO REVISED CODE AND CONFIDENTIAL ADVISORS:

One statute in Ohio law that may affect a confidential advisor program is Section 2921.22 of the Ohio Revised Code. Specifically, the law states that no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities. However, the statute also provides specific exemptions to this requirement when certain conditions exist.

One of these exceptions applies when confidential information is shared in a privileged communication/environment. Under this exception, a person is not required to report knowledge of a crime when this knowledge is based on information that is privileged by reason of the relationship between the victim/survivor and any of the following types of individuals: licensed psychologist, a licensed professional clinical counselor, licensed professional counselor, independent social worker, or social worker; or a member of the clergy, rabbi, minister, or priest. The key to this exemption is that the information that would otherwise need to be reported is made confidential by Ohio's laws regarding privilege.

The other type of exemption relevant to the reporting requirements of confidential advisors protects information shared as part of a bona fide program for providing counseling services. To meet this exemption, the program should provide these counseling services in an informal setting by a person who, by education or experience, is competent to provide those services to victims of rape or gross sexual imposition and other sexual assault related crimes.

The complete statute, including the exemptions discussed above, can be found at codes.ohio.gov/orc/2921.22.¹

UNDERSTANDING FEDERAL GUIDANCE AND/OR REGULATIONS AND CONFIDENTIAL ADVISORS:

Federal regulations and guidance detail how and under what limiting circumstances a confidential advisor program can be operated in a campus setting and what information may be withheld and what must be reported.

The *Clery Act* (20 U.S.C. §1092(f)) requires all institutions to collect crime reports from a variety of individuals and organizations that Clery considers to be "campus security authorities" as identified by the institution. However, the Clery Act² provides two exemptions to the mandatory reporting requirements of a campus security authority.

Pastoral counselor: *A person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor.*

Professional counselor: *A person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution.*

1 The exemptions apply to students eighteen and older as there are much broader reporting requirements for minors under ORC 2151.421.

2 34 CFR 668.46(a)

To be exempt from disclosing or reporting a crime as otherwise required by Clery, the person with knowledge of that crime must have been acting in the capacity of a pastoral or professional counselor.

Some individuals who provide assistance to students who experience sexual violence are not professional or pastoral counselors. This type of assistance is often provided by campus counselors or individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers fall into this category. While these individuals are required to report incidents of sexual violence, the Clery Act does not require such reporting **in a way that identifies the student** without the student's consent. Therefore, these non-professional counselors or advocates are valuable sources of support for students, and may be designated as confidential advisors who can still meet reporting obligations without identifying survivors.³

Additional reporting requirements are imposed by Title IX, and are designed to ensure colleges and universities provide a safe and non-discriminatory environment that does not interfere with a victim's right to pursue an education.⁴ Like *Clery*, professional and pastoral counselors are exempt from Title IX reporting obligations. Unlike *Clery*, Title IX requires employees identified as a "responsible employee" who do not otherwise meet the professional or pastoral exemption to report incidents of sexual assault or violence to the Title IX Coordinator or designee when that "responsible employee" has become aware of such an incident. And, critical to any confidential advisor program, these "responsible employees" cannot withhold information that identifies the victim or alleged assailant when a report is made. Given these unique reporting requirements for "responsible employees" under Title IX, colleges and universities should be cautious in presenting such individuals as confidential advisors and be sure to explain the degree to which confidentiality can be protected depends on whether an employee or other individual to whom the person reported the act can engage in privileged communications.

Anyone working in a counseling setting must be instructed on what and how to inform students of their rights to file a complaint and about campus resources for counseling, medical and academic support. Again, it is important to consult with legal counsel before establishing a confidential advisor program.

For additional and more specific information concerning these federal regulations, please refer to:

<http://www2.ed.gov/admins/lead/safety/handbook.pdf> and

<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

INTERSECTION OF STATE AND FEDERAL LAW:

All confidential advisors that have an established relationship as described under Ohio Revised Code Section 2921.22(G) are exempt from state laws requiring reporting to law enforcement authorities. However, a determination needs to be made if the communication is privileged and thus also exempt from Clery and Title IX reporting requirements. If the information is not exempt under Clery and Title IX reporting, Clery and Title IX do not require reporting in a manner that discloses personally identifiable information.

³ See 34 CFR 668.46(c)(5)

⁴ See Title IX of the Education Amendments of 1972, and its implementing regulation at 34 CFR Part 106.