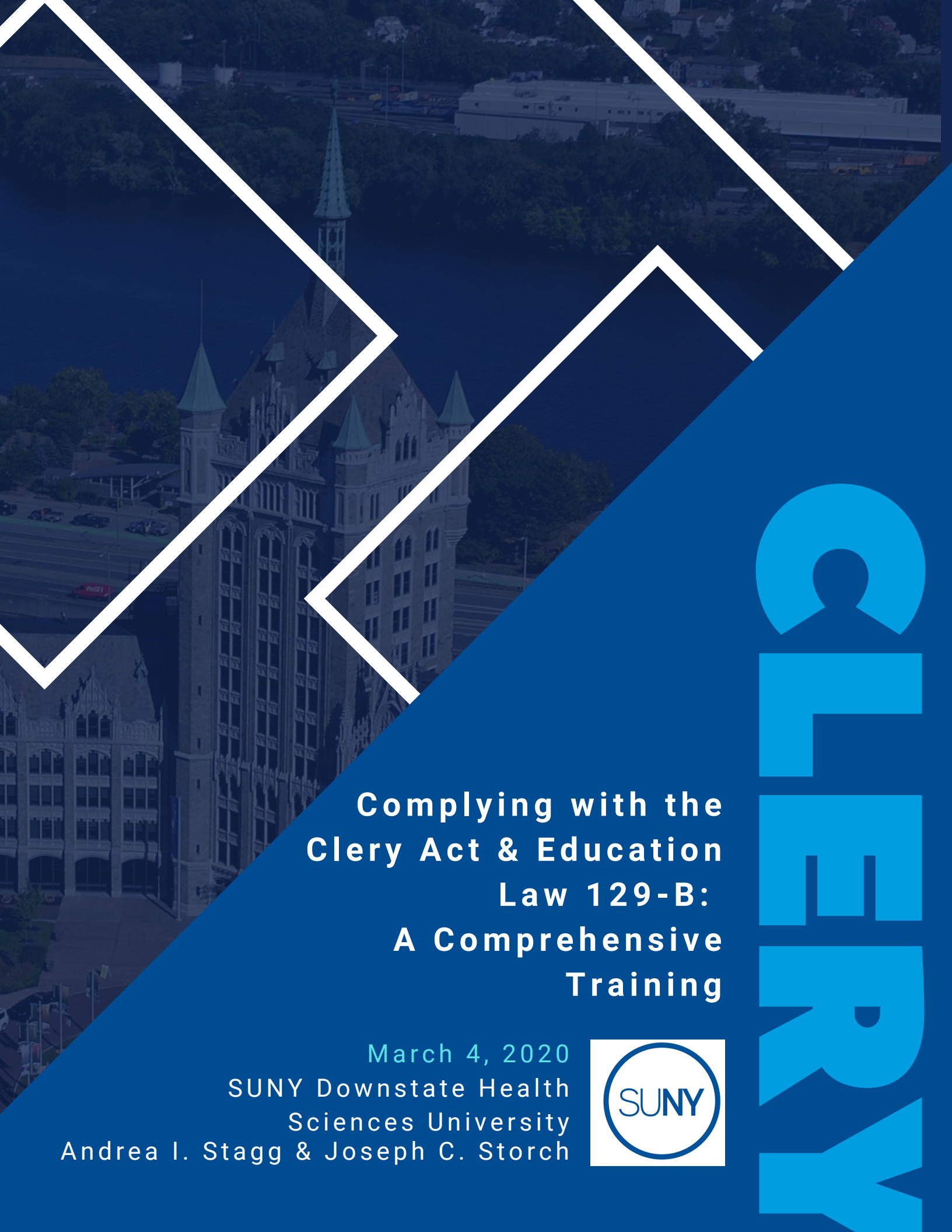




Complying with the Clery Act & Education Law 129-B: A Comprehensive Training

March 4, 2020
SUNY Downstate Health
Sciences University
Andrea I. Stagg & Joseph C. Storch



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Andrea Stagg is Deputy General Counsel at Barnard College. She has advised federal and state legislators on best practices in campus safety and sexual harassment prevention, and serves on a campus working group with prevention and response partners throughout New York state. Before joining Barnard Andrea advised three colleges within the State University of New York on all legal matters and provided SUNY-wide Title IX compliance advice. Andrea co-coordinated a working group that created SUNY's sexual and interpersonal violence prevention and response policies, which formed the basis for New York Education Law Article 129B. In 2019, Andrea received the First Decade Award from the National Association of College and University Attorneys, and in 2014 she was awarded the Commission's Award from the State University Police. She graduated Phi Beta Kappa with high honors from Rutgers University, and received her law degree from The George Washington University, where she was an intern in the counsel's office.



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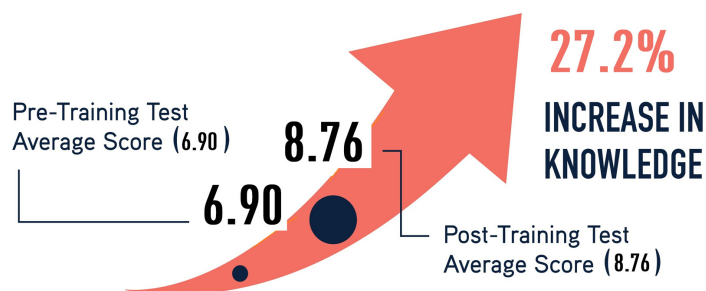
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Quickly and Clearly Clery: Introduction to the Campus Crime Reporting Law

June 22, 2019 Microsession

Andrea Stagg

Deputy General Counsel, Barnard College

The materials below provide an introduction the Clery Act for lawyers new to higher education, including the following:

- I. Background and Brief Summary of the Clery Act
- II. Common Clery Terms Cheat Sheet
- III. A Venn Diagram on Clery, Title IX, and VAWA
- IV. Clery Act Obligations Outline

The NACUA Resource Library includes links to the law, regulations, guidance, enforcement documents, past conference materials, case law, and more. To navigate to the Clery Act resource page, head to the NACUA web site, Resource Library, By Topic, then select Campus Police, Safety, & Crisis Management. <https://www.nacua.org/resource-library/resources-by-topic/campus-police-safety-crisis-management/clery-act>

I. Background and Brief Summary of the Clery Act

The Clery Act is a consumer protection law that requires colleges and universities that accept federal funds to report and disclose crime statistics. In one sentence, it requires colleges and universities to disclose, via an annual report, certain crimes that occur in certain places if they are reported to certain people.

The Act was named for Jeanne Clery, a student who was sexually assaulted and murdered in her residence hall at Lehigh University in the spring of her first year. Her parents learned afterward that there had been a number of a violent crimes on campus before Jeanne's murder, and their advocacy for greater transparency about campus crime led to the passage of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

The Clery Act only applies to colleges and universities that receive federal funds. The law was initially designed as a consumer protection act to "... assist students in making decisions which affect their personal safety..." and "... to make sure institutions of higher education provide students, prospective students, and faculty the information they need to avoid becoming the victims of campus crime" (Congressional Record 1990).

At its core, the Clery Act requires institutions of higher education to disclose the statistics regarding certain crimes that are reported to certain people and said to have occurred in certain geographic locations. The Higher Education Act of 1998 and subsequent amendment of the implementing regulations (34 C.F.R. § 668.46) significantly expanded institutional obligations under the Act. In the wake of tragic campus shootings, the Higher Education Opportunity Act (HEOA) imposed new obligations including requirements for a Missing Student Policy and Emergency Response and Evacuation Procedures. Implementing regulations were published on October 29, 2009.

In 2013, the reauthorization of the Violence Against Women Act amended the Clery Act, and its final regulations in 2014 made further clarifications. These changes added prevention and response obligations for institutions related to the following sexual and interpersonal violence crimes: stalking, sexual assault, domestic violence, or dating violence. These required actions constituted a change from what was formerly a mostly straightforward focus on Clery geography and reporting that looked backwards.

In June 2016, the U.S. Department of Education, Office of Post-Secondary Education published the third version of *The Handbook for Campus Safety and Security Reporting* (The Handbook). The Handbook is a guide to complying with the Act that is available for free online at <http://www.ed.gov/admins/lead/safety/campus.html>. The Handbook provides insight into meeting the reporting requirements and provides sample notices and policies. Please also feel free to consult a White Paper published by the University Risk Management & Insurance Association on the changes at <http://bit.ly/2pbGB32>.

The Clery Act is enforced by the Office of Federal Student Aid, or FSA. FSA's Clery Group reviews Annual Security Reports submitted by recipients in compliance with the Clery Act, and also conducts compliance reviews or audits. After a program review, the Department will make a decision on whether or not to issue a fine. In June 2017, the Department more than doubled the fines assessed by FSA for Clery Act violations to maintain their deterrent value. The highest fine in 2017 was over \$150,000. In 2018 the Department fined the University of Montana almost \$1 million, but in January the University announced that after an appeal the fine was less than half of the original amount.

In addition to the statute, regulations, and the Handbook, college and university staff responsible for Clery compliance can look to other subregulatory guidance, such as questions and answers published on the Department's website, for further information. Reports and determination letters from program reviews are also instructive.

II. Common Clery Terms and Abbreviations

ASR: Annual Security Report, sometimes referred to as ASFSR, Annual Security and Fire Safety Reports. These are the annual filings required by the Clery Act, to be filed with the Department of Education on or before October 1 of each year.

Clery Crime: A Clery crime is one of the designated crimes that we count and disclose under the Clery Act. Not every crime is a Clery crime; for example, larceny is not a Clery Crime, but burglary is a Clery Crime. Some non-Clery crimes are counted and disclosed if they are Hate Crimes, which is a separate reporting category.

Clery Geography: Generally, Clery Crimes are only counted if they take place in Clery Geography. Clery Geography includes the following categories: On Campus, On Campus Residence Hall (a subset of On Campus), Noncampus, and Public Property.

Clery Handbook: The Handbook for Campus Safety and Security Reporting reflects the Department of Education's interpretations and guidance, and is published to assist institutions in complying with the Clery Act. The latest version is over 200 pages and was published in 2016.

Crime Log: A daily log of alleged criminal incidents (not just Clery Crimes) that is open to public inspection.

CSA: Campus Security Authority. A college employee who has responsibility for campus security, is designated as someone to whom crimes should be reported, and/or has significant responsibility for students or student activities.

FSA: The Office of Federal Student Aid of the U.S. Department of Education, which enforces the Clery Act, among other laws and regulations.

Emergency Notification: This emergency alert notifies the campus community or the affected segment of the community about confirmed threats to health and safety that may or may not be Clery Act reportable crimes, such as a gas leak, tornado, meningitis outbreak, or armed intruder.

Noncampus: This is a particular category of property under the Clery Act, and crimes are reported in a noncampus column if that is where they occur. Generally, noncampus property is owned or controlled by the institution, even if it's off-campus (Handbook 2-18).

On Campus: Property owned or controlled by a college or university within the reasonably contiguous geographic area of the institution, used in direct support of or related to the educational purposes. Also, property owned by the institution but controlled by another person but is used by students in support of the institution's educational purposes.

Public Property: Public property that’s within the same reasonably contiguous geographic area of the campus. For example, the public sidewalk, street, and opposite sidewalk from your campus property are all Public Property for Clery reporting purposes.

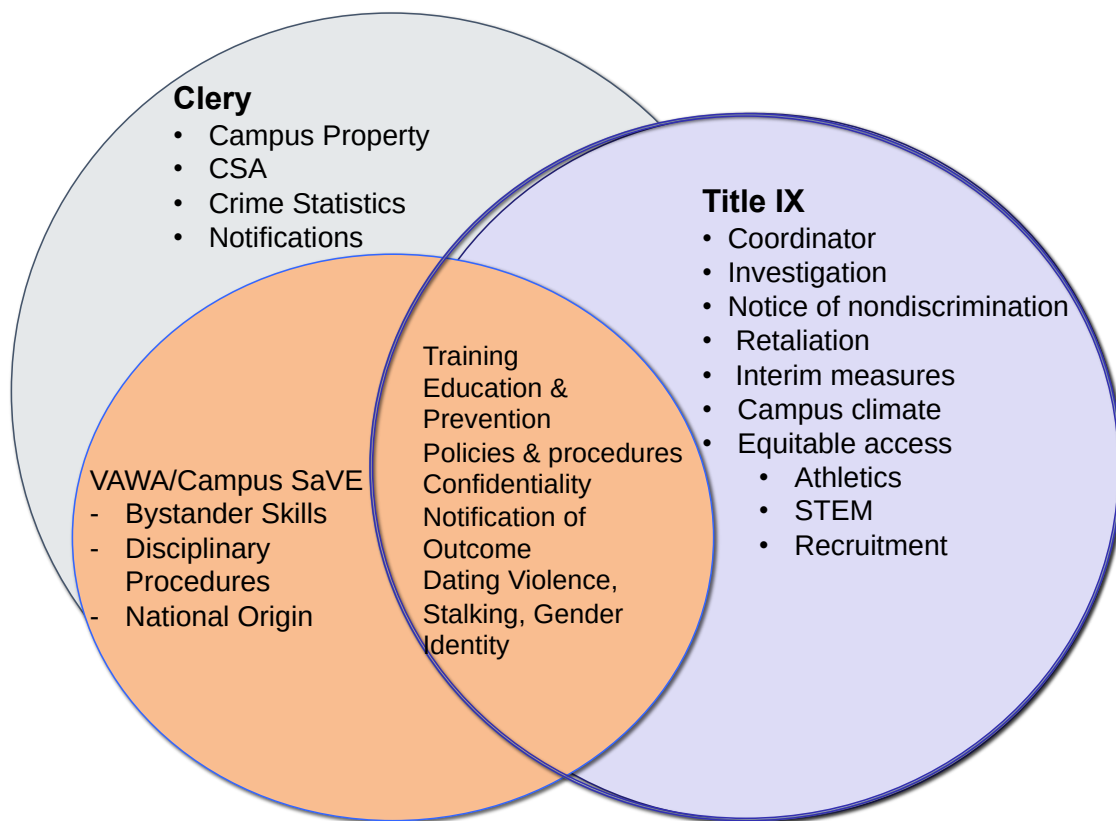
Short Stay Away Trip: A school-sponsored overnight student trip that is longer than one night. The locations used must be assessed to see whether they meet the definition of Noncampus Property.

Timely Warning: This prompt alert to the community follows a Clery crime that may pose a serious or continuing threat to the campus community.

VAWA: The Violence Against Women Act. The VAWA amendments to Clery (2013) and the accompanying regulations (2014) added new requirements for prevention and response related to the following crimes: stalking, sexual assault, dating violence, and domestic violence, sometimes referred to under the umbrella term “sexual and interpersonal violence.” VAWA also amended Clery to add stalking, domestic violence, and dating violence to the list of Clery-reportable crimes.

III. A Venn Diagram on Clery, Title IX, and VAWA

This diagram can help clarify where incidents or crimes may overlap among different compliance obligations in higher education.



IV. Outline of Obligations Under the Clery Act

- a. **All institutions** that receive federal financial aid are required to report annually both safety information and campus crime statistics (34 C.F.R. § 668.47 et seq.).
- b. **Who** is required to supply information for the annual security report (34 C.F.R. § 668.46(a))?
 - i. Campus Security Authorities (See The Handbook 4-1 – 4-5; 108-112).
 1. Campus police or campus security.
 2. Any individual who has responsibility for campus security (but not police or campus security) such as an individual who is responsible for monitoring entrances into institutional property (e.g., parking lot security and student escorts), or act as event security at sporting events or large, registered parties.
 3. Any individual designated in your institutional campus security policy as an individual or organization to which crimes should be reported. Also, similarly, anyone your institution directs students or employees to report crimes to, which could include include physicians in a campus health center; counselors; health educators; peer educators; ombudspersons; victim advocates (The Handbook 4-4; 111).
 4. An official of an institution who has significant responsibility for student and campus activities including housing, student discipline, and campus judicial proceedings. An official is defined as any person who has authority to take action or respond to particular issues on behalf of the institution.
 5. Institution determines who is a campus security authority (CSA) based on function – if a person has significant responsibility for student and campus activities, he or she should be designated as a campus security authority. Examples of persons who meet the definition of a CSA include:
 - Dean of students who oversees student housing, a student center, or student extra curriculum activities.
 - Director of athletics or a team coach, including part-time coaches and graduate assistants.
 - Faculty advisors to student organizations and coordinator of Greek Affairs.
 - Title IX Coordinator
 - Ombudsperson (including student ombudspersons)
 - Director of campus health or counseling center

- Victim advocates or others who are responsible for providing victims with advocacy services
 - Members of a sexual assault response team
 - Office from law enforcement who are contracted by the institution to provide campus safety-related services
 - The Handbook indicates that student resident advisors and students who monitor access to residence halls or buildings that are owned by recognized student organizations meet the definition of a CSA.
6. No formal police report or investigation is required for a crime report to be included in the statistics.
 7. **Specific Exclusion for Pastoral and Professional Counselors**– The following people are not CSAs under the act: Professional counselors, persons whose official responsibilities include providing mental health counseling, and who are functioning within the scope of their license or certification. Also, pastoral counselors who are associated with a religious order or denomination as someone who provides confidential counseling and is functioning within the scope of that recognition as a pastoral counselor.
 8. **Recommendations** – The Handbook recommends that you include the CSA duty in job descriptions, provide annual notice and provide training.
 9. **Confidentiality** – In most cases it is possible for a CSA to fulfill his or her responsibilities while maintaining victim confidentiality – this is about statistics and evaluating the need for timely warning or emergency notification. (The Handbook 4-8; 115)
- ii. Other ways institutions must collect information and sources
 1. Local police agencies (city, township, and sheriff) for non-campus buildings or property and public property; also for school-sponsored overnight student trips of 2+ nights.
 2. State Police or State Highway Patrol for non-campus buildings or property and public property.

Note: Institutions must make a reasonable and good faith effort to obtain the required statistics from police agencies. If the institution makes the effort, it is not responsible for either the failure of the police to provide the statistics or for verifying the accuracy of the statistics provided. The institution should document its good faith efforts in writing.

3. Victim or witness confidential reports (34 C.F.R. § 668.46(b)(2)(iii) (optional)
 - a. Confidential not anonymous – If institution is public, must check state public records law to determine whether confidentiality can be promised.
 - b. Some states require reporting of felonies to police (see e.g., Ohio Revised Code § 2921.22).
- c. **What** must be reported? In short, certain crimes that occur in certain places that are reported to certain people.
 - i. Reportable General Crimes/Hate Crimes/Arrests/Campus Disciplinary Actions.
 1. Primary Crimes (34 C.F.R. § 668.46(c)(1)(i))
 - a. Aggravated Assault;
 - b. Arson;
 - c. Burglary;
 - d. Manslaughter (Negligent);
 - e. Murder and Non-Negligent Manslaughter;
 - f. Motor Vehicle Theft;
 - g. Robbery;
 - h. Sex Offenses – Rape, Fondling, Incest, and Statutory Rape
 2. Hate Crimes (34 C.F.R. § 668.46(c)(1)(iii) and § 668.46(c)(4))
 - a. Hate Crimes must be reported by category of prejudice (intentional selection of victim based on actual or perceived) – Race, Religion, National Origin, Sexual Orientation, Gender, Gender Identity, Ethnicity or Disability. Hate Crimes are defined in the Hate Crime Data Collection Guidelines of the UCR.
 - b. Primary Crimes above plus Larceny-Theft, Simple Assault, Intimidation, Destruction Damage or Vandalism of Property, Dating Violence, Domestic Violence, and Stalking. (Report only if Hate Crime)
 3. VAWA Crimes must be counted § 668.46(c)(9)(iv)
 - a. Definitions as per VAWA regulations, UCR definitions
 - i. Dating Violence includes threats of violence, while Domestic Violence must be a felony or misdemeanor
 - ii. Domestic Violence can be among family members (i.e., father/son), not only intimate partners
 - iii. Stalking is two or more acts that cause a reasonable person to experience significant mental suffering
 - iv. Amended definition of sexual assault makes it an umbrella term for rape and fondling.
 - v. How to count stalking, which is repetitive by nature, usually – § 668.46(c)(6)
 - b. Multiple Offenses and the Hierarchy Rule – Typically, but with exceptions, only the most serious offense must be reported. Exceptions include arson, sexual assault, and hate crimes. Note: The Handbook includes arrests for liquor, drug, or weapons in the hierarchy rule. (See The Handbook 3-2, 53; 3-24, 75; 3-32, 83).

- c. Reporting Year – Report crime statistics based on the year the crime was reported.
 - d. Burglaries – for additional information on reporting burglaries see the *Summary of New and Revised Campus Safety and Security Reporting Requirements Required by the Higher Education Opportunity Act* (Public Law 110-315) – July 2010 (Exhibit A).
- 4. Liquor Law, Drug Law, and Illegal Weapons Arrests (34 C.F.R. 668.46(c)(1)(vii)) – report arrests only
- 5. Campus Disciplinary Referrals (34 C.F.R. § 668.46(c)(1)(vii)(B)) –
 - a. **Not** arrested, but reported for student discipline for liquor law violations, drug law violations, and illegal weapons possession.
 - b. Violations of campus policy that are not violations of law should not be counted.
 - c. Count the number of incidents or charges.
- ii. Geographic Reporting Requirements.
 - 1. Required: On Campus:

Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and

Any building or property that is within or reasonably contiguous to the area identified in paragraph (1) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor). (Handbook 2-2; 25)

- 2. Required: Non-Campus
 - 3. Required: Public Property: All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus or immediately adjacent to and accessible from the campus. For roads, thoroughfares and streets that are immediately adjacent to your campus include crimes that occur on “sidewalk, street and opposite sidewalk.” This means if you have a college across the street, your reports will count overlapping sidewalks.
 - 4. Use of Map in the Campus Security Report (34 C.F.R. § 668.46(c)(8)) – this is not required, although some institutions elect to use a map to help identify the geographic reporting areas. A map may be used only if it presents an accurate picture of the geographic locations it depicts.
 - 5. Foreign campuses should be reported as a separate campus.
- iii. Campus Security Policies
 - 1. Annual reports must include a statement of current campus policies regarding procedures for students and others to report criminal activities or other emergencies occurring on campus including:
 - a. Policies for Making Timely Warning Reports.

- Timely Warning Policies – Institutions must, in a manner that is timely, that withholds the names of victims as confidential, and will aid in the prevention of similar crimes, report to the campus community on reportable crimes, including hate crimes that are reported to campus security authorities, or local police agencies that are considered by the institution to represent a serious or continuous threat to students and employees. Include circumstance(s) under which a warning will be issued, person or office responsible for issuing the warning, and manner in which it will be disseminated.
- Timely warnings can be issued for threats to property, as well as for threats to persons. It is irrelevant whether the victims or perpetrators are members of the campus community. The Clery Act mandates timely warnings only for Clery Act crimes, but nothing in the Clery Act prohibits timely warnings for other crimes that may pose a serious or continuing threat to the campus community (e.g., kidnapping). (The Handbook – pages 6-13; 146). Schools are not required to provide timely warning with respect to crimes reported to pastoral or professional counselor (34 C.F.R. § 668.46(b)(2)).
- Victim or witness confidential reports (34 C.F.R. § 668.46(b)(2)(iii)). (Optional) - consider whether the institution has any policies or procedures that allow victims or witnesses to make confidential reports for inclusion in annual report.
- Describe the procedures, if any that encourage pastoral and professional counselors, if and when they deem it appropriate, to inform persons they are counseling of any procedures to report crimes on a confidential basis.
- b. Emergency Response and Evacuation Procedures.
 - The regulations are intended to ensure that your institution has sufficiently prepared for an emergency and that you have considered how you will inform the campus community and other persons, such as parents and guardians.
 - i. Four Obligations:
 - Have An Emergency Plan;
 - Test It;
 - Evaluate It; and
 - Publicize It.
 - ii. What is an Emergency? Tornado or Other Extreme Weather; Earthquake; Outbreak of Meningitis; Terrorist Incident; Armed Intruder; Bomb Threat; Civil Unrest or Rioting; and/or Explosion.
 - iii. The Procedures must contain:
 - 1. Procedures to immediately notify campus community including the modes of communication (public address, text messaging, e-mail messaging, electronic sign boards, VOIP system). Information on how to sign up.

2. Procedures institution will follow in an emergency – describe them in a manner that lets the community know what you will do and who or what organization will be responsible for each step along the way. Include information on how to report an emergency (911).
- iv. Describe how your institution will:
 1. Confirm there is a significant emergency or dangerous situation;
 2. Determine the appropriate segment(s) of the campus community to receive the notification;
 3. Determine the content of the notification; and
 4. Initiate the notification system.
 - v. List the persons or organizations responsible for carrying out these actions – If different person/organization will be responsible depending on type of emergency make it clear. Avoid conflicts (emergency notification and containing emergency).
 - vi. Required Statement: A statement asserting the institution will without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system unless issuing the notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to or otherwise mitigate the emergency.
 - vii. Describe how your institution provides emergency information to persons *outside* the campus community. For example, cell phone alerts to parents, radio and/or TV.
- If procedures differ depending on the situation, you must explain.
 - Include information on whom or what office is responsible for developing and disseminating information.
 - Procedures for scheduled testing (may be announced or unannounced) of the Emergency Response and Evacuation Procedures on at least an annual basis including:
 - **Drills** – tests a single procedural operation (text alert system or evacuation or lockdown of a building) **AND**
 - **Exercises** – involves a test of coordination of efforts (police, fire, EMT).
 - **Follow-through Activities** – activity designed to review the test (survey of participants).
 - **Design of Test** – Test must be designed for assessment of emergency plans and capabilities – should have measurable goals.
 - **Evaluation** – Be designed for evaluation of emergency plans and capabilities – design the test to determine whether the test met its goals.
 - **Publicizing the emergency response and evacuation procedures** – at least one (1) test per calendar year in conjunction with a test; and
 - **Document each test:**
 - Description of the test
 - Date test was held

- Time started and ended;
 - Whether test was announced or unannounced; and
 - Maintain documentation for 7 years.
- c. Emergency Notification v. Timely Warning.
- If there is an immediate threat to the health or safety of students or employees occurring on campus, the institution must follow its Emergency Notification Procedures. No timely warning based on the same circumstances is required. However, follow-up information “as needed” must be disseminated to the community.
2. Policies for preparing the annual disclosure of crime statistics: Include a brief description explaining the purpose of the report, who prepares it, and how and from what sources the crime statistics are collected.
 3. A list of the titles of each person or organization to which employees should report criminal offenses for the purpose of timely warnings and annual statistical report. Include any procedures that allow victims or witnesses to report crimes on a voluntary, confidential basis, for inclusion in annual reports, and if so, a description of the process. You do not need to list all CSAs- list only those persons or organizations to which you want reports to be made (e.g., police).
 4. Policies concerning security of and access to campus facilities including campus residences.
Include security considerations used in the maintenance of campus facilities.
 5. A statement of current policies concerning campus law enforcement that:
 - a) Address the law enforcement authorization of campus police/security personnel and whether those security personnel have the power to arrest.
 - b) Address the working relationship of campus police/security with state and local law enforcement agencies; institution must disclose their relationship with local law enforcement including any operational memorandum of understandings/mutual aid agreements for investigation of crimes (MOU).
 - c) Encourage accurate and prompt reporting of all crimes to police when the victim of such crime elects or is unable to make such a report.
 - d) A description of the procedures, if any, that encourage pastoral and professional counselors, if and when they deem it appropriate to inform persons they are counseling, of any procedures to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics.

6. A description of the programs (type and frequency) designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others (34 C.F.R. § 668.46(b)(5)).
7. A description of institutional crime prevention programs (34 C.F.R. § 668.46(b)(6)).
8. A statement of policies regarding monitoring and recording through local police, criminal activity engaged in by students at off-campus locations of recognized student organizations, including organizations with off-campus housing (34 C.F.R. § 668.46(b)(7)).
9. A statement of policy regarding the possession, use and sale of alcoholic beverages, and enforcement of state underage drinking laws (34 C.F.R. § 668.46(b)(8)).
10. A statement of policy regarding the possession, use and sale of illegal drugs and enforcement of federal and state drug laws (34 C.F.R. § 668.46(b)(9)).
11. Description of drug abuse education programs required by the Higher Education Act § 120(a)-(d) (may be a cross-reference to other publications) (34 C.F.R. § 668.46(b)(10)).
12. Provide a statement that the institution will, upon written request, disclose to the alleged victim of a crime of violence (as that term is defined in section 16 of title 18, United States Code), or a non-forcible sex offense, the report on the results of any disciplinary proceeding conducted by such institution against a student who is the alleged perpetrator of such crime or offense. If the alleged victim is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim for purposes of this paragraph.
13. Statement of policy regarding the institution's programs to prevent domestic violence, dating violence, sexual assault, and stalking and procedures the institution will follow once a report has been made, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from a report. The Policy must include the following:
 - a) Educational programs to promote awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking. The education programs must include:
 - Primary prevention and awareness programs for all incoming students and new employees, and ongoing prevention and awareness campaigns for continuing students and employees. These education programs will include: a statement that these crimes are prohibited at the institution; definitions of consent, domestic violence, dating violence, sexual assault, and stalking in the institution's jurisdiction; safe and positive bystander intervention when there's

a risk of one of those incidents; information on risk reduction to recognize warning signs of abusive behavior and avoiding potential attacks; and information about the institutional disciplinary procedures.

- For descriptions of bystander intervention, ongoing prevention and awareness campaigns, risk reduction, and more, please feel free to consult this resource from the State University of New York on Policy and Programming Changes Pursuant to the Campus SaVE Provisions of the Violence Against Women Act (page 68, and others).
<http://bit.ly/1wVsatsx>.

- b) All possible sanctions or protective measures the institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, sexual assault, domestic violence, dating violence, or stalking. This list should be exhaustive, not a range. For more on why institutions must list all sanctions, and not a range, see page 62772 of the preamble to the VAWA regulations, <http://bit.ly/2pvY183>
- c) Procedures victims should follow if domestic violence, dating violence, sexual assault or stalking has occurred including information in writing about: evidence preservation, how and to whom to report these crimes, options about involvement of law enforcement (or not involving law enforcement), options for obtaining an order of protection or “no contact” order,
- d) Statement that the institution will provide written notification to students and employees about existing counseling, mental health, health, victim advocacy, legal assistance and other services for victims both on-campus and in the community.
- e) Statement that the institution will provide written notification for victims about options for and available assistance in changing a victim’s academic, living, transportation and working situations if requested by student; and if such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.
- f) Information how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.
- g) Explanation of the procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking including a clear statement that:
 - Such proceedings shall provide a prompt, fair and

impartial investigation and resolution and will be conducted by officials who receive annual training on the issues related to domestic violence dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;

- The accuser and the accused are entitled to the same opportunities to have others present during a disciplinary proceeding including the opportunity to be accompanied to any related meetings or proceeding by an advisor of their choice;
- Both the accuser and the accused will be simultaneously informed in writing of the following:
 - Outcome of any disciplinary proceeding;
 - The institution's procedures for the accuser and accused to appeal the results to the disciplinary proceeding;
 - Any changes to the results that occurs prior to the time such results become final; and
 - When the results become final.

- i) A student or employee who reports to an institution that the student or employee has been a victim of domestic violence, dating violence, sexual assault or stalking, whether the offense occurred on or off-campus, must be provided with a written explanation of the student's or employee's right and options as described above.

14) A statement advising where law enforcement information concerning registered sex offenders may be obtained (34 C.F.R. § 668.46(b)(12)).

15) A Missing Student Policy (34 C.F.R. § 668.46(h)) – Institutions that provide on-campus student housing are required to establish a Missing Student Policy for students residing in on-campus housing and include the policy in the Clery Act Annual Security Report.

- a) Definitions:

On-campus student housing facility:

A dormitory or other residential facility for students that is located on an institution's campus.

On-Campus (Clery definition):

Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of or in a manner related to the institution's educational purposes, including residence halls. Any building or property that is within or reasonably contiguous to the area identified above that is owned by the institution, but controlled by another person, is frequently used by students and supports institutional purposes (such as a food or other retail vendor).

b) Missing Student Policy in Annual Security Report must:

- Contain a list of the titles of persons or organizations to which students, employees, or other individuals should report that a student has been missing from campus for 24 hours.
- Require that any missing student report be referred immediately to institution's police or campus security department. If there is no campus police or campus security, must report to local law enforcement.
- Contain an option for students to identify a confidential contact person(s) whom the institution will notify within 24 hours of the determination that the student is missing by law enforcement, campus security, or local law enforcement.

Confidential – means this information will be accessible only to authorized campus officials and it may not be disclosed except to law enforcement personnel in furtherance of a missing person investigation. NOTE: The institution must advise students that their contact information will be registered confidentially.

- Inform students that if they are under 18 and not emancipated, the institution must notify a custodial parent or guardian within 24 hours of the determination the student is missing, **in addition** to any additional confidential contact person designated by the student.
- Advise the student that the institution will notify the local law enforcement agency within 24 hours of the determination that the student is missing, unless it was the law enforcement agency that made the determination.

c) Procedures to be followed by the institution – If a student who resides in on-campus housing is determined to have been missing for 24 hours:

- Notify the confidential contact person that the student is missing;
- Notify the custodial parent or guardian if the missing student is under 18 and not an emancipated minor; and
- Notify local law enforcement agency (unless already notified).

QUICK SUMMARY OF TOP CHANGES IN THE 2016 CLERY HANDBOOK

November 15-17, 2017

Andrea Stagg

Deputy General Counsel
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On June 23, 2016 the U.S. Department of Education (ED) issued a new version of The Handbook for Campus Safety and Security 2016 Edition. This Handbook replaces the 2011 handbook, which replaced the 2005 version. Some of the changes made reflect changes in statute and regulations, others confirm previous guidance (oral or written), and a few changes reflect a departure from previous guidance. This brief summary will go over some of the more major changes.

VAWA Offenses and Hierarchy

Major additions that will not surprise anyone relate to the inclusion of VAWA crimes. The 2013 Reauthorization of the Violence Against Women Act and the regulations finalized in July 2015 amended the Clery Act by adding “VAWA Offenses” to the annual security report. These are domestic violence, dating violence, and stalking; sexual assault is a VAWA crime, but remains reportable under Criminal Offenses (or primary crimes).

The hierarchy rule, which calls for subsuming less grave offenses when more than one primary crime occurs during an incident, does not apply to VAWA offenses. Sexual assault also has its own hierarchy; fondling is an element of sexual assault, and if there is fondling *and* rape, only count rape. And if sexual assault and murder occur in the same incident, count both the sexual assault and the murder.

Overnight Trips

The 2016 Handbook incorporates 2012 guidance about how repeated use of a location for school-sponsored trips and “short-stay away trips” can lead to more Noncampus property, but the Handbook adds a twist on the overnights. The 2012 guidance said a one-time overnight trip could not meet the definition of Noncampus property, but a three-week trip was of sufficient “long duration.” In response, many institutions considered 3 weeks or 21 days to be the threshold for a “trip of long duration” that would trigger consideration of whether the property was Noncampus Clery geography. The new Handbook (here’s the twist!) says that all locations used by students and controlled by the institution in support of educational purposes during an “away” trip of more than one night is Noncampus property. The three-week threshold that many had relied on shrinks down to any trip that is two or more nights away.

Recall that the repeated use of a location triggers a Noncampus property consideration when the institution sponsors students on an overnight trip every year and students stay in the same hotel.

Note that the repeated use is about the specific hotel rather than the city, while the 2+ nights standard is about the length of the trip, wherever it may be. A plain reading says the students

could be staying in a different hotel each night of the 3 day trip, but it would still count as Noncampus property.

On-Campus, Reasonably Contiguous Property

The new handbook expands its example of what is considered “reasonably contiguous” and could make more spaces considered “On-Campus Property.” The 2011 Handbook example cited a house two blocks away that was owned by the institution and converted into an art studio for students. The 2016 Handbook says that it is reasonable to consider locations within one mile of the campus border to be reasonably contiguous for the On-Campus definition, but describes how a major highway or river in that space may keep a property from being reasonably contiguous. Consider your campus owned or controlled properties and the distance from your campus border when you update your list of Clery-relevant geography.

Institution-Associated Entities and Institutional Control

The old Handbook said that if an institution-associated *foundation* owns or controls property that is operated in support of the institution’s educational purposes, the institution is considered to be in control of that property. The 2016 Handbook adds properties owned or controlled by holding companies, subsidiaries, alumni associations, athletic booster clubs, or any other associated entity. Apparently campuses were taking a narrow view of “foundation.”

The new Handbook also addresses institution-associated hospitals and/or medical centers that are controlled by the institution and reasonably contiguous. The Handbook says these should be included as part of the campus, and some factors other than a formal relationship that could determine “institutional control” include overlapping faculty/doctors, overlapping board officers, use of the hospital as part of the educational program, and more.

URMIA White Paper

The 2016 Clery Handbook: New Developments and Important Changes

July 2016

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Overview and Brief Description

AUTHORS¹

Joseph Storch² and Andrea Stagg³

STATUTE/REGULATION SOURCE

The Clery Act, as amended by the Violence Against Women Act, 20 USC 1092(f); 34 CFR 668.46.

BRIEF DESCRIPTION

On November 8, 2015, the Clery Act, a set of law and regulations that governs how colleges report on and work to prevent crimes on campus, turned a quarter century old. Over the course of 25 years, the law has been amended and expanded several times, most recently by the 2013 reauthorization of the Violence Against Women Act and its regulations.⁴ In 2005, the United States Department of Education (“ED”) Office of Postsecondary Education issued *The Handbook for Campus Crime Reporting*.⁵ ED used the 200-page Handbook as a guide when conducting program reviews of compliance with the Clery Act. In February 2011, ED released a 285-page *The Handbook for Campus Safety and Security Reporting* (“2011 Handbook”).⁶ Author Storch wrote an article to detail the changes between the 2005 and 2011 Handbooks.⁷ On June 23, 2016, ED issued *The Handbook for Campus Safety and Security Reporting 2016 Edition* (“2016 Handbook”).⁸ This piece dives into the changes in the 2016 Handbook

1 The authors are deeply grateful to the University Risk Management & Insurance Association, especially Executive Director Jenny Whittington, and its Government and Regulatory Affairs Committee, Co-Chairs Sally Alexander and Leta Finch, and Board Liaison Marjorie Lemmon, for support of this publication and for their work assisting risk managers and higher education professionals in complying with this and other complex areas of the law, and to expert colleagues Alison Kiss and Abigail Boyer of the Clery Center for Security On Campus and John Graff of Hirsch Roberts Weinstein LLP for their helpful insights and comments.

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4 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54 (2013) (“VAWA statute”).

5 U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Crime Reporting*, Washington, D.C., 2005.

6 U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, Washington, D.C., 2011.

7 See Joseph Storch, *The 2011 Clery Handbook: New Developments and Important Changes*, NACUA Note, National Association of College and University Attorneys (NACUA), vol. 9 n. 12 (June 10, 2011).

8 U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting, 2016 Edition*, Washington, D.C., 2016.

to aid in complying with the Clery Act, as interpreted by ED. While the 2016 Handbook clocks in at only 265 pages, this reduction mostly comes by deleting 65 pages of statutory and regulatory language as well as sample policy documents printed in 2005 and 2011. Removing that section, the 2016 Handbook is about 4,500 words/45 pages longer than in 2011.

In 2005 and 2011, the Handbook was issued under the authorship of Westat, ED's Clery Act contractor, and included endorsement limitation language, "The views expressed herein do not necessarily represent the positions or policies of the U.S. Department of Education" (2011 Handbook copyright page). The 2016 Handbook removes the reference to Westat as author and does not include that disclaimer language. Like the Handbooks before it, the 2016 Handbook was neither subject to formal notice and comment rulemaking or informally given to higher education representatives⁹ for comment and feedback.¹⁰ It was not issued as "significant guidance" under federal government rules¹¹ like the 2011, 2013, and 2015 Dear Colleague Letters from the Office for Civil Rights. ED says the Handbook represents "the Department's interpretations and guidance as of the date of publication" (1-4, 15); it makes significant compliance changes and, while affirming that the law "allows institutions a great deal of flexibility in complying" (1-5, 16), states on its face that ED auditors will hold institutions to its standards (1-4, 15).

9 As a contemporaneous comparison, on August 18, 2015, ED's Family Policy Compliance Office (the Office that regulates compliance with Family Educational Rights and Privacy Act [FERPA]) issued a *Draft Dear Colleague Letter* on access to student mental health records. Department of Education, Family Policy Compliance Office, *Draft Dear Colleague Letter*, <http://familypolicy.ed.gov/sites/fpc.ed.gov/files/DCL%20Final%20Signed-508.pdf> (Aug. 2015). On August 19, 2015, ED widely distributed the draft letter to higher education institutions and associations through (among other methods) its Student Privacy ListServ. Electronic mail message from Kathleen M. Styles, Chief Privacy Officer, Department of Education (on file with authors). ED requested comments by October 2, 2015, and made the comments available to the public on a website, <http://familypolicy.ed.gov/dear-colleague-letter-to-school-officials-at-institutions-of-higher-education>. ED's Office for Civil Rights and other divisions have likewise sought input from higher education associations and institutions in development of guidance.

10 ED did conduct calls with members of the VAWA Negotiated Rulemaking team and asked higher education, through the National Association of College and University Attorneys (NACUA) and other organizations, to submit resources and feedback (some of which were incorporated in the Handbook), but to the knowledge of the authors and all those they have spoken with, ED did not provide drafts or partial drafts for review or comment, or reach back out to the higher education community for input on specific language.

11 Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf>.

Potential/Actual Impact to Higher Education

Complying with the Clery Act is a campus-wide responsibility. Whether the reader is in risk management, compliance, student affairs, law enforcement/public safety, or the counsel's office, it is critically important to review the institution's development of its Clery Act policies and statistics. Even if your institution is a national leader in crime prevention and safety education, you must technically and wholly comply with the Clery Act, as interpreted by ED in its most recent published Handbook. ED officials have stated that colleges must act consistently with the interpretations in the June 2016 Handbook when they issue their October 1, 2016 Annual Security Report (ASR) and must report 2015 calendar year data using the interpretations described in the June 2016 Handbook.¹² For comparison, the 2011 Handbook had the same rule but was published in February of that year. Fines for "substantial misrepresentations" can be \$35,000 per incident (1-11, 22). The impact of a negative audit finding can go beyond civil financial penalties. ED reaffirms its commitment to a technical compliance regime¹³ cautioning that campuses "remember to maintain detailed documentation of your compliance with each requirement" (1-6, 17).

A note of caution, when developing or updating policy statements to address the requirements in the Handbook, make sure that your institution has actual policies, procedures, and practices behind those statements. ED requires that institutions include "statements of policy" in the ASR, and not necessarily the entire policy (although an institution may do so) (7-1-7-2, 152-153). But when updating the statement of policy, make sure that the underlying documents are updated to match. Not doing so risks a negative audit finding.

12 Personal communication to the Clery Center for Security on Campus (June 2016).

13 Compare with the ED Family Policy Compliance Office enforcement of FERPA.

Discussion

To ease understanding of the changes, we have developed three documents. This URMIA GRAC White Paper is generally organized by Handbook chapter and discusses the major substantive changes, providing analysis and links to resources. We have also created a table of major and minor substantive changes and have uploaded an MS Word Compare document of the 2011 and 2016 Handbooks which includes all changes. Users can feel free to use any, all, or part of the content created by the authors for non-commercial educational purposes in any way that is helpful. The 2016 Handbook changed pagination from prior Handbooks to be by chapter rather than the document in total. This can be confusing, so to aid understanding, we will cite to the Handbook using the system: (Chapter-Page, Page in this PDF of the Handbook).

CHAPTER 2: GEOGRAPHY

The Handbook makes significant changes in the area of institutional control, reasonably contiguous property, international programs, and mobile classrooms.

ED updated its past regulatory statements on housing owned and operated by third parties¹⁴ to state firmly that an institution is considered to “control” any buildings or property that are directly owned by an associated entity (such as a foundation, holding company, subsidiary, alumni association, athletic booster club, etc.) if it is used to support educational purposes (2-3, 26). Readers should check with their financial and real property management colleagues to ensure that all parties are on the same page regarding property.

The Handbook adds complexity to the reporting requirements in hospital and medical centers that are owned or controlled by the institution. The language reaffirms traditional Clery guidance about Non-campus property by differentiating between agreements for geography and agreements for programming (2-21, 44). Simply sending students to a program at an off-campus site (hospital, clinical, student teaching, other internship-type site) is not control for Clery reporting purposes if there is not a specific written agreement for geography (e.g. contract or lease for control of the second floor or a set of offices on the seventh floor) (2-21, 44). However, in the On Campus section a few pages earlier there are new factors to consider to determine when an institution controls an institution-associated hospital or medical center, including: “overlapping faculty/doctors, overlapping boards of directors or officers, use of the hospital or medical center as part of the institution’s educational program, geographic proximity,

14 “One commenter requested clarification of what would be considered an “on-campus student housing facility.” Specifically, the commenter questioned how this definition should be applied in cases in which there are public-private partnerships or third parties who may own or control property on areas contiguous to the campus or on university-owned property. Discussion: The Department recognizes that there are a myriad of possible arrangements that an institution may have for housing facilities for students. Regarding whether a particular student housing facility is an “on-campus” facility, we refer to the current definition of the term “campus” in Sec. 668.46(a). To clarify, any student housing facility that is owned or controlled by the institution, or is located on property that is owned or controlled by the institution, and is within the reasonably contiguous geographic area that makes up the campus is considered an on-campus student housing facility.” 74 Fed. Reg. 55901, 55912 (Oct. 2009).

an ongoing relationship between the institution and the hospital, and whether students consider the hospital or medical center to be part of the campus” (2-3, 26). Institutions affiliated with hospitals are advised to seek clarification from ED because some of the new standards (ongoing relationship and student opinions) are very subjective and may change over time.

The Handbook has a new, more expansive example of “reasonably contiguous,” a term referring to institutionally owned or controlled property that’s considered or treated as On Campus property. While the previous Handbook only included an example of a school’s art studio two blocks from campus, the new Handbook gives the general guidance that it is “reasonable to consider locations within one mile of your campus border to be reasonably contiguous” (2-3, 26). ED goes on to add that campuses should conduct a case-by-case analysis to determine whether property or buildings within one mile but separated by a river or major highway (without a pedestrian walkway) are Noncampus or On Campus, and prepare to explain the basis for that decision. The one mile concept is a guide that campuses can use to improve comparability among institutions, and colleges should document their decisions to classify such property as either Noncampus or On Campus.

Unlike Noncampus Property, whether the property is “frequently used by students” is not an element in the first part of the On Campus definition. For instance, if the college maintains office space used by Government Relations employees with no students coming to the building for any purpose in a location 10 miles from the campus, it would not count as Noncampus property since even though it is owned or controlled by the institution and used for institutional purposes, it is not frequently used by students. It is also not On Campus because it is not reasonably contiguous. If that same building or property is located a half-mile from the campus, it would count as On Campus, even though students do not go there.

For Separate On Campus Locations, the 2011 Handbook said that a location would count if it had administrative personnel and offered an Organized Program of Study (OPOS). The 2016 Handbook echoed oral guidance provided since by defining an OPOS to mean that the location “offers courses in educational programs leading to a degree, certificate, or other recognized credential.” Unfortunately, the Handbook language is not as detailed as the oral guidance, which added that a student can take an entire program at that separate location without ever having to take a class on the main campus. If this new sentence is interpreted as covering any location that offers courses and has administrative personnel, it would dismantle much of the Noncampus Property definition (e.g. 2-7, 30 [locations where students take a course or two] 2-19 and 2-20, 42-43 [rent a high school to offer classes but not an organized program of study]) and transform Noncampus locations into separate campuses.

The previous oral guidance is consistent with ED’s discussion of how a Noncampus location becomes a separate Campus; an institution offers some classes and has administrative personnel at a rented facility, and when the location becomes popular, the institution rents additional space and offers a certificate program (2-22, 45). Here, a student can earn that certificate entirely at the location, making it an OPOS. Along with administrative personnel (also better defined in the 2016 Handbook), an OPOS makes a location a separate campus rather than Noncampus Property, and it must publish its own ASR (or clearly differentiate statistics and policies in a single report with the other campus) (2-6, 29). Additions under “Other Locations” include non-contiguous Research Campuses and Athletic Campuses or Complexes owned by the institution with an administrator on site as potential separate campuses if they meet certain requirements. Such Research Campuses must be “used by students for recurring

classes, recurring field trips, internships, student jobs, or other regularly scheduled use,” and the Athletic Campus or Complex must have “classrooms used for courses that are part of an organized program of study” (2-8, 31).

ED writes about Research and Athletic Campuses that the institutions “own,” as opposed to the phrase “own or control” used elsewhere in the chapter (including in the following paragraph about a foreign location “that a U.S. institution owns or controls that has an organized program of study and administrative personnel on site”), but these are cited examples of “other institution-owned or -controlled locations” (2-8, 31). Either this is a further limitation for Research and Athletic Campuses, or simply a drafting inconsistency.

As before, Noncampus property¹⁵ has two definitions, and crimes occurring in properties that meet either definition are combined into a single number in the ASR. In the section of the definition that refers primarily to fraternities and sororities, ED adds organizations that are “registered” in addition to the long-standing “recognized,” perhaps a nod to *Christian Legal Society v. Martinez*,¹⁶ where UC Hastings registered a certain exclusionary student organization but would not recognize it (2-18, 41). The 2005 Handbook included institutionally-owned research vessels that carry students participating in educational programs as Noncampus property.¹⁷ The 2011 Handbook clarified that the students must be on the ship or boat for educational purposes.¹⁸ The 2016 Handbook created the umbrella term “mobile classroom” and added “van” to “research boats/ships” from 2011; such mobile classrooms that meet the requirements of a separate campus (2-6, 29) for any part of the year should be considered a separate campus for that full year, as opposed to Noncampus (2-22, 45).

The most significant change in the Handbook unanticipated by statute or regulation is the treatment of overnight trips of two nights or more, including study abroad experiences (2-25-2-26, 48-49). First, ED incorporated guidance from 2012¹⁹ about repeated use of a location for school-sponsored trips and short-stay away trips in a new Noncampus sub-section for “Trips to Off-Campus Locations” (2-25, 48). In 2012, ED had written that a trip of short duration, such as an overnight at a one-time-only location, would not trigger considerations for Noncampus property, but a three-week study abroad trip was of sufficient “long duration.” Institutions could reasonably infer from the example that three weeks was a threshold time period, and trips of that duration would require an analysis for Noncampus property. The 2016 Handbook says, “If your institution sponsors short-stay “away” trips of more than one night for its students, all locations used by students during the trip, controlled by the institution during the trip and used to support educational purposes should be treated as noncampus property” (emphasis added, 2-25, 48). That same three-week example follows, however the plain language of the new interpretation would count a trip anywhere from two nights or more with the same result. No useful examples are added, so consider the following: An institution sponsors a one-time trip to New York City where students will stay in a hotel for two nights, go to the Museums of Modern Art and Natural

15 “Any building or property owned or controlled by a student organization that is officially recognized by the institution; or any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution’s educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution” (2-18, 41).

16 561 U.S. 661 (2011).

17 2005 Handbook at 15.

18 2011 Handbook at 31.

19 “Clery Act: Department of Education Approved Clarifications,” Campus Safety Help Desk, http://www.higheredcompliance.org/resources/resources/Clery_Campus_Safety_Survey.pdf.

History, attend a lecture at the 92nd Street Y, and finally, see Hamilton on Broadway. The lecture hall at the Y was rented by the institution, and a speaker chosen to address this school group was arranged by a third-party contractor. If the museums and Broadway show are open to the public and the institution does not have an agreement for the use of a particular space, those locations are not reportable for Clery purposes. The lecture hall at the Y and relevant space at the hotel (certain rooms, public areas, stairwells, elevators, and hallways) where the group is staying are Noncampus property for the times and dates specified in the institution's agreements.

This new language on short-stay away trips may severely complicate study abroad and short trips. It is unclear from the 2012 guidance or the 2016 modifications how to consider property that varies throughout a multi-day trip. For example, if a faculty-led student trip is more than one night but changes hotels every night along the way, is each hotel (and rented/leased classroom space) Noncampus property? It reads as though the length of the trip is what matters, not the length of the stay in any particular place. If the trip is four days and each day a different classroom is used, by written agreement, are each of those classrooms Noncampus property for that duration? These questions aside, these changes will clearly require significantly more staff time²⁰ devoted to tracking travel and compliance. Author Storch will update a relevant NACUA Note to reflect these Handbook changes.

The following chart covers the new interpretation of ED as to distance travel:

One Night in Hotel, Once Per Year	One Night in Hotel, More than Once Per Year	More than One Night
Does Not Count	Noncampus (Repeated Use)	Noncampus (Stay Away Trip)

CHAPTER 3: CRIME STATISTICS

The major changes to this Chapter arise from the VAWA amendments to Clery. ED requires that institutions report all Clery crimes in Clery geography reported to local law enforcement or a Campus Security Authority.²¹ Therefore, ED has determined that institutions should not consider whether there was consent under state law or college policy²² when counting reports of sexual assault (3-7, 58, 8-6, 167). Contrary to this instruction, an earlier paragraph requires that institutions consider state law to determine whether a victim was capable of consent in Statutory Rape situations (3-7, 58). The Handbook says "if force was used or threatened, or the victim was incapable of giving consent because of his/her age . . . the offense is Rape, not Statutory Rape" (3-7, 58, emphasis added). The authors believe this may be a typo and ED meant to say "and" instead of "or." Otherwise there would be no situation where an institution would classify a crime as Statutory Rape.

ED acknowledges the January 2012 updated UCR definition of Rape used by the VAWA Negotiated Rulemakers to interpret Fondling narrowly such that a Fondling is only reportable if the Fondling is the only crime. If the Fondling is part of an occurrence that includes any other element of Rape, Rape

²⁰ ED suggests assigning "someone at your institution" with the role of tracking all the geographic requirements (2-19, 42), many of which will change each year. Unfortunately, at many campuses, this may require more than one person to track local and distant geography.

²¹ Campus law enforcement and public safety are included in the definition of Campus Security Authority (4-2, 109).

²² The VAWA Negotiated Rulemaking Committee declined to develop a national consent definition, Violence Against Women Act, 79 Fed. Reg. at 62,784, 62755-62756 (34 C.F.R. 668.46[a]) ("VAWA Regulations").

should be reported and Fondling subsumed in the hierarchy (3-6, 57).²³ Note that if the Rape and Fondling are tied to a Hate Crime, both crimes would appear in Hate Crimes while only the Rape would appear in Primary Crimes.

The Handbook adds a new Aggravated Assault example wherein someone uses drugs to subdue a victim but does not commit a sexual assault (3-11, 62). ED reasonably assumes that the use of such drugs is intended to inflict bodily harm and finds that such action would meet the Aggravated Assault standard, and also considers use of a date rape drug to be a Poisoning, which must be included as an Aggravated Assault (3-10, 61). If the person administering the drug commits sexual assault, it would be reported in Part I as a Rape or Fondling, and the Aggravated Assault would be subsumed via the hierarchy rule. Note that if the drugging and assault are tied to a Hate Crime, both crimes would appear in Hate Crimes while only the Rape or Fondling would appear in Primary Crimes.

In identifying dating violence, ED cautions that students may describe the underlying relationship in different ways that would still be counted as dating violence, including “hanging out” or “hooking up” (3-36, 87); the assessment of whether there is a social relationship of a romantic or intimate nature is made by the reporting party, consistent with counting other Clery crimes based on reports. The Handbook cannot possibly keep current with potential student slang (“DTF,” “Netflix and Chill”), and notes that victims may or may not describe such a dating relationship as “serious” or “monogamous” (3-36, 87).

In counting stalking, ED recognized that stalking does not end at the campus gates and, in fact, may occur on multiple campuses; institutions are encouraged (but not required) to notify other institutions of stalking that occurred on their Clery geography (3-40, 91). At a time when several states (like New York and Virginia) have instituted transcript notations for policy violations involving VAWA offenses, it represents an interesting shift for the Handbook to include this shift in an institution’s duty (or at least suggestion) to warn.

ED continues its advice from 2010 that marijuana possession should not be reported in states that have decriminalized the drug (since drug, alcohol, and weapons arrests and referrals only count if they are violations of state law) (3-48, 99) and adds that use “of legally obtained, personal prescription drugs... by the owner in a manner not consistent with the instructions provided by the physician” is not a reportable drug offense (3-48, 99).²⁴ Inasmuch as the arrests and referrals are for state and local law violations, ED removed from the 2016 Handbook a confusing (and inconsistent) 2011 Handbook reference to the federal Controlled Substances Act (2011 Handbook at 69).

Unfounding a reported crime is the only way that a Clery statistic can be removed after it is reported. The law about how to unfound reported crimes has not changed, but ED added new requirements to the VAWA Regulations about disclosing unfounded crimes to address its belief that colleges were routinely unfounding crimes so as to hide them and keep numbers low.²⁵ The 2014 VAWA final regu-

23 See VAWA Regulations at 62768 (removing sex crimes from the hierarchy only when conducted at the same time as a murder).

24 Institutions interested in reviewing compliance with the Drug Free Schools and Drug Free Workplace requirements may wish to use this resource: <http://system.suny.edu/compliance/topics/safety/drug-free/>.

25 VAWA Regulations at 62765-62766. To date, ED has not published a program review or finding of such behavior.

lations said: “An institution must report to the Department and disclose in its ASR statistics the total number of crime reports listed in paragraph (c)(1) of this section that were ‘unfounded’ and subsequently withheld from its crime statistics pursuant to paragraph (c)(2)(iii) of this section during each of the three most recent calendar years.”²⁶ Unfounding is not when someone is found not guilty, not arrested, or not charged; instead, it is an extreme and rare measure to be used when, using a reasonable investigative standard, sworn/commissioned law enforcement believes a reported crime is false or baseless (more than just not guilty in criminal court or not responsible in a student conduct process) (3-51-3-54, 102-105). ED requires a full and completed investigation of such crimes before unfounding (3-51, 102) and “the determination to unfound a crime can be made only when the totality of available information specifically indicates that the report was false or baseless” (3-51, 102).

ED added to the 2016 Handbook a list of examples that colleges may not count as unfounded crimes. Among them are crimes that were initially misclassified (for example, Simple Assault instead of Aggravated), initially reported as occurring on Clery geography but later determined to have occurred elsewhere (3-52, 103), motor vehicle thefts “where investigation determined that the car was misplaced by the owner,” or “burglaries where investigation determined that the items were misplaced by the owner and Burglary did not occur and was not attempted” (3-54, 105). These examples appear in a list alongside other scenarios where it was well understood that the crime was not unfounded, such as withdrawn complaints, not guilty verdicts, or the return of stolen property. The plain language of the Handbook says that these examples should not be counted and disclosed as Unfounded Crimes in the ASR. It does not say whether such examples should be counted as crimes and otherwise disclosed in the ASR, which may lead to confusion. Consider this example: a student calls campus police and says “I was robbed!” When officers arrive, the student states that a phone was stolen from a classroom table. This is a non-Hate Crime Larceny and not reportable, but the “initial” report was Robbery. We know from the Handbook that an initial misclassification is not counted as an Unfounded Crime. But because it was initially reported as a Robbery, is it counted in Primary Crimes, even though police quickly determined that it was a larceny?

Similarly, Witness calls the Title IX Coordinator to say they saw Respondent fondle Victim in the hallway of their residence hall, obviously against Victim’s consent. When the Coordinator follows up with Victim, Victim states that when Respondent pinched Victim’s rear it was consensual, and they are a couple. Further, Victim is having a roommate quarrel with Witness. Here, the Victim, Respondent and all administrators would agree that the crime of Fondling did not occur. It is not clear from the Handbook whether the insistence that it is not Unfounded means it must be counted in Primary Crimes as Sexual Assault.

It is possible that this is simply a drafting error by ED; in the Chapter on the Crime Log, ED states if “a crime is reported and entered into the crime log but the resulting investigation shows that the initial description was inaccurate, you should update the description. Do not list the initially recorded crime as unfounded due to misclassification, or delete an entry once it has been made. Update the nature of the crime instead” (5-5, 130). Perhaps ED intends for colleges to apply this Crime Log reasoning to the ASR as well, but the examples on 3-52-3-54, 103-105 add compliance risk to reclassifying and not counting examples like the ones cited above.

26 VAWA Regulations at 62788.

The 2016 Handbook later includes examples on the format to disclose unfounded crimes. They may be presented in a table or narrative format (as with Hate Crimes). They need not be broken down by geographic category or type of crime. With tables growing significantly anyway, it will likely be easier for colleges to simply state “There were three unfounded crimes in 2013, ten unfounded crimes in 2014 and five unfounded crimes in 2015” (9-7, 192). Traditionally, ED has not required colleges to gather statistics in a new category until the year after new regulations are final (e.g. Higher Education Opportunity Act regulations of 2009). The example in the Handbook displays Unfounded statistics for 2013, 2014, and 2015, which may be a clue that ED will be looking for these statistics in the October 2016 ASRs.²⁷ Note that the new requirement to disclose Unfounded Crimes came from the VAWA final regulations, which became effective in summer 2015. Colleges with large police departments that did not disclose unfounded crimes prior to the regulation (or even prior to the statute which was only passed in early 2013) may have significant compliance work ahead of them prior to October 1, 2016.

CHAPTER 4: COLLECTING STATISTICS

The Handbook removed the 2005 and 2011 Handbooks’ limitation that CSAs only document crime reports that he or she believes were made “in good faith”²⁸ (4-1, 108). Lifting the burden of determining “good faith” also minimizes the risk of responses that are not trauma-sensitive, no matter how well-meaning. Removing the good faith limitation will bring more reports forward to the professionals best trained to address them.²⁹ Later, ED observes that “CSAs are responsible for reporting allegations of Clery Act crimes that are reported to them in their capacity as a CSA. This means that CSAs are not responsible for investigating or reporting incidents that they overhear students talking about in a hallway conversation; that a classmate or student mentions during an in-class discussion; that a victim mentions during a speech, workshop, or any other form of group presentation; or that the CSA otherwise learns about in an indirect manner” (4-5, 112, emphasis supplied). This advice brings the Handbook into alignment with Office for Civil Rights guidance.³⁰

²⁷ See also Lynn B. Mahaffie, U.S. Department of Education, *Dear Colleague Letter*, <https://ifap.ed.gov/dpccletters/GEN1515.html> (July 22, 2015) (stating that Unfounded crimes must be included in 2015 ASR, but not specifying for which year or years).

²⁸ “If a campus security authority receives the crime information and believes it was provided in good faith, he or she should document it as a crime report” (2011 Handbook at 73).

²⁹ Good faith does not completely disappear from the Handbook. In Chapter 4, ED states, “If there is reason to believe that a crime report was not made in good faith, and your institution does not include the reported incident in its crime statistics, we strongly suggest that you document the justification for not including the crime in those statistics” (4-10, 117).

³⁰ Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (Apr. 2014). See also Andrea Stagg, *Distilling the April 29, 2014 OCR Questions & Answers on Title IX and Sexual Violence*, <http://system.suny.edu/media/suny/content-assets/documents/compliance/Distilling-the-4-29-14-Q-and-Q---Stagg-Final.pdf> (May 2014).

The 2016 Handbook expands examples of Campus Security Authorities in a way that may surprise professionals in light of recent guidance from ED's Office for Civil Rights (OCR). After stating in its 1999 regulatory preamble that "A physician in a campus health center or a counselor in a counseling center whose only responsibility is to provide care to students are unlikely to have significant responsibility for student and campus activities,"³¹ ED now declares "the director of a campus health or counseling center" to be an example of a CSA (4-3, 110), although it may be that the directors actively see patients.³² It later states that if "your institution directs students or employees to report crimes to other individuals, then those individuals are also CSAs. These individuals could include physicians in a campus health center; counselors, including peer counselors (except for professional or pastoral counselors addressed later in this chapter); and health educators, including peer health educators" (4-4, 111). Also included for the first time in the CSA sample list is an "ombudsperson (including student ombudspersons) [and] victim advocates or others who are responsible for providing victims with advocacy services, such as assisting with housing relocation, disciplinary action or court cases, etc.; [and] members of a sexual assault response team (SART) or other sexual assault advocates" (4-3-4-4, 110-111). Later, ED adds as a CSA example "a triage nurse at the student health center or crisis intervention staff at the rape crisis clinic at your institution" who does not have the pastoral or professional counselor exemption and "otherwise [has] significant responsibility for student and campus activities" (4-8, 115). While some of these positions are consistent with similar language in the 2011 Handbook (75), some examples can be seen as directly contrary to the privacy and confidentiality spirit of past ED regulations on the topic,³³ and may also put campuses in a difficult position trying to thread a needle between ED's discussion here and OCR guidance.

OCR developed a classification of individuals who, while not pastoral or professional counselors, were people that should be treated like them—nonprofessional counselors and advocates.³⁴ These individuals are not required to report identifying information to the Title IX Coordinator about incidents of sex discrimination, including sexual violence, that may be reported to them. Also, the institution designates the nonprofessional counselors and advocates, and it may be that at one college peer health educators are in this category, but at another college they are not. Nonprofessional counselors and advocates are still required to provide aggregate data to the Title IX Coordinator, who is ultimately responsible in tracking patterns and trends in order to address prevention and response.³⁵ It may be

31 64 Fed. Reg. at 59059, 59062 (Nov. 1999).

32 James Moore of ED responded to a question on a Clery Center for Security on Campus webinar that if a counselor who had confidentiality told their director who is a CSA about a disclosure, that would *not* break the confidentiality and require that the statistic, told to the counselor in confidence, be disclosed (July 7, 2016).

33 "We agree with the commenters about the importance of victims' being able to obtain confidential counseling. We also agree that although reporting a statistic is not likely, of itself, to identify the victim, the need to verify the occurrence of the crime and the need for additional information about the crime to avoid double-counting can lead to identification of the victim. Representatives of psychological counselors informed us that counselors would, as a matter of professional obligation, be required to inform a patient at the beginning of any session that detailed information may be disclosed to other parties for statistical reporting purposes. In their experience, this disclosure has a chilling effect on access to professional counseling by causing a victim to decline or be wary of professional assistance. Given the importance of access to counseling, the availability of statistics from other sources on campus, and the provisions we included in this regulation concerning confidential reporting, we believe this regulation strikes the appropriate balance between individuals' need for counseling and the community's need for complete statistics." 64 Fed. Reg. 59059, 59063 (Nov. 1999).

34 U.S. Department of Education, Office for Civil Rights, *2014 Questions and Answers on Title IX and Sexual Violence*, at 18-24, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> ("2014 DCL").

35 2014 DCL at 23-24. See also U.S. Department of Education, *Intersection of Title IX and the Clery Act*, <https://notalone.gov/assets/ferpa-clerychart.pdf>.

that such aggregate reporting is seen as similar to disclosing a Clery statistic (which doesn't require personally identifiable information), but the increasingly complex web between Title IX and Clery and distinguishing Responsible Employees and those exceptions from Campus Security Authorities seems more difficult than is reasonable. We would note that inasmuch as the Title IX Coordinator is a CSA (4-3, 110), a report to the Coordinator should also satisfy Clery Act reporting requirements.

Wisely, ED slightly expanded the part of the CSA definition covering directors of athletics, team coaches, and faculty advisors (2011 Handbook at 75) to include all athletic coaches, including part-time employees and graduate assistants as CSAs (4-3, 110). ED advises that colleges "reevaluate the CSA status of all employees (including student employees) on at least an annual basis and document the rationale of the determinations" (4-5, 112) and accurately notes that "while there may be some overlap, persons considered to be CSAs for Clery Act reporting are not necessarily the same as those defined as "responsible employees" for Title IX" (4-5, 112 emphasis supplied).³⁶

In the new Handbook, ED affirms throughout that the hierarchy rule only applies to Part I Primary Crimes, which it also calls Criminal Offenses (3-2, 53; 3-24, 75; 3-32, 83). The hierarchy rule states that, with some exceptions, when more than one reportable crime occurs in the same occurrence, the institution should only report the more grave crime, and should subsume less grave crimes.³⁷ The Department has slowly chipped away at the hierarchy since its adoption. First it removed arson from the hierarchy, requiring that institutions always count arsons even when graver crimes occur. In 2014, the VAWA negotiated rules partially exempted sexual assault from the hierarchy; sexual assault will subsume lesser crimes but never be subsumed by graver crimes.³⁸ The 2011 Handbook placed the concept of inapplicability of the hierarchy to Hate Crimes in an example, but the 2016 Handbook states it more clearly (3-2, 53). As a result, the Primary Crime and Hate Crime statistics may differ, leading to confusion as to how many incidents actually occurred. The hierarchy is not used in the Crime Log (5-1, 126).³⁹

Additionally, ED changed its approach to hierarchy between Primary Crimes and Arrests/Referrals for drug, alcohol and weapons crimes. In 2011, the Handbook stated "Although arrests and referrals are technically not part of the hierarchy, they are shown here to illustrate their place in counting crimes. For example, if a student is arrested for Aggravated Assault and a Drug Abuse Violation, disclose only the Aggravated Assault" (2011 Handbook at 53). In 2016, that paragraph is removed, and a different section states "that arrests and referrals for these law violations are not covered by the Hierarchy Rule used to count Criminal Offenses. Therefore, you must count arrests for Weapons, Drug Abuse and Liquor Law Violations in addition to the most serious Criminal Offense when occurring in a single incident. For example, if an Aggravated Assault is committed with the use of a firearm in violation of a

36 For more information, see Andrea Stagg and Joseph Storch, *Crime and Incident Reporting Guidelines for CSAs and Responsible Employees*, <http://system.suny.edu/media/suny/content-assets/documents/compliance/Crime-and-Incident-Reporting-Guidelines-for-CSAs-and-Responsible-Employees-FINAL.pdf> (Sep. 2014).

37 For instance, if in the course of a burglary in a campus office the burglar discovers a professor and kills the professor, the burglary would be subsumed into the murder count. The count would be one On Campus Murder/Non-Negligent Manslaughter.

38 If the crimes are Rape and Murder, we count both Rape and Murder. If the crimes are Rape and Burglary, we only count Rape.

39 In the earlier example, we would count only the Murder and not the Burglary in the professor's office as Primary Crimes; if the act was committed because of animus against the professor as a member of a covered group, we would count both the Murder and the Burglary as Hate Crimes.

weapons law, count both the Aggravated Assault and the arrest or referral for the Weapons Law Violation” (3-42, 93). In addition, although ED does not call it a “hierarchy,” for individuals who are arrested and referred for the same violation or a different violation in the same occurrence (arrested for weapons, referred for drugs), ED continues its call for institutions to report only the arrest and subsume the referral (3-42, 93). As to which of the three violations within arrest or referral to count, the Handbook recommends officer discretion with documentation to justify the choice (3-44, 95). ED has informally approved of a simpler model, a mini-hierarchy which establishes standards for consistent reporting of arrests and referrals in all cases at an institution.⁴⁰

CHAPTER 6: EMERGENCY NOTIFICATIONS AND TIMELY WARNINGS

The 2016 Handbook adds slight complications to complying with the Emergency Notification requirements added in the 2008 Higher Education Opportunity Act and treated in depth in the 2011 Handbook. While the 2011 Handbook said the “regulations don’t require your institution to use a particular mode of communication...We do encourage you to consider overlapping means of communication in case one method fails or malfunctions...If any of the emergency notification services require the campus community to sign up, include information on how to do this” (2011 Handbook at 100), the 2016 Handbook adds to this language a requirement that institutions “ensure that notifications and warnings can be transmitted quickly to all students and employees. Therefore, an institution would not be able to rely solely on a text messaging system if all members of the campus community are not required to participate in that system. Similarly, relying on an e-mail would not be adequate for institutions that do not establish an e-mail account for all students and employees, or require each member of the campus community to register an e-mail address with the institution” (6-4, 137). Institutions should consider how they will meet the compliance requirement of reaching all “members of the campus community,” especially considering that some students do not use text messaging or do not wish to receive text messages. Requiring “all members of the campus community” to be part of at least one of the overlapping systems of emergency notification may mean significant policy, compliance and cultural changes at an institution. Institutions may need to seek out additional bandwidth to use during emergencies, as some locations report a slowing of emergency messages when local bandwidth cannot support tens or hundreds of thousands of simultaneous messages during an emergency. Further, this requirement may be interpreted as not allowing an “opt out” of emergency notifications where an institution cannot otherwise guarantee that those who opt out of one system are otherwise covered by another system, since ED auditors may be instructed to measure against the Handbook language requiring that absolutely all members of the community receive every emergency notifications through a single or multiple overlapping methods.

VAWA made a minor change to Timely Warnings requiring that institutions “withhold as confidential the names and other identifying information of victims” (FR 62787). Although the regulations and the statute are clear, the relevant Handbook chapter is silent on it. A near reference is a statement that an “institution may, in appropriate circumstances, include personally identifiable information in a

⁴⁰ The hierarchy would be to report the gravest of the following for all acts in the same occurrence:

1. Weapons arrest
2. Drug arrest
3. Alcohol arrest
4. Weapons referral for discipline
5. Drug referral for discipline
6. Alcohol referral for discipline

timely warning” under FERPA (6-15, 148). That paragraph is similar to the 2011 Handbook (2011 Handbook at 114) but seems to ignore the more recent statutory and regulatory change. This may be a situation where the Handbook’s statement that “The HEA and its regulations take precedence if there are any differences between them and the handbook” (1-4, 15) applies.⁴¹ Of course, while VAWA expressly prohibits an institution from naming or providing identifying information about a victim in a timely warning,⁴² a deductive reading of the statute would say that an institution may name a suspect in a warning.⁴³ It is unclear whether ED is trying to give institutions more or less flexibility in issuing Timely Warnings with the slight change of language regarding assessing continuing risk for an apprehended perpetrator.⁴⁴

CHAPTER 7: POLICY STATEMENTS

Surprisingly, ED doesn’t provide significant context to the concept of reporting “when the victim of a crime elects to, or is unable to, make such a report” (7-6, 157). This was a much-discussed issue in negotiated rulemaking, and the regulations has “unable” cover “physical and mental incapacitation of a victim” rather than “unwillingness to report.”⁴⁵ The Handbook does not provide this crucial information, referencing instead “a balance between empowering victims to make the decision about whether and when to report a crime, and encouraging members of the campus community to report crimes of which they are aware” (7-6, 157).

Some detail is added to the work of the rule makers in the area of educational programs and campaigns. ED acknowledges the lack of long-term data on efficacy of many promising sexual and interpersonal violence prevention programs and while requiring that schools use programming that is

41 While it is possible that ED assumed readers are already familiar with the confidentiality provision in statute, this assumed depth of all readers is belied by ED’s education on how an institution can figure out how to find a local police department if an institution does not know how to otherwise find the police (4-14, 121). “If you are unsure where to begin [finding local law enforcement], call your local area information number (generally 411), and give your institution’s address to the operator. He or she can give you the telephone number of the local police who respond to calls for your location. You can also find this information on the Internet by searching for ‘law enforcement’ along with the zip code in which your institution is located”). It can be surmised that an institution that cannot find its local police department without specific instructions may not be aware of the details of timely warning confidentiality.

42 See 20 U.S.C. § 1092(f)(3); VAWA Regulations at 62,787.

43 Compare restriction on identifying information in the Annual Security Report, “Identification of the victim or the accused. The statistics required under paragraph (c) of this section do not include the identification of the victim or the person accused of committing the crime,” VAWA Regulations at 62,787, with restriction on identifying information in timely warnings, “An institution must [issue timely warnings] in a manner that is timely and that withholds as confidential the names and other identifying information of victims,” *Id.* See also *id.* at 62,769. This is not to say that an institution must name a suspect or even to take a position on whether it should; it is simply to say that this is allowed when the provisions are read together. Institutions should consider several factors when determining whether to name a suspect, including whether the suspect is at large, armed, dangerous or likely to pose a continuing danger to the community, or whether the suspect is in custody or at a distant location. There is some persuasive case law that would (if followed by other courts) give institutions some flexibility in naming suspects in a Timely Warning, even when that warning was not strictly and technically required by the letter of the statute. See *Havlik v. Johnson and Wales University*, 509 F.3d 25 (1st Cir. 2007) (awarding judgment to the defendant university in a defamation lawsuit for reporting that a crime occurred outside of Clery geography, because the College believed it was covered).

44 Compare 2011 Handbook at 112 (“For example, if a Rape is reported on campus and the alleged perpetrator has not been caught, the risk is there. If the alleged perpetrator was apprehended, *there is no* continuing risk”) to 2016 Handbook at 6-13, 146 (“For example, if a Rape is reported on campus and the alleged perpetrator has not been caught, there is a risk of similar crimes. If the alleged perpetrator was reported or apprehended, *there may not be a* continuing risk”). Emphases added.

45 VAWA Regulations at 62760.

“informed by research,” also states “This does not preclude you from using promising practices that have been assessed by members of your institution, or other institutions, for value, effectiveness or outcome but not yet subjected to scientific review” (8-4, 165). Further, the Handbook is flexible in allowing institutions to meet more than one training requirement in a single session or otherwise combine concepts within a campaign (8-4, 166). Colleges are required to use good-faith efforts to reach students, but as per the decision of the VAWA negotiators, the Handbook encourages but does not require that institutions make attendance at training mandatory for students.⁴⁶

The Handbook provides slight guidance on information that must be included in written notifications to victims, stating that victims should be given information about “both on- and off-campus services, as applicable [and if] there are no on- or off-campus services, you must state this fact in your policy statement” (8-14, 175). Campuses without on campus immigration attorneys available to students may use the VAWA Visa and Immigration Resource to provide visa and immigration information for victims, customized to the institution, and automatically translated into a growing list of languages.

Regarding assistance and adjustments for those reporting violence, ED requires that colleges state that the “institution is obligated to comply with a student’s reasonable request for a living and/or academic situation change following an alleged sex offense” (8-14, 165). Note that to be consistent with the lessons of trauma-informed treatment of victims, institutions may wish to reword “alleged sex offense” to “incident of sexual or interpersonal violence.”

In a change from 2011, the Handbook requires that “Protective measures should minimize the burden on the victim. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the victim from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case” (8-15, 176). This is now consistent with OCR guidance.⁴⁷ Also coming into alignment with OCR guidance is a requirement that the VAWA policies on violation response (not the counting) be followed “regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e., on or off your institution’s Clery Act geography)” (8-16, 177).

The section addressing the description of the standard of evidence may mislead institutions. Since April 2011, a few months after the last Handbook was issued, OCR guidance has required that colleges use a preponderance of the evidence standard to evaluate sexual harassment and violence complaints.⁴⁸ The 2016 Handbook says that common standards of evidence used in legal proceedings are preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt, but reaffirms that “[t]he Clery Act does not require a specific standard of evidence” (8-16, 177). The Handbook next says that “the Clery Act does require that each institution choose which standard of evidence they will use in their disciplinary proceedings arising from allegations of dating violence, domestic violence, sexual assault or stalking, and describe that standard in this statement” (8-16, 177). ED (FSA) declines to reference OCR’s more narrow requirement, which institutions must apply to sex discrimination under Title IX (and whether dating violence or stalking are always sex discrimination under Title IX is its own article). Some VAWA crimes clearly do not implicate Title IX, such as a father punching a son at a

⁴⁶ VAWA Regulations at 62769-62770.

⁴⁷ United States Department of Education, Office for Civil Rights, *Dear Colleague Letter* (Apr. 2011) at 15-16, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (“2011 DCL”).

⁴⁸ 2011 DCL at 10-11.

football game or a student stalking a faculty member seeking a grade. Still, the lack of a comprehensive discussion of these separate and overlapping pieces of guidance from the same government agency may lead to compliance problems and unnecessary confusion.

Without explanation, ED has extended the regulatory requirement that a campus publish all possible sanctions for VAWA violations (not just a range)⁴⁹ to require that institutions list the type and length of a suspension that is a possible sanction (8-7, 168). Of course, institutions use different lengths and types of suspensions depending on the nature of the violation as well as other factors such as the length of time the victim will remain at the college. To comply with this additional Handbook requirements, campuses may wish to develop a detailed list of all possibilities.⁵⁰ Note that the list of sanctions is distinct from providing information about the protective measures for reporting individuals, which does allow a range (8-17, 168).

ED's guidance on providing fair and impartial processes defines such processes to include "written notice to the accuser and the accused of the delay and the reason for the delay" (8-18, 179) and later states that while it does not require that institutions cancel or delay meetings because an advisor could not be present, it "encourage[s] institutions to consider reasonable requests to do so (8-20, 181). Not referenced, but crucial, is OCR's view that a "typical investigation takes approximately 60 calendar days."⁵¹ Institutions may wish to put language into their Code of Conduct allowing each party (reporting individual and respondent) the ability to request a one-time delay that, if reasonable, will be granted by the Director of Student Conduct (or similar role) and to allow delays mutually agreed upon by all parties. In this way, an institution will be able to advance in its process within the time frame set by OCR, even if one student's attorney claims to not be available for months. ED also requires that a fair and impartial proceeding "be one that lacks hidden agendas and conditions" (8-18, 179) but does not explain what it means or will audit against for this phrase.

The Handbook applies the new standards equally to student investigation/discipline and to faculty/staff investigation/discipline (8-16, 177; 8-20, 181). Institutions may wish to reach out to employee relations and union representatives to make them aware of the guidance.

The Handbook follows longstanding practice allowing colleges to restrict the role of the advisor of choice (sometimes referred to as the "potted plant"), allows for removal of advisors who do not follow the restrictions (8-21, 182), and requires detail in findings letters: "in explaining the rationale for the result and sanctions, the official or entity must explain how it weighted the evidence and information presented during the proceeding, and explain how the evidence and information support the result and sanctions. You must describe how the institution's standard of evidence was applied. It is not sufficient to say only that the evidence presented either met or did not meet the institution's standard of evidence" (8-22, 183).

49 VAWA Regulations at 62772-62773.

50 For example: residence hall suspension of one semester, two semesters, three semesters...; campus-wide suspension of one semester, two semesters, three semesters...

51 2011 DCL at 12.

CHAPTER 9: PUBLISHING THE ASR

As recently as last year, ED in oral guidance required that institutions with multiple campuses publish separate ASR's for each campus with separate policies and separate statistics. This was very difficult at distributed learning institutions with dozens of locations, and contrary to the previous Handbooks. The 2016 Handbook reaffirms that an institution may publish one ASR with separate crime statistics for different campuses (and specifics if policies differ at specific locations) (2-6, 29).

In addition to longstanding guidance requiring that all students receive notification of the availability of the ASR, including those students that are studying elsewhere, the Handbook adds that notification must go to those who are not taking courses but are completing thesis or dissertation work (9-11, 196). Readers are advised to work closely with Registrars and Provost's Office staff, since ABD students may not be officially registered for a time (even a significant time) after completing coursework but before defense. The Handbook includes no end date for sending the ASR to those who never complete their thesis, and campuses would be wise to send liberally to such individuals rather than risk a negative finding.

For the first time, the 2016 Handbook addresses institutions that correct their ASR (9-10, 195). ED requires that if there are any statistical changes or updates to policies after publication, that the institution correct, re-publish the ASR with a note explaining the change(s) and any reasons for the change(s), and re-notify current and prospective staff and students. Further, if older statistics are corrected, ED requires that the institution "correct the statistics in all previous annual security reports that included the statistics" (9-10, 195). This would seem to require that institutions maintain the most recent three (corrected) ASR's on a website, and not just post the most recent ASR, as many institutions currently do.

A NOTE ON LANGUAGE

The Handbook has minor changes in language throughout, such as interchanging disclose/include, classify/count, saying Clery Act instead of simply Clery, and other non-substantive alterations. The Handbook uses various language to refer to participants in crimes and the student conduct process (sometimes referencing the same person differently in the same section) that can be confusing. At various times, students reporting crimes are called "accuser," "complainant," "victim" and the person committing the crime or violation is called "accused" and "alleged perpetrator," (1-2, 13; 7-9, 160; 8-15, 176, 8-18, 179; 8-21, 182; 8-22, 183).

We recommend that institutions use the neutral and standardized language used in New York Education Law 129-B of "reporting individual" and "accused/respondent."⁵² This law is also useful in providing the phrase "sexual and interpersonal violence"⁵³ as an umbrella term for the VAWA offenses; defining VAWA itself can lead to the misconception that these incidents are only crimes when perpetrated against women or against individuals of different sex/gender.

Some readers may find that certain examples in the Handbook unnecessarily use offensive language, including Hate Crime Scenarios 9, 10, 11 and 12 (3-35, 86) where ED could have simply made the exact same point by referencing "offensive word" or "biased statement" as it did with "Anti-gay threats" (3-29, 80). It is unclear what gain there is to students, faculty, or staff for a book published by ED itself to include terms offensive to members of our community.

52 New York Education Law §6439(7)-(9).

53 New York Education Law §6447(2)(a).

Action and Conclusion

ACTION

Colleges and universities that accept Title IV funding should carefully review the changes described in this GRAC White Paper alongside the complete 2016 Handbook to ensure changes are made before issuing the October 1, 2016 ASR.

CONCLUSION

Compliance with the Clery Act is complicated. The Handbook is an important compliance tool since it is the document that any ED auditor will use as a standard. By using this GRAC White Paper, the Handbook, and other resources created by members of URMIA and other higher education groups, an institution can develop programs and processes to comply.

Sources and References

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This document is not legal advice. For legal advice, please contact your legal counsel.

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UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence¹

Title IX of the Education Amendments of 1972 ("Title IX")² is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.³

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").⁴ The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.⁵ Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

¹ The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

² 20 U.S.C. § 1681 *et seq.*

³ Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

⁴ Available at <http://www.ed.gov/ocr/letters/colleague-201104.html>.

⁵ Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.
- Discusses proactive efforts schools can take to prevent sexual violence.
- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act (“FERPA”),⁶ and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (“Clery Act”)⁷ as it relates to a complainant’s right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.
- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).⁸ The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

April 29, 2014

⁶ 20 U.S.C. §1232g; 34 C.F.R. Part 99.

⁷ 20 U.S.C. §1092(f).

⁸ Available at <http://www.ed.gov/ocr/docs/shguide.html>.

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A. A School's Obligation to Respond to Sexual Violence

A-1. What is sexual violence?

Answer: Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. How does Title IX apply to student-on-student sexual violence?

Answer: Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.⁹

A-3. How does OCR determine if a hostile environment has been created?

Answer: As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

⁹ This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See *2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. See *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

Answer: OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school's basic responsibilities to address student-on-student sexual violence?

Answer: When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.¹⁰ The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Answer: Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

¹⁰ Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.¹¹

B. Students Protected by Title IX

B-1. Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?

Answer: A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

¹¹ For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at http://rem.s.ed.gov/Docs/ASM_Marketing_Flyer.pdf.

uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at <http://www2.ed.gov/policy/elsec/guid/secletter/110607.html>.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.¹² Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

¹² OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. See 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq.* and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.¹³

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.¹⁴ A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

¹³ See 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. See 34 C.F.R. § 300.300.

¹⁴ OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.¹⁵ The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.¹⁶

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

¹⁵ For more information on the U nonimmigrant status, see <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status>.

¹⁶ For more information on the T nonimmigrant status, see <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. Title IX Procedural Requirements

Overview

C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?

Answer: The Title IX regulations outline three key procedural requirements. Each school must:

(1) disseminate a notice of nondiscrimination (see question C-2);¹⁷

(2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);¹⁸ and

¹⁷ 34 C.F.R. § 106.9.

¹⁸ *Id.* § 106.8(a).

(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).¹⁹

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.²⁰ For additional information about the procedural requirements in the Clery Act, please see <http://www2.ed.gov/admins/lead/safety/campus.html>.

Notice of Nondiscrimination

C-2. What information must be included in a school's notice of nondiscrimination?

Answer: The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.²¹

Title IX Coordinator

C-3. What are a Title IX coordinator's responsibilities?

Answer: A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

¹⁹ *Id.* § 106.8(b).

²⁰ All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.

²¹ For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at <http://www.ed.gov/ocr/docs/nondisc.pdf>.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. Are there any employees who should not serve as the Title IX coordinator?

Answer: Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?

Answer: Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

- (1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- (2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;
- (3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
- (4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);
- (5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and
- (6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

- (1) a statement of the school's jurisdiction over Title IX complaints;
- (2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;
- (3) reporting policies and protocols, including provisions for confidential reporting;
- (4) identification of the employee or employees responsible for evaluating requests for confidentiality;
- (5) notice that Title IX prohibits retaliation;
- (6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
- (7) notice of available interim measures that may be taken to protect the student in the educational setting;
- (8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;
- (9) notice of potential remedies for students;
- (10) notice of potential sanctions against perpetrators; and
- (11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (*e.g.*, mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting²²

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

²² This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a “responsible employee”?

Answer: According to OCR’s *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.²³

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants’ option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants’ right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

²³ The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a “responsible employee” under OCR’s guidance for administrative enforcement of Title IX is broader.

school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?

Answer: Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?

Answer: Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

Answer: As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.²⁴ When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (*e.g.*, drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

²⁴ Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.²⁵

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

²⁵ The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") to request to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. See 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

E-2. What factors should a school consider in weighing a student's request for confidentiality?

Answer: When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?

Answer: OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.²⁶

²⁶ The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at <http://www2.ed.gov/admins/lead/safety/handbook.pdf>. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.²⁷ These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is 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 school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

²⁷ Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as “Take Back the Night”?

Answer: No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as “Take Back the Night” or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

F. Investigations and Hearings

Overview

F-1. What elements should a school’s Title IX investigation include?

Answer: The specific steps in a school’s Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term “investigation” refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.²⁸ Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

²⁸ This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.²⁹ Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

²⁹ As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

Intersection with Criminal Investigations

F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?

Answer: A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?

Answer: A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

Off-Campus Conduct

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

Hearings³⁰

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

³⁰ As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

F-6. May every witness at the hearing, including the parties, be cross-examined?

Answer: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant's sexual history be introduced at hearings?

Answer: Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

Timeframes

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

Answer: As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. Interim Measures

G-1. Is a school required to take any interim measures before the completion of its investigation?

Answer: Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

H. Remedies and Notice of Outcome³¹

H-1. What remedies should a school consider in a case of student-on-student sexual violence?

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

³¹ As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;
- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;
- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and
- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.³²

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;
- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;
- Developing materials on sexual violence, which should be distributed to all students;
- Conducting bystander intervention and sexual violence prevention programs with students;
- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

³² For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;
- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and
- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

Answer: If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

Answer: Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.³³

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

³³ 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention³⁴

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

³⁴ As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?

Answer: All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,³⁵ and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,³⁶ remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

³⁵ Available at <http://www.ed.gov/ocr/firstamend.html>.

³⁶ Available at <http://www.ed.gov/ocr/letters/colleague-201010.html>.

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.³⁷

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

Answer: Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see <http://www2.ed.gov/admins/lead/safety/campus.html>.

M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html>.

³⁷ 34 C.F.R. § 106.42.

N. Further Federal Guidance

N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?

Answer: Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at <https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at <http://www.ed.gov/ocr/complaintintro.html> or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at ocr@ed.gov.

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

Answer: Yes. OCR's policy guidance on Title IX is available on OCR's webpage at <http://www.ed.gov/ocr/publications.html#TitleIX>. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010),
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>
- *Sexual Harassment: It's Not Academic* (Revised September 2008),
<http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001),
<http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education's Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013)
<https://www2.ed.gov/policy/gen/guid/secletter/130228.html>
- Department of Education's National Center on Safe Supportive Learning Environments
<http://safesupportivelearning.ed.gov/>
- Department of Justice, Office on Violence Against Women
<http://www.ovw.usdoj.gov/>

URMIA Government and Regulatory Affairs White Paper

An Overview of the Violence Against Women Act (VAWA)
Amendments to the Clery Act

May 2017

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Overview and Brief Description

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STATUTE/REGULATION SOURCE

The Clery Act, as amended by the Violence Against Women Act, 20 USC 1092(f); 34 CFR 668.46.

BRIEF DESCRIPTION

On March 7, 2013, President Obama signed the Violence Against Women Reauthorization Act of 2013 (VAWA).⁴ Among the provisions included in the Act were amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, otherwise known as the Clery Act. Most of the amendments to the Clery Act address how institutions must count, disclose, and respond to reports of domestic violence, dating violence, stalking, and sexual assault. Other changes require colleges and universities to implement educational initiatives aimed at preventing and remedying instances of these crimes on campus. Yet other amendments concern hate crimes and the confidentiality of crime victims in timely warnings. This URMIA Government and Regulatory Affairs Committee (GRAC) White Paper will describe the new statutory and regulatory requirements by (1) defining dating violence, domestic violence, stalking, and sexual assault; (2) identifying new categories of reportable hate crimes; (3) clarifying the methodology for counting certain Clery-reportable crimes; (4) listing required policy changes; and (5) examining the overlap between the VAWA regulations and Office for Civil Rights (OCR) sub-regulatory guidance on Title IX.⁵

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4 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54 (2013).

5 Although Federal Student Aid (which audits compliance with the Clery Act) and OCR (which audits compliance with Title IX) are both departments of the Department of Education, they do not always speak with one voice and their guidance is not always consistent.

Potential/Actual Impact to Higher Education

Complying with the Clery Act is a campus-wide responsibility. Whether the reader is in risk management, compliance, student affairs, law enforcement/public safety, or the counsel's office, it is critically important to review the institution's development of its Clery Act policies and statistics. The amendments to the Clery Act passed as part of the VAWA reauthorization are already effective, but are complicated and full of detail. Institutions should carefully review all policies and procedures to ensure compliance and, more importantly, to ensure that they are providing a safe living and learning environment for students and other members of the campus community.

Discussion

Traditionally, the Clery Act has been a geographic reporting law,⁶ while Office for Civil Rights Guidance issued by OCR to implement Title IX of the Education Amendments of 1972 has required response based on the identity of the victim or accused/respondent.⁷ VAWA is actually a mix of both approaches. The *reporting* elements of VAWA are geographically based as per traditional Clery. But the *response* elements of VAWA are based on identity, and look more like post 2011 interpretations of Title IX.

Law	Theoretical Approach to Violations
Traditional Clery Act compliance	Geographically-based reporting of crimes
Title IX as interpreted by OCR	Identity-based response to unequal treatment that addresses the violation and prevents recurrence
VAWA Amendments to Clery Crime Reporting	Geographically-based reporting of crimes
VAWA Amendments to Clery Violence Response	Identity-based response to crimes/incidents that addresses the violation and prevents recurrence

⁶ US Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2016 Edition, Washington, DC, 2016 ("2016 Handbook") at 1-11, 22. The 2016 Handbook changed pagination from prior Handbooks to be by chapter rather than the document in total; to aid understanding, we will cite to the Handbook using the system: (Chapter-Page, Page) in this PDF of the Handbook: <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

⁷ Office for Civil Rights, US Department of Education, "Dear Colleague Letter: Sexual Violence" (Apr. 2011) [hereinafter "2011 Dear Colleague Letter"], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

A. CRIMES AND COUNTING

1. New VAWA Reportable Incidents: Domestic Violence, Dating Violence, Stalking, and Sexual Assault

A key component of the original Clery legislation was the requirement that colleges and universities count and disclose various crimes in an Annual Security Report (ASR). VAWA adds domestic violence,⁸ dating violence,⁹ and stalking¹⁰ as new categories of reportable incidents¹¹ that must be recorded and disclosed in an institution's ASR. The regulations also update the definition of sexual assault. Campus Security Authorities should be fluent in these new definitions (the revised sexual assault definition and newly included definitions of stalking, domestic violence, and dating violence) to ensure accurate reporting. Also, definitions must actually be included in the ASR, not simply referenced.¹² While institutions must count these crimes using the federal definitions referenced below, they must also include jurisdictional definitions for these crimes in the ASR.¹³

Dating Violence and Domestic Violence

VAWA differentiates dating violence and domestic violence as two separate and distinct categories of reportable offenses. Dating Violence is:

Violence committed by a person—

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship
 - (ii) The type of relationship
 - (iii) The frequency of interaction between the persons involved in the relationship¹⁴

Domestic Violence is:

A felony or misdemeanor crime of violence committed—

- (A) By a current or former spouse or intimate partner of the victim;
- (B) By a person with whom the victim shares a child in common;
- (C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or

8 Violence Against Women Act, 79 Fed. Reg. at 62,784 (codified at 34 C.F.R. 668.46(a)); 2016 *Handbook* at 3-36-3-41, 87-92; 8-1-8-2, 162-163.

9 Ibid.

10 Ibid. at 62,784-85 (codified at 34 C.F.R. 668.46(a)).

11 The GRAC White Paper uses the term “incident” here, as an incident may be a countable VAWA statistic even if it does not rise to the level of a crime under federal or state law. For instance, the final regulations’ definition of dating violence includes threats of violence, which would count for Clery Act purposes even though it is not a crime. For procedural and technical reasons, the final regulations state that any countable statistic is a “crime” even where it is not a crime under federal and state law. Violence Against Women Act, 79 Fed. Reg. at 62,764-62,765. During the rest of the white paper, we will mostly refer to “VAWA crimes” for ease of use, but use this footnote to make the point that to be countable, an incident need not technically be defined as a crime in the jurisdiction or in the VAWA statute.

12 Violence Against Women Act, 79 Fed. Reg. at 62,770; 2016 *Handbook* at 8-6, 167.

13 Not all jurisdictions define all VAWA crimes (e.g., dating violence) and if that is the case, an institution can simply explain that such a crime is not defined in the applicable jurisdiction. Ibid. If the reader is at a New York State college or university, they may find this information for New York helpful on pages 7-12 of the SUNY *Policy and Programming Changes Pursuant to the Campus SaVE Provisions of the Violence Against Women Act*, available at <http://system.suny.edu/media/suny/content-assets/documents/generalcounsel/SUNY-VAWA-Guidance-2014.pdf>.

14 34 C.F.R. § 668.46(a); 2016 *Handbook* at 8-1-8-2, 162-163.

intimate partner;¹⁵

(D) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or

(E) By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.¹⁶

While under VAWA these definitions may cover similar conduct, there are distinctions. For example, VAWA limits domestic violence to felonies and misdemeanors and also may cover relationships that would not be covered by dating violence. As a result, if violence between a married couple does not rise to the level of a felony or misdemeanor crime of violence, it would not constitute domestic violence, although it would probably be reportable as dating violence, if it meets the other prongs of the definition.¹⁷ Also, the same violence between a mother and daughter would not necessarily meet either definition, but if it were a felony or misdemeanor, it might qualify as domestic violence under either (D) or (E) of that definition.¹⁸

The analysis gets more complicated when there is an incident of violence between intimate partners that would constitute a felony or misdemeanor. If the relationship of the individuals involved met the definition of domestic violence—for example, if they were married, cohabiting, or shared a child in common—then the incident would be counted as domestic violence.

In these circumstances, the incident would most likely qualify as both domestic violence and dating violence, but to report the incident as two separate crimes would result in inflated crime statistics. To address this issue, the Department of Education has created a hierarchy of sorts, without calling it a hierarchy, such that a felony or misdemeanor crime of violence occurring in Clery geography between individuals covered by the domestic violence definition should be counted as domestic violence, and not as dating violence.¹⁹

Stalking

Pursuant to the final rule, stalking is engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress.²⁰ The definition clarifies that "a course of conduct"²¹ is "two or

15 The *Handbook* states, "To categorize an incident as Domestic Violence, the relationship between the perpetrator and the victim must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship." 2016 *Handbook* at 3-38, 89.

16 Ibid.

17 Violence Against Women Act, 79 Fed. Reg. at 62, 757.

18 The VAWA regulations require two factors to be counted as domestic violence. The first is that the crime is either a felony or misdemeanor. The second is that the victim and assailant are in a covered relationship. Some of these relationships are spelled out specifically in the regulations (current or former spouse or intimate partner, those who share a child in common or cohabitate as a spouse or intimate partner), while other relationships are based on the state domestic relations law of the jurisdiction in question (a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction or any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction). Examples in most jurisdictions would be a parent and child or two siblings. Final Rule at 62784.

19 Violence Against Women Act, 79 Fed. Reg. at 62, 757.

20 Ibid. at 62, 784.

21 Ibid.

more acts,”²² and that “substantial emotional distress” is “significant mental suffering or anguish that may, but does not necessarily, require medical or professional treatment or counseling.”²³ A “reasonable person” is “a reasonable person under similar circumstances and with similar identities to the victim.”²⁴ Institutions must report a single count of stalking for each year in which the course of conduct occurs (not multiple counts for each element of stalking) and institutions are not required to follow up with reporting individuals in future years to determine if the stalking activities continued.²⁵ Note that the Department of Education did not include stalking in what is referred to in the prior section as the domestic violence/dating violence hierarchy.

Sexual Assault

Although sexual assault has long constituted a reportable crime under the Clery Act, VAWA amended the definition of sexual assault. Under the new regulations, sexual assault is “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.”²⁶ Rape is “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”²⁷ Previously, the law defined “forcible rape,” “forcible sodomy,” “sexual assault with an object,” and “forcible fondling” separately. The new definition of rape encompasses forcible rape, forcible sodomy, and sexual assault with an object, and forcible fondling has been changed to fondling. In general, sexual assault is an umbrella term encompassing rape and fondling.²⁸

2. New Hate Crimes: Gender Identity and National Origin

VAWA adds two new categories of bias that can yield a reportable hate crime: gender identity and national origin. Prior to the promulgation of the VAWA statute and regulations, crimes motivated by race, gender, religion, sexual orientation, ethnicity, and disability were the only reportable hate crimes. With the addition of gender identity and national origin, institutions must now report hate crimes that are motivated by a bias against an individual based on an actual or perceived gender-related characteristic²⁹ or actual or perceived place of origin, or physical, cultural, or linguistic characteristics of a certain national origin group.³⁰ Additionally, bias against someone married to or associated with a member of a protected class may count.³¹

22 Ibid.

23 Ibid. at 62, 784-85.

24 Ibid. at 62, 784. This means that institution officials must not replace their self-view of what they would do in a circumstance with what this person, with their experiences, would reasonably do.

25 2016 *Handbook* at 3-39-3-40, 90-91.

26 Ibid. at 62, 784.

27 Ibid. at 62, 789.

28 Some higher education professionals were confused about the terms non-forcible and forcible rape in classifying what some call “acquaintance rape,” or “date rape,” when really, forcible rape meant all rape that was not statutory or incest. This change is also consistent with the US Department of Justice’s 2012 revisions to the Uniform Crime Report’s definition of rape. See US Department of Justice, “Attorney General Eric Holder Announces Revisions to the Uniform Crime Report’s Definition of Rape,” (Jan. 6, 2012), available at <http://www.justice.gov/opa/pr/attorney-general-eric-holder-announces-revisions-uniform-crime-report-s-definition-rape>.

29 18 U.S.C. 249(c)(4).

30 As defined by the Equal Employment Opportunity Commission: 29 C.F.R. 1606.1.

31 2016 *Handbook* at 3-26-3-27, 77-78.

3. Compiling Statistics

The Clery Act requires that colleges and universities compile statistics regarding various crimes³² that occurred within certain Clery-defined geographic boundaries during the course of a calendar year. The amendments specifically address how to count various Clery crimes in four areas: unfounded crimes, multiple reports of the same crime, stalking, and incidents that involve multiple crimes.

Unfounded Crimes

The final rule requires that institutions report crimes, regardless of whether an assailant is charged judicially or criminally, found responsible or guilty, or even caught, and even if, after an investigation, the crimes are deemed to be “unfounded.”³³ An “unfounded” crime is an allegation that a sworn or commissioned law enforcement officer deems to be false or baseless after conducting an investigation.³⁴ When such a determination is made, the university may designate these unfounded crimes as a separate category in the annual security report (ASR) (in either tabular or narrative format)³⁵ and in the statistics provided to the Department of Education. In these instances, the institutions must maintain documentation specifying the grounds upon which a determination was made that the allegations were unfounded.³⁶ The *Handbook* expands on these requirements.³⁷

Multiple Reports of the Same Crime

Institutions sometimes question how to count multiple reports of what appears to be the same incident. This occurs with regularity in VAWA crime reporting, as victims and bystanders sometimes seek anonymity and anonymous complaints are sometimes received by campus professionals via mail or email and through anonymous reporting websites and phone numbers.³⁸ Under the final rule, if two or more reports appear to point to the same incident, the institution need only include one report of that crime in its statistics.³⁹

Special Issues in Counting Stalking

Special issues arise when counting stalking because stalking is repetitive in nature and may occur in multiple locations, both on and off campus. Recall that stalking, by definition, is a “course of conduct.” Under the final rule, the course of conduct counts as a single instance of stalking until January 1st of the new calendar year. If the course of conduct continues into the following year and is again reported to a local police agency or campus security authority, the institution must record a separate instance of stalking in its ASR.⁴⁰ The institution is not required to follow up with stalking victims in the new calendar to learn whether or not the conduct has continued, but is not precluded from doing so.⁴¹ Institutions may, but are not required to, provide additional detail regarding these reports and

32 See Note 7 *supra*.

33 34 C.F.R. 668.46(c)(2)(iii)(A); 2016 *Handbook* at 3-51-3-54, 102-105.

34 Ibid. at 668.46(c)(2)(iii).

35 2016 *Handbook* at 9-7, 192.

36 79 Fed. Reg. at 62,765-66. This requirement was included to allay fears that the institutions would “hide” crimes by summarily and arbitrarily concluding that the allegations were unfounded. Ibid. at 3-54, 105.

37 2016 *Handbook* at 3-51-3-54, 102-105.

38 See, for example, <http://www.buffalo.edu/police.html> and other forms and phone numbers found under “Anonymous Reporting” for each campus at <http://response.suny.edu/>.

39 79 Fed. Reg. at 62,765.

40 34 C.F.R. 668.46(c)(6)(i).

41 79 Fed. Reg. at 62,767.

whether the statistic represents a new case of stalking or a continuation from a prior year's report.⁴² The final rule also clarifies how one determines whether stalking took place in a Clery-reportable geographic area. Colleges must use the location where the victim first became aware of the stalking, or the location where the incident was perpetrated (if known), or both if both locations are known and fall within Clery-reporting geography.⁴³ For example, if an individual perpetrated the stalking in Clery geography on Campus A, the victim first became aware of the stalking while in Clery geography on Campus B, and a campus security authority at each institution learned of the crime, then each campus would record one incident of stalking in its ASR.⁴⁴

Multiple Clery Crimes in the Same Occurrence

There may be instances in which a single incident of violence includes multiple crimes (i.e. perpetrator sexually assaults and murders victim). Clery embeds a hierarchy,⁴⁵ adopted from the Uniform Crime Reporting program of the FBI, that generally requires institutions to subsume lesser crimes into the gravest crime. However, the final regulations partly removed sex crimes from the hierarchy.⁴⁶ In removing sex crimes from the hierarchy, the regulations require that institutions count sex crimes even if a crime deemed more serious under the Uniform Crime Reporting hierarchy occurs. For example, if in the same occurrence an individual sexually assaults and takes a life within Clery Act geography, the institution must count both the murder and the sexual assault. Note, however, that lesser crimes are still subsumed within sexual assault (e.g., if an individual commits a burglary and a sexual assault, institutions should only count the sexual assault).

B. NEW POLICIES AND CODE OF CONDUCT CHANGES

VAWA and the accompanying regulations require colleges and universities to enact various policies and amend their codes of conduct to institutionalize protections for individuals who are victims of domestic violence, dating violence, stalking, or sexual assault or who participate as parties in disciplinary proceedings relating to VAWA crimes. Each policy statement must be supported by an actual published and implemented policy—having the statement in the ASR is not sufficient for compliance.⁴⁷ This section outlines the required policy statements and procedural protections that colleges and universities must embed into policies and codes of conduct. For clarity, we will use separate sections for what may appear in the regulations to be one required statement. In the ASR, the statement(s) and paragraphs may be separated so long as all of the required information is published. Further, policy statements may be published in any order or combined provided that they are clearly labeled as such.⁴⁸

⁴² 2016 Handbook at 3-40, 91.

⁴³ Ibid. at 3-39, 90. Note that, especially with electronic communication, victims of stalking may simultaneously receive messages on multiple devices located on and off of Clery geography. The key question is not whether there was a device within Clery geography that received the message, but whether, when the person who receives the message becomes aware that she or he has received that message, they are currently located within Clery geography. For this reason, it is important to ask questions about geography when individuals report incidents of stalking. The fact that digital stalking may have occurred over a campus network is insufficient to report stalking at that institution, if the stalking was perpetrated or discovered outside of Clery geography. See Fed. Reg. at 62, 767.

⁴⁴ 79 Fed. Reg. at 62,767-68.

⁴⁵ For a detailed explanation of the hierarchy rule following the final regulations, see Joseph Storch, *Clery Act Hierarchy Following the Final Rules Implementing the Violence Against Women Act*, November 2014, http://www.higheredcompliance.org/resources/CleryActHierarchy_FinalRulesImplementVAWA.pdf.

⁴⁶ 79 Fed. Reg. at 62,787.

⁴⁷ Policy statements in the ASR are meant to be statements of existing full policies of the institution and not necessarily the full policy, though it is permissible to include the full policy.

⁴⁸ 2016 Handbook at 7-2, 153.

The ASR must include new and expanded policy statements addressing the following:

- **The encouragement of prompt reporting to law enforcement consistent with the victim's wishes⁴⁹**

Clery has always required a statement in the ASR encouraging prompt reporting of all crimes to law enforcement.⁵⁰ VAWA amended that statement to specify that crimes should only be reported to law enforcement when the victim elects to or is unable to report.⁵¹ A victim who is unwilling to report does not qualify as *unable* under the statute and regulation; rather, an unable victim is one who is deceased or in a coma.⁵² This practice is consistent with modern guidance on empowering victims to make choices,⁵³ including the model standards provided by the White House Task Force Report.⁵⁴ Crimes against children may require mandatory reporting under state law⁵⁵ or campus policy.⁵⁶

The preamble to the final regulations recognizes that some states have laws regarding the mandatory reporting of known cases of sexual assault to law enforcement regardless of the victim's wishes or involvement.⁵⁷ The preamble says that there is no conflict between the obligation to notify a victim of the option not to notify police and a state mandatory reporting obligation, because the former is about whether a victim reports or not and the latter is an institutional obligation.⁵⁸

49 34 C.F.R. § 668.46(b)(4)(iii).

50 20 U.S.C. § 1092(f)(1)(C)(iii) (2012).

51 Violence Against Women Reauthorization Act of 2013, Sec 304(a)(1)(A); Violence Against Women Act, 79 Fed. Reg. at 62,760; 34 C.F.R. 668.46(b)(4)(iii).

52 Ibid. at 62, 760.

53 See "Help and Support for Victims," National Sex Offender Public Website, Department of Justice, <http://www.nsopw.gov/en-US/Education/HelpSupport>; "An Information Guide for Sexual Assault Victims in Virginia," Department of Criminal Justice Services Victims Services Section, Virginia, 2004, <https://www.dcjs.virginia.gov/victims-services>; "Information for Sexual Assault Victims and Their Families," Connecticut Office of Victim Services of the Judicial Branch, <http://www.jud.ct.gov/Publications/vs030.pdf>, at 10; "Sexual Assault Protocol for Adult Forensic and Medical Examination," Iowa Department of Public Health, 2012, <https://idph.iowa.gov/Portals/1/userfiles/143/Iowa%20Sexual%20Assault%20Examination%20Protocol%20282015%20update%29.pdf>, at ii; "What to Do if You've Been Raped or Sexually Assaulted," New York State Department of Health, https://www.health.ny.gov/prevention/sexual_violence/what_to_do.htm; "Reporting to Law Enforcement," Rape Abuse & Incest National Network, <https://rainn.org/get-information/legal-information/reporting-rape>.

54 See White House Task Force, *First Report: Not Alone*, <https://www.justice.gov/ovw/page/file/905942/download>, at 11 (explaining that these policies have the tendency to take control away from the victim and may be counterproductive to encouraging reporting).

55 "Mandatory Reporters of Child Abuse and Neglect, State Statutes (current through 2013)," Child Welfare Information Gateway, US Department of Health and Human Services, <https://www.childwelfare.gov/>.

56 See "Policy on Mandatory Reporting and Prevention of Child Sexual Abuse," State University of New York, https://www.suny.edu/sunypp/documents.cfm?doc_id=759; "Policy VI-1.50 on Reporting of Suspected Child Abuse and Neglect," University System of Maryland, <http://www.usmd.edu/regents/bylaws/SectionVI/>; "Policy on Reporting Child Abuse and Neglect," University of California, <http://policy.ucop.edu/doc/4000603/CANRA>; "Policy AD72- Reporting Suspected Child Abuse," Pennsylvania State University, <https://guru.psu.edu/policies/AD72.html>.

57 79 Fed. Reg. at 62,761.

58 Ibid. This seeming distinction without a difference may leave the reader dissatisfied, and it is unclear whether reporting students would be aware of the fine distinctions.

- **Programs in place to prevent VAWA crimes⁵⁹**

Institutions must describe the programs that they have in place to inform students and employees about the prevention of domestic violence, dating violence, sexual assault, and stalking, including both primary prevention and ongoing awareness programs. The programs must be culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed or assessed for value, effectiveness, or outcome.⁶⁰ Note that, inasmuch as the literature on effectiveness of many programs is still developing, the Department of Education will allow institutions to use “promising practices that have been assessed by members of your institution, or other institutions, for value, effectiveness or outcome but not yet subjected to scientific review.”⁶¹

Institutions must describe the educational programs in the ASR, not merely state that they exist.⁶² The educational programs must include at least the following information: a statement that the institution prohibits VAWA crimes; definitions of consent, domestic violence, dating violence, stalking, and sexual assault in the applicable jurisdiction,⁶³ safe and positive options for bystander intervention when there is a risk of a VAWA crime occurring, and information on risk reduction to recognize warning signs of abusive behavior.⁶⁴

- **Procedures victims should follow to report or respond to these crimes⁶⁵**

Policies must state that victims⁶⁶ will be provided with written information about evidence preservation, how and to whom to report dating violence, domestic violence, sexual assault, and stalking, and options for and assistance with notifying law enforcement if the victim chooses.⁶⁷ Victims will also be told of the option to decline to notify law enforcement.⁶⁸ The statute and regulations do not give examples of evidence preservation information.⁶⁹ Policies must provide information about no contact or stay away orders from the institution, orders of protection from local law enforcement or courts, and other similar orders.⁷⁰ The Violence Against Women Act requires that states give full faith and credit to protection orders issued in other states, Indian Tribes, and territories.⁷¹

59 34 C.F.R. § 668.46(b)(6). See also Note 11 *supra* for a discussion of the terminology used in this Note.

60 34 C.F.R. § 668.46(a) (2014).

61 2016 *Handbook* at 8-4, 165.

62 “Dear Colleague Letter on Implementation of the Final VAWA Regulations,” July 22, 2015, p. 2. <http://ifap.ed.gov/dpccletters/GEN1515.html>; and 79 Fed. Reg. at 62,752.

63 34 C.F.R. § 668.46(j)(1)(i) (B) (2014).

64 34 C.F.R. § 668.46(j)(1)(i) (2014).

65 34 C.F.R. § 668.46(b)(11)(ii) (2014).

66 Use the terminology of your campus, whether it’s victim, survivor, witness, complainant, reporting individual, or something else. VAWA uses the term victim, and this article is in line with that statute. New York State uses the term Reporting Individual, Education Law § 6439(9).

67 Ibid. § 668.46(b)(11)(ii)(A)-(C).

68 Ibid. § 668.46(b)(11)(ii)(C)(3).

69 Evidence preservation information may include advice that victims should avoid showering, washing, changing clothes, combing hair, drinking, eating, or doing anything to alter physical appearance until after a physical exam has been completed. See “September 2014 Annual Security Report,” SUNY Brockport, p. 8, https://www.brockport.edu/policies/docs/campus_safety_report_clery_act_and_campus_crime_statistics.pdf; “The Johns Hopkins University Sexual Misconduct Policy and Procedures,” Johns Hopkins University, <http://sexualassault.jhu.edu/policies-laws/> (Section 8 describes medical procedures and preservation of evidence).

70 Ibid. § 668.46(b)(11)(ii)(D).

71 18 U.S.C. § 2265.

- **Possible sanctions that may be imposed after a determination of responsibility for a VAWA crime through an internal disciplinary process**⁷²

Policies must list all possible sanctions that an institution could impose on an individual after a finding that the respondent has been found responsible for a code or handbook violation involving domestic or dating violence, stalking, or sexual assault. The list must be exhaustive, not a range or sampling of potential sanctions.⁷³ The *2016 Handbook* admonishes institutions to “be specific. For examples, if suspension is a possible sanction, describe the type of length of the suspension and any requirements that must be met for reinstatement.”⁷⁴

- **The range of protective measures that the institution may offer to the victim following an allegation of a VAWA crime**⁷⁵

Policies must include a range of protective measures offered to victims of VAWA crimes. In contrast to the sanctions, it is unnecessary to be exhaustive. Note that these measures may be offered following an allegation, and are unrelated to an individual’s participation in disciplinary procedures or the final determinations of such procedures.

- **Procedures the institution will follow once an incident has been reported, including the standard of evidence used to adjudicate allegations of VAWA crimes**⁷⁶

Policies must describe the institutional response to reports of sexual assault, domestic violence, dating violence, or stalking, such as how the institution will provide victims with written notice of available options, remedies, and services. Congress and the rule makers declined to name a standard of evidence for VAWA crimes, noting only that the institution must publish which standard it will use in its proceedings. Title IX guidance says that in cases of sex discrimination, including sexual assault—a VAWA crime—the standard of evidence must⁷⁷ be preponderance of the evidence, or more likely than not.⁷⁸ Colleges must consider whether to use the preponderance of the evidence standard to adjudicate allegations of (1) all conduct violations, (2) all sexual and interpersonal violence violations, including VAWA crimes, or (3) only those violations that OCR guidance addresses, such as sexual harassment and sexual assault. The law does not require institutions to use one standard of evidence for all violations in the code.⁷⁹

72 Ibid. § 668.46(k)(1)(iii). Violence Against Women Act, 79 Fed. Reg. at 62,772-73.

73 Note that OCR Resolution Agreements will often call for a “range,” while the Clery Handbook specifically does not allow a range. Compare e.g. “OCR Resolution Agreement with Wesley College,” Complaint No. 03-15-2329 (Sep. 30, 2016) at 4 with *2016 Handbook* at 8-17, 178.

74 *2016 Handbook* at 8-17, 178. As an example, SUNY Cortland outlines available sanctions for cases of sexual assault or rape, dating violence, domestic violence, and stalking in detail. “SUNY Cortland Code of Student Conduct,” 2016-2017, Section 12(g): Sanctions, <https://www2.cortland.edu/dotAsset/7369b784-04b6-4939-a0ba-0afbba7d5acb.pdf> at 20-21.

75 34 C.F.R. § 668.46(k)(1)(iv).

76 Ibid. § 668.46(k)(1)(ii).

77 Although this article will reference OCR guidance that may include words like “must” or “required,” the authors acknowledge that OCR’s authority to mandate obligations via sub-regulatory guidance is unsettled.

78 “2011 Dear Colleague Letter,” at 11. For more discussion on the standard of evidence, see Part C.1 *infra*.

79 Issues with this are raised in Part C.1, below.

- **Procedures for available institutional disciplinary actions in allegations of domestic violence, dating violence, sexual assault, and stalking, that include equal rights to an advisor and notice of outcome⁸⁰**

Policies must explain each type of internal disciplinary or adjudication procedure used by the institution to address VAWA crimes. Include the steps reporting or participating individuals should or must take; anticipated timelines, including how many days each step might take and, if available, how many days a party has to appeal;⁸¹ the decision-making process; and how the institution determines which procedure to use. For example, institutional policies should distinguish between the procedures used when the accused individual is an employee versus a student⁸² or even a third-party.⁸³

Policies should also state that the process will be fair, impartial, and prompt throughout the investigation and to the final result.⁸⁴ The process must be conducted by officials who receive annual training on issues related to VAWA crimes, conducting investigations, and ensuring a safe and accountable hearing process.⁸⁵ Neither the regulations nor the preamble suggest that students are prohibited from being “officials” on hearing board or panels, so long as they receive the annual training.⁸⁶

VAWA requires institutions to allow the parties in an institutional student disciplinary proceeding for a VAWA crime to bring an advisor of choice to the student conduct hearing and any related meetings.⁸⁷ The preamble to the final regulations, and the final regulations themselves, make clear that any advisor is permitted, including attorneys.⁸⁸ Institutions should specify in their policies how many advisors will be permitted—can a student bring an attorney, a parent, and an advocate? Even though they must allow the presence (subject to reasonable behavior requirements) of an advisor of choice, institutions may limit the extent of an advisor’s participation, which many call the “potted plant” rule.⁸⁹ Any limitation on the participation of an advisor must apply equally to all advisors, and should be published in the written disciplinary proce-

80 Ibid. § 668.46(k)(2)(i)-(v).

81 Note that Title IX guidance advises investigations should take 60 calendar days from complaint to outcome—listed available days for the process addressing sexual assault, which falls under Title IX response, should add up to 60 days or less before appeals. See “2011 Dear Colleague Letter” at 12 and US Department of Education, Office for Civil Rights, “2014 Questions and Answers on Title IX and Sexual Violence,” at 31, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter “2014 Sexual Violence Q&A”].

82 34 C.F.R. § 668.46(k)(1)(i) and see also Violence Against Women Act, 79 Fed. Reg. at 62,772.

83 VAWA does not limit required responses to situations where the accused is a member of the college community. Institutions must offer information on remedies, resources, and accommodations when an accused is a third-party. For example, the institution may have a process by which to ban an individual from the campus. Also, the Office for Civil Rights interprets Title IX as requiring institutions to consider allegations from third parties.

84 34 C.F.R. § 668.46(k)(2)(i).

85 Ibid. at § 668.46(k)(2)(ii). Both the FSA and OCR have indicated in separate oral guidance to the authors and others that nothing in either law prohibits students from serving as panel members.

86 See “OCR Letter to Virginia Military Institute,” Complaint No. 13 (May 9, 2014) (“VMI should ensure that [student cadet] involvement with sexual assault complaints is limited to their receipt.”); “OCR Letter to Princeton University,” Case No. 02-11-2025, 1, 3 (Nov. 5, 2014) (“[T]he University affirms that these procedures . . . include . . . an understanding that current students should not serve on hearing boards in cases involving allegations of sexual misconduct.”).

87 Ibid. at § 668.46(k)(2)(iii); 2016 *Handbook* at 8-20-8-21, 181-182.

88 79 Fed. Reg. at 62,774 and 34 C.F.R. § 668.46(k)(2)(iii).

89 34 C.F.R. § 668.46(k)(2)(iv); Violence Against Women Act, 79 Fed. Reg. at 62,773-74; 2016 *Handbook* at 8-21, 182.

dures.⁹⁰ Institutions should also address what length of delay, if any, will be permitted for hearings or related meetings so that a particular attorney or other advisor's schedule can be accommodated.⁹¹

The accuser and accused (VAWA terms) will be notified simultaneously in writing about the outcome of any institutional disciplinary proceeding, the availability of any appeal procedures, and when the results become final after any appeals.⁹²

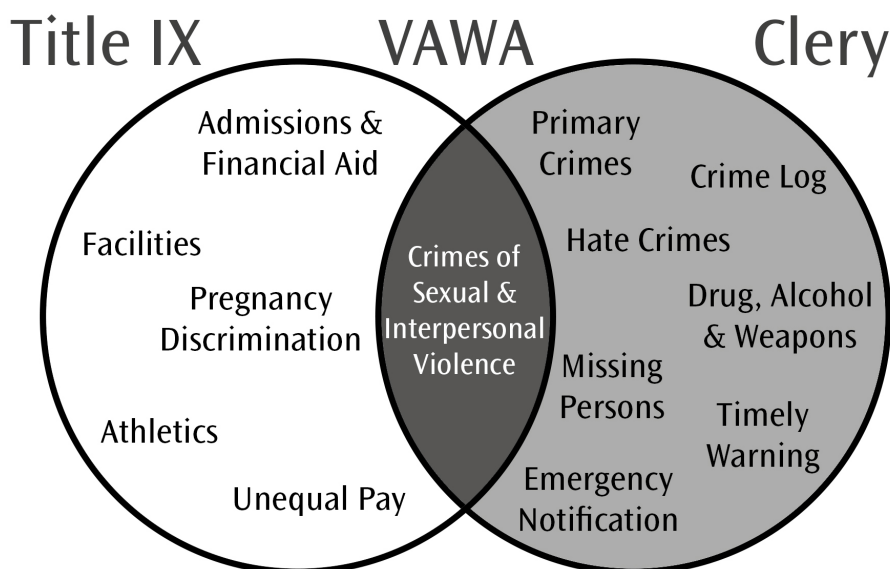


Figure 1: Intersections between Title IX, Clery Act, and Violence Against Women Act

C. THE INTERSECTIONS OF VAWA AND TITLE IX

As the Venn Diagram below shows, the Clery Act addresses very different matters than Title IX; the laws only really overlap in the area of response to sexual and interpersonal violence.

And yet in some ways, the language in the VAWA amendments is similar to that used in Title IX guidance, including the “Dear Colleague Letter” (DCL) from April 2011 and the Sexual Violence Q&A. The Department of Education has made clear, however, that VAWA “has no effect on a school’s obligations under Title IX or the DCL.”⁹³ Similar requirements between the two laws include notice of rights and outcomes, prompt and impartial investigations and resolutions, equal opportunities for the parties,⁹⁴ and a prohibition on retaliation. Yet there are also some meaningful distinctions, especially with respect to the standard of evidence, confidentiality, and retaliation. This section examines the intersections between VAWA and Title IX, offering guidance to institutions in instances in which the regulations and the guidance imperfectly align.

90 79 Fed. Reg. at 62,773-74.

91 Ibid. at 62,773.

92 Ibid. § 668.46(k)(2)(v).

93 “2014 Sexual Violence Q&A” at 44.

94 “Equal opportunities” include the right to have others present during an institutional disciplinary proceeding; the right to be accompanied to any related meeting or proceeding by an advisor; the right to simultaneous notification in writing of the outcome of any institutional disciplinary proceeding; the right to appeal (if applicable); and the right to a prompt, fair, and impartial investigation and resolution. See 34 C.F.R. §668.46(k)(2).

1. Standard of Evidence

The DCL says that institutions must use the preponderance of the evidence standard—sometimes referred to as the “more likely than not” standard—to adjudicate cases of sex discrimination, including sexual violence.⁹⁵ VAWA requires institutions to publish the standard of evidence used for VAWA crimes in their ASRs, but does not specify the standard they must use.⁹⁶ It is possible—and legal—for an institution to adjudicate VAWA crimes using the preponderance of the evidence standard and to adjudicate cases of domestic violence, stalking, and dating violence that do not implicate Title IX under a different standard, such as a “clear and convincing” standard. While *possible* under the law, however, the use of different standards may complicate disciplinary proceedings, especially in instances in which a single respondent faces multiple charges that implicate separate standards of review—a process likely to cause significant confusion at best and unequal application at worst.

2. Confidentiality

VAWA requires institutions to publish in the ASR policies or procedures for reporting crimes on a confidential basis for inclusion in an institution’s Clery Act statistics.⁹⁷ OCR guidance is much more specific in outlining which individuals can keep confidential information provided by a complainant. The Sexual Violence Q&A is particularly helpful in this respect, detailing the confidentiality permitted when victims talk to licensed mental health counselors and clergy, non-professional counselors and advocates, and responsible employees.⁹⁸ These distinct groups have varying obligations and privileges. For example, if a student reports to a licensed mental health counselor acting in that capacity at the student counseling center that he or she has been a victim of sexual assault, this interaction will be kept confidential, except where disclosure is permitted or required by law, such as where there is a health or safety emergency. If the student reports to a peer counselor or a sexual assault victim advocate on campus, those individuals are what OCR terms “non-professional counselors and advocates,” who can safeguard the identity of the parties but should report data similar to that required by the Clery Act to the Title IX coordinator to assist with tracking trends and patterns.⁹⁹ This data may include the nature, date, time, and general location of the incident.¹⁰⁰ However, under Clery the obligation to report falls to individuals who are Campus Security Authorities (CSA), as defined by Clery.¹⁰¹ CSA reports must indicate that an incident occurred but need not provide information that would permit identification of the victim. Some readers will find that the list of potential CSAs included in the 2016 *Handbook*¹⁰² is not consistent with OCR guidance. The Title IX coordinator is a CSA,¹⁰³ and institutions may route Clery data through that office to comply with both laws.

95 “2011 Dear Colleague Letter,” *supra* note 66, at 10.

96 34 C.F.R. §668.46(k)(1)(ii) (2014). The preamble to the final rule specifically declined to adopt this standard. Violence Against Women Act, 79 Fed. Reg. 62,772 (Oct. 20, 2014) (codified at 34 C.F.R. pt. 668).

97 34 C.F.R. § 668.46(b)(11)(iii). For an example of such a policy, see SUNY, “Options for Confidentially Disclosing Sexual Violence,” available at <http://system.suny.edu/sexual-violence-prevention-workgroup/policies/disclosure/>.

98 “2014 Sexual Violence Q&A” at 15. OCR defines a Responsible Employee as “any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.”

99 *Ibid.* at 22.

100 *Ibid.* at 24.

101 34 C.F.R. §668.46(a) (2014).

102 2016 *Handbook* at 4-3-4-4, 111-112.

103 *Ibid.* at 4-3, 110.

Questions pertaining to confidentiality may arise when an institution issues a “timely warning.” The Clery Act has long required that colleges and universities issue timely warnings for certain crimes. While VAWA expressly prohibits an institution from naming or providing identifying information about a victim in a timely warning,¹⁰⁴ an institution *may* name a suspect.¹⁰⁵ It may also name the location at which the crime occurred (e.g., a specific fraternity house) and provide a description of the crime (e.g., drugs were used to commit a sexual assault), provided that the victim is not identified. In some instances, an institution may have an obligation to disclose information about the suspect or the crime location, when there is an ongoing, imminent threat to the health and safety of the campus community.¹⁰⁶ Institutions sometimes face the dilemma of balancing the amount of information needed to give adequate warning to the campus community with the obligation not to disclose the victim’s identity. This can be especially difficult at small institutions and is a time to work closely with counsel or others familiar with Clery requirements.

3. Retaliation

Another notable difference between VAWA and the DCL concerns the prohibition on retaliation. While both the Clery Act and Title IX guidance prohibit institutional retaliation,¹⁰⁷ the DCL goes further in requiring that institutions prevent and respond to peer retaliation against the complainant.¹⁰⁸ Institutional policies should define retaliation, make clear that retaliation against any participant in the discipline/grievance process¹⁰⁹ is prohibited and will result in disciplinary action, and inform individuals how to report it.

104 See Violence Against Women Reauthorization Act of 2013, § 304(a)(2), 20 U.S.C. § 1092(f)(3); Violence Against Women Act, 79 Fed. Reg. at 62,787.

105 Compare restriction on identifying information in the Annual Security Report, “Identification of the victim or the accused. The statistics required under paragraph (c) of this section do not include the identification of the victim or the person accused of committing the crime,” Violence Against Women Act, 79 Fed. Reg. at 62,787, with restriction on identifying information in timely warnings, “An institution must [issue timely warnings] in a manner that is timely and that withholds as confidential the names and other identifying information of victims,” Ibid. See also Ibid. at 62,769. This is not to say that an institution must name a suspect or even to take a position on whether it should; it is simply to say that this is allowed when the provisions are read together. Institutions should consider several factors when determining whether to name a suspect, including whether the suspect is at large, armed, dangerous, or likely to pose a continuing danger to the community, or whether the suspect is in custody or at a distant location. There is some persuasive case law that would (if followed by other courts) give institutions some flexibility in naming suspects in a Timely Warning, even when that warning was not strictly and technically required by the letter of the statute. See *Havlik v. Johnson and Wales University*, 509 F.3d 25 (1st Cir. 2007) (awarding judgment to the defendant university in a defamation lawsuit for reporting a crime occurred outside of Clery geography, because the college believed it was covered).

106 Emergency notification is discussed in the 2016 *Handbook* at 6-1-6-11, 134-144.

107 34 C.F.R. 668.46(m) (2014); 20 U.S.C. § 1681.

108 “2011 Dear Colleague Letter,” *supra* note 66, at 4-5, 16.

109 Per the “2015 Dear Colleague Letter on Title IX Coordinators,” April 24, 2015, p. 5, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

Action and Conclusion

ACTION

Colleges and universities that accept Title IV funding should carefully review the requirements of the VAWA amendments to the Clery Act described in this GRAC White Paper alongside the statute, regulations, and *2016 Handbook* to ensure compliance.

CONCLUSION

While traditionally the Clery Act has been a crime counting and disclosure statute, VAWA requires many action items that blur the practical lines between Clery Act and Title IX-type requirements. Because the number of regulations may seem overwhelming, and the overlap with Title IX can be confusing, institutions should consider developing a compliance plan—in consultation with counsel—that includes steps for meeting both Clery Act requirements and Title IX guidance, all the while maintaining focus on the most important aspect of the process: creating policies, procedures, and programming that will educate and protect our students and campus communities.

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This document is not legal advice. For legal advice, please contact your legal counsel.

URMIA’s Government and Regulatory Affairs Committee (GRAC) serves as a resource for informing and educating its membership about federal legislation and regulations. Sally Alexander, Colorado State University, and Leta Finch, Aon, serve as its co-chairs. If you would like to be a member or have a topic for a future Regulatory Blast or White Paper, contact the URMIA National Office (urmia@urmia.org).



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Policy and Programming Changes Pursuant to the Campus SaVE Provisions of the Violence Against Women Act

**Office of General Counsel
State University of New York**

January 2015 (updated from July 2014)

To Learn
To Search
To Serve



Introduction

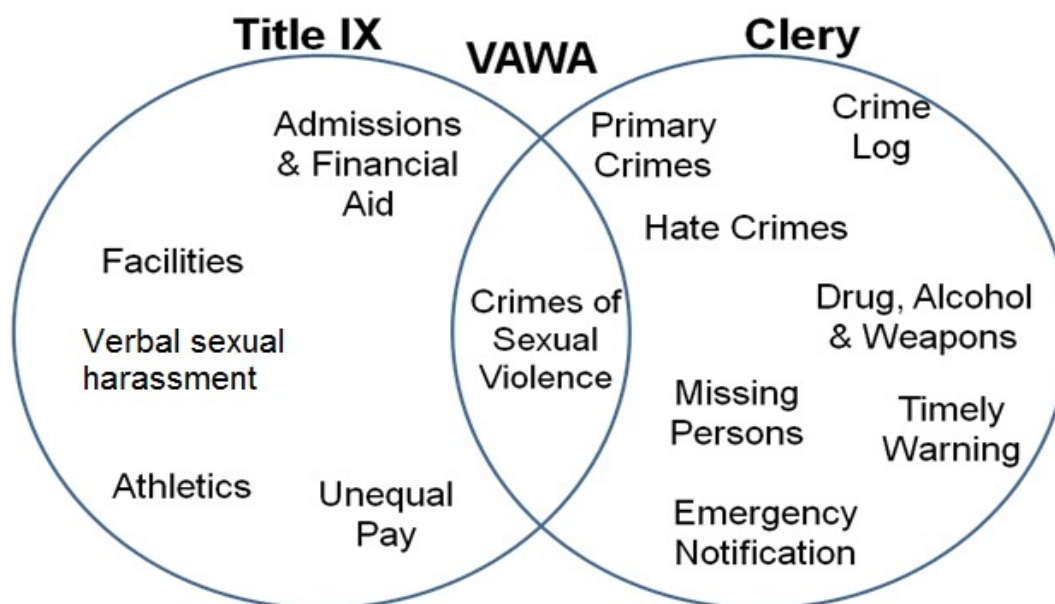
This document represents a team effort of members of the State University of New York Office of General Counsel, alongside partner organizations, to create guidance that SUNY colleges can use to prepare for the changes required by the [2013 amendments to the Violence Against Women Act](#) and its [regulations](#). The Department of Education released a [letter](#) detailing expectations for colleges to make a “good faith effort” to comply with these changes. The documents below were created specifically for two sessions SUNY hosted for campuses in the summer of 2014 to help them prepare to meet the requirements. We were pleased that hundreds of campus professionals representing all corners of the SUNY system attended those trainings. As we were preparing for these sessions, we benefitted significantly from the resources of the [First Report of the White House Task Force to Protect Students From Sexual Assault](#).

Attorneys often provide guidance about compliance with the law and regulations, and the guidance documents found here certainly aim to ensure compliance with the laws and regulations as we currently understand them. But we don’t want to “miss the forest for the trees.” **Our objective is to work with SUNY colleges and universities to best serve our students and foster a safe and healthy environment for our students and employees. Our priority at SUNY is not checking the boxes on compliance checklists or documenting details for an audit; our priority is an educational environment free from discrimination and assault. The most important concepts we hope that our clients take from this guidance is the need to be fair, transparent, and supportive with members of our campus community who experience, learn about, or otherwise report these very serious incidents and crimes.**

This guidance is meant to be used by SUNY State-operated and community colleges. The documents appear in the order of the trainings the Office of General Counsel conducted in June and July 2014. As new guidance arrives from the Department of Education and White House, we will update our guidance and maintain the current copy on the SUNY Website. Other colleges and universities may feel free to adapt the language in the documents under a [Creative Commons Attribution-NonCommercial 4.0 license](#) wherein colleges and universities may use this content provided that it is attributed to the State University of New York, but no one may sell or make other commercial use of this content. Higher education organizations may link to or post this document on their Web site provided no one is charged to access the content and the document retains its attribution. Non-SUNY readers are encouraged to consult with college counsel as the contents of this guidance do not constitute legal advice.

The amendments to the Violence Against Women Act make changes to Clery Act compliance. Some of these changes are minor (adding gender identity and national origin to hate crime reporting or ensuring victims are never identified in Timely Warnings) while others are complex (the myriad training, programming and campaign requirements). **Compliance with these laws requires an institution-wide effort and support from college leadership.** The

proposed regulations insist that they make no changes to Title IX, but casual and intense readers will certainly note overlap and distinctions between Title IX compliance and Clery/VAWA compliance. In response to questions from clients, we created this Venn diagram:



While there is some overlap between the Clery Act and Title IX, most of each law does not concern the other. Remember also that the Clery Act is part of the Higher Education Act, only applicable to colleges and universities that accept Title IV funds, whereas Title IX is applicable to both higher education and K-12 schools.

SUNY colleges and universities take reports of crimes, including sexual assault, domestic violence, dating violence, and stalking, very seriously. We are proud of the work of our SUNY clients and we remain available to support you as you continue to work towards a safe and supportive college environment for all of our students.

As stated earlier, this project was a true team effort among SUNY colleagues willing and eager to provide a helpful resource to our clients. **The idea was to create an efficiency by centralizing the research and drafting of appropriate language, so campus clients could return to doing what they do best—serving students.** We are deeply grateful to our Counsel's Office colleagues who both participated in the training and worked together seamlessly to draft the guidance that appear in this comprehensive document:

- Nedra Abbruzzese-Werling, Director of Compliance
- Jim Jarvis, Associate Counsel
- Elise Puzio, Special Assistant to the Deputy Counsels
- Wendy Ravitz, Associate Counsel
- Suzanne Shane, Associate Counsel
- Janet Thayer, Associate Counsel

We appreciate the support and leadership of Senior Vice Chancellor and General Counsel Bill Howard and Deputy General Counsel Sandra Casey who convened SUNY's VAWA training sessions. Bill played a significant role in the White House Task Force process, attending a meeting with Vice President Biden and Cabinet members, and providing them with useful feedback on these issues. We were fortunate to have two bright and thoughtful legal interns during the summer of 2014 who played a large part in the research and presentation of these concepts. Stephanie Morrison, a 2L at Cornell Law School and Alex Slichko, a 2L at Harvard Law School, each distinguished themselves by going above and beyond their assignments and providing our clients with innovative and well-prepared presentations. Kudos to both of you.

We are also very thankful for the partnership with colleagues across SUNY, especially Commissioner Bruce McBride and Deputy Commissioner Paul Berger of the SUNY University Police and University Life colleagues Liz Droz, Cariann Quick and Lisa Kelsey. We were lucky to work closely with our friend and colleague Bob Passonno of the New York State Office for the Prevention of Domestic Violence, whose work on bystander intervention inspired great parts of the training.

During the VAWA Negotiated Rulemaking process, we were privileged to work with a team of higher education lawyers, organized by NACUA, to analyze the proposals and suggest solutions that are workable and also allowed colleges to best provide support and assistance to students. NACUA members Dana Scaduto and Jerry Blakemore provided exceptional representation to the rulemaking team and we appreciate their leadership, friendship and collegiality. Thank you also to NACUA colleague John Graff who has been a great partner in teaching Clery compliance to the NACUA community and who contributed the checklist to this document. We are lucky to have such colleagues and could not complete this without them.

Any readers who see areas of improvement in this paper or have additional resources to suggest are encouraged to reach out to us. We hope to continually update and improve this document to serve as a resource both for compliance with the law and, more importantly, to create cultures on our campuses that strongly resist sexual violence in all forms.

Best wishes as you work to comply with the VAWA changes to the Clery Act and please let us know if we can be helpful.

This January 2015 document is an updated version of the document initially created in July 2014 to include [updated SUNY policies](#) and new guidance.



Andrea Stagg
Associate Counsel



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Counting Crimes in The Annual Security Report¹

Hate Crimes:

If reporting in tabular format, add a column/row in Hate Crimes for **Gender Identity**. You should already be reporting for **National Origin** based on guidance from the 2011 Clery Act Handbook.

If reporting in paragraph, leave as before, just include these crimes (if they occur).

Add **Gender Identity** to list of categories for Hate Crime purposes.

To the extent practicable, institutions should include such hate crimes, if any occurred, from the 2013 calendar year in the 2014 Annual Security Report. Such reporting shows good faith in compliance, even prior to the July 1, 2015 effective date of the VAWA regulations.

The Violence Against Women Act and its Proposed Regulations require us to use two (or potentially three) different definitions in counting, notifying, and holding students accountable for crimes of sexual violence, dating violence, domestic violence and stalking.

- Counting Crimes – Use VAWA definitions only (below).
- Notifying of Definitions in Annual Security Report – Use New York State definitions and campus definitions (if applicable). See [New York Crime Definitions](#), below.
- Holding students accountable in Judicial/Conduct Code – Use campus or New York State definitions.

Counting Crimes

Use the following definitions from the Proposed Regulations to count Sexual Violence, Dating Violence, Domestic Violence and Stalking.

Note: Sex crimes definitions have changed. In a positive development sure to reduce confusion and misreporting of sexual violence, especially in the area of acquaintance sexual assault, the Department of Education removed the descriptors of “Forcible and Non-Forcible Sex Offense” in favor of clear definitions of crimes.

Sex Offenses

Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

¹ Prepared by Joseph Storch, Associate Counsel.

Rape

The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

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.

Note: The Proposed Regulations will use the age of consent of the jurisdiction. In New York State, the age of consent is seventeen.

For campuses with operations outside of New York State, the Department of Health and Human Services has created a resource, ***Statutory Rape: A Guide to State Laws and Reporting***

Requirements: Summary of Current State Laws which is available here:

<http://aspe.hhs.gov/hsp/08/sr/statelaws/summary.shtml>

To the extent practicable, institutions should include such VAWA crimes, if any occurred, from the 20013 calendar year in the 2014 Annual Security Report. Such reporting shows good faith in compliance, even prior to the July 1, 2015 effective date of the VAWA regulations.

New York Crime Definitions²

The Violence Against Women Act and its proposed regulations require the inclusion of certain New York State definitions in a campus's Annual Security Report and also require that those definitions be provided in campaigns, orientations, programs and trainings for employees and students. Definitions required include: consent; dating violence; domestic violence; sexual assault; and stalking.

CONSENT: Lack of consent results from: forcible compulsion; or incapacity to consent; or where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct. Where the offense charged is rape in the third degree, a criminal sexual act in the third degree, or forcible compulsion in circumstances under which, at the time of the act of intercourse, oral sexual conduct or anal sexual conduct, the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances. A person is incapable of consent when he or she is: less than 17 years old; or mentally disabled; or mentally incapacitated; or physically helpless; or committed to the care and custody of the state department of correctional services, a hospital, the office of children and family services and is in residential care, or the other person is a resident or inpatient of a residential facility operated by the office of mental health, the office for people with development disabilities, or the office of alcoholism and substance abuse services, and the actor is an employee, not married to such person, who knows or reasonably should know that such person is committed to the care and custody of such department or hospital.

CONSENT, ABBREVIATED: Clear, unambiguous, and voluntary agreement between the participating to engage in specific sexual activity.

DATING VIOLENCE: New York State does not specifically define "dating violence." However, under New York Law, intimate relationships are covered by the definition of domestic violence when the act constitutes a crime listed elsewhere in this document and is committed by a person in an "intimate relationship" with the victim. See "Family or Household Member" for definition of "intimate relationship."

DOMESTIC VIOLENCE: An act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted murder, criminal obstruction or breaching or blood circulation, or strangulation; and such acts have created a substantial risk of physical or emotional harm to a person or a person's child. Such acts are alleged to have been committed by a family member. The victim can be anyone over the age of sixteen, any married

² Prepared by Stephanie Morrison, Legal Intern, 2L at Cornell Law School under the supervision of Joseph Storch, Associate Counsel.

person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of the act.

FAMILY OR HOUSEHOLD MEMBER: Person's related by consanguinity or affinity; Persons legally married to one another; Person formerly married to one another regardless of whether they still reside in the same household; Persons who have a child in common regardless of whether such persons are married or have lived together at any time; Unrelated persons who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household; Persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors that may be considered in determining whether a relationship is an "intimate relationship" include, but are not limited to: the nature or type of relationship regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship"; Any other category of individuals deemed to be a victim of domestic violence as defined by the office of children and family services in regulation. Intimate relationship status shall be applied to teens, lesbian/gay/bisexual/transgender, and elderly individuals, current and formerly married and/or dating heterosexual individuals who were, or are in an intimate relationship.

PARENT: means natural or adoptive parent or any individual lawfully charged with a minor child's care or custody.

SEXUAL ASSAULT: New York State does not specifically define sexual assault. However, according to the Federal Regulations, sexual assault includes offenses that meet the definitions of rape, fondling, incest, or statutory rape as used in the FBI's UCR program.

SEX OFFENSES; LACK OF CONSENT: Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.

SEXUAL MISCONDUCT: When a person (1) engages in sexual intercourse with another person without such person's consent; or (2) engages in oral sexual conduct or anal sexual conduct without such person's consent; or (3) engages in sexual conduct with an animal or a dead human body.

RAPE IN THE THIRD DEGREE: When a person (1) engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than 17 years old; (2) Being 21 years old or more, engages in sexual intercourse with another person less than 17 years old; or (3) engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent.

RAPE IN THE SECOND DEGREE: When a person (1) being 18 years old or more, engages in sexual intercourse with another person less than 15 years old; or (2) engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated. It is an affirmative defense to the crime of rape in the second degree the defendant was less than four years older than the victim at the time of the act.

RAPE IN THE FIRST DEGREE: When a person engages in sexual intercourse with another person (1) by forcible compulsion; or (2) Who is incapable of consent by reason of being physically helpless; or (3) who is less than 11 years old; or (4) who is less than 13 years old and the actor is 18 years old or more.

CRIMINAL SEXUAL ACT IN THE THIRD DEGREE: When a person engages in oral or anal sexual conduct (1) with a person who is incapable of consent by reason of some factor other than being less than 17 years old; (2) being 21 years old or more, with a person less than 17 years old; (3) with another person without such persons consent where such lack of consent is by reason of some factor other than incapacity to consent.

CRIMINAL SEXUAL ACT IN THE SECOND DEGREE: When a person engages in oral or anal sexual conduct with another person (1) and is 18 years or more and the other person is less than 15 years old; or (2) who is incapable of consent by reason of being mentally disabled or mentally incapacitated. It is an affirmative defense that the defendant was less than four years older than the victim at the time of the act.

CRIMINAL SEXUAL ACT IN THE FIRST DEGREE: When a person engages in oral or anal sexual conduct with another person (1) by forcible compulsion; (2) who is incapable of consent by reason of being physically helpless; (3) who is less than 11 years old; or (4) who is less than 13 years old and the actor is 18 years old or more.

FORCIBLE TOUCHING: When a person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire. It includes squeezing, grabbing, or pinching.

PERSISTENT SEXUAL ABUSE: When a person commits a crime of forcible touching, or second or third degree sexual abuse within the previous ten year period, has been convicted two or more times, in separate criminal transactions for which a sentence was imposed on separate occasions of one of one of the above mentioned crimes or any offense defined in this article, of which the commission or attempted commissions thereof is a felony.

SEXUAL ABUSE IN THE THIRD DEGREE: When a person subjects another person to sexual contact without the latter's consent. For any prosecution under this section, it is an affirmative defense that (1) such other person's lack of consent was due solely to incapacity to consent by reason of being less than 17 years old; and (2) such other person was more than 14 years old and (3) the defendant was less than five years older than such other person.

SEXUAL ABUSE IN THE SECOND DEGREE: When a person subjects another person to sexual contact and when such other person is (1) incapable of consent by reason of some factor other than being less than 17 years old; or (2) less than 14 years old.

SEXUAL ABUSE IN THE FIRST DEGREE: When a person subjects another person to sexual contact (1) by forcible compulsion; (2) when the other person is incapable of consent by reason of being physically helpless; or (3) when the other person is less than 11 years old; or (4) when the other person is less than 13 years old.

AGGRAVATED SEXUAL ABUSE: For the purposes of this section, conduct performed for a valid medical purpose does not violate the provisions of this section.

AGGRAVATED SEXUAL ABUSE IN THE FOURTH DEGREE: When a person inserts a (1) foreign object in the vagina, urethra, penis or rectum of another person and the other person is incapable of consent by reason of some factor other than being less than 17 years old; or (2) finger in the vagina, urethra, penis, rectum or anus of another person causing physical injury to such person and such person is incapable of consent by reason of some factor other than being less than 17 years old.

AGGRAVATED SEXUAL ABUSE IN THE THIRD DEGREE: When a person inserts a foreign object in the vagina, urethra, penis, rectum or anus of another person (1)(a) by forcible compulsion; (b) when the other person is incapable of consent by reason of being physically helpless; or (c) when the other person is less than 11 years old; or (2) causing physical injury to such person and such person is incapable of consent by reason of being mentally disabled or mentally incapacitated.

AGGRAVATED SEXUAL ABUSE IN THE SECOND DEGREE: When a person inserts a finger in the vagina, urethra, penis, rectum or anus of another person causing physical injury to such person by (1) forcible compulsion; or (2) when the other person is incapable of consent by reason of being physically helpless; or (3) when the other person is less than 11 years old.

AGGRAVATED SEXUAL ABUSE IN THE FIRST DEGREE: When a person subjects another person to sexual contact: (1) By forcible compulsion; or (2) when the other person is incapable of consent by reason of being physically helpless; or (3) when the other person is less than eleven years old; or (4) when the other person is less than thirteen years old and the actor is twenty-one years old or older.

COURSE OF SEXUAL CONDUCT AGAINST A CHILD IN THE SECOND DEGREE: When over a period of time, not less than three months, a person: (1) Engages in two or more acts of sexual conduct with a child less than 11 years old; or (2) being 18 years old or more engages in two or more acts of sexual conduct with a child less than 13 years old. A person may not be subsequently prosecuted for any other sexual offense involving the same victim unless the other charges offense occurred outside of the time period charged under this section.

COURSE OF SEXUAL CONDUCT AGAINST A CHILD IN THE FIRST DEGREE:

When a person over a period of time, not less than three months in duration, a person: (1) Engages in two or more acts of sexual conduct, or aggravated sexual contact with a child less than 11 years old; or (2) being 18 years old or more engages in two or more acts of sexual conduct which includes at least one act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact with a child less than 13 years old.

FACILITATING A SEX OFFENSE WITH A CONTROLLED SUBSTANCE: A person is guilty of facilitating a sex offense with a controlled substance when he or she: (1) knowingly and unlawfully possesses a controlled substance or any preparation, compound, mixture or substance that requires a prescription to obtain and administers such substance or preparation, compound, mixture or substance that requires a prescription to obtain to another person without such person's consent and with intent to commit against such person conduct constituting a felony defined in this article; and (2) commits or attempts to commit such conduct constituting a felony defined in this article.

INCEST IN THE THIRD DEGREE: A person is guilty of incest in the third degree when he or she marries or engages in sexual intercourse, oral sexual conduct or anal sexual conduct with a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.

INCEST IN THE SECOND DEGREE: A person is guilty of incest in the second degree when he or she commits the crime of rape in the second degree, or criminal sexual act in the second degree, against a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.

INCEST IN THE FIRST DEGREE: A person is guilty of incest in the first degree when he or she commits the crime of rape in the first degree, or criminal sexual act in the first degree, against a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or half blood, uncle, aunt, nephew or niece.

STALKING IN THE FOURTH DEGREE: When a person intentionally, and for not legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct (1) is likely to cause reasonable fear of material harm to the physical health, safety or property of such person, a member of such person's immediate family or a third party with whom such person is acquainted; or (2) causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was

previously clearly informed to cease that conduct; or (3) is likely to cause such person to reasonably fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease that conduct.

STALKING IN THE THIRD DEGREE: When a person (1) Commits the crime of stalking in the fourth degree against any person in three or more separate transactions, for which the actor has not been previously convicted; or (2) commits the crime of stalking in the fourth degree against any person, and has previously been convicted, within the preceding ten years of a specified predicate crime and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or (3) with an intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family; or (4) commits the crime of stalking in the fourth degree and has previously been convicted within the preceding ten years of stalking in the fourth degree.

STALKING IN THE SECOND DEGREE: When a person: (1) Commits the crime of stalking in the third degree and in the course of and furtherance of the commission of such offense: (a) displays, or possesses and threatens the use of, a firearm, pistol, revolver, rifle, sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, slingshot, slungshot, shiriken, "Kung Fu Star," dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, dangerous instrument, deadly instrument or deadly weapons; or (b) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or (2) commits the crime of stalking in the third against any person, and has previously been convicted, within the preceding five years, of a specified predicate crime, and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or (3) commits the crime of stalking in the fourth degree and has previously been convicted of stalking in the third degree; or (4) being 21 years of age or older, repeatedly follows a person under the age of fourteen or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place such person who is under the age of fourteen in reasonable fear of physical injury, serious physical injury or death; or (5) commits the crime of stalking in the third degree, against ten or more persons, in ten or more separate transactions, for which the actor has not been previously convicted.

STALKING IN THE FIRST DEGREE: When a person commits the crime of stalking in the third degree or stalking in the second degree and, in the course and furtherance thereof, he or she intentionally or recklessly causes physical injury to the victim of such crime.

VAWA's Impact on Student Conduct Codes/Disciplinary Proceedings³

VAWA requires that the Institution's policy describe its procedures for disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking cases.

Prompt, Fair, and Impartial

All proceedings must be prompt, fair, and impartial from initial investigation to final result. A proceeding is defined in the proposed regulations as "all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, fact-finding investigations, formal or informal meetings or hearings." The proposed regulations require that the Code of Conduct:

- Have designated and reasonably prompt timeframes for the major stages of the grievance process that apply equally to the parties of the complaint, including the investigation, complaint resolution, and appeal processes, if any.
- Be conducted by officials who receive annual training on issues related to dating violence, domestic violence, sexual assault, and stalking and the procedure to conduct an investigation that protects the safety of victims and promotes accountability;
- Include a statement of the standard of evidence that will be used during the proceeding. VAWA does not prescribe a particular evidentiary standard, but OCR guidance directs the 'preponderance of the evidence standard' for Title IX purposes;
- The proposed regulations indicate that the process should:
 - Allow for an extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay;
 - Be consistent with the institution's policies and transparent to the accuser and accused;
 - Include timely notice of meetings at which the accuser or accused, or both, may be present;
 - Provide the accuser, the accused, and appropriate officials timely access to any information that will be used after the fact-finding investigation and during informal and formal disciplinary meetings and hearings;
 - Be conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused; and
 - Include in the results (which is defined as any initial, interim and final decisions by any official or entity authorized to resolve disciplinary matters within the institution) any sanctions imposed by the institution and must include the rationale for the result and the sanctions. Result will replace "outcomes," "resolution" and "final determinations" in statute regulations.

³ Prepared by Suzanne Shane, Associate Counsel & Alexander Slichko, Legal Intern, 2L Harvard Law School.

Sample Language

ESTABLISHING TIME FRAMES FOR THE REVIEW PROCESS

The University will conduct a timely review of all complaints of domestic violence, dating violence, and/or stalking. Absent extenuating circumstances, review and resolution is expected to take place within sixty (60) calendar days from receipt of the complaint.

The preliminary review of all complaints, including any necessary interviews to be conducted and any necessary interim measures to be put in place, will usually be completed within ____ days of receipt of the complaint.

The subsequent, comprehensive review and investigation of the complaint, including interviews with all involved parties and gathering of evidence, is usually completed within ____ days of receipt of the complaint.

Results of the complaint, via either a formal hearing or waiver of hearing are typically issued within ____ days of receipt of the complaint.

An appeal of the results must be submitted within 7 days of receipt of the written result. Absent extenuating circumstances, decisions on appeals are typically issued within ____ days of submission of the appeal.

BURDEN OF PROOF

The burden of proof in all cases is “the preponderance of the evidence” – whether it is “more likely than not” that the sex discrimination, dating violence, domestic violence, sexual assault, or stalking occurred. If the evidence presented meets this standard, then the respondent must be found responsible.

Adopted from SUNY Oswego Student Code of Conduct

EXTENSIONS

All deadlines and time requirements in the Code may be extended for good cause as determined by _____. Both the respondent and the complainant will be notified in writing of the delay, the reason for delay, and provided the date of the new deadline or event. Extensions requested by one party will not be longer than 5 business/school days.

EVIDENCE

Evidence to be presented by complainant(s) and respondent(s) during any hearing on the charges must be shared with the opposing party at least two (2) business days in advance of the scheduled hearing. The University Official presiding at and/or hearing the case may exclude evidence that has not be shared or adjourn the hearing to afford all parties the opportunity to review evidence to be presented during the hearing. The University Official presiding at and/or hearing the case will make the final decision relating to the admissibility of all evidence.

Adapted from the SUNY Stony Brook University Student Conduct Code

Meeting/Hearing

- Both the complainant and the alleged offender must be given equal opportunity to have others present during a disciplinary proceeding including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice. The Institution cannot limit the parties' choice of an advisor but may establish restrictions regarding the **extent** to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.
 - For example: Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
 - Similarly, if the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- An adviser is defined in the proposed regulations as “any individual who provides the accuser or the accused support, guidance or advice.”

Sample Language

PARTIES' RIGHTS TO ADVISORS

The respondent and complainant may be assisted during disciplinary hearings and related meetings, by an advisor of their choice. The respondent and complainant may present witnesses and may produce other evidence for consideration by the student conduct body. The respondent and complainant are responsible for presenting evidence on their own behalf. Advisors may speak privately to their advisee, respondent or complainant, during the proceeding. Either party may request a brief recess to consult with their advisor which will be granted at the discretion of the Assistant Dean of Students for Student Conduct or designee. Advisors for the respondent and complainant may not present evidence or question witnesses.

Adapted from the SUNY Oswego Student Code of Conduct

Notification

Both parties must be notified **simultaneously and in writing** of:

- (a) the result of the disciplinary proceeding;
- (b) any appellate procedures available (which should be available to both parties);
- (c) any change to the result that may occur prior to the time that the result becomes final;
- (d) when the results become final.

Note: OCR Guidance recommends only that the parties be provided the determination “concurrently.”

Sample Language

Notification of findings

Within five (5) class days after the adjournment of the hearing, the student conduct hearing body shall submit written findings of fact, conclusions regarding the charge(s), and imposition of a sanction, if any, to the respondent and any College official who is determined by the Assistant Dean of Students for Student Conduct to have a legitimate interest in the result. In the case of sexual misconduct and violations involving dating violence, domestic violence, sexual assault, or stalking, both the complainant and respondent shall also receive simultaneous notice of the results and sanctions imposed (and the rationale for the result and sanctions), as well as notice of the appellate procedures available, any possible changes to the result that may occur before it becomes final, and when the result becomes final.

Adopted from SUNY Oswego Student Code of Conduct

Protective Measures/Sanctions and Retaliation

Language should be included which explains:

- The range of protective/interim measures that an institution may offer following an allegation of domestic violence, dating violence, sexual assault or stalking such as changing academic, living, transportation and/or working situations;
- The possible sanctions that the institution may impose following a final determination of a disciplinary proceeding regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking;
- The prohibition against retaliation. Retaliation is prohibited against any individual who files a sex discrimination complaint under Title IX or participates in a complaint investigation in any way. (Was previously in the statute but not the regulations.)

Sample Language

SANCTIONS

The University considers dating violence, domestic violence, sexual assault, and stalking as extremely serious violations and subject to SUSPENSION and/or EXPULSION from the University. In such cases, the Exceptional Procedure of EXECUTIVE SUSPENSION also may be invoked.

Adopted from the SUNY Stony Brook University Student Conduct Code

RETALIATION

No member of the University community shall retaliate, intimidate, threaten, coerce or otherwise discriminate against a person who files a Title IX complaint, serves as a witness, or assists or participate in a Title IX proceeding in any manner. Participants who experience retaliation should report the incident to _____.

Adopted from the SUNY Oswego Student Code of Conduct

New VAWA Required Definitions for Student Conduct Codes⁴

Dating Violence

The definition must include:

- Reference to a violent **act**;
- Committed by
 - A person who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - The existence of the relationship shall be determined based on victim's statement with consideration of the length of the relationship, the type of the relationship, and the frequency of the relationship.

Domestic Violence

The definition must include:

- Reference to a violent **crime**;
- Committed by
 - Current or former spouse or intimate partner;
 - Person sharing a child with the victim; and
 - Person cohabitating with or has cohabitated with the victim as a spouse or intimate partner.

Stalking

The definition must include:

- Engaging in a course of conduct (two or more acts by which the stalker directly, indirectly, or through third parties follows, monitors, observes, surveils, threatens, or communicates about a person or interferes with his or her property);
- Directed at a specific person; and
- Causes a reasonable person to fear for his or her safety or the safety of others or causes that person to suffer substantial emotional damage.

Consent

The definition must include:

- Consent is a voluntary agreement to engage in sexual activity;
- Someone who is incapacitated cannot consent;
- Past consent does not imply future consent; silence or an absence of resistance does not imply consent;
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
- Consent can be withdrawn at any time; and
- Coercion, force, or threat of either invalidates consent.

⁴ Prepared by Alexander Slichko, Legal Intern, 2L at Harvard Law School under the supervision of Andrea Stagg, Associate Counsel and Joseph Storch, Associate Counsel.

Sample Language

DATING VIOLENCE

Dating violence is any act of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the victim's statement and with consideration of the type and length of the relationship and the frequency of interaction between the persons involved in the relationship. Two people may be in a romantic or intimate relationship, regardless of whether the relationship is sexual in nature; however, neither a casual acquaintance nor ordinary fraternization between two individuals in a business or social context shall constitute a romantic or intimate relationship. This definition does not include acts covered under domestic violence.

DOMESTIC VIOLENCE

Domestic violence is any violent felony or misdemeanor crime committed by a current or former spouse or intimate partner of the victim, a person sharing a child with the victim, or a person cohabitating with the victim as a spouse or intimate partner.

STALKING

The term stalking means intentionally engaging in a course of conduct, directed at a specific person, which is likely to causes a reasonable person to fear for his or her safety or the safety of others or cause that person to suffer substantial emotional damage. Examples include, but are not limited to, repeatedly following such person(s), repeatedly committing acts that alarm, cause fear, or seriously annoy such other person(s) and that serve no legitimate purpose, and repeatedly communicating by any means, including electronic means, with such person(s) in a manner likely to intimidate, annoy, or alarm him or her.

CONSENT

Affirmative consent is a clear, unambiguous, knowing, informed, and voluntary agreement between all participants to engage in sexual activity. Consent is active, not passive. Silence or lack of resistance cannot be interpreted as consent. Seeking and having consent accepted is the responsibility of the person(s) initiating each specific sexual act regardless of whether the person initiating the act is under the influence of drugs and/or alcohol. Consent to any sexual act or prior consensual sexual activity between or with any party does not constitute consent to any other sexual act. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity or gender expression. Consent may be initially given but withdrawn at any time. When consent is withdrawn or cannot be given, sexual activity must stop. Consent cannot be given when a person is incapacitated. Incapacitation occurs when an individual lacks the ability to fully, knowingly choose to participate in sexual activity. Incapacitation includes impairment due to drugs or alcohol (whether such use is voluntary or involuntary), the lack of consciousness or being asleep, being involuntarily restrained, if any of the parties are under the age of 17, or if an individual otherwise cannot consent. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.

<http://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/>

Developing a Confidentiality and Reporting Webpage⁵

VAWA requires that Institutions publish policy statements describing their reporting and confidentiality protocols used in cases of dating violence, domestic violence, sexual assault, and stalking.⁶ Publishing this information on the Title IX page can encourage students to seek help.

In December 2014, SUNY developed model [Victim/Survivor Bill of Rights](#), [Sexual Violence Response Policy](#), and [Options for Confidentially Disclosing Sexual Violence](#) for implementation at all SUNY colleges.

What information should be included?

- A description of the options through which a student can report an incident of dating violence, domestic violence, sexual assault, or stalking. The description should also explain how the Institution could assist the student through the process. These reporting options should include:
 - Filing a criminal complaint with law enforcement;
 - Filing student disciplinary charges with the Institution; and
 - Filing a discrimination complaint with the Institution's Title IX Coordinator.
- A list of the people and organizations to whom the student may report and their respective obligations to report that information to the Institution, including:
 - **Professional Counselors** – These licensed and pastoral counselors provide mental-health counseling to members of the campus community and are not obligated to report any information to the Institution.
 - **Non-Professional Counselors** – Other individuals that work or volunteer in on-campus counseling centers may talk to a victim without revealing any personally identifying information to the Institution. However, those individuals must report the nature, date, time, and general location of the incident to their Title IX Coordinator.
 - **Responsible Employees** – Responsible employees must report all relevant details to the Title IX Coordinator. If a student requests confidentiality, the Institution will consider the request, but cannot guarantee that it will honor it.
- How an Institution will decide if it can honor a student's confidentiality request and how it will protect and assist the student if it cannot.

⁵ Prepared by Alexander Slichko, Legal Intern, 2L at Harvard Law School under the supervision of Andrea Stagg, Associate Counsel and Joseph Storch, Associate Counsel.

⁶ There are many ways to accomplish this notification. This is one example but, like the other resources in this guidance, there are many ways to accomplish the same goals. Institutions that do a good job with this information include the University at Buffalo (<http://www.buffalo.edu/equity/obtaining-assistance/sex-discrimination-and-sexual-harassment/if-you-have-experienced-sexual-assault.html>).

- Information about alternative confidential avenues to disclose an incident. These alternatives include public awareness events, such as Take Back the Night, and anonymous reporting procedures.
- An explanation of the Institution's reporting obligations under the Clery Act, including the annual reporting responsibilities of Campus Security Authorities and the school's obligation to issue timely warnings.
- The Institution's policy for granting amnesty for violations from drug, alcohol, and other student code of conduct violations when reporting incidents of dating violence, domestic violence, sexual assault, and stalking. For more information, see the section on [Good Samaritan 911 Policy](#), below.

How to make your information more accessible:

- *Use The Title IX Website* – Creating a separate webpage on the college's website devoted to sexual assault helps to consolidate and simplify information that is otherwise scattered among the Student Code of Conduct, Handbook, and Safety Report.
- *Make the Website Easy* – Use a short URL with no more than one slash. (e.g. titleix.college.edu/report). Use links and headings to guide students to the information they need.
- *Help Students Find It* – Check the search results using Google and your website's built-in search function. Try phrases such as "report rape" or "sexual assault" to ensure students can reach the information they need.

How to make your information clear:

- *Place commonly requested information prominently* – Addresses, phone numbers, and email addresses of places where students can request help should be placed toward the top of the website.
- *Websites must be more than readable, they should be "skimable"* – Students will rarely read every word on a webpage. Instead, they will scan for what is most important to them. Important information should be kept to the top and left of a webpage, where it is most likely to be read.
- *Use lists and Q&A's to organize information* – Lists and "Questions and Answers" sections can organize information in a more digestible form. Minimizing hassle encourages students to get the help they need.⁷

⁷ Good examples include: SUNY Oswego (<http://www.oswego.edu/about/titleix/incidentreport/sexualassault.html>), and SUNY New Paltz (<http://www.newpaltz.edu/police/faqs.html>).

Information to Place in the Student Handbook or a Website⁸

Sample Sexual Misconduct Policy

Introduction

Policy Statement on Sexual Misconduct:

SUNY [insert school] is committed to creating and maintaining an educational environment free from all forms of sex discrimination, including sexual misconduct. Any act involving sexual harassment, violence, coercion, and intimidation will not be tolerated.

Specifically, SUNY strictly prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking. These acts have a real impact on the lives of victims. They not only violate a person's feelings of trust and safety, but they can also substantially interfere with a student's education. It is the policy of SUNY [insert name] that, upon learning that an act of sexual misconduct has taken place, immediate action will be taken to address the situation and punish the perpetrator. This includes working with State and local law enforcement to bring possible criminal charges, seeking disciplinary action through the college/university, and enforcing mandatory transcript notifications so other institutions are on notice of the offense committed. SUNY police has long required a mandatory transcript notification for students found responsible of certain crimes.

SUNY [insert name] encourages the reporting of sexual misconduct that is prompt and accurate. This allows the college/university community to quickly respond to allegations and offer immediate support to the victim. SUNY [insert name] is committed to protecting the confidentiality of victims, and will work closely with students who wish to obtain confidential assistance regarding an incident of sexual misconduct. Certain professionals at the College are permitted by law to offer confidentiality. Those who do not maintain the privilege to offer confidentiality are expected to keep reports private to the extent permitted under the law and college policy. This means that they may have to report to college officials, but will not broadcast the information beyond what is required by law and policy. All allegations will be investigated promptly and thoroughly, and both the victim and the accused will be afforded equitable rights during the investigative process.

It is the collective responsibility of all members of the SUNY [insert name] community to foster a safe and secure campus environment. In an effort to promote this environment and prevent acts of sexual misconduct from occurring, the college/university engages in ongoing prevention and awareness education programs. All incoming students [and employees] are required to participate in these programs, and all members of the college/university community

⁸ Prepared by Janet Thayer, Associate Counsel & Elise Puzio, Special Assistant to the Deputy Counsels. Language in yellow highlight is taken directly from the VAWA proposed regulations.

are encouraged to participate throughout the year in ongoing campaigns and trainings focused on the prevention of sexual misconduct on campus.

Scope

Who: This policy applies to all members of the SUNY [insert name] community, including students, faculty, staff, visitors, independent contractors, and other third parties who are on campus and involved in an incident of sexual misconduct (this can be someone who witnessed an incident or who wishes to report an incident on behalf of another). The policy applies to these parties regardless of sexual orientation or gender identity.

What: This policy prohibits all forms of sexual misconduct. This broad term includes, but is not limited to, acts of sexual harassment, sexual violence, sexual coercion, sexual threats or intimidation, domestic violence, dating violence, sexual assault, stalking, and cyber-stalking. Please refer to the Definitions section for a complete list of terms and prohibited acts [may include a definitions section in Handbook or refer to definitions in your Student or Judicial Code—make sure to include the new required definitions].

Where: This policy covers conduct that takes place on the college/university campus. This includes any building or property owned or controlled by SUNY [insert name] and used in direct support of, or in a manner related to, the school's educational purposes, including residence halls, dining halls, and public property within or immediately adjacent to and accessible from campus. This also includes any building or property owned or controlled by a student organization that is officially recognized by the college/university and any building or property not within the same reasonably contiguous geographic area of the college/university that supports or relates to the school's educational purposes and is frequently used by students. This policy also covers conduct that takes place off-campus that may have a nexus to the college/university community.

Programs: This policy covers all educational, extracurricular, athletic, or other campus programs.

Activities: This policy covers all campus and school-related activities, including, but not limited to, student organizations (academic, greek, multicultural, religious, service, social and support, sports and recreational), community organizations with student [and/or faculty] participation, and all other educational or extracurricular events hosted by or at the college/university.

Relationships: This policy covers sexual misconduct occurring between individuals in various types of relationships. These include, but are not limited to, student to student, staff to staff, faculty member to faculty member, visitor/contracted employee to faculty/staff, faculty member to student, staff to student, supervisor to subordinate, and coach to student athlete. Sexual misconduct may be acts committed by an individual or collective actions committed by members of a group or organization. These acts may be committed against an individual or against a

group or organization. These acts may be committed by a stranger, an acquaintance, or someone with whom the victim has a social, romantic, or intimate relationship. These acts may be committed by or against any individual, regardless of sexual orientation or gender identity.

Confidentiality: The college/university is committed to maintaining the privacy of all individuals involved in a report of sexual misconduct. While the college/university encourages victims to report an incident of sexual misconduct, there are many options available for students to speak with someone about what happened while maintaining confidentiality. Please see the Handbook sections on Resources Available for Support and Reporting Procedures for more information on confidentiality.

Resources Available for Support

In December 2014, SUNY developed a model [Options for Confidentially Disclosing Sexual Violence](#) that applies to all campuses.

After an allegation that an act of sexual violence has occurred, including any act of dating violence, domestic violence, sexual assault, or stalking, the college/university offers students a range of protective measures.

- 1. Resources for Immediate Assistance:** The information below provides contacts for trained on- and off- campus advocates and counselors who can provide an immediate confidential response in a crisis situation. Also provided are emergency numbers for on- and off- campus safety, law enforcement, and other first responders.

Confidential Resources: The college/university encourages all members of the school community to report any incidents of sexual misconduct; however, there are several confidential resources available to students [faculty and staff] who are not yet ready to report an incident. These individuals can help a victim obtain needed resources, explain reporting options, and assist in navigating the reporting process. These resources are required by law to keep all communications confidential without an individual's express consent to release information or as otherwise required by law.

On-Campus	Off-Campus
(advocates)	
(counselors)	
(emergency response)	

Campus Resources: These are resources provided by the college/university community offering intervention services, counseling, academic support, and medical services. These resources are not bound by confidentiality, but will work together to maintain individual privacy.

On-Campus

(college police)
(campus EMS)
(campus health services)
(Dean of Students)
(Title IX Coordinator)

Community Resources: These are resources located off-campus in the local community offering intervention services and counseling.

Off-Campus

Sexual Assault Response Team (SART)/Title IX Team/Similar Name: [Optional—Describe your school’s resource if one exists/funding exists to establish one] The Sexual Assault Response Team (SART) is a free service to students seeking medical transport following an incident of sexual assault, domestic violence, dating violence, sexual assault, or stalking. Students will be transported by a trained driver and accompanied to the hospital by a student advocate who is available to provide confidential, nonprofessional support. Upon arriving to the hospital, an advocate specifically trained in sexual assault will be contacted to provide assistance at the hospital, including during the medical visit. The driver will depart and return at a later time to pick up the student as needed. This is a confidential service. Students transported by the SARTeam are not required to report the incident.

SART Contact Information or link to SART page

Health Care Resources: Medical assistance is available [times available, i.e. 24/7, during business hours, etc.] by calling [list number to call, i.e. campus security/police or local police]. Every victim has the option to seek treatment for injuries sustained during an incident of sexual misconduct, preventative treatment for sexually transmitted diseases, and other health services. A medical exam is also an important way for a health provider to properly collect and preserve evidence. In cases where necessary, rape kits are also available [explain where/how are they available on your campus], and victims may contact a Sexual Assault Nurse Examiner (SANE) located [where, if available on your campus or in the community]. Also, victims may be accompanied by an advocate to the hospital or health provider. See below for contact information.

Immediate Medical Attention
(911)

(local hospital)
(campus EMS)
(campus health services)
(local rape crisis center)
(on-campus advocacy program)

2. **Resources for Ongoing Assistance:** The information below provides contacts for trained on- and off- campus advocates who can provide on-going counseling, advocacy, and support following an incidence of sexual misconduct.

Confidential Resources: These are resources on- and off- campus where the victim may disclose confidentially with counseling, advocacy, health, mental health, or sexual-misconduct-related resources.

On-Campus	Off-Campus
(advocates)	
(counselors)	

Campus Resources: These are resources provided by the college/university community offering counseling and support for victims of sexual misconduct, whether or not a victim chooses to make an official report or participate in the institutional disciplinary or criminal process. These individuals can also provide ongoing support during the institutional disciplinary and criminal process.

On-Campus
(college counseling)
(Title IX Coordinator)
(campus health services)

Academic Accommodations: The college/university is committed to ensuring the safety and well-being of the victim. A student who has been a victim of sexual misconduct may request an academic accommodation or change in residence after a report of sexual misconduct. Any individual who makes a request will receive an appropriate and reasonable accommodation. Possible requests include the ability to change academic schedules or work schedules, withdraw from or retake a class without penalty, access academic support such as tutoring services, and change residence hall assignments. Pursuant to Title IX, in most cases of sexual violence or sex discrimination, the College will endeavor, to the extent practicable, to change the schedule or accommodations of the accused student prior to changing the schedule or accommodations of the victim.

Interim Measures: In situations where it is necessary, the college/university will take immediate steps to protect victims pending the final outcome of an investigation. These steps include the accommodations listed above in addition to issuing no contact orders. Pending resolution of the complaint, the accused may be prohibited from contacting the victim and may be placed on suspension or denied access to campus. Also, the college/university may change the course schedule or residence assignment of the accused. Please refer to the Student Code of Conduct for disciplinary procedures related to acts of sexual misconduct.

Title IX Coordinator

The Title IX Coordinator is responsible for the University's compliance with Title IX of the Education Amendments of 1972. In this role, the Title IX Coordinator administers the review, investigation, and resolution procedures for reports of sexual misconduct. Please refer to the Reporting Policies & Procedures section for additional information on the role and duties of the Title IX Coordinator.

--Provide contact information for Title IX Coordinator--

Reporting Policies & Procedures

A. Where to Report All Acts of Sexual Misconduct/Violence

1. Filing a Complaint with the University:

A student may report sexual misconduct, including sexual harassment, sexual assault, domestic violence, dating violence, sexual assault, stalking, and cyber-stalking to the following offices:

1. Criminal complaint
 - a. University Police (telephone number)
2. Institutional complaint
 - a. Title IX Coordinator (telephone number)
 - b. Office of Diversity and Inclusion [or institutional name] (telephone number)
 - c. Campus Security Authorities (telephone numbers)
 - Advocacy Center for Sexual Assault
 - Counseling Center
 - Student Health Center
 - Residential Life (all staff)
 - Vice Provost for Undergraduate Education/Dean of Students
 - Professional staff in Student Success/Student Affairs
 - Senior staff in the Office of Human Resource Management
 - Academic Advisors in Advisement Services Center Undergraduate Studies
 - Educational Opportunity Program
 - Professional staff in Athletics, including coaches

- Faculty Advisors to student groups
- d. Student Discipline
Office of Conflict Resolution/Judicial Affairs/Student Conduct (telephone number)
- e. Employee Discipline
Office of Human Resources (telephone number)

A student may file a complaint with one or more Offices, and each Office is prepared to assist the student with deciding on where complaints may be filed, if any, and the processes associated with each Office's complaint procedures. In addition, each Office is able to refer a student for academic accommodations, housing accommodations, and health care services.

2. Filing a Complaint with a State and/or Federal Agency:

A student who is not satisfied with the University's handling of a complaint, may also file a complaint with federal and state agencies. Attached is an Appendix listing the agencies and their respective contact information.

3. Dual Filing a Complaint with the University and a State and/or Federal Agency:

In addition, the Complainant may file a complaint with the appropriate State or Federal agency at any point during the process.

Role of the Title IX Coordinator in the Complaint Process:

The Title IX Coordinator shall be notified of all sexual misconduct complaints by the University employee who took the complaint in order for the Title IX Coordinator to oversee the complaint processes and accommodations for the student.

B. Investigatory Procedures:

1. ***Criminal complaints:*** the NYS and/or federal law will apply, and the matter will follow the criminal processes through a police investigation, a referral to the District Attorney's Office for prosecution and the criminal court system for resolution.
2. ***Institutional complaints:*** the complaint will be handled through the University's Policy and Procedures Against Sexual Harassment. Please see <http://sexualharassmentprocedures.university.edu>.
3. ***Student Disciplinary complaints:*** the complaint will be handled through the University's Student Disciplinary Code. Please see <http://studentdiscipline.university.edu>.
4. ***Employee Disciplinary complaints:*** the complaint will be handled through the Office of Human Resources, in accordance with its procedures for complaints against management confidential employees, or for complaints against a employee who is a member of a union, in accordance with the disciplinary procedures set forth in the

applicable NYS Collective Bargaining Agreements negotiated statewide through the NYS Governor's Office of Employee Relations.

C. *Evidentiary Standard in Institutional, Student Disciplinary and Employee Disciplinary Complaints:*

Preponderance of the Evidence: the standard of proof in sexual misconduct cases, which asks whether it is “more likely than not” that the sexual misconduct occurred [this standard is required for sexual assault, but not required for other crimes (dating violence, domestic violence, stalking), but we recommend using this standard].

D. *Potential Outcomes under the Procedures:*

1. ***Criminal Complaints:*** The complaint may result in criminal penalties, such as fine, community service, probation, jail sentence, registration as a sex offender with the NYS or Federal data bases.
2. ***Institutional Complaints:***
 - a. Under the ***sexual harassment policy***, if there is a finding that a sexual assault may have occurred ***and the alleged perpetrator is***
 - A ***student***, then the matter is referred to the Student Discipline process for student discipline, and the penalties may be disciplinary probation, suspension or expulsion from the residence halls, or suspension or expulsion from the University.
 - An ***employee***, then the matter is referred to the Office of Human Resources for employee discipline and the penalties may include fines, formal counseling, probation, suspension with or without pay, or termination from employment.
 - b. Under the ***Student Discipline process***, the penalties may be disciplinary probation, suspension or expulsion from the dorms, or suspension or expulsion from the University.
 - c. Under the ***Employee Disciplinary process***, the penalties may be fines, formal counseling, probation, suspension with or without pay, or termination from employment.

Retaliation

The University is firmly committed to a policy that encourages timely disclosure of sexual misconduct. Any person, who, in good faith, reports sexual misconduct will be protected from retaliation (defined as an adverse action taken because an individual has engaged in protected activities), threats of retaliation, suspension or discharge from an educational opportunity or employment, or any other forms or means of discrimination because this person reported sexual misconduct.

Confidentiality and Reporting Protocol

If a crime of sexual misconduct has occurred, including dating violence, domestic violence, sexual assault, or stalking, the college/university encourages accurate and prompt reporting of these crimes to the campus police or State and local police agencies. However, it can be difficult for a victim to come forward after such an event, and there are several options available for students who wish to maintain confidentiality while getting the support they need. Different employees on campus have different abilities to maintain a victim's confidentiality:

1. Privileged Communications: Some employees are required to maintain near complete confidentiality; talking to them is sometimes called a “privileged communication”
2. No Personally Identifying Information: Other employees may talk to a victim in confidence, and generally only report to the College that an incident occurred without revealing any personally identifying information. Disclosures to these employees will not trigger a College investigation into an incident against the victim's wishes
3. Responsible Employees: These employees are required to report all the details of an incident (including the identities of both the victim and accused) to the Title IX coordinator. A report to these employees (called “responsible employees”) constitutes a report to the College—and generally obligates the College to investigate the incident and take appropriate steps to address the situation

1. Privileged & Confidential Communications:

Professional and Pastoral Counselors:

Professional, licensed counselors and pastoral counselors who provide mental-health counseling to members of the school community (and including those who act in that role under the supervision of a licensed counselor) are not required to report any information about an incident to the Title IX coordinator without a victim's permission. [If an institution has no pastoral counselors, simply state that clearly]. Following is the contact information for these individuals:

Professional & Pastoral Counselors

2. No Personally Identifying Information:

Non-Professional Counselors and Advocates:

Individuals who work or volunteer in the on-campus [list the offices that pertain to your school: sexual assault center, victim advocacy office, women’s center, health center], including front desk staff and students, can generally talk to a victim without revealing any personally identifying information about an incident to the College. A victim can seek assistance and support from these individuals without triggering a College investigation that could reveal the victim’s identity or that the victim has disclosed the incident. While maintaining a victim’s confidentiality, these individuals or their office should report the nature, date, time, and general location of an incident to the Title IX Coordinator. This limited report – which includes no information that would directly or indirectly identify the victim – helps keep the Title IX Coordinator informed of the general extent and nature of sexual violence on and off campus so the coordinator can track patterns, evaluate the scope of the problem, and formulate appropriate campus-wide responses. Before reporting any information to the Title IX Coordinator, these individuals will consult with the victim to ensure that no personally identifying details are shared with the Title IX Coordinator. A victim who speaks to a professional or non-professional counselor or advocate must understand that, if the victim wants to maintain confidentiality, the College will be unable to conduct an investigation into the particular incident or pursue disciplinary action against the accused. Even so, these counselors and advocates will still assist the victim in receiving other necessary protection and support, such as victim advocacy, academic support or accommodations, disability, health or mental health services, and changes to living, working or course schedules. A victim who at first requests confidentiality may later decide to file a complaint with the school or report the incident to local law enforcement, and thus have the incident fully investigated. These counselors and advocates will provide the victim with assistance if the victim wishes to do so. Following is contact information for these non-professional counselors and advocates:

Non-Professional Counselors and Advocates

3. Reporting to Responsible Employees:

A “responsible employee” is a College employee who has the authority to redress sexual violence, who has the duty to report incidents of sexual violence or other student misconduct, or who a student could reasonably believe has this authority or duty. When a victim tells a responsible employee about an incident of sexual violence, the victim has the right to expect the College to take immediate and appropriate steps to investigate what happened and to resolve the matter promptly and equitably. A responsible employee must report to the Title IX coordinator all relevant details about the alleged sexual violence shared by the victim and that the College

will need to determine what happened – including the names of the victim and accused, any witnesses, and any other relevant facts, including the date, time and specific location of the alleged incident. To the extent possible, information reported to a responsible employee will be shared only with people responsible for handling the College’s response to the report. A responsible employee should not share information with law enforcement without the victim’s consent or unless the victim has also reported the incident to law enforcement. Before a victim reveals any information to a responsible employee, the employee should ensure that the victim understands the employee’s reporting obligations – and, if the victim wants to maintain confidentiality, direct the victim to confidential resources. If the victim wants to tell the responsible employee what happened but also maintain confidentiality, the employee should tell the victim that the College will consider the request, but cannot guarantee that the College will be able to honor it. In reporting the details of the incident to the Title IX Coordinator, the responsible employee will also inform the Coordinator of the victim’s request for confidentiality. Responsible employees will not pressure victims to request confidentiality, but will honor and support their wishes, including for the College to fully investigate an incident. By the same token, responsible employees will not pressure victims to make full reports if they are not ready.

4. Requesting Confidentiality:

If a victim discloses an incident to a responsible employee but wishes to maintain confidentiality or requests that no investigation into a particular incident be conducted or disciplinary action taken, the College must weigh that request against the College’s obligation to provide a safe, non-discriminatory environment for all students, including the victim. If the College honors the request for confidentiality, a victim must understand that the College’s ability to meaningfully investigate the incident and pursue disciplinary action against the accused may be limited. Although rare, there are times when the College may not be able to honor a victim’s request in order to provide a safe, non-discriminatory environment for all students. The College has designated the following individual(s) to evaluate requests for confidentiality once a responsible employee is on notice of alleged sexual violence:

Requests for Confidentiality

When weighing a victim’s request for confidentiality or that no investigation or discipline be pursued, [name/position] will consider a range of factors, including the following:

- The increased risk that the accused will commit additional acts of sexual or other violence, such as:
 - whether there have been other sexual violence complaints about the same accused individual;
 - whether the accused has a history of arrests or records from a prior school indicating a history of violence;

- o whether the accused threatened further sexual violence or other violence against the victim or others;
- o whether the sexual violence was committed by multiple perpetrators;
- o whether the sexual violence was perpetrated with a weapon;
- o whether the victim is a minor;
- o whether the College possesses other means to obtain relevant evidence of the sexual violence (e.g., security cameras or personnel, physical evidence);
- o whether the victim's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group

The presence of one or more of these factors could lead the College to investigate and, if appropriate, pursue disciplinary action. If none of these factors is present, the College will likely respect the victim's request for confidentiality. If the College determines that it cannot maintain a victim's confidentiality, the College will inform the victim prior to starting an investigation and will, to the extent possible, only share information with people responsible for handling the College's response. The College will remain ever mindful of the victim's well-being, and will take ongoing steps to protect the victim from retaliation or harm and work with the victim to create a safety plan. Retaliation against the victim, whether by students or College employees, will not be tolerated.

The College will also:

- Assist the victim in accessing other available victim advocacy, academic support, counseling, disability, health or mental health services, and legal assistance both on and off campus (see portion of policy identifying these);
- Provide other security and support, which could include issuing a no-contact order, helping arrange a change of living or working arrangements or course schedules (including for the accused pending the outcome of an investigation) or adjustments for assignments or tests; and inform the victim of the right to report a crime to campus or local law enforcement – and provide the victim with assistance if the victim wishes to do so.

The College may not require a victim to participate in any investigation or disciplinary proceeding. Because the College is under a continuing obligation to address the issue of sexual violence campus-wide, reports of sexual violence (including non-identifying reports) will also prompt the College to consider broader remedial action – such as increased monitoring, supervision or security at locations where the reported sexual violence occurred; increasing education and prevention efforts, including to targeted population groups; conducting climate assessments/victimization surveys; and/or revisiting its policies and practices. If the College determines that it can respect a victim's request for confidentiality, the College will also take immediate action as necessary to protect and assist the victim.

5. Other Confidential Avenues:

There are other ways to disclose a sexual assault that will be handled confidentially:

a. Take Back the Night and other Public Awareness Events

If a student discloses a situation through a public awareness event such as "Take Back the Night," candlelight vigils, protests, a Student Survivor Advocacy Alliance forum, or other public event, the information the student provides will not result in an investigation. The University may use the information the student provides to inform the need for additional education and prevention efforts.

b. Anonymous Reporting

A student may call the [Relevant Office] anonymously at [contact number] to talk about the situation and find out information about the student's options. The student should simply tell the receptionist that he or she would prefer not to give his or her name. The student can talk confidentially with [office name], and disclose as much or as little information as the student would like to. The student may also complete a Sexual Assault Anonymous Report.

c. Off-Campus Counselors and Advocates

Crisis Services and off-campus healthcare providers will generally maintain confidentiality unless a student signs a consent or waiver form.

Timely Warnings and Emergency Notifications

1. What warrants a "timely warning" or "emergency notification"?

Timely Warnings shall be issued whenever a Clery Crime that is considered to represent a serious or continuing threat to students and employees is reported to UPD or a local police agency and has occurred within the University's Clery Geography. Whenever a timely warning is sent it may be sent to the entire Campus Community or to the relevant population if technology allows.

Emergency Notifications shall be issued when a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurs on the campus. As appropriate, emergency notifications may be targeted at only a segment or segments of the campus community that is at risk. Emergency notifications will be issued without delay unless doing so would compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency.

Who decides? [The Vice President for Student Success/Student Affairs/the individual responsible at your institution], or a designee of the [Vice President], in conjunction with the

Chief of University Police and/or other campus and non-campus officials as appropriate, shall confirm the existence of a situation that may warrant a warning or notification and determine if a timely warning or emergency notification is warranted and the extent of the notification as appropriate. In addition to criminal incidents, emergency notifications may be issued in situations such as, but not limited to:

1. Safety Related Issues:

- An incident that occurs on any of our campuses that affects the personal safety and security of our population.
- An incident that occurs in close proximity to the campus that may potentially affect the personal safety and security of our student, faculty and staff population.

2. Health Related Issues:

- Diagnosis of a serious or life threatening communicable/infectious disease.
- Evidence of bio terrorism.

An immediate notification for a confirmed emergency or dangerous situation may not be issued if doing so will compromise efforts to: assist a victim, contain the emergency, respond to the emergency, or otherwise mitigate the emergency.

2. How will a Timely Warning or an Emergency Notification be Communicated?

For Safety Related Issues: The means of communication will be chosen by the [VP for Student Success/Student Affairs/the individual responsible at your institution] or the designee based upon the nature of the incident. Possible means of communication are:

- E-mail to all students and/or faculty/staff
- Postings in campus center, residence halls, as applicable to the incident. Postings can be emailed as attachments to various offices as indicated below
- Delivery of hard copy notification to all residential suites
- Student Newspaper ad, based on timing of the incident
- Posting of notification on University Police Department web site
- ***SUNY NY Alert in the case of a critical campus wide emergency***
- Email to parents
- Post to web portal

For Health Related Issues: The means of communication will be chosen by the [VP for Student Success/Student Affairs/the individual responsible at your institution] or the designee based upon the nature of the incident. Possible means of communication are:

- Letters to students and/or parents (communication to parents is extremely minimal, most likely done in cases of measles, mumps, or rubella. Viral Meningitis would be communicated to the parents whose students are directly affected.)
- Letters to faculty and staff, if appropriate
- Posting of notification on the University web-site
- Student Newspaper ad, based on timing of the incident

Investigation, Grievance, & Adjudication Procedures

Please refer to the Judicial Code of Conduct and the Student Code of Conduct for a complete description of procedures.

How to Help as a Bystander⁹

The college/university expects all members of the campus community to take reasonable and prudent actions to prevent or stop an act of sexual misconduct. Educating and engaging bystanders are effective ways to help prevent acts of sexual misconduct. Bystanders can help in several different ways, including direct invention, seeking assistance from an authority figure, notifying campus security, or calling State or local law enforcement.

If you see an act of sexual misconduct: It is important to understand that no individual has the right to be violent, regardless of whether people are in a relationship. Recognizing when acts of sexual misconduct are occurring is the first step to intervening. Required campus education and training programs give a full synopsis on recognizing when sexual misconduct is taking place. If you make the decision to intervene, do so safely—violence does not stop violence, and, if you cannot stop the act with your words, call law enforcement. Do not be afraid to ask an RA, RD, or other students for help.

If a victim confides in you: It is important to let the victim tell their story. Listen respectfully, and help them explain and identify what has happened to them. Do not contradict them or play “devil’s advocate” even if parts of the story don’t immediately make sense or even if you would have made other choices when presented with the same scenario or challenges. Help the victim identify others in their network who they can confide in. Ask the victim what they need to feel safe, encourage them to seek medical attention and counseling, and encourage them to report the act if they feel comfortable doing so. The first people that a victim talks to can have a significant impact on the person and their ability to report and get through an ordeal. Be a supportive, kind, understanding and nonjudgmental person and you can be a positive force for this victim in seeking the help they require to move forward.

OPTIONAL

Insert Good Samaritan 911 Policy here [This type of policy is STRONGLY encouraged]¹⁰

Prevention Education & Awareness Programs/Trainings

The College has education programs to promote the awareness of rape, including acquaintance rape, dating violence, domestic violence, sexual assault, and stalking. These education programs include primary prevention and awareness programs for all incoming students and new employees. These education programs will include: a statement that these

⁹ For background on bystander intervention see [Some Thoughts on the Importance of Bystander Intervention](#), below.

¹⁰ For an example of a Good Samaritan 911 Policy, see [Good Samaritan 911 Policy](#), below.

crimes are prohibited at the College; definitions of consent, domestic violence, dating violence, sexual assault, and stalking in the College's jurisdiction; safe and positive bystander intervention when there's a risk of one of those incidents; information on risk reduction to recognize warning signs of abusive behavior and avoiding potential attacks; and information about the institutional disciplinary procedures. The various programs and trainings offered by the college/university are described below:

1. *Prevention Programs*: These are programs to prevent dating violence, domestic violence, sexual assault, and stalking. The programs are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome. They also consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.
 - Specifically, at SUNY [insert name]...describe your prevention programs
2. *Awareness Programs*: These are community-wide or audience-specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration.
 - Specifically, at SUNY [insert name]...describe your awareness programs
3. *Bystander Intervention*: These programs and trainings offer safe and positive options that may be carried out by an individual or individuals to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault, or stalking. They include recognizing situations of potential harm, understanding institutional structures and cultural conditions that facilitate violence, overcoming barriers to intervening, identifying safe and effective intervention options, and taking action to intervene.
 - Specifically, at SUNY [insert name]...describe your bystander intervention programs/trainings
4. *Ongoing Prevention & Awareness Campaigns*: These include programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of topics relevant to and skills for addressing dating violence, domestic violence, sexual assault, and stalking, using a range of strategies with audiences throughout the college/university and including information provided in campus education programs.
 - Specifically, at SUNY [insert name]...describe your ongoing campaigns
5. *Primary Prevention Programs*: These include programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and

stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.

- Specifically, at SUNY [insert name]...describe your primary prevention programs
6. *Risk Reduction Programs*: These programs present options designed to decrease perpetration and bystander inaction, and to increase empowerment for victims in order to promote safety and to help individuals and communities address conditions that facilitate violence.
- Specifically, at SUNY [insert name]...describe your risk reduction programs

APPENDIX:

NYS Division of Human Rights

State Headquarters

New York State Division of Human Rights
One Fordham Plaza, 4th Floor
Bronx, New York 10458
Tel: (718) 741-8400
Fax: (718) 741-3214

Albany

New York State Division of Human Rights
Empire State Plaza, Corning Tower, 28th Floor, Post Office Box 2049
Albany, New York 12220
Tel: (518) 474-2705
Fax: (518) 473-3422

Office of Sexual Harassment

New York State Division of Human Rights
Office of Sexual Harassment
55 Hanson Place, Suite 347
Brooklyn, New York 11217
Tel: (718) 722-2060 or 1-800-427-2773
Fax: (718) 722-4525

Office of AIDS Discrimination

New York State Division of Human Rights
Office of AIDS Discrimination
20 Exchange Place, 2nd Floor
New York, New York 10005
Tel: (212) 480-2522 or 1-800-522-4369
Fax: (212) 480-0143

United States Department of Labor

Office of Federal Contract Compliance Programs (OFCCP)

201 Varick Street, Room 750
New York, NY 10014
Tel: (212) 337-2006
Fax: (212) 620-7705

OFCCP New York District Office

26 Federal Plaza, Room 36-116
New York, NY 10278-0002
Tel: (212) 264-7742
Fax: (212) 264-8166

New York State Department of Labor

State Campus, Building 12, Room 500
Albany, NY 12240-0003
Tel: (518) 457-2741
Fax: (518) 457-6908

United States Equal Employment Opportunity Commission

EEOC National Headquarters
131 Main Street NE, Fourth Flr., Suite 4NW02F Washington, D. C. 20507
Tel: (202) 663-4900
Fax: (202) 663-4912

EEOC Field Office
6 Fountain Plaza, Suite 350
Buffalo, New York 14202
Tel: (716) 551-4441
Fax: (716) 551-4387

Office for Civil Rights

OCR National Headquarters
U. S. Department of Education
Office of Civil Rights, Customer Service Team
Mary E. Switzer Building
330 C. Street, S. W.
Washington, D. C. 20202
Tel: (800) 421-3481
Fax: (202) 205-9862

Office for Civil Rights, New York Office
32 Old Slip, 26th Floor
New York, NY 10005-2500
Tel: (646) 428-3800
Fax: (646) 428-3843

Good Samaritan 911 Policy¹¹

Policy Summary:

The University's *Good Samaritan 911 Policy* supports students who reach out for assistance in the case of a medical emergency, as well as supports the student who is helped. Therefore, a student or student organization seeking medical treatment for him/herself, or for any other student who is in immediate medical need, or any student who is the recipient of this emergency medical help, will not be subject to disciplinary sanctions related to the violation of using or possessing alcohol or other drugs, as defined in *Community Rights and Responsibilities* (Prohibited Conduct *Drugs and Alcohol*). This policy applies to emergencies both on and off campus.

Purpose:

At the University, the health and safety of every student is of primary importance and all students are strongly encouraged to be empowered bystanders who respond in a potentially dangerous situation without fear of reprisal from the University. The University's *Good Samaritan 911 Policy* supports students who act responsibly by reaching out for assistance in the case of a medical emergency, as well as supports the student who is helped.

Application of the Policy:

A student is eligible to use the Good Samaritan 911 Policy on more than one occasion and students are always strongly encouraged to report a medical emergency. The positive impact of reporting a medical emergency will always hold the highest priority when determining the appropriate response for University policy violations.

Repeated use of the amnesty provided by the Policy is cause for a higher level of concern for the well-being of the student and amnesty in these cases will be individually reviewed.

Parental Notification:

Because parents are vital partners in the educational process and because the student can be best supported from home, the University typically contacts parents of students under 21 years of age in instances where there is evidence of risk to health, welfare or safety. In addition, the University may record names of those students involved to enable the University to follow up with the students as deemed necessary to ensure a student's well-being.

¹¹ Prepared by Janet Thayer, Associate Counsel based on 911 Good Samaritan Policy at the University at Albany.

Mandatory Intervention Program:

A student who receives medical assistance for alcohol use under the Good Samaritan 911 Policy will be referred by the Vice President for Student Success or their representative to a mandatory intervention program, such as the *Brief Alcohol Screening and Intervention for College Students* (BASICS) program at the University Counseling Center. Additionally, a student who qualifies for the Good Samaritan 911 Policy by calling for medical assistance for another student may be referred to this program at the discretion of the Vice President for Student Success.

Frequently Asked Questions:

Q. What if I am underage and drunk when I call for help for a friend?

A. In this situation, emergency personnel will be mainly concerned with the person who needs the most help. Make sure to stay with your friend until help arrives. Emergency personnel might want to ask you a few questions about how much the sick person had to drink or if they mixed the alcohol with any other drugs, for example. This information will be critical to helping your friend. In such a case, the University will not refer you or the person you called for an alcohol violation.

Q. Will my name be recorded if I call for help for my friend?

A. In most situations, if you are level-headed enough to call for help and you are not showing signs of alcohol or other drug overdose, emergency personnel will thank you for your assistance and simply help your friend.

Q. How will anyone know I was the Good Samaritan who called for help?

A. In most cases, a professional staff member from Residential Life or the Office of Conflict Resolution and Civic Responsibility will know that you called for help. If they do not know, you can simply inform them of your role in helping your friend or yourself.

Q. Does the Good Samaritan Policy apply if I call for help for myself?

A. Yes

Q. Does the University contact my parents if I am transported to the hospital?

A. The University does not automatically contact your parents when you are transported to the hospital. However, your parents would eventually be notified by mail if you are under 21 and had a hospital transport for alcohol or drug use.

Q. What happens if I am transported to the hospital for the second time – does the Good Samaritan Policy apply?

A. While the main concern is the health and safety of every student, a pattern of behavior for hospital transports will require a staff member to review the situation and follow up using professional judgment for each individual situation.

Q. What should I do if a friend is showing signs of alcohol poisoning or overdose?

A. Remember to **Check**, **Call** and **Care**. Alcohol overdose can be scary, but getting help is not.

CHECK: Watch out for your friends throughout the night. Encourage healthy choices. If someone you know has consumed too much alcohol, check for signs of overdose.

Click [here](#) for a list of signs of possible alcohol poisoning or overdose.

CALL: If you discover any one of the above problems, call for medical help immediately. Call 911. The above indicators of alcohol overdose are very serious and time is of the essence.

CARE: Continually talk to the person and monitor their skin color, temperature and breathing. Turn and keep the person on his/her left side as this will help to keep the person from choking should they vomit. Wait with your friend until help arrives; never leave a sick friend alone.

Q. What should I do if a friend is showing signs that he or she might be thinking of suicide?

A. Click [to appropriate link] to learn about what you can do to help a friend who is showing signs that he or she might be thinking of suicide.

Q. What should I do if a friend has been raped or sexually assaulted?

A. Click [to appropriate link] to learn about what you can do to help a friend who has been raped or sexually assaulted.

Q. Is there training on campus to be a better bystander and help other students who may be in distress?

A. ***STEP UP!*** is a bystander intervention program that educates students to be proactive in helping others when faced with problematic or risky situations that are of concern.

The ***STEP UP!*** training program focuses on real-life situations/scenarios students might encounter. The goal of the program is to generate open, honest and non-judgmental discussions about the material presented. This training is not meant to cover all possible scenarios or variables, nor is it meant to train you as a counselor.

Please contact the University Counseling Center () if you would like to schedule a *STEP UP!* training session for your class or student group.

For more information on the University Good Samaritan 911 Policy, please contact:

Name

Address

Telephone

Email

Optional Addition: Crime Reporting, Sexual Assault, and Amnesty/Good Samaritan Policies

Some campuses add a statement to the existing medical amnesty/Good Samaritan policy to make clear that an individual reporting a crime such as sexual assault will not be charged under the student conduct code for violating drugs or alcohol policies if such use was involved. This statement encourages reporting of sexual assault without fear of self-reporting alcohol or drug violations. It is likely that most campuses already exercise such discretion, but publishing it in the policy may help students determine whether or not to report an incident.

Note that, pursuant to due process and Title IX considerations, if the College does not charge a victim or complaining witness with alcohol violations stemming from a particular incident, the College should likewise not charge the respondent with the attendant alcohol violations stemming from that same incident, but concentrate instead on the charges of sexual violence/sexual assault.

In December 2014, SUNY developed a uniform [Policy for Alcohol and/or Drug Use Amnesty in Sexual Violence Cases](#) that says:

The health and safety of every student at the State University of New York and its State-operated and community colleges is of utmost importance. [College/University] recognizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time a sexual violence incident occurs may be hesitant to report such incidents due to fear of potential consequences for their own conduct. [College/University] strongly encourages students to report incidents of sexual violence to campus officials. A bystander reporting in good faith or a victim/survivor reporting sexual violence to [College/University] officials or law enforcement will not be subject to campus conduct action for violations of alcohol and/or drug use policies occurring at or near the time of the sexual violence.

Statement of Victim's Rights¹²

In December 2014, SUNY developed a uniform [Sexual Violence Victim/Survivor Bill of Rights](#).

VICTIMS OF CAMPUS SEXUAL ASSAULT: STATEMENT OF PRINCIPLES AND RIGHTS

The University is committed to providing a safe and secure environment in which all members are treated with dignity and respect, and a campus free from all discrimination on the basis of sex. To that end, the University takes the strongest possible stance against sexual misconduct in all its forms, including sexual harassment, sexual assault, sexual violence or the use of coercion, intimidation or exploitation of others for sexual purposes. The University is actively engaged in educating its members about these vital issues and in providing timely support and assistance to victims of sexual assault.

Should a sexual assault be reported, the University will investigate allegations and take appropriate actions, to the fullest possible extent. The University supports the victim's right to privacy. In the event that a victim wishes to remain anonymous, the University will respect that request while evaluating the obligation to protect the safety and well-being of the broader community. For example, in the event that the assault/crime must be reported, the request for anonymity would be weighed against other factors, such as whether the accused individual is the subject of other complaints. In such instances, every safeguard will be taken in order to ensure the victims' anonymity. It is imperative that victims be fully supported in their efforts to heal and respond as they determine is in their own best interests. To this end, the University will provide information about campus and community medical and counseling resources and support the victim's right to make choices about these resources and options.

All members and representatives of the University community, including campus officers, administrators, faculty, professional staff, employees, and students are expected to recognize and abide by the following principles regarding victims of campus-related sexual assaults:

1. The Right to Human Dignity

¹² Prepared by Janet Thayer, Associate Counsel. As with all resources incorporated in this guidance, this is one strong example of a statement of victim's rights, but other institutions can and do include other information. Another example is the SUNY Cortland Victim's Rights page (<http://www2.cortland.edu/offices/judaffairs/victims-rights.dot>).

Victims shall:

Be treated with fairness and respect for their dignity;

Have their privacy honored;

Be free from any suggestions that they must report sexual assaults to be assured; recognition of any other identified principles or rights;

Have their allegations of sexual assault treated seriously;

Be free from any suggestion that they are responsible for the sexual assaults committed against them;

Be free from any threat of retaliation or other attempt to prevent the reporting of sexual misconduct;

Be free from unwanted pressure from campus personnel to:

Report sexual assaults if they do not wish to do so,

Report sexual assaults as less serious offenses,

Refrain from reporting sexual assaults for any reason, including the fear of unwanted personal publicity.

2. The Right to Resources On and Off Campus

Victims shall:

Receive notice describing options to pursue a criminal complaint with the appropriate law enforcement agency, to pursue the University's disciplinary process, or to pursue both processes simultaneously;

Be notified of existing campus and community-based medical, counseling, mental health and student services for victims of sexual assault whether or not the assault is formally reported to campus or civil authorities;

Have access to campus counseling;

Be informed of and assisted in exercising:

Any rights to confidential or anonymous testing for sexually transmitted infections, HIV, and pregnancy,

Any rights to preventive measures such as emergency contraception or HIV prophylaxis,

Any rights that may be provided by law to obtain the communicable diseases test results of sexual assault suspects;

Be informed of the possible availability of crime victim assistance compensation through the New York State Crime Victims Board;

Additional information about resources and options to aid in recovery are available at the end of Appendix X and at [website].

3. The Right to Campus Judicial Proceedings

Victims have the right to:

Written and advance notice about a disciplinary hearing involving the person or persons accused of sexually assaulting them;

Have the opportunity to present witnesses and other evidence, and to receive notice of the process, information about procedures, and written notice of the outcome in a manner that is equivalent to the process of the accused;

Have a person of their choice accompany them throughout the disciplinary hearing;

Remain present during the entire proceeding, whenever possible; alternative arrangements may be made for those who do not want to be present in the same room as the accused during the disciplinary hearing;

Be heard at the proceeding;

Be assured that their irrelevant past sexual history will not be discussed during the hearing;

Make a “victim impact statement” if the accused is found in violation of the code;

Be informed in a timely fashion (60 days) of the outcome of the hearing;

Have the right to appeal the outcome of the hearing.

4. The Right to Law Enforcement and Campus Intervention

Reports of sexual assault will be investigated and evaluated by the appropriate criminal and civil authorities of the jurisdiction in which the sexual assault is reported;

Victims shall receive full and prompt cooperation and assistance of campus personnel in notifying the proper authorities;

Victims shall receive full, prompt, and victim-sensitive cooperation of campus personnel with regard to obtaining, securing and maintaining evidence, including a medical examination when it

is necessary to preserve evidence of the assault; “No contact” orders (e.g., Cease and Desist orders) shall be issued promptly and in writing to all parties to a reported sexual assault after the University receives notice of a complaint;

Campus personnel shall take reasonable and necessary actions to prevent further unwanted contact by victims’ alleged assailants;

Victims shall be notified of the options for and provided assistance in changing academic and living situations if such changes are reasonably available.

5. Note: Statutory Mandates

Nothing in this Statement of Principles and Rights shall be construed to preclude or in any way restrict the University from carrying out its duties under law to report suspected offenses to the appropriate law enforcement authorities. Except as required by law, the University will take care not to identify the victim.

Nothing in this Statement of Principles and Rights shall be construed to preclude or in any way restrict the University from issuing a Timely Warning when the University is aware of a reported sexual assault incident that potentially puts the campus community at risk. The University will take care not to identify the victim in such notices but may, in certain cases of continuing danger, identify the suspect, assailant or the address where the crime occurred.

VAWA Requires Institutions to Add New Policy Statements to the Annual Security Report¹³

Encouraging Prompt Reporting

*Campus policy encourages every member of the campus community to report a crime promptly to UPD if the victim wants to or is unable to report.*¹⁴

Institutional Response to Reports of VAWA Crimes

The institution has programs to prevent domestic violence, dating violence, sexual assault, and stalking. When an incident of domestic violence, dating violence, sexual assault, or stalking is reported, the College will provide victims with written notice of available options, remedies, and services. If the accused individual is a student, the standard of evidence used in an institutional disciplinary hearing will be preponderance of the evidence.

Education Programs re VAWA Crimes

The College has education programs to promote the awareness of rape, acquaintance rape, dating violence, domestic violence, sexual assault, and stalking. These education programs include primary prevention and awareness programs for all incoming students and new employees. These education programs will include: a statement that these crimes are prohibited at the College; definitions of consent, domestic violence, dating violence, sexual assault, and stalking in the College's jurisdiction; safe and positive bystander intervention when there's a risk of one of those incidents; information on risk reduction to recognize warning signs of abusive behavior and avoiding potential attacks; and information about the institutional disciplinary procedures.

Sanctions for VAWA Crimes

Following a final determination of an institutional disciplinary procedure for cases of rape, acquaintance rape, dating violence, domestic violence, sexual assault, or stalking, the following sanctions or protective measures may be imposed: *[list, for example: suspension, expulsion, education programs, community service, probation, no-contact order.]*

Procedures for survivors of domestic violence, dating violence, sexual assault, or stalking

Survivors/victims of these crimes will be provided written information about evidence preservation, how and to whom to report these crimes, options about involvement of law enforcement and campus authorities, and assistance in notifying law enforcement if the victim chooses, as well as the option to decline to notify authorities. Victims will also be provided

¹³ Prepared by Andrea Stagg, Associate Counsel.

¹⁴ The italicized language is already required to be in the ASR—the plain text language that follows is new.

information in writing about rights and institutional responsibilities regarding no contact orders, orders of protection, or other available applicable options.

- Evidence preservation: In order to best preserve evidence, victims should avoid showering, washing, changing clothes, combing hair, drinking, eating, or doing anything to alter physical appearance until after a physical exam has been completed.
- Reporting: Victims should report to [*insert person/title, email address, office address, phone number.*]
- Notifying Law Enforcement: Victims have the right to notify law enforcement, and the campus can assist in notifying law enforcement if victims choose. Victims may also choose to decline to notify authorities.

Procedures for institutional disciplinary procedures in cases of domestic violence, dating violence, sexual assault, and stalking

The institutional disciplinary procedures will provide a fair, prompt, and impartial process from investigation to final result. The investigation and any hearing will be conducted by those who receive annual training on issues related to VAWA crimes, how to conduct an investigation, and a hearing process that protects victim safety and promotes accountability. Parties are entitled to the same opportunities to have an advisor of their choice present at any hearing and related meetings. There is no limit to the choice of an advisor; however, the parties are responsible for presenting evidence on their own behalf. Advisors may speak privately to their advisee during the proceeding, and cannot present evidence or cross-question witnesses. Parties will be informed simultaneously in writing of the outcome of the process, the availability of any appeal procedures, and when the results become final after any appeals. The disciplinary processes available for victims of domestic violence, dating violence, sexual assault, and stalking are [*insert options for procedures. For example, “campus student conduct disciplinary procedures”*]. [*Describe the steps—report taken, investigation, charges issued, initial meeting, pre-hearing meeting, hearing, appeal.*] [*Describe timeline – how many days between the steps? How many days for an appeal?*] The standard of evidence in these cases is preponderance of the evidence. Following an allegation or report of one of these crimes, the institution may offer available protective measures such as a no-contact order; alteration of living, academic, and work situations; or [*more?*]. [*sanctions are already listed above.*]

Confidentiality

The institution will maintain as confidential any accommodations or protective measures provided to the victims so long as it does not impair the ability to provide such measures. Personally identifiable information about victims will not be included in any publicly available record-keeping, including the reporting and disclosure of crime statistics.

Written Notifications to Students, Employees, and Victims of VAWA Crimes For Students and Employees:

The College will provide written notification to students and employees about existing and available counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, and other services available in community and on campus to victims of

dating violence, domestic violence, sexual assault, and stalking. The College will also provide information about these services in writing to victims of domestic violence, dating violence, domestic violence.

For Survivors/Victims:

The College will provide written notification to victims regarding rights and options, including: available and existing on- and off-campus services such as victim advocacy, counseling, health, mental health, legal assistance, visa and immigration assistance; available and applicable institutional disciplinary procedures, and an explanation of those procedures; confidentiality in protective measures and Clery reporting and disclosure; and reasonable and available options and assistance with changing academic, living, transportation, and working situations, regardless of whether the victim chooses to report the crime to law enforcement.

VAWA, Title IX, and Clery Training & Education Considerations¹⁵

In December 2014, SUNY developed a uniform [Student Onboarding and Ongoing Education Guide](#).

Background

What is VAWA? Under The Violence Against Women Act (“VAWA”), colleges and universities are required to: (1) report dating violence, domestic violence, sexual assault, and stalking, beyond crime categories the Clery Act already mandates; (2) adopt certain student discipline procedures, such as for notifying purported victims of their rights; and (3) adopt certain institutional policies to address and prevent campus sexual violence, such as to train in particular respects pertinent institutional personnel.¹⁶

Updates to VAWA: The Violence Against Women Reauthorization Act, which President Obama signed into law on March 7, 2013, imposes new obligations on colleges and universities under its Campus Sexual Violence Act (“SaVE Act”) provision, Section 304. This provision imposes new reporting requirements, new student discipline requirements, and new requirements to educate and train students and employees on sexual violence.

What is Clery? Requires colleges and universities that participate in federal financial aid programs to report annual statistics on crime, including sexual assault and rape, on or near the campus, and to develop and disseminate policies.

Components to Clery: Part of the Higher Education Act. Compliance requirements are gathered from the statute, as well as the regulations. Additional information comes from sub-regulatory guidance, the Clery Handbook, Annual Clery Letters to Institutions, Dear Colleague Letters, Clarifications (published and unpublished), and Program Reviews.

What is Title IX? Title IX of the Education Amendments of 1972 is a comprehensive federal law that protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. The law prohibits discrimination on the basis of sex in any federally funded education program or activity. Title IX applies to traditional educational institutions such as colleges, universities, including SUNY campuses. Under Title IX of the Educational Amendments Act of 1972, colleges and universities are required to develop procedures to respond to claims of sexual harassment.

Title IX states: *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.*

¹⁵ Prepared by Nedra Abbruzzese-Werling, Director of Compliance.

¹⁶ American Council on Education, *New Requirements Imposed by the Violence Against Women Reauthorization Act* <http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf>.

College duty under Title IX: promptly respond to complaints of sexual harassment and sexual violence in a way that limits its effects and prevents its recurrence, through the Title IX coordinator, and training and education.

New Obligations to Train and Educate under VAWA

New Obligation to Train: The Department of Education engaged in negotiated rulemaking to implement VAWA's 2013 amendments to the Clery Act, which requires schools to provide education and awareness programs. Regulations will become effective in July 2015.

New Requirements to Educate New Students and Employees on Sexual Violence: Under VAWA, new students and new employees must be offered "primary prevention and awareness programs" that promote awareness of rape, acquaintance rape, domestic violence, sexual assault, and stalking.

CAVEAT: Schools are expected to make a good faith effort to meet these new requirements now even though the regulations are not yet effective

SUNY state-operated campuses are required to comply with the [SUNY OCR 2013 Voluntary Resolution Agreement](#), which is more specific than the general national guidance. Per the agreement, campuses offer a series of information sessions to students so that they are aware of the campuses' prohibition against sex discrimination (including sexual harassment, sexual assault, and sexual violence).

The SUNY Campus information sessions at the campus cover:

- How to recognize such sex discrimination and sexual harassment when it occurs
- How and with whom to report any incidents of sex discrimination
 - including sexual harassment, sexual assault, and sexual violence
- Title IX Information, including:
 - Campus' revised grievance procedures for Title IX complaints
 - General overview of Title IX,
 - Rights that Title IX confers on students
 - Resources available to students who believe that they have been victims of sexual harassment/assault/violence
 - The existence of OCR and OCR's authority to enforce Title IX

When Should the Information Sessions Be Held?

These sessions may be provided as part of the existing annual student orientation for new and returning students, and existing annual residence life orientation for students residing in campus housing.

Who Needs to Be Trained?

All students and employees of the campus should receive some level of training.

As discussed in the New Obligations to Train and Education under VAWA section of this document, new students and new employees should be offered "primary prevention and

awareness programs” that promote awareness of rape, acquaintance rape, domestic violence, sexual assault, and stalking. Existing employees should be offered ongoing prevention and awareness campaigns directed specifically at employees, while existing students should be offered ongoing prevention and awareness campaigns directed specifically to students.

Students:

- Incoming Students: Programs to prevent dating violence, domestic violence, sexual assault, and stalking must be directed at incoming students.
- All Students: ongoing prevention and awareness campaigns should be offered to all students.

Employees:

- New Employees: Programs to prevent dating violence, domestic violence, sexual assault, and stalking must be directed at new employees.
- All Employees: Ongoing prevention and awareness campaigns should be offered to all employees.

What has changed? How is this new training obligation different from our past obligation?

Past obligations under Clery and Title IX

- Mandated training for the Title IX Coordinator, investigators, and adjudicators and campus police.
- Campus community must have been provided information to know what can and should be reported.
- Was only a best practice to provide training to students, staff and faculty.

Note: Specific employees have to receive more training, depending upon their role on the campus. Refer to the Specialized Employee Training Considerations section of this document for more information on employees who may need specialized training, and what that training should entail.

Frequency of the Trainings

The frequency of these trainings was not spelled out in the new regulations, except with respect to those involved with campus investigations, disciplinary actions and proceedings and hearings, where the regulations state clearly they need to be trained at least annually.

Trainings, according to the White House Report, should be:

- Sustained (not brief, one-shot educational programs).
- Comprehensive.

Suggestions for When to Offer the trainings for Students:

Pre-orientation / Arrival

- Student orientation handbook.
- Email.
- Flyers.
- Peer-to-peer letter.

Orientation / Arrival Stage

Post-Orientation/ Ongoing Stage

- Target Events:
 - Athletics activities.
 - Rush activities.
 - New Student fairs.
 - Awareness tables outside of bookstore/ student union.
- Residence Hall training.
- Peer theater presentations.
- Follow-up emails on particular days based on holidays (Dating violence on holidays, consent message before a campus weekend event where students are prone to party).
- Establish a webpage for program information, articles, blogs, etc.
- Recruit students to become involved in peer education.

Suggestions for When to Offer Trainings for Employees:

New Employees

- Pamphlets with their offer letters.
- First day job on-boarding.
- Initial mandated training sessions.

Current Employees

- Annual retraining.
- Exposure to ongoing programs aimed at students.

Training Goals

The three key functions of the training program are:

1. **PREVENTION:** A primary prevention and awareness program [which includes bystander intervention] for all incoming students aims to prevent dating violence, domestic violence, sexual assault, and stalking.
2. **POLICY AWARENESS:** Primary prevention and awareness programs lay out the institution's policy regarding dating violence, domestic violence, sexual assault and stalking and¹⁷;
3. **PROCEDURE AWARENESS:** Inform students and employees about the procedures that the institution will follow when one of these crimes is reported.¹⁸

What should the training include?

To comply with VAWA'S new rules, Title IX's new guidance, and Clery training components:¹⁹

1. Incorporate mandatory statement in all trainings, programs, orientations or campaigns:

"[Institution name] prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking."

2. Provide the state definitions of dating violence; sexual assault; domestic violence; and stalking.

The Violence Against Women Act and its Proposed Regulations require the inclusion of New York State definitions and the campus code definitions in the Annual Security Report and for programs and training for employees and students.²⁰

The required terms that must be defined for purposes of training include:

- Dating Violence.
- Domestic Violence.

¹⁷ §668.46 Institutional security policies and crime statistics, page 28 <http://www.gpo.gov/fdsys/pkg/CFR-2012-title34-vol3/pdf/CFR-2012-title34-vol3-sec668-46.pdf>, Section B (11).

¹⁸ §668.46 Institutional security policies and crime statistics, page 28 <http://www.gpo.gov/fdsys/pkg/CFR-2012-title34-vol3/pdf/CFR-2012-title34-vol3-sec668-46.pdf>, Section K.

¹⁹ §668.46 Institutional security policies and crime statistics, page 28 <http://www.gpo.gov/fdsys/pkg/CFR-2012-title34-vol3/pdf/CFR-2012-title34-vol3-sec668-46.pdf>.

²⁰ See [New York Crime Definitions](#), above.

- Sexual Assault.
- Stalking.

3. Provide the definition of “consent” in reference to sexual activity from our New York State jurisdiction.

Consent at SUNY: Consent is clear, unambiguous, and voluntary agreement between the participants to engage in specific sexual activity.

4. Provide safe and positive options for bystander intervention an individual may take to prevent harm or intervene in risky situations.

Bystander Intervention: teaching men and women to speak out against rape myths, and to intervene if someone is at risk of being assaulted, has been shown to be an effective prevention tool.

- Resources to help teach bystander intervention:
 - o The White House released a [Public Service Announcement](#) video featuring President Obama, Vice President Biden, and celebrity actors to spread the message of “if she doesn’t consent – or can’t consent – it’s a crime. And if you see it happening, help her, don’t blame her, speak up.” The video “urge[s] men’s groups, Greek organizations, coaches, alumni associations, school officials and other leaders to use the PSA to start campus conversations about sexual assault.”
 - o A [Bystander Intervention Fact Sheet](#) released by the White House in conjunction with the White House Sexual Assault Task Force Report is a succinct document that covers:
 - Common Components of Bystander Intervention.
 - Delivery methods for training.
 - Information on combining tools for training.
 - Challenges to the bystander action.

5. Provide options designed to decrease perpetration and bystander inaction, and to increase empowerment for victims to promote safety and to help individuals and communities address conditions that facilitate violence.

Giving survivors more control:

- Assuring confidentiality so they are more likely to come forward.
 - o Why: Survivors / victims need support and assurances to regain a sense of control, so they can confidentially sort through their options without others knowing, or without the school conducting a full-fledged investigation.
- Recognition of signs of abusive behavior and how to avoid potential attacks.

Signs of Abuse: Recognition of signs of abusive behavior and how to avoid potential attacks.

Confidentiality: Communicate and identify those trained, confidential victim advocates who can provide both emergency and ongoing support.

Who can be confidential: Non-professional on campus counselors and advocates – like those who work or volunteer in sexual assault centers, victim advocacy offices, women’s and health centers, as well as licensed and pastoral counselors-- can talk to a survivor in confidence.

- Must clearly communicate policy statement on confidentiality, and what it says with regard to the campuses need to override confidentiality when necessary to pursue alleged perpetrator and/or keep the campus community safe.
- New Department of Education guidance for Title IX says that these employees can now maintain confidentiality and talk to survivors in confidence:
 - Non-Professional On-campus counselors and advocates
 - On-campus advocates: work or volunteer in sexual assault centers, victim advocacy offices, women’s and health centers, and some licensed and pastoral counselors.
- **Resources available to survivors/ victims:** Schools must provide student with information on services available, including:
 - Identify trained, confidential victim advocates who can provide emergency and ongoing support.
 - Who can a victim/ survivor talk to in confidence?
 - Where can the student go?
 - Where can the student go for emergency services
 - On campus.
 - Local partnerships with community: (if you have them- such as a rape crisis center).

Optional Campus Climate Survey (not currently required by law, highly encouraged by White House First Report):

- **Campus Climate Survey:** Communicate the results of your Campus Climate Survey
 - What does campus climate measure:
 - Gauges the prevalence of sexual assault on campus, tests students attitudes and awareness of the issue, and provides schools with information to help them come up with solutions.
 - What was the problem your campus climate survey identified
 - Remember - to fix a problem, you understand the extent of the problem.
 - Goal of campus climate is to provide a fair measure of the problem

- Campus climate surveys are not currently mandated, but the White House Report urges schools to conduct a survey within the next year, as they are considering legislative and administrative options to require climate surveys by 2016.

6. Provide your campuses comprehensive policy regarding programs to prevent dating violence, domestic violence, sexual assault, or stalking.

Campuses should effectively communicate their policy to the campus and make it clear what sexual assault is according to campus policy.

- What your campus policy says on instances when confidentiality can be overridden in order to provide a safe campus for all.

7. Provide information on the institutional disciplinary proceedings for cases of dating violence, domestic violence, sexual assault, or stalking.

Resources for survivors and victims

Train both students and employees on what is in place at the campus to help students in this situation, including:

- Communicating campus model reporting and confidentiality protocol.
 - Campus should make very clear who on campus can maintain confidentiality.
- Investigation and Adjudication Procedures.

8. For Title IX, campus community should know, generally, how to identify sexual harassment and how to report discrimination.

- What is Title IX?
- What is sexual discrimination?
- How does one report under Title IX?
- Who is the campus Title IX Coordinator?
- What is the process for a Title IX Claim?

9. Include ongoing prevention and awareness campaigns for students and employees, both staff and faculty.

Student-Specific Training Elements

1. Title IX

- Student rights under Title IX:
 - Title IX protects all students regardless of their sexual orientation or gender identity or immigration status or disability
 - Students who report sexual violence can expect their school to take steps to protect and support them, including while a school investigation is pending.
- Definitions of sexual violence and consent.
- Sexual Harassment: What it is and how to identify it?
- How the campus analyzes complaints.
- Confidential resources available to the students.
- Reporting options available to the students.
- Confidentiality.
- Relevant and applicable campus procedures and codes.
- Bystander intervention.
- The Role of alcohol and drugs, and the prohibition of retaliation.
 - Student Safety: Campuses should put an emphasis on student safety and take efforts during the training to focus on safety to ensure that alcohol or drug use do not chill reporting.

Employee-Specific Training Elements

These are elements of a training that apply to employees specifically, in addition to the general training requirements for both students and employees

All employees should be trained on:

- **How to respond to reports of sexual violence, and responsible employees know their obligation to report**
 - This includes practical information about identifying, preventing, and reporting sexual violence
- **Communicate to responsible employees:**
 - General information:
 - The employees' reporting obligation under Title IX if they are told information by a student.
 - Confidentiality –the confidentiality available to the student.
 - Students Rights.
 - Students Remedies.
 - Student Services.
 - Obligation to report:
 - Employees must report incidents of sexual harassment or sexual violence to the Title IX coordinator or designee.
 - Employee does not need to make a determination of whether harassment occurred or whether a hostile environment was created – that is the job of the Title IX Coordinator and other allied offices.
 - The dynamics of crimes of sexual assault:
 - Employee should understand the dynamics of sexual assault and the unique toll it can take on self-blaming and traumatized individuals; Need to ensure that all staff understand the dynamics of sexual assault so that they are aware of the dynamics of the crimes, and elements including:
 - What is proper questioning?
 - What would constitute harsh/ hurtful questioning?
 - Questions about past sexual history should not be permitted.
 - Questions that are not relevant to the incident should not be permitted, including accusations of past mental health history.
 - Mere fact of previous consensual relationship does not imply consent or preclude a finding of sexual violence.
 - Parties should not be allowed to cross-examine one another.

Specialized Training for Certain Key Employees May Include:

Trauma-Informed Training Programs: training to prevent trauma to the victims that may result from insensitive or judgmental questions

- Employee should understand the dynamics of sexual assault and the unique toll it can take on self-blaming and traumatized individuals.
- Understand how sexual assault occurs, how it is perpetrated, and how victims naturally respond during and after assault.

Campuses may consider providing additional training in various forms to employees who will be involved with sexual violence issues in some way, including those on the front-line, those who a student would be most likely to make the official report to. Often times, the students are most comfortable reporting to those who they have an established relationship with, which is why training those on the ‘front-line’, those with the most student contact, is important. Keep the front-line employees in mind when deciding who needs this trauma-informed training. However, we know at the very least, the list of those who must be subjected to trauma-informed training include::

- School Officials and administrators charged with oversight or specific duties related to Clery, Title IX and VAWA.
- Investigators.
- Employees likely to witness or receive reports under Title IX.
- Campus and local law enforcement.
- Campus Security Authorities Under Clery:
 - campus police department or a campus security department of an institution.
 - Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department.
 - Any individual or organization specified in an institution’s statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.
 - An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings.

Confidential Victim Advocates:

- Like all employees, this person should:
 - Understand the **dynamics of sexual assault** and the toll it can take on victims who self-blame or are traumatized.
 - Know where to direct the victim for **resources** and **accommodations**.

- o Be able to **effectively communicate** to the student how the campus **disciplinary system**.

Those involved with campus investigations, disciplinary actions and proceedings/hearings:

- Who: Those who are charged with ensuring a prompt, fair, and impartial investigation and result.
- Frequency: At a minimum, must receive annual training on how to conduct an investigation and issues related to VAWA crimes. This is the only place in the VAWA Proposed Regulations where a frequency of training is specified directly.
- Title IX: Requires that campuses train employees implementing Title IX procedures, specialized employees on certain elements of Title IX, and law enforcement personnel.

Title IX Specialized Training:

Who: Employees Implementing Title IX Grievance Procedures, including Title IX Coordinators, Investigators, and Adjudicators, and A Law Enforcement Title IX Designee.

Best Practice Note - One Law Enforcement Expert: at least one member of the campus police department should be fluent in the campus grievance procedures and act as liaison between the police and the Title IX coordinator

They should have training on, and experience with the following:

- Handling sexual violence complaints and using the campus grievance procedures
- How to:
 - o interview victims.
 - o identify sexual discrimination.
 - o identify sexual violence.
- For purposes of the investigation:
 - o How to conduct an investigation.
 - o Consent, what it means, including when drugs and alcohol are involved.
 - o Evaluating evidence impartially.
 - o Determining credibility.
- Maintain a documentation system that documents the process of following the procedure
- Cultural awareness.
- Understanding of what constitutes sexual harassment and violence.
- Familiarity with the institution's grievance procedures.
- How to implement the institution's grievance procedures.

- To promote an impartial investigation and hearing process.
- Confidentiality.
- Conflicts of interest: Real or perceived conflicts of interest should be reported to investigators and adjudicators.
- Notice and hearing requirements.
- Information about preponderance of evidence standard OCR requires in sexual harassment and sexual assault cases.

Title IX Training for Law Enforcement

- Copies of the Title IX policies and grievance procedures.
- Recognize Red Flags: ability to recognize when a ‘red flag’ – such that they can work with the law enforcement Title IX.
- Notification to Complainant: Law enforcement personnel obligation to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint.
- Obligation for law enforcement personnel to report incidents of sexual violence or sexual harassment to the Title IX Coordinator.
- Title IX Coordinator Availability: Ensure law enforcement are aware that the Title IX Coordinator is available to them as a resource in cases of sexual violence and harassment.
- One Law Enforcement Expert: at least one member of the campus police department should be fluent in the campus grievance procedures and act as liaison between the police and the Title IX coordinator.

Delivery Methods for Trainings

The VAWA, Clery, and Title IX laws and regulations do not tell us how training must be delivered. However, we know that in-person training for students, faculty and staff, rather than an online model that simply requires some clicks through a slideshow, can be more effective to convey the message of the importance of sexual violence prevention and education. If online training modules are used, a best practice is to add some participation elements, such as questions throughout, or quizzes at the end of the training, to keep trainees engaged in the content and the message.

The following is a list of some ideas for how campuses can deliver the mandated trainings and programs to their students, staff, and faculty

How to Deliver the Trainings:

- Websites.
- Courses – online or in-person.
- Presentations.
- Seminars.
- Theatre discussions.
- Letters/ emails.
- Visible campus campaigns.

Elements of Training Programs

According to the new regulations,²¹ programs to prevent dating violence, domestic violence, sexual assault, and stalking must:

- Be comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking.
- Be culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome.
- Consider environmental risk and protective factors as they occur on the individual, relationship institutional, community, and societal levels.

Effective Programs: Guidance from the CDC, and discussed in the White House Task Force Report, tells us that effective programs are those that are:

²¹ §668.46 Institutional security policies and crime statistics, <http://www.gpo.gov/fdsys/pkg/CFR-2012-title34-vol3/pdf/CFR-2012-title34-vol3-sec668-46.pdf>.

- Sustained (not brief, one-shot educational programs).
- Comprehensive.
- Address the root: individual, relational, and societal causes of sexual assault.

Note on Effective Programs: White House admits that more research needs to be done to understand what constitutes an effective program

- Planned Studies:
 - CDC collaborating with the Justice Department's Office on Violence Against Women and the Department of Education to identify emerging, promising practices to prevent sexual assault, with the goal of putting consensus recommendations into practice.
 - Justice Department's Office on Violence Against Women developing a multi-year initiative on campus sexual assault to test and evaluate prevention programs.
- White House Task Force First Report includes an announcement that the Federal government plans to provide more resources on training in the future, on both the substance offered in the training for specialized staff and student training and the effectiveness of certain programs.

Getting Buy-In From Your Campus to participate in the Training

Campuses may experience an uphill battle in convincing all campus staff, faculty and students to participate in the training. However, there are a few things that can be done to communicate the importance of the training. Some ideas for building buy-in at your institution include:

• Setting a Tone From the Top

Be sure that the importance of prevention of sexual assault, sexual violence, and discrimination is communicated from the top down. Campus leaders should be actively engaged in communicating just how important these issues are to the campus community as a whole.

Tone at the Top is a phrase commonly used in the compliance world to describe an organization's ethical climate and tone as beginning with its leaders. The principle is that if leaders believe that an issue is important, and communicate that importance to the organization, and then continue to live by the idea that it is important by acting ethically and leading by example, the organization will be more apt to believe that the message being communicated is important.

To set the tone at the top, leaders at your campuses should not just be communicating the importance of combating sexual assault, sexual violence, and gender inequality; they should be demonstrating its importance through their actions. The hope is that this tone will filter through the institution, and ensure that everyone believes that the issues are important.

- **Communicate the idea that training is for everyone's benefit**

Often, people think of training as just a way for an institution or organization to reduce their own liability and protect their own interests. In reality, though, the training is empowering the trainees because it provides them with the knowledge they will need if a situation arises, and helps to create a culture where everyone has an awareness of sexual assault prevention, and the resources available to them on the campus. If you can communicate the message that training is NOT just for the institution's benefit, but is meant to help prevent and reduce sexual violence, then it shifts the conversation from one of the institution's self-protection, to the protection of the campus and its community. Everyone will benefit from the training, from the employee who will know how to respond when a situation arises, to the student who is empowered by the message and understands their rights under the laws, to the potential perpetrator or bystander, who by way of bystander intervention training, will be more aware of what they can do to become part of the solution rather than part of the problem.

- **It is the Law (and regulations will be effective in 2015)**

The new VAWA regulations require training and education for all new and existing student and employees on elements of VAWA, Clery, and Title IX, as discussed throughout this document.

Document, Document, Document

As with all compliance, we need to take certain steps to comply, but documenting can help show what we have done to meet our obligations.

In the training realm, documentation is particularly important with regard to:

- Who took the training?
- When they took the training?
- What the training entailed - what was the substance of the training completed by the employee?
- Delivery method for the training: how was the content delivered? In-person, online?
- How long was the training?
- How often was the training taken?

The proposed regulations require that institutions provide the training, but do not penalize institutions if students and employees do not attend trainings. Keep track of those who do, and consider offering incentives to attend training.

Compliance is important, but unless there is a record of the compliance, it could seem to someone coming in from the outside that nothing has been done to ensure compliance.

Nine Steps to Effective Training²²

Program Definitions

Programs to prevent dating violence, domestic violence, sexual assault, and stalking:

- Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking that –
 - Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome; and
 - Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community and societal levels.
- Programs to prevent dating violence, domestic violence, sexual assault, and stalking include both primary prevention and awareness programs directed at incoming students and new employees and ongoing prevention and awareness campaigns directed at students and employees.

Awareness programs:

- Community-wide or audience-specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration.

Bystander Intervention:

- Safe and positive options that may be carried out by an individual or individuals to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault, or stalking. Bystander intervention includes recognizing situations of potential harm, understanding institutional structures and cultural conditions that facilitate violence, overcoming barriers to intervening, identifying safe and effective intervention options, and taking action to intervene.

Ongoing prevention and awareness campaigns:

- Programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of topics relevant to and skills for addressing dating violence, domestic violence, sexual assault, and stalking, using a range of strategies with audiences throughout the institution and including information on the eight steps the institution is taking for effective programming as described below.

Primary prevention programs:

- Programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence,

²² Prepared by Stephanie Morrison, Legal Intern, 2L at Cornell Law School under the supervision of Nedra Abbruzzese-Werling, Director of Compliance.

sexual assault, and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.

Risk reduction:

- Options designed to decrease perpetration and bystander inaction, and to increase empowerment for victims in order to promote safety and to help individuals and communities address conditions that facilitate violence.

9 STEPS FOR EFFECTIVE PREVENTION PROGRAMMING:

The proposed activities outlined below are intended to be expanded upon as an individual campus deems appropriate or tailored specifically to meet the needs of the individual campus.

1. Identify specific prevention goals for your campus.

By identifying specific learning goals, your campus can best tailor its prevention programs to the needs of your community. Examples include: (1) increasing students' knowledge about policies and resources on campus; (2) increasing positive bystander attitudes and action; (3) reducing women's risk of sexual assault; or (4) reducing potential self-blame after an assault.

- A "campus climate survey" is the best way to identify the needs of your campus. The Justice Department has partnered with Rutgers University's Center on Violence Against Women and Children to launch a pilot program. The White House Task Force also has released a "Tool-kit" guide to campus climate surveys.²³
- The Tool-kit includes an overview of how to plan and conduct a climate survey and describes and provides examples of an empirically informed survey based on best practices. The planning overview provides information for selecting appropriate individuals to conduct the survey, mediums through which the survey can be conducted, and using an appropriate sample of participants
- The Tool-kit also includes examples of questions to be addressed in the survey. Examples from the Took-kit are reproduced below.²⁴

²³ <https://www.notalone.gov/assets/ovw-climate-survey.pdf>

²⁴ <https://www.notalone.gov/assets/preventing-sexual-violence-on-college-campuses-lessons-from-research-and-practice.pdf>

Sample Programming:***Sample Context and Disclosure Question***

For the next set of questions, please pick the MOST SERIOUS INCIDENT if you had more than one, and answer the questions below about this experience. If you had no unwanted sexual experiences, circle “no experience” for each of the questions below.

Who did the UNWANTED BEHAVIOR involve? (Check only one)

a. Stranger	f. College professor/instructor
b. Family Member	g. College staff
c. Acquaintance	h. Non-romantic friend
d. Coworker	i. Casual or first date
e. Employer/supervisor	j. Current romantic partner

Sample Programming:***Perceptions of Leadership, Policies and Reporting***

If someone were to report a sexual assault to a campus authority, how likely is it that:

Very Likely Moderately Likely Slightly Likely Not at all Likely

- a. The university would take the report seriously.
- b. The university would keep knowledge of the report limited to those who need to know in order for the university to respond properly.
- c. The university would forward the report outside the campus to criminal investigators.
- d. The university would take steps to protect the safety of the person making the report.
- e. The university would support the person making the report.
- f. The university would take corrective action to address factors that may have led to the sexual assault.
- g. The university would take corrective action against the offender.
- h. The university would take steps to protect the person making the report from retaliation.
- i. Students would label the person making the report a troublemaker.
- j. Students would support the person making the report.
- k. The alleged offender(s) or their associates would retaliate against the person making the report.
- l. The educational achievement/career of the person making the report would suffer.

2. Know your target audience.

Universal prevention education for all students is best for campuses because it is likely that individual students' attitudes or peer norms for particular subgroups are more important than group membership, per se. (e.g., Greek system members or student athletes.) Prevention will be more effective if it is tailored to a community's level of motivation of preparedness to address the issue.

- The Center for Disease Control and Prevention (CDC) has shifted its concentration from victims to perpetrators to reduce rates of sexual violence. These efforts are designed to work alongside efforts focused on risk reduction, criminal justice, recidivism prevention, and victim services.²⁵
- Efforts shifting to perpetrators can be seen in a number of programs endorsed by the White House Report, and advanced through websites such as PreventIPV.org and CALCASA.org.

Sample Programming:

Coaching Boys Into Men

This program engages athletic coaches through the Coaches Leadership Program to help shape the attitudes and behaviors of young male athletics. This program targets specific, at risk populations. Because of the special role coaches play in the lives of young men, the program equips coaches to talk with their athletes about respect for women and girls that violence does not equal strength.

The Playbook is a core feature and component of the Coaches Leadership Program that provides “teach easy tactics and teachable moments” that illustrate ways to role model and promote healthy choices and relationships among young.

For more information, visit

http://www.futureswithoutviolence.org/section/our_work/men_and_boys/_coaching_leadership/

²⁵ See Preventing Sexual Violence on College Campuses: Lessons from Research and Practice, Division of Violence Prevention, Centers for Disease Control and Prevention. April 2014, <https://www.notalone.gov/assets/evidence-based-strategies-for-the-prevention-of-sv-perpetration.pdf>.

3. Use the best practices available.

Many tools exist that are evidence informed or promising. Programs should build on clearly written logic models drawn from research that help explain why programs should work. Research shows that using multiple tools for a multi-pronged approach to prevention is best.²⁶ Programs can and should include a variety of methods – website, courses, presentations, seminars, theater discussions, letters etc.

Strategies to Reduce Risk for Sexual Violence:

- Develop organizational policies and environmental interventions to reduce risk.
- Strengthen existing policies or services on campus related to reporting and responding to sexual violence.
- Increase negative consequences for perpetrators.
- Decrease social norms that facilitate sexual violence.

Primary Prevention: Two primary prevention strategies, to date, have demonstrated significant reductions in sexual violence behaviors using a rigorous evaluation design.²⁷ These programs include *Safe Dates* and *Shifting Boundaries*.²⁸ Both programs were developed for the middle-school age student. However, both provide opportunities for adaptation in college populations. College and universities can use these evidence-based approaches to address risk for sexual violence in college relationships.

Sample Programming: Bringing in the Bystander

This education and training program is developed for college students and delivered in 4.5 hours over 1-3 sessions. It provides participation skills to help students act when they see behavior that puts others at risk for violence, victimization, or perpetration. The skills include speaking out against rape myths and sexist language, supporting victims, and intervening in potentially violent situations.

²⁶ Nation, M. Crusto, C., Wandersman, A., Kumpfer, K.L., Seybolt, D., Morrissey-Kane, E., & Davino, K. (2003). What works in prevention: Principles of effective prevention programs. *American Psychologist*, 58,449-456.

²⁷ See Preventing Sexual Violence on College Campuses: Lessons from Research and Practice, Division of Violence Prevention, Centers for Disease Control and Prevention. April 2014.

²⁸ *Safe Dates* is a “universal dating violence prevention program for middle and high school students.” It includes a ten session curriculum that addresses attitudes, social norms, and health relationship skills. It includes a 45 minute student play and a poster contest. For more information, visit <http://www.hazelden.org/web/public/safedates.page>. *Shifting Boundaries* is part of a universal, 6-10 week, school based dating violence prevention strategy that addresses policy and safety concerns through the use of temporary building based restraining orders, a poster campaigns to increase awareness of dating violence, and “hotspot” mapping to identify unsafe areas of the school for increased monitoring. To learn more, visit <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=226>.

Risk Reduction: The CDC also evaluated some programs based on their impact on sexual violence behaviors. These programs were found to be effective in reducing risk of sexual violence or related outcomes. These programs include:

- o *Coaching Boys into Men.*
- o *Bringing in the Bystander.*
- o *Green Dot.*²⁹
- o *The Rape Prevention and Education Program.*³⁰

In addition, CALCASA’s “Campus Violence Prevention: Resource Guides” has a number of resources that can be accessed for risk-reduction programs.

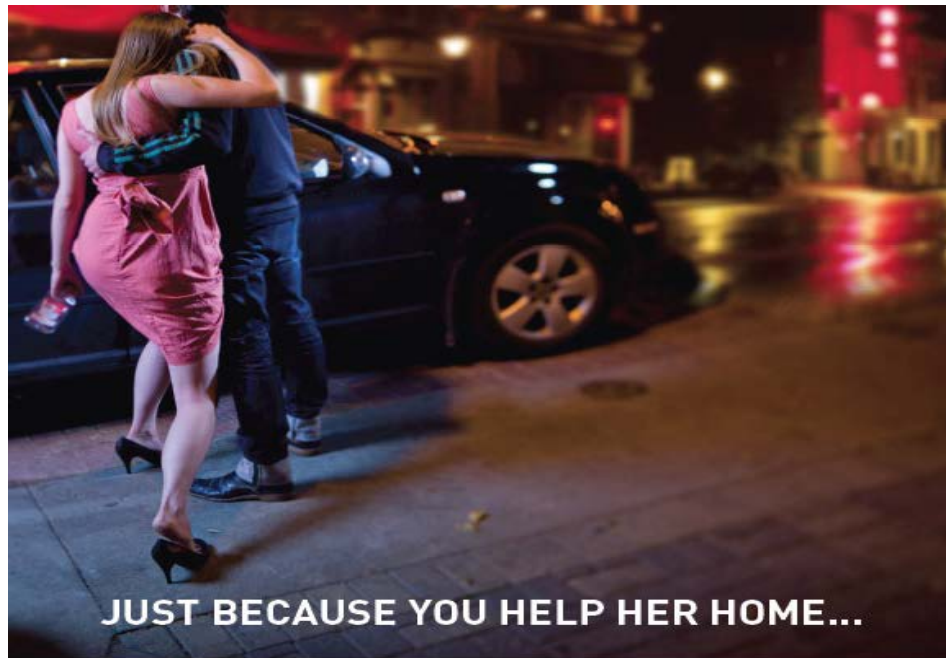
- **Awareness Programs:** *Social Media Campaigns* are an effective method that will help to increase awareness, and potentially reduce risk and perpetration of acts of violence. A number of social media and awareness campaigns have been developed including:
- o Know Your Power.
 - o Red Flag Campaign.
 - o White Ribbon Campaign.
 - o Walk a Mile in her Shoes.
 - o Don’t Be That Guy.

Bystander Intervention Programs: One requirement of the VAWA Regulations is to increase positive bystander action. Bystander intervention programs share a number of components that aim to increase: (1) Awareness; (2) Sense of responsibility; (3) Perceptions of norms; (4) Weighing pros and cons; (5) Confidence; (6) Skills; and Context. A common challenge with increasing bystander participation is that bystanders are often unsure of themselves as responders and unclear about whether intervention is unwelcome or needed. Developed bystander intervention programs include:

- o *Bringing in the Bystander.*
- o *One in Four.*
- o *Coaching Boys to Men.*
- o *Men’s Project.*
- o *Green Dot.*

²⁹ *Green Dot*, is another program that includes bystander training and has proven to be effective in increasing bystander behavior scores.

³⁰ <http://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf>



JUST BECAUSE YOU HELP HER HOME...

DOESN'T MEAN YOU GET TO HELP YOURSELF.

sex without consent = sexual assault

DON'T BE *THAT* GUY.

vpd.ca



VANCOUVER POLICE DEPARTMENT
Beyond the Call



To see more campaign posters, visit <http://www.theviolencestophere.ca/dbtg.php>

4. Consider what is needed for implementation on your campus.

Use tools that will allow students to see themselves reflected in the stories and images used. For example, social marketing campaigns taken from one campus should be modified when implemented on another campus.

5. Find the resources to go big.

Short single session prevention tools do little to create long-term attitude or behavior changes. Campuses should commit to multiple components of prevention education over time to reach broad audiences.

Many resources exist that are designed to provide information, encourage communication, and prevent violence. One such example is “Prevent IPV, Tools for Social Change.” This site includes a “tool kit” of resources to review and use.³¹

6. Connect your work to other prevention efforts on campus.

Prevention work could be much more effective if offices worked collaboratively. Connect prevention of sexual violence efforts with offices that address substance abuse, mental health concerns, and risky sexual behavior.

7. Include faculty, staff, and administrators in prevention and training efforts.

College students are more likely to report concerns about violence if they trust campus authorities. Faculty, staff, and administrators can support prevention, bystander action, and victim assistance.

By providing information to students about their reporting options, a student will be more likely to report the occurrence. Make sure the student knows their options for addressing the incident with the criminal justice system or by keeping it limited to the College justice system.

8. Evaluate and help move toward an evidence base.

Ask participants in prevention programs to answer a short survey before and after a program that tests what they have learned, and then follow up a few months later to learn if they have used new skills. Use these surveys to collect information on what impact these programs are having.

9. Plan for sustainability

Look to the future and consider how these prevention tools will continue for your campus over time.

³¹ For more information visit, <http://preventipv.org/>.

Some Thoughts on the Importance of Bystander Intervention³²

After a series of sexual assaults, Golda Meir, the first female Prime Minister of Israel, was advised to place a curfew on women. Golda retorted that, “[i]t is the men who are attacking the women. If there is to be a curfew, let the men stay at home.”³³ Higher education groups, and society in general, have spent many years talking to victims and potential victims about how to avoid sexual assault. We have told them:

- Watch your drink,
- Walk in groups,
- Lock your doors,
- Be careful with strangers,
- And other messages to help them avoid becoming victims of sexual assault.

But that is merely half the message (and perhaps not even the proper half to fully *prevent* sexual assault, not simply work to minimize exposure to it). For some time now, SUNY, and other New York State agencies, most prominently Bob Passonno of the New York State Office for the Prevention of Domestic Violence, have been talking about the other half of the equation: talking to potential assailants and potential bystanders to violence. Now, with the encouragement of the VAWA Proposed Regulations (requiring bystander intervention programming) and the resources of the White House First Report,³⁴ we have an opportunity to educate our campuses about this different method of training to confront sexual violence and encourage the use of bystander intervention.

Changing the culture of bystanders takes several steps and it cannot be accomplished overnight. Colleges should use a sustained approach to train and encourage bystanders using different methods including live discussion, peer-to-peer conversations, social media, and many other methods to educate and reinforce the message. Concurrent with the training of bystanders, we may impact potential assailants, who may be confronted with information about sexual assault and may choose to act differently when given the opportunity to commit such a crime.

In Group and Out Group Dynamics: Expanding the Reference Group:

In his book *Identity and Violence*,³⁵ Nobel Prize winner in Economic Sciences Amartya Sen wrote about identity and how individuals are more willing to commit violence against those who are outside their identity’s group. In other words, individuals experience an “us versus them” mentality about those in different identity groups. Sen, as a Solitarist, believes each individual has a single identity mostly revolving around race and religion. Although it is always

³² Prepared by Joseph Storch, Associate Counsel.

³³ Glenn E. Good and Nancy B. Sherrod, *the Sychology of Men and Masculinity: Research Status and Future Directions*, in *Handbook of the Psychology of Women and Gender* (Rhoda K. Unger, ed.) (2001), p. 201; Jagdish N. Singh, *Addressing the Rape Crisis in India: Will Golda Meir Inspire Modi?*, THE JEWISH PRESS, <http://www.jewishpress.com/indepth/opinions/stopping-rapes-in-india-or-will-golda-meir-inspire-modi/2014/06/22/2/> (June 23, 2014).

³⁴ See especially <https://www.notalone.gov/assets/bystander-summary.pdf>.

³⁵ Amartya Sen, *Identity and Violence: The Illusion of Destiny*, 2006.

dangerous to disagree with a Nobel winner, this author has a slightly different analysis: individuals, including college students, have a variety of identities, some that shift over time, some that are stronger than others. While individuals may have a primary identity (sometimes revolving around their race or religion), students have a myriad of identities that may shift, swell and recede based on circumstances:

- Race
- Religion
- Gender
- Geographic Origin (wide, as in state and nation, and narrow, as in block or school district)
- Athletic Teams
- School Affiliation
- Greek or club affiliation
- Residence hall or other housing

People naturally organize themselves in groups. Some of the groups, when viewed with a critical eye, look rather random and unimportant, and yet can lead to violence.³⁶ Each of these and other identities have an “in group” and “out group.” Those who are “in” receive protection from violence while those who are “out” are susceptible to violence. Although there are clear examples of within-group violence, such as domestic violence this section of the guidance is aimed at violence against those outside the in group.

In many cases, stronger identities lead to more willingness to commit violence against those outside the group. The saving grace that we learn from Sen’s work, however, is that education (especially education that allows you to see through others’ eyes) can lower the incidence of violence.

One path toward encouraging bystander intervention is to increase the size of the reference group. When the reference in group is narrow, bystanders may not act to help those outside the in group. By widening the reference group, we can train bystanders to empathize with those who would not otherwise be in the group, and advance them down the path of stepping in to prevent sexual violence.

To accomplish this, colleges and universities should work to expand the reference in group: we are better served by a reference group of “students at my college” than we are by a reference group of “members of my fraternity, sports team, club, or house.”

³⁶ Consider for instance the Los Angeles Dodgers baseball fans who brutally beat a fan of the Giants, an opposing major league baseball team, or the football fans who knocked over an eight-year-old child wearing a New York Jets jersey. Sonya Hamasaki, *Jury: Dodgers Negligent in Giants Fan’s Beating*, CNN, <http://www.cnn.com/2014/07/09/justice/california-giants-fan-beating/> (July 9, 2014); Mike Florio, *Eight-Year-Old Jets Fan Allegedly Tackled While Leaving Browns Game*, NBCSPORTS, <http://profootballtalk.nbcsports.com/2010/11/16/eight-year-old-jets-fan-allegedly-tackled-while-leaving-browns-game/> (November 16, 2010).

Bystander Inaction:

Classic research on bystanders consistently shows that bystanders are loath to act to stop violence. The most famous story of bystander inaction was the 1964 murder of Kitty Genovese in Queens, New York. As was later exposed by the media, dozens of her neighbors saw or heard Winston Mosely attacking, assaulting, sexually assaulting, and killing her without calling the police or stopping the assault.³⁷ As in many bystander cases, they might have assumed someone else would step in or call the police.

One man reportedly took a small step, shouting down from his window to “leave that girl alone.” Even though the shout was not accompanied by calling police or any other step, that small intervention by a bystander caused Mosely to temporarily flee. However, her salvation did not last long. When no police cars arrived, Mosely returned to Genovese, assaulted her and killed her.

In the fifty years since that murder, human nature has not changed. In that time, however, the level of research on bystander action and inaction has increased significantly, and we have learned steps we can take to encourage bystander action when witnessing violence.

The cruel irony of the bystander effect is that the number of bystanders to violence is inversely proportional to the likelihood that any one of them will step in to stop violence or call for assistance. In laboratory experiments, one or two people witnessing violence will often step in; the larger the crowd, the less likely any of them will step forward. Bystanders look around at others, see that the others are not stepping in, and assume it is appropriate *not* to step in since no one else does. Known as the principle of social proof, individuals in a situation observe and mimic the behavior of others, behavior they assume *must* be correct if others engage in it. This is sometimes called “herd behavior,” as a large group of otherwise free-thinking individuals stands around like a herd afraid to think for themselves.

How Colleges Can Change Bystanders’ Actions:

At colleges and universities, the signs of sexual assault often begin at events with large crowds, including parties, concerts, “after hours,” and athletic events. At these events, many people witness the beginnings of sexual assaults, but most do not recognize what is occurring. For those that do recognize what is occurring, almost none step in to stop the impending crime. Following are suggested steps that colleges should use to train bystanders to complete the process of stepping in or calling authorities to prevent these heinous crimes.

- Recognize that an incident is occurring or will occur;
- Reduce the ambiguity of whether it is a crime or not;
- Believe that the potential victim is in your “in group;”
- Become empowered to act where others do not;

³⁷ Note that the precise facts of the Genovese murder are subject to some dispute among competing writers. See Nicholas Lehman, *A Call For Help*, THE NEW YORKER, <http://www.newyorker.com/magazine/2014/03/10/a-call-for-help?currentPage=all> (Mar. 10, 2014).

- Determine if one can intervene safely;
- Determine if Direct Intervention or Detour Intervention (calling University Police, alerting friends) is more appropriate;
- Act (directly, indirectly, or sneakily); and
- Feel proud of your role in preventing a life altering crime.

Some Brief Context on Each Segment:

- Recognize that an incident is occurring or will occur;

Bystander training can provide students and members of the college community with the tools to recognize signs of an impending sexual assault. Some students are naive to what is occurring around them and others simply lack the skill set to recognize crimes as they are occurring. Not all students will have obtained training in this area in high school, and colleges can fill in the gaps by explaining what these crimes are and what some signs of these crimes look like.

- Reduce the ambiguity of whether it is a crime or not;

One of the problems in bystander intervention in sexual violence is the ambiguity between what is consensual sexual activity and what is sexual assault. Most people naturally assume the best about their friends and roommates and cannot imagine that what they would be doing would constitute a crime. In an alcohol-fueled environment, there can also be confusion about exactly what individuals are willingly participating in, and what they are participating in under duress. Using media and poster campaigns described elsewhere in this guidance can be a strong education tool to reduce ambiguity in the area of sexual assault. Among other resources, the posters in the Canadian project “Don’t Be That Guy” are hard-hitting and can help clarify for potential assailants and potential bystanders the differences between consensual activity and a crime. <http://www.theviolencestopshere.ca/dbtg.php>.

- Believe that the potential victim is in your in group;

As described earlier, one of the biggest gains in this area can come from increasing the size of the reference in group that one considers when observing potential sexual violence. Colleges can use phrases that increase the size of the group. For example, at a college with the mascot of the Eagle, training can include statements such as the “Eagle Way is to stand up for each other and protect all Eagles from violence.”

- Become empowered to act where others do not;

Part of successful bystander intervention is training to ignore all those around you who are not acting. As described earlier, the principle of social proof often means that a large number of bystanders and potential heroes in a situation simply stand around as a herd, unsure of what to do, mimicking the behavior of others who are likewise simply standing around. Educating about this phenomenon, and empowering students to “step forward even if you are the only one doing so” can be a powerful message to minimize the herd phenomenon.

- Determine if one can intervene safely;

Violence should not beget violence. Training should encourage students to intervene only if they can do so safely, not increasing risk for themselves or the potential victim. Ways to avoid such risk include obtaining the assistance of others and involving police or campus professionals.

- Determine if Direct Intervention or Detour Intervention (calling University Police, alerting friends) is more appropriate;

While Direct Intervention can be a powerful method of stopping an impending assault, students should be encouraged to also consider Detour Intervention, including bringing in law enforcement and campus professionals who have proper training to assist in such a situation. Students should receive tools to consider which method is best.

- Act (directly, indirectly, or sneakily);

After considering the above factors (ideally in a very quick way), students and college community members should be empowered to act to prevent assault and sexual violence. Sometimes that can be direct action, sometimes it can be sneaky, such as spilling a drink, turning down the music, or asking the potential victim or assailant to step outside so they can tell them something important. Whatever the method, it is important to step up and act to prevent this violence.

- Feel proud of your role in preventing a life altering crime.

Students should understand the difference they can make in the life of a potential victim, and should feel proud of their efforts to intervene and prevent crimes.

In an oft quoted line from the Bible “God said unto Cain: ‘Where is Abel thy brother?’ And he said: ‘I know not; am I my brother's keeper?’” With bystander intervention programs, we can and should convince our students that, in many ways, we are our brothers’ and sisters’ keeper. Even if the individual student does not have a legal duty to step in and prevent a given situation, we can help convince our students to be better. We can make our campuses (and off campus communities) safer for all members of the college community. Bystander training can help us get there.

For more information, please review the resources collated by the White House First Report in this document: <https://www.notalone.gov/assets/bystander-summary.pdf>.

NACUA 2014 Annual Conference

An Insiders' Guide to the Violence Against Women Act Negotiated Rulemaking: Implementing Changes to the Clery Act

[John Graff, Hirsch Roberts Weinstein LLP](#)

The regulations implementing the Violence Against Women Reauthorization Act ("VAWA") amendments to the Clery Act have not been finalized. However, VAWA became effective March 7, 2013, and institutions nevertheless are required to comply with the resulting changes to Clery. From the effective date of VAWA through issuance of the implementing regulations, institutions will be judged against a 'good faith' standard in determining compliance. The checklist below is designed to assist institutions in attempting to reach that good faith standard.

- ✓ Do I know my key definitions³⁸ for statistical counting³⁹ of reported crimes?
 - o **Dating violence:** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
 - **Violence** includes, but is not limited to, sexual or physical abuse *or* the threat of such abuse.
 - The existence of a **social relationship of a romantic or intimate nature with the victim** is determined based on:
 - The reporting party's statement;
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

³⁸ The definitions in this section are not intended to be an exhaustive list of definitions contained in the proposed regulations. Rather, they are provided for the purpose of assisting with the determination of whether the elements of a crime are present such that the incident should be disclosed in an institution's annual security report.

³⁹ When counting statistics, the hierarchy rule does not apply to *dating violence, domestic violence, stalking, and sexual assault*.

- The term *dating violence* excludes acts covered under the definition of *domestic violence*.
- o **Domestic violence:** A felony or misdemeanor crime of violence committed by any of the following individuals:
- A current or former spouse *or* intimate partner of the victim; *or*
 - A person with whom the victim shares a child in common; *or*
 - A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; *or*
 - A person similarly situated to a spouse of the victim under the domestic or family laws of the jurisdiction in which the crime of violence occurred; *or*
 - Any other person against an adult or youth victim who is protected under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
- o **Sexual assault:** An offense that meets the definition of *rape, fondling, incest, or statutory rape* as stated in the FBI’s Uniform Crime Reporting program.
- **Rape** is defined as the penetration, not matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of a person.
- o **Stalking:**⁴⁰ Engaging in a *course of conduct* directed at a specific person that would cause *a reasonable person* to fear for the person’s safety or the safety of others *or* suffer substantial emotional distress.
- A **course of conduct** is two or more acts, including, but not limited to:
 - Acts in the which the ‘stalker’ directly, indirectly, or through third parties by any action, method, device, or means,
 - Follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person’s property.

⁴⁰ See Appendix to this document.

- **Substantial emotional distress** is significant mental suffering or anguish that may, *but does not necessarily require*, medical or other professional treatment or counseling.
 - A **reasonable person** is one under *similar circumstances and with similar identities to the victim*.
- ✓ Has my institution included in its annual security report (“ASR”) a statement of policy regarding the institution’s programs to prevent *dating violence, domestic violence, sexual assault, and stalking*?
- Your institution’s policy statement must contain the following:
 - A description of programming to promote the awareness of *dating violence, domestic violence, sexual assault, and stalking*?
 - The statement must include the following:
 - A description of the institution’s primary prevention⁴¹ and awareness programs⁴² for all incoming students and new employees, which must include:
 - A statement that the institution prohibits the crimes of *dating violence, domestic violence, sexual assault, and stalking*;
 - The definitions of “dating violence,” “domestic violence,” “sexual assault,” and “stalking” in the applicable jurisdiction;
 - The definition of “consent,” in reference to sexual activity, in the applicable jurisdiction;

⁴¹ The term **primary prevention programs** means programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.

⁴² The term **awareness programs** means community-wide or audience-specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration.

- A description of safe and positive options for bystander intervention; and
 - Information on risk reduction.⁴³
- o A description of the institution's ongoing prevention and awareness campaigns⁴⁴ for students and employees.
- Procedures victims should follow in the event of a crime of *dating violence, domestic violence, sexual assault, and stalking*.
- The statement of procedures must contain information about the following:
 - o The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred *or* which may be helpful in obtaining a protection order.
 - o How and to whom the alleged offense should be reported.
 - o Options about the involvement of law enforcement *and* campus authorities, including notification of the victim's option to:
 - Notify proper law enforcement authorities, including on-campus and local police; and
 - Decline to notify such authorities.
 - o Where applicable, the rights of victims and the institution's responsibilities for *orders of protection, no contact orders, restraining orders, or similar lawful orders* issued by a criminal, civil, or tribal court *or by the institution*.

⁴³ The term **risk reduction** means options designed to decrease perpetration and bystander inaction, and to increase empowerment for victims in order to promote safety and to help individuals and communities address conditions that facilitate violence.

⁴⁴ The terms **ongoing prevention** and **awareness campaigns** mean programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of topics relevant to and skills for addressing *dating violence, domestic violence, sexual assault, and stalking*, using a range of strategies with audiences throughout the institution.

- Information about how the institution will protect the confidentiality of victims and other necessary parties, including how the institution will:
 - Complete publicly available record-keeping and, for purposes of Clery Act reporting and disclosure, without the inclusion of identifying information about the victim, as defined in 42 U.S.C. 13925(a)(20);⁴⁵ and
 - Maintain as confidential any *accommodations or protective measures* provided to the victim, *to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the accommodations or protective measures.*
- A statement that the institution will provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, and other services available for victims, both within the institution and in the community.
- A statement that the institution will provide written notification to victims about options for, and available assistance in, changing academic, living, transportation, and working situations. The institution must make such accommodations if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.
- An explanation of the procedures for institutional disciplinary action in cases of alleged *dating violence, domestic violence, sexual assault, or stalking*, including:

⁴⁵ ***Personally identifying information*** or ***personal information*** as defined under 42 U.S.C. 13925(a)(20) mean individually identifying information for or about an individual including information likely to disclose the location of a victim of *domestic violence, dating violence, sexual assault, or stalking*, regardless of whether the information is encoded, encrypted, hashed, or otherwise protected, including a first and last name; a home or other physical address; contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number); a social security number, driver license number, passport number, or student identification number; and any other information, including date of birth, racial or ethnic background, or religious affiliation, that would serve to identify any individual.

- A description of each type of disciplinary proceeding used by the institution;
 - The steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding;
 - How the institution determines which type of proceeding to use based on the circumstances of an allegation of dating violence, domestic violence, sexual assault, or stalking;
 - A description of the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking;
 - A listing of *all* of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking;
 - A description of the range of protective measures that the institution may offer following an allegation of dating violence, domestic violence, sexual assault, or stalking;
- o The procedures must:
- Include a prompt, fair, and impartial process⁴⁶ from the initial investigation to the final result;
 - Be conducted by officials who at a minimum receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation

⁴⁶ A prompt, fair, and impartial proceeding includes a proceeding that is: (a) completed within reasonably prompt timeframes designated by an institution's policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay; (b) conducted in a manner that (i) is consistent with the institution's policies and transparent to the accuser and accused, (ii) includes timely notice of meetings at which the accuser or accused, or both, may be present, and, and (iii) provides timely access to the accuser, the accused, and appropriate officials to any information that will be used after the fact-finding investigation but during informal and formal disciplinary meetings and hearings; and (c) is conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.

and hearing process that protects the safety of victims and promotes accountability;

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding,⁴⁷ including the opportunity to be accompanied to any related meeting or proceeding by the advisor⁴⁸ of their choice;
- Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties; and
- Require simultaneous notification, in writing, to both the accuser and the accused, of:
 - The result⁴⁹ of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking;
 - The institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available;
 - Any change to the result; and
 - When such results become final.
- A statement that neither the institution, nor any officer, employee, or agent of an institution, may retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights to avail themselves of the institution's grievance procedures.

⁴⁷ The term **proceeding** means all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, fact-finding investigations, formal or informal meetings, and hearings.

⁴⁸ The term **advisor** means any individual who provides the accuser or accused support, guidance, or advice.

⁴⁹ The term **result** means any initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution. The result must include any sanctions imposed by the institution. The result must also include the rationale for the result and the sanctions.

- o A statement that, when a student or employee reports to the institution that the student or employee has been a victim of *dating violence, domestic violence, sexual assault, or stalking*, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options with respect to the report.

APPENDIX

A Note on Recording Reports of Stalking

When recording reports of stalking that include activities in more than one calendar year, an institution must record a crime statistic only for the calendar year in which the course of conduct was first reported to a local police agency or to a campus security authority.

If the course of conduct continues in a subsequent year, it must be recorded for that year.

An institution must record each report of stalking as occurring at only the first location within the institution's Clery Geography in which (a) a perpetrator engaged in the stalking course of conduct; *or* (b) a victim first became aware of the stalking.

A report of stalking must be counted as a new and distinct crime and is not associated with a previous report of stalking when the stalking behavior continues after: (a) an official intervention including, but not limited to, an institutional disciplinary action; *or* (b) the issuance of a no-contact order, restraining order or any warning by the institution or a court.

Resource List

White House First Report Resources

Report: <http://www.nacua.org/documents/WhiteHouseTaskForceonSexualAssaultReport.pdf>

Not Alone: Together Against Sexual Assault: <https://www.notalone.gov/>

Climate Survey Toolkit: <https://www.notalone.gov/assets/ovw-climate-survey.pdf>

CDC Prevention Findings: <https://www.notalone.gov/assets/evidence-based-strategies-for-the-prevention-of-sv-perpetration.pdf>

PSA: <http://www.whitehouse.gov/1is2Many>

Bystander Intervention Factsheet: <https://www.notalone.gov/assets/bystander-summary.pdf>

Establishing Prevention Programming: <https://www.notalone.gov/assets/prevention-overview.pdf>

Confidential Reporting Sample Policy: <https://www.notalone.gov/assets/reporting-confidentiality-policy.pdf>

Sexual Misconduct Policy Checklist: <https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf>

MOU Samples (Note also Ed Law on MOU): <https://www.notalone.gov/assets/mou-rape-crisis-centers.pdf>

Fostering Healthy Norms:

<http://www.alanberkowitz.com/articles/Preventing%20Sexual%20Violence%20Chapter%20-%20Revision.pdf>

Key Components of Sexual Assault Crisis Intervention/Victim Service Resources:

<https://www.notalone.gov/assets/intervention-resources.pdf>

WH Call to Action: http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf

Sexual Assault Datasets:

<http://catalog.data.gov/dataset?q=sexual+assault&sort=score+desc%2C+name+asc>

TIX/FERPA/Clery Chart: <https://www.notalone.gov/assets/ferpa-clerychart.pdf>

DOE/DOJ MOU: http://www.justice.gov/crt/about/cor/ED_DOJ_MOU_TitleIX-04-29-2014.pdf

VAWA Resources

Statute: <http://www.nacua.org/documents/VAWA2013.pdf>

Redline against Clery: <http://www.nacua.org/documents/CleryLanguageForVAWRA2013.doc>

Brief Review: <http://www.nacua.org/documents/Vawasummary.pdf>

Interim Department of Ed VAWA Guidance:

<http://www.ifap.ed.gov/eannouncements/052913ImplementofChangesMade2CleryActViolenceAgainstWomenReauthorizationAct2013.html>

Proposed Regs: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-14384.pdf>

Summary of Consensus Language:

http://www.nacua.org/documents/VAWARulemakingSummary_4714.pdf

New Requirements Imposed by the Violence Against Women Reauthorization Act:

<http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf>

Other Resources

Department of Education Resources:

Department of Education Campus Security Page:

<http://www2.ed.gov/admins/lead/safety/campus.html>

2011 Clery Handbook: <http://www2.ed.gov/admins/lead/safety/handbook.pdf>

Clery primer (pre-VAWA):

http://www.nacua.org/securedocuments/programs/june2012/pc05b_xxvi-12-06-1.pdf

Department of Education Office for Civil Rights:

<http://www2.ed.gov/about/offices/list/ocr/index.html>

Title IX: <http://www.law.cornell.edu/uscode/text/20/1681>

SUNY 2013 TIX Resolution Agreement: <http://www.ed.gov/news/press-releases/us-department-education-reaches-agreement-state-university-new-york-address-and->

http://www.nacua.org/securedocuments/resourcepagedocs/SexualMisconduct/SUNY_OC_RComplianceReviewLetter.pdf

http://www.nacua.org/securedocuments/resourcepagedocs/SexualMisconduct/SUNY_OC_RComplianceReviewAgmnt.pdf

April 2011 DCL: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

April 2014 OCR DCL Follow Up:

http://www.nacua.org/documents/OCRQandA_TitleIXSexualViolence.pdf

SUNY Resources:

SUNY Sexual Violence Prevention Workgroup: <http://system.suny.edu/sexual-violence-prevention-workgroup/>

Distilling the OCR Q&A from 2014: <http://www.nacua.org/documents/DistillingOCR.pdf>

Properly Classifying Geographic Locations for Clery Act Annual Security Report Purposes: http://www.nacua.org/securedocuments/resourcepagedocs/CleryAct/ProperlyClassifyingGeographicLocations_CleryAct.pdf

Notifications Following Student Conduct Hearings (Explanatory Chart): <http://www.nacua.org/securedocuments/resourcepagedocs/CleryAct/VictimNotificationChartJuly2014.pdf>

OPDV Resources:

1) General information from the New York State Office for the Prevention of Domestic Violence (OPDV):

<http://www.opdv.ny.gov/help/fss/fss.pdf>

<http://www.opdv.ny.gov/professionals/campus/ipvcampusguide.pdf>

<http://www.opdv.ny.gov/whatisdv/ipvinfostudent.pdf>

<http://www.opdv.ny.gov/whatisdv/ipvinfoparent.pdf>

2) Bystander intervention on OPDV site:

<http://www.opdv.ny.gov/whatisdv/ipvinfobystander.pdf>

<http://www.respectlove.opdv.ny.gov/yourpower/bystander.html>

<http://www.stopabuse.vt.edu/bystander.php#strategies> (Virginia Tech)

3) Other helpful resources regarding bystander intervention (state and federal levels):

<http://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf> (CDC's sexual violence prevention recommendations)

<http://www.health.ny.gov/publications/2040.pdf> (state level - New York)

<https://www.notalone.gov/assets/evidence-based-strategies-for-the-prevention-of-sv-perpetration.pdf> (White House guidelines - federal level)

<http://www.sexualassault.army.mil/index.cfm> (US ARMY I. A.M. STRONG campaign)

http://www.nsvrc.org/sites/default/files/publications_nsvrc_guide_engaging-bystanders-prevent-sexual-violence_0.pdf (NSVRC - federal level)

<http://wiki.preventconnect.org/Bystander+Intervention> (PreventConnect project)

<http://www.purdue.edu/incsapp/bystanderintervention/index.shtml>

<http://www.northwestern.edu/womenscenter/issues-information/bystander-intervention.html>
Responsible Action Protocol (RAP)

4) Relevant research articles:

<http://www.ncdsv.org/images/Sex%20Violence%20Prevention%20through%20Bystander%20Education.pdf>

<http://www.tandfonline.com/doi/pdf/10.1080/07448481.2013.849258>

http://www.courtinnovation.org/sites/default/files/MVP_evaluation.pdf (MVP gender violence prevention program evaluated at Syracuse Univ.)



The Student Affairs Compliance Report & Analysis

Executive Editors: Andrea Stagg, Deputy General Counsel, Barnard College and Joseph Storch, Associate Counsel, SUNY Office of General Counsel

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18 Fraternity Members Charged in Hazing Death

A grand jury recently found 18 Penn State fraternity members responsible for the February hazing death of a sophomore student.

One Night in February

Penn State sophomore Timothy Piazza became intoxicated during a Beta Theta Pi fraternity pledge night on February 2 when he went through an initiation ritual that involved a gauntlet of drinking stations, according to an indictment in a grand jury investigation. Due to being drunk, he fell multiple times and then “fell 15 feet down a flight of stairs, hair-first” according to a group text message sent at about midnight by a fraternity member, saying Piazza was “going to need help.”

Surveillance camera footage from inside the fraternity house shows Piazza unconscious and unresponsive as fraternity brothers tried to revive him with liquid on his face, reported *The New York Times*. They were also seen “back-packing” him, meaning they stuffed a backpack with textbooks and put it on his back

The Penn State Greek community “nurtured an environment so permissive of excessive drinking and hazing that it emboldened its members to repeatedly act with reckless disregard to human life.”

— *Indictment from grand jury in the Timothy Piazza case*

to hold him down and prevent him from rolling over to choke on his own vomit.

Piazza was in trouble for approximately 12 hours when fraternity members finally decided to call an ambulance – at 10:48 in the morning. It was too late and Piazza died on February 4 from traumatic brain injuries and spleen damage.

The Grand Jury’s Decision

Now 18 students have been charged in his death, with prosecutors also saying that fraternity members tampered with the evidence. Eight students

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Legal & Legislative Update

18 Fraternity Members Charged in Hazing Death



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and the Penn State chapter of Beta Theta Pi have been charged with involuntary manslaughter and face felony charges of aggravated assault that could result in jail time. The other 10 students face charges such as hazing, providing alcohol to minors and recklessly endangering another person.

Beta Theta Pi has been barred from the university, reported the *Times*, and President Eric J. Barron has imposed strict regulations on Greek life (see last month's SACRA cover story, May 2017). "I think the university needs every single partner out there to begin to put the pressure that is necessary to fix this problem," Barron said in response to the grand jury report. "It has to be alumni who say not in my house. It has to be parents who say I have heard what my child has said. My child doesn't belong there. And it needs to be us saying in each and every time clearly we're serious. You violate the rules, you're history. It takes a full partnership."

Sources: *The New York Times*, 5/5/17; Yahoo News, 5/10/17; PennLive.com, 5/5/17



continued on page three

Four Plead Guilty in 2013 Hazing Death of Baruch College Pledge

In mid-May, four Baruch College (NY) students who were charged with murder in the 2013 hazing death of an 18-year-old Pi Delta Psi pledge – after a delay in seeking him medical assistance – pled guilty to reduced charges of voluntary manslaughter and hindering apprehension. They are set to be sentenced on December 4. A fifth student is waiting for his case to be resolved, plus the national fraternity is awaiting a trial to hear murder and other charges against the organization.

Overall, 37 people were charged in the student's death, reported *The New York Times*, many of whom faced counts of assault and hindering apprehension.

What Happened

An initiation occurred in December 2013 so pledges could attempt to join Pi Delta Psi, an Asian-American fraternity. The ritual took place in a house in the Poconos where authorities said the 18-year-old student put on a blindfold and a backpack heavy with sand. He and three other pledges went through a "glass ceiling" gauntlet said to represent the experiences of Asian-Americans, according to the *Times*.

The now-deceased student was defiant, according to a 2015 grand jury report, kicking one of the fraternity members lined up to tackle him and refusing to say things he was asked to. As a result, investigators say he was pushed to the ground and one member rammed him, knocking him unconscious. The report said his body felt like "dead weight" when he was carried into the house. Group members tried to revive him and changed his clothes, as his breathing became labored.

A national fraternity official was initially called instead of an ambulance, which a fraternity member told investigators was thought to be expensive. According to the grand jury report, the official told members to hide anything that had the Pi Delta Psi symbol on it. Members also used the Internet to search for guidance about what to do when the pledge wouldn't wake up.

Three fraternity members then drove the student to a hospital an hour later, where he died the next day. He sustained severe head trauma and was covered in bruises.

The Aftermath

Baruch permanently barred the Pi Delta Psi fraternity and instituted a moratorium on all Greek pledging, which ends in 2018. The national fraternity said the hazing was unsanctioned and a clear violation of organizational rules.

Source: *The New York Times*, 5/15/17



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Legal & Legislative Update

18 Fraternity Members Charged in Hazing Death



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Beyond the Story

Commentary from Executive Editors Andrea Stagg and Joseph Storch

This young man's death was a tragedy, and may have been avoidable if he'd received time-later medical attention. Consider sharing information about the terrible consequences of this kind of inaction with your students, including Greek life, athletics and other organizations.

"The details in these findings are heart-wrenching and incomprehensible. The university community continues to mourn his tragic death but no pain we feel can begin to compare to the devastating heartbreak that Timothy's family and friends are experiencing."

- Penn State President Eric J. Barron in a statement

Educate students about how they can report medical emergencies and get treatment for those in need without opening themselves up to conduct charges.

If your institution does not have a formal "good Samaritan" policy in place, consider adding such language to your student conduct policies.

Proposed Amnesty Laws Designed to Increase Sexual Assault Reporting

Amnesty laws – that say students cannot be punished for alcohol or other drug use if they report that they've been sexually assaulted or witnessed a sexual assault – are being proposed in multiple states. The hope is that such legislation will remove students' fears that they'll "get in trouble," thus failing to come forward to report sexual misconduct.

Right now, New York and Wisconsin are the only states that have this type of official amnesty protection on the books. We'll keep you informed if other states pass similar laws.

Source: *The Herald*, 4/19/17

Beyond the Story

Commentary from Executive Editors Andrea Stagg and Joseph Storch

Whether current measures pass into state law or not, the increased conversation about amnesty in this sense could cause more institutions (in any state) to update their policies and include it anyway. In the aftermath of New York state passing a comprehensive sexual and interpersonal violence prevention and response bill, student feedback about

the amnesty provision was overwhelmingly positive. But students lauding the "new" amnesty were attending institutions that had never and would never discipline a student reporting sexual or interpersonal violence for alcohol or drug use that was discovered through that report. Their perception was not reality, and having a policy about amnesty is another way to make space for conversations in educational programs about the importance of reporting, seeking resources and learning about options.



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Legal & Legislative Update

New Tennessee Law Protects Campus Free Speech

Tennessee's governor signed into law a measure that would protect campus free speech in several ways after the bill overwhelmingly passed through the state's House of Representatives and received unanimous approval by the state's Senate.

Lawmakers decided to prohibit public institutions from disinviting speakers due to their controversial viewpoints. Student groups also can't be charged higher security fees when they host speakers who are expected to incite possible commotion.

In addition, the law "bars public colleges from limiting students' speech to specific sections of a campus, denying funds to student groups based on their viewpoints, or punishing faculty members for classroom speech germane to the subjects they teach," according to *The Chronicle of Higher Education*.

The Foundation for Individual Rights in Education (FIRE) advised Tennessee lawmakers on the bill, with executive director Robert Shibley saying in a statement that the Tennessee law is "the most

comprehensive state legislation protecting free speech on college campuses that we've seen passed anywhere in the country."

Source: *The Chronicle of Higher Education*, 5/10/17

Beyond the Story

**Commentary from Executive Editors
Andrea Stagg and Joseph Storch**

A careful read of the legislation (www.capitol.tn.gov/Bills/110/Amend/SA0333.pdf) shows that, far from making major changes to campus activity, the bill reads like a summary of First Amendment speech, protest and academic freedom cases. The law demands that public institutions follow the Constitution and then denotes some of the First Amendment concepts that one can derive from various cases interpreting the Amendment.

Some paragraphs are not carefully written (perhaps intentionally) and can lead to unintended interpretations.

Paragraph (12) on page 5 yields

an interesting absolute about not limiting speech to "free speech zones" and thus allowing students unfettered speech anywhere on campus. But the legislation later allows time, place and manner restrictions. The two, read together, return to the status quo.

Paragraph (13) on page 5 prohibits public institutions from denying funding to student organizations based on the viewpoints the organization advocates. That is easy enough with political organizations (if you allow the Democrats to meet, you must allow the Republicans to meet, and vice versa), but will likely be interpreted to allow certain religious organizations to ban gays and lesbians from their ranks. Further, by not allowing *any* discretion, it appears that the future leaders could ban women, the student government could ban Muslims and a student organization could not be denied funding based on their viewpoint that having to comply with generally accepted accounting principles violates their rights.

In fact, the bill carefully requires colleges to grant rights pursuant to the First Amendment and specifically does not require them to grant rights that are not covered by the First Amendment. Frankly, with the exception of paragraph (13), they could have saved the Volunteer State taxpayers copying and printing costs by simply saying, "public colleges must follow the First Amendment."

Current bills such as a "campus free speech act" proposed in Michigan (which would see students at the state's public institutions who twice infringe on the free speech rights of others be issued a one-year suspension or expulsion) are modeled after a legislative proposal from The Goldwater Institute, a libertarian think tank based in Arizona, according to MLive.com. The group's spokesperson said that similar bills have been introduced in California, Colorado, North Carolina and Wisconsin.

Source: MLive.com, 5/9/17



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Legal & Legislative Update

Student Suspect in UT Stabbing Had Recently Been Involuntarily Committed

A freshman was killed and three others injured during a stabbing attack at the University of Texas at Austin on May 1. The suspect is also a UT student and was taken into custody quickly, according to police. He had an initial court appearance in his murder case, according to the *American-Statesman*, but as of press time had not been indicted by a grand jury.

The suspect had recently been involuntarily committed due to mental health concerns, reported *The Washington Post*, and police believe he was suffering from mental illness at the time of the attack. He had recently been admitted into a care facility, said the *Statesman*.

According to an affidavit, the suspect told UT police after his arrest that he didn't remember the stabbing attack, but he didn't deny that he could have done it, the paper said. These perceptions

were repeated during a jailhouse interview the suspect did with a Houston TV station, where he said, "I had a dream. It showed my face and I thought maybe it was possible I could have done it, but I didn't remember doing it myself, if that makes any sense."

A judge ruled that recordings of this interview be preserved so they could potentially become evidence in the case. The suspect's attorneys filed the motion, saying the interview might contain content that could be favorable in their client's case.

Sources: *American-Statesman*, 5/12/17; *The Washington Post*, 5/2/17

Beyond the Story

Commentary from Executive Editors Andrea Stagg and Joseph Storch

With an investigation ongoing and student privacy laws in place, we know little

about the school's knowledge and evaluation of the suspect. Still, this is the sort of case that keeps members of behavior intervention teams up at night. Emergency management or threat assessment teams should follow this case and determine the protocol on your campus in such an emergency.

Who makes the decision to send an Emergency Notification? What about a Timely Warning? And further, what is your process for identifying students of concern? Who determines when, if ever, students should be put on involuntary leaves? Are students on involuntary leaves banned from campus?

Thinking about all of these questions proactively may be helpful if your institution needs to react to such a difficult, stressful and tragic crime.

Sample Involuntary Leave Policies from U.S. Campuses

Boston College's "Involuntary Leave of Absence Policy" at <http://bit.ly/2q8j2Kx>

Gonzaga University's "Involuntary Withdrawal Policy" at <http://bit.ly/2rNbg5O>

Michigan State University's "Mandatory Assessment and Involuntary Withdrawal Policy" at <http://bit.ly/2re72r4>

Source: *Dismissal Policies & Mental Health Disabilities: Prevent Discriminatory Responses & Protect Your Campus* Binder by Vanessa Phelan, PaperClip Communications, 2017, www.paper-clip.com



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Recent Research

Anti-Semitic Campus Activity Increased 40 Percent Between 2015 and 2016

Anti-Semitic activity increased last year by 40 percent at colleges and universities with the largest number of Jewish students, according to the April “Antisemitism: At the Epicenter of Campus Intolerance” report from the AMCHA Initiative.

The number of incidents

increased, not the total number of schools affected, with seven schools – including Vassar College (NY), the University of Minnesota, the University of Chicago (IL), New York University, the University of Wisconsin Madison, Ohio State University and Columbia University (NY) – having the largest increase in anti-Semitic

activity. The report also suggested “a troubling increase in universally intolerant, hateful behavior” directed at other campus groups such as LGBTQ students, immigrants, and those with differing political opinions and ideologies.

Source: OneNewsNow.com, 4/11/17

Free Speech Resources

As we continue attempting to make sense of campus free speech issues, while protecting the rights of campus community members in the process, a variety of resources are available to address the issues. Here are just a few...

“At Mizzou, Yale and Beyond, Campus Protests Stir Fresh Questions about Free Speech.” PBS News Hour (2015): <http://bit.ly/2kq6ye4>. This 10-minute clip from the PBS News Hour’s Gwen Ifill focuses on campus unrest two years ago that brought many of today’s free speech concerns out into the open.

“Shouting Fire: Stories from the Edge of Free Speech.” HBO Documentary (2012): <https://vimeo.com/38265857>. This documentary explores the current state of free speech in America, including historical perspectives, recent free speech struggles, and how

both the right and the left sometimes react out of fear.

And Campus for All: Diversity, Inclusion, and Freedom of Speech at U.S. Universities. PEN America (2016): <http://bit.ly/2jH0HB1>. This report includes analysis of recent debates, case studies, interviews and more related to campus free speech issues.

“What Does Free Speech Mean?” U.S. Courts: <http://bit.ly/1V8FdH3>. This overview outlines what is and isn’t included within Freedom of Speech – and offers the court cases affiliated with each point.

PaperClip Communications is also proud to offer a new ***Pocket Guide to Free Speech and Peaceful Assembly*** brochure written for students by Eric T. Butler, attorney and Interim Title IX Coordinator at the University

of Denver. Learn more at www.paper-clip.com.

“First Amendment FAQs”

Newseum Institute First Amendment Center: <http://bit.ly/2ptNZou>. The Newseum in Washington, DC offers this online look at Freedom of Speech issues, answering questions such as:

- Which types of speech are not protected by the First Amendment?
- What is freedom of expression?
- Is speech on the Internet entitled to as much protection as speech in more traditional media?
- What has the Supreme Court said about free expression?
- What is academic freedom?
- Are public colleges permitted to put any restrictions on the student groups that they will recognize?

Questions about other freedoms are also addressed within this comprehensive site.

Prevention & Awareness Initiatives

Bystander Training Resources

During these summer months, you may be considering how to spread effective, smart bystander messages to various audiences in the year ahead. We've created some resources you can use in this pursuit, whether you're discussing bystander intervention during orientation, within RA training, during faculty/staff development sessions or in another arena.

You'll find one example to the right...

Printable Resources for SACRA Subscribers

On our password-protected website (www.studentaffairscompliance.com), in conjunction with this article, you'll find several bystander resources that you can use during upcoming bystander training initiatives. They include:

- A copy of the "10 Distractions Active Bystanders Can Provide" handout seen here
- A "20 Ways to be an Effective Bystander" handout
- A "Definitions" handout
- A "Bystander Barriers" worksheet
- A "How to Build Capacity" worksheet

10 Distractions Active Bystanders Can Provide

*"I always wondered why somebody doesn't do something about that. Then I realized **I was somebody.**"*
— Lily Tomlin

Stepping in to help in situations where sexual violence could possibly occur doesn't have to be difficult or uncomfortable! You can provide a simple distraction to separate potential perpetrators and victims, thus changing the outcome of the story.

- Turn off the music
- Yell something loudly like "Are the cops here?"
- Do a silly, attention-grabbing dance
- Call your friend's cell multiple times
- Interrupt the conversation between a potential victim & perpetrator
- Spill a drink on someone
- Pull your friend away, saying, "I need to talk to you now!"
- Ask where the bathroom is
- Tug on your friend's arm insistently
- Tell a potential perpetrator, "Someone needs you in the kitchen"

What are some other ways I could intervene in a situation where sexual assault may occur?

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The Student Affairs Compliance Report & Analysis

Executive Editors: Andrea Stagg, Deputy General Counsel, Barnard College and Joseph Storch, Associate Counsel, SUNY Office of General Counsel

Compliance in Focus

Keeping the Community Informed: Sending Timely Warnings of Clery Act Crimes

By Joseph Storch, Executive Editor

Editor's Note: *The Higher Education Act requires that colleges and universities notify students in two manners about certain crimes and dangers in certain Clery Act geographic locations. This Compliance in Focus will serve as Part I of a deep dive into the most recent guidance on these two very different requirements. We cover Timely Warnings here and will cover Emergency Notifications in next month's issue of SACRA.*

In brief, **Timely Warnings** notify the campus community about Clery Act crimes, occurring anywhere in your institution's Clery geography, that present a serious or continuing threat to students and employees. **Emergency Notifications** notify the campus community about confirmed threats to health and safety (that may, but do not have to be Clery Act reportable crimes) occurring in On Campus Clery geography. While these requirements seem straightforward, they have been the subject of program reviews and the Clery Act Handbook (<https://www2.ed.gov/admins/lead/safety/handbook.pdf>, Chapter 6) spends 17 pages on significant

Timely Warnings notify the campus community about Clery Act crimes, occurring anywhere in your institution's Clery geography, that present a serious or continuing threat to students and employees.

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details in requirements. The Department of Education (ED) has indicated an interest in continuing to audit compliance with these two requirements.

All Title IV institutions are required to issue Timely Warnings as part of their expanded Clery Act compliance requirements. An institution may not outsource this requirement to local law enforcement and cannot make any agreement with local law enforcement in which the institution pledges not to issue Timely Warnings (6-14).

Neither the statute, regulations, nor Handbook define "timely" in Timely Warnings. The Handbook expressly acknowledges this (6-12) and

states that the intent of such a warning is to "enable people to protect themselves." To this end, ED appears to be calling for a case-by-case analysis. Anyone proclaiming a certain hard and fast time-period (24 hours, 48 hours) is not basing that on ED's express guidance. Like Emergency Notifications, Timely Warnings should be issued even if the institution does not have all facts regarding an incident, but they need not be issued "immediately upon confirmation" as the Emergency Notification language requires.

Covered Crimes

Timely Warnings are not the same as Campus Alerts. You may issue a Campus Alert for all manner of news that may or may not qualify as Timely Warnings, such as a bear spotted on campus, the need to secure passwords against hacking or a series of larcenies. While each presents a danger, it is a best practice not to issue them as *Timely Warnings* because none of these examples are Clery Act crimes. Note that the Handbook

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does not distinguish between Clery Act Part I Primary Crimes and other Clery Act crimes, such as Part III Hate Crimes and Part IV VAWA Crimes. If a report of a Part I, III or IV crime meets the other two factors, it should lead to a Timely Warning.

Larceny, computer crimes and a visit by a bear do not currently qualify as Clery Act crimes and therefore do not, on their own, require a Timely Warning. While your Timely Warning policy “*may* include non-Clery Act crimes” (6-13, emphasis added), institutions are advised to use different nomenclature (e.g. Campus Alert versus Timely Warning) to make this clear for an auditor. Remember that if an institution’s Timely Warning policy is *broader* than required by law and guidance, and the institution does not strictly follow its policy, ED reserves the right to audit against the published Timely Warning policy and find (and fine on) a violation, even though the law and guidance on point did not require a specific action (see e.g. the Virginia Tech Final Program Review and Determination from Dec. 9, 2010, finding that VT

In addition to being a Clery Act crime, the incident must have occurred in Clery Act geography to require a Timely Warning. Note that this is *not* limited to On Campus property (as Emergency Notifications are).

did not follow its own policy to issue Timely Warnings for a school shooter lockdown type of situation, even though the technicalities of such a requirement would not arise under the *law* until passage of the Emergency Notification requirements in 2008; <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/virginiatech/FPRD200810326735.pdf>).

Covered Geography

In addition to being a Clery Act crime, the incident must have occurred in Clery Act geography to require a Timely Warning. Note that this is *not* limited to On Campus property (as Emergency Notifications are). Crimes that occur in Non Campus and Public Property are eligible for Timely Warnings as well (if all factors are met). This can complicate compliance in an age of more international and distance travel. Clery Act crimes that occur in an apartment building rented by the institution in Europe or certain qualifying

hotels that the basketball team uses at a tournament across the country may (if they present a continuing danger) require a Timely Warning. The institution must develop plans for obtaining this information from local law enforcement and (more likely) from Campus Security Authorities. This is an ongoing obligation and international programs, career services and athletics staff must be trained in the requirement to provide this information to the person or office coordinating Clery Act compliance.

Note that the statute, regulations and guidance do not require a Timely Warning for crimes that occur outside of Clery geography. ED encourages policies that require such warnings, but as with the above guidance on types of crimes, an institution may wish to limit official Timely Warning policy to covered crimes occurring in Clery geography, and send Campus Alerts (or another type

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of warning) for crimes occurring elsewhere. This is not meant to discourage institutions from providing such relevant warnings, far from it (for a court decision ruling against liability for a Rhode Island college that issued a Timely Warning for a crime off campus, see *Havlik v. Johnson & Wales*, <http://caselaw.findlaw.com/us-1st-circuit/1281697.html>). But institutions should carefully consider how to go about such notices. If policy requires warnings for additional geographic locations, it could lead to inconsistencies and to intentional or inadvertent violations of institutional policy which, again, ED reserves the right to include in a negative audit finding, even though such notices are not required by law.

Serious or Continuing Threat

Even for Clery Act crimes occurring in Clery Act geography, a Timely Warning is only required if the crime (or crimes) constitutes a serious or continuing threat to the campus community (6-13). This is the most complex aspect of this requirement, one that lacks truly useful guidance and one that can be controversial. Factors to be

considered are the nature of the crime and the likelihood of an additional crime (ED gives the example of students setting fire to posters after a sporting event as a likely one-time arson); whether the suspect has been identified, caught and/or removed from campus; the number of suspects and whether some can commit the crime again, and other factors. ED lists as a factor whether the assailant has put similar crimes in motion, but it is difficult to see exactly how to apply this to the types of crimes covered by the Clery Act. Even if an incident meets all three tests, ED's guidance allows a delay of a Timely Warning if it could compromise a law enforcement investigation.

The Timely Warning "clock" appears to begin to run when a Campus Security Authority is notified of a covered crime. This is yet another reason for robust training of Campus Security Authorities and policies that require immediate, or as soon as practicable, notification of a Clery coordinating person or office. Reports of crimes that are made to professional and pastoral counselors do not lead to a Timely Warning (and in general need not be reported in the Annual Security Report).

The Timely Warning "clock" appears to begin to run when a Campus Security Authority is notified of a covered crime.

Drafting and Sending the Warning

Although the 2016 Clery Handbook makes no mention of it, the 2013 Violence Against Women Act amendments to the Clery Act require that an institution not identify a victim in a Timely Warning. Practically, it is difficult to imagine why any institution would do so. Note that when read together with other sections about not identifying victims or assailants in the statistics in the Annual Security Report, this provision reflects that while an institution may not identify a victim in a Timely Warning, it may identify a suspect. Note also that ED seems to acknowledge this in a paragraph (that lacks full context) covering the exception to the Family Educational Rights and Privacy Act (FERPA), in which you may share a student's identity in a health and safety emergency (6-15). Since the law (not

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acknowledged in the Handbook) forbids disclosure of a *victim's* identity, this paragraph can only be referring to a *suspect's* identity. Whether or not an institution identifies a suspect is a policy question that may require a case-by-case analysis.

ED does not require any specific language be included in a Timely Warning, providing only the vague mandate that “the warning should include all information that would promote safety and that would aid in the prevention of similar crimes” (6-14). While the 2005 and 2011 Handbooks offered long sample language for Timely Warnings (see 2005 Handbook at 64-65; 2011 Handbook at 115-117), the 2016 Handbook does not offer any sample language (the Handbook does include sample language for Emergency Notifications, 6-5). It is unstated whether this is an editing choice or whether ED no longer supports these examples.

The plain language of the Handbook is that all Timely Warnings must “be reasonably **likely to reach the entire campus community**” (6-15, emphasis in original). Some read this as a requirement to

The 2013 Violence Against Women Act amendments to the Clery Act require that an institution not identify a victim in a Timely Warning.

send all Timely Warnings to all students, faculty and staff regardless of where on earth a covered crime occurs. There is some support for this in the different (and clearer) way that the Handbook states that Emergency Notifications may be sent to the entire campus community or to affected segments (6-6). Others read this in a more nuanced way as *this* entire campus community. That is to say, for a Clery Act crime occurring in college-owned housing in Japan, Timely Warnings should be sent to students and staff in Japan, but there is no gain in notifying students back home in the United States or traveling elsewhere abroad. We know that students and staff have a limited tolerance for institutional notifications before they tune out or send warnings to email spam. But this latter approach has the significant risk of ED taking a hard line on a statement that can be read to have no flexibility,

and making a negative audit finding for not notifying your students in New Jersey, Texas or Spain about this covered crime in Japan.

Timely Warnings, like their Emergency Notification counterparts, must be issued in an active manner that does not require members of the campus community to search them out (6-15). It is not enough to post them to a website, they must also be distributed. The method for distribution is up to the institution and need not be (indeed, should not be) precisely the same method as used for Emergency Notifications.

Overlap and Differences

If an institution issues an Emergency Notification about an event, it does not have to issue the same information as a Timely Warning (although if additional follow-up information becomes available, that must also be provided to the campus community) (6-17). For a useful comparison chart, see Handbook 6-16.

Next month, we'll discuss Emergency Notifications more in-depth.

Resources: Clery statute, <https://www.law.cornell.edu/uscode/text/20/1092> ; The 2016 Clery Act Handbook (<https://www2.ed.gov/admins/lead/safety/handbook.pdf>) covers Timely Warnings in Chapter 6.



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5 Takeaways

How Campuses Cover FERPA During Orientation

Being prepared to handle questions about the Family Educational Rights & Privacy Act (FERPA) during orientation makes good sense, as it can be confusing to students and parents alike. Some colleges and universities put FERPA-related orientation initiatives in place to help in this pursuit. Here are 5 examples from schools throughout the U.S....

1. At Elizabethtown College (PA), the pdf “What Does FERPA Mean for Parents?” (<http://bit.ly/2pwAGHK>) explains that parents no longer have access to students’ education records once their student turns 18 and/or is enrolled in college. Being “enrolled” begins with check-in, typically on the first day of fall orientation for new students. During this orientation program, students are given the opportunity to sign a FERPA release form once they’ve been informed of their FERPA rights.

2. At Rutgers University New Brunswick, students are encouraged to “Review and discuss the FERPA waiver with your family” as part of their Post Orientation Checklist (<http://bit.ly/2r5bCY3>). They are then linked to a FERPA site at compliance.rutgers.edu/ferpa.

3. At the University of Southern California, students learn about FERPA during Day 1 of orientation and how it protects the privacy of their student records and how they can choose to allow their parents access to certain information. Guests hear about FERPA during Day 1 of their orientation as well.

4. At Cleveland State University (OH), in an orientation FAQs document, students are told that family members are not able to join them

during advising appointments due to FERPA guidelines. However, students are encouraged to share their course schedules with their family members later.

5. At California Baptist University, students are told to complete a FERPA form and bring it with them to orientation because, “By law, CBU needs to collect this from every CBU student. California Baptist University is unable to release any personal educational information to anyone other than the student without prior written consent. This form grants or denies permission for CBU to discuss student information with, for example, a parent or guardian who is named on the form.” A copy of their FERPA Privacy Release form can be found online at: <http://bit.ly/2rcWqoe>.

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Legal & Legislative Update

Implications of Travel Ban's Partial Re-instatement

In late June, the U.S. Supreme Court agreed to hear the case on the executive order that barred nationals from six Muslim-majority countries from entering the United States. Until then, the Court partially re-instated what's often called "the travel ban," with some exceptions.

The unsigned ruling explained an exception from the ban for "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States... As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading Executive Order-2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship... So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience."

While the court's ruling establishes that higher education

institutions' students and employees have a legitimate connection to the U.S., the issue is not yet fully resolved. Inside-HigherEd.com reported that discretionary decisions about implementation will be largely left up to officials at U.S. Department of State and Customs and Border Patrols. Because the Supreme Court will take the case up in October, the situation will remain unsettled in the near future. Most recently, Hawaii successfully challenged the U.S. State Department's interpretation of a "close familial relationship" which was put in place after the U.S. Supreme Court decision. The executive orders were meant to be in place for a short period of time while the administration examined national security risks.

The president of Portland State University, Wim Weiwel, pointed to the evolving nature of the executive orders' implementation and resulting court actions

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Legal & Legislative Update

Implications of Travel Ban's Partial Re-instatement



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and their potential chilling effect. He told InsideHigherEd.com, "It's unclear what will or will not be OK, so why will I gamble with my future, especially if there are alternatives?"

Sources: cnn.com, 6/26/17; insidehighered.com, 6/27/17; nytimes.com, 7/14/17

Beyond the Story

*Commentary from Executive Editors
Andrea Stagg and Joseph Storch*

Immigration professionals and international education staff, as well as their professional organizations, will continue to monitor the travel ban. Many schools have chosen to host information sessions on campus

featuring immigration counsel and other relevant professionals, offering an opportunity for education on issues in the current climate as well as an opportunity for students and faculty to ask questions. Certainly, professionals are considering how the travel ban may affect admissions, study abroad, faculty recruitment, research travel and more.

Responding to Off-Campus Reports of Domestic Violence and Sexual Misconduct

An investigation concluded that University of Colorado officials, including the head football coach, athletic director and the chancellor, mishandled a report that an assistant coach committed domestic violence; the report has implications for Title IX and Clery Act compliance, reported *The Chronicle of Higher Education*.

In December, the head coach received a phone call from the ex-girlfriend of one of his assistant coaches. She reported that the assistant coach had physically and emotionally abused her. The head coach reported the phone call to the athletic director, who then reported it to the university's chancellor. According to the *Chronicle*, the chancellor decided that he did not need to report the allegation to the Office of Institutional Equity

and Compliance (OIE) because the abuse occurred off campus and was reported by someone who was not connected to the university.

The investigation was conducted by external law firms hired by the university. Among the key findings:

- Officials took actions that shielded the information from the appropriate university officials at the OIE

- Those who received the report did not take sufficient action, especially when one considers that the policy around off-campus reporting was unclear and merited a call for guidance
- A lack of knowledge and/or training were not sufficient excuses for the officials' inaction

"Rather than trying to determine for myself if her complaint fell within our jurisdiction, I should have contacted our campus experts, who would have made sure that she received an immediate response from the university."

— University of Colorado Chancellor in a statement

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Legal & Legislative Update

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- Athletic officials took troubling steps, like consulting an adjunct professor for legal advice and blocking the phone number of the woman who reported the abuse

In an official statement, the chancellor stated, “Rather than trying to determine for myself if her complaint fell within our jurisdiction, I should have contacted our campus experts, who would have made sure that she received an immediate response from the university.”

As a result of the investigation, the university suspended the chancellor for 10 days without pay. The athletic director and head coach promised to donate

\$100,000 each to groups that work to prevent domestic violence. The university promised to donate money to programming that supports students and employees who are victims of domestic violence.

Source: chronicle.com, 6/13/17

Beyond the Story

*Commentary from Executive Editors
Andrea Stagg and Joseph Storch*

This report, accompanied by other recent reports of presidents and cabinet officials losing their positions, and even being convicted of crimes, should empower student affairs personnel to get their cabinet and leadership engaged in Clery Act and Title IX compliance. Whether at Penn State, Colorado or other institutions, mid-level officials may have made mistakes, but senior staff members also paid serious penalties. In the past, leadership of institutions could claim ignorance or could otherwise transition to other

positions. These situations could create an opportunity for Title IX coordinators and others with training responsibilities to gain access to leadership for training and policy development and approval.

Many institutions include off-campus conduct in the student code of conduct, and many workplaces consider how even off-duty actions may affect job performance and fitness. Clery (as amended by VAWA) obligates institutions to provide certain information to victims of VAWA crimes, including domestic violence, even when the report is from a non-student and non-employee. Note that a complaint against Liberty University was recently dismissed by OCR for jurisdictional reasons—the misconduct alleged occurred off-campus, was unrelated to an educational program or activity, and the complainant was a non-affiliate. SACRA will continue to monitor any trends related to jurisdiction of enforcement.

You can read results of the University's investigation here:
<https://www.cu.edu/doc/201706cozen-oconnor-reportpdf>.

Lawsuit Alleges Climate of Anti-Semitism

A lawsuit filed against San Francisco State University (SF State) alleges that university violated a plaintiffs' constitutional rights to free speech and equal protection and Title VI of

the Civil Rights Act of 1964, reported *The Washington Post*. In a statement posted on its website, the university stated, “Lawsuits seeking to force SF State to both protect free speech

and assure diversity and inclusion are unnecessary and redundant. SF State remains committed to furthering free speech

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Lawsuit Alleges Climate of Anti-Semitism



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and defeating discrimination, including anti-Semitism.”

The students’ lawsuit claims that SF State has a history of anti-Semitism dating back to 1973. More recently, reported InsideHigherEd.com, the mayor of Jerusalem, Nir Barkat, was invited to speak. His speech was interrupted and drowned out by pro-Palestine student activists. At one point, the protestors violated the student code of conduct by using bullhorns. The chief of police, who was dressed in civilian clothes, tried to stop the protest, but students did not recognize him and he was ignored. Though the university’s president later apologized for the way the protest was handled and invited Mr. Barkat back to campus, the university later cancelled his return appearance, stating that it did not receive sufficient advanced notice.

One of the plaintiffs, who claimed he was threatened by another student because of his Jewish faith, told the *Post*, “I didn’t have the right to speak on my own campus; I felt afraid as a Jewish student. The administration was actively working against me.” He supports his classmates’ right to protest and

“I didn’t have the right to speak on my own campus; I felt afraid as a Jewish student. The administration was actively working against me. Without this lawsuit, Jewish students will remain marginalized on San Francisco State’s campus.”

— One of the plaintiffs in the lawsuit, who claimed he was threatened by another student because of his Jewish faith

speak, but said, “Without this lawsuit, Jewish students will remain marginalized on San Francisco State’s campus.”

For its part, SF State claimed that it is actively working toward a more inclusive climate, taking steps like:

- Creating a new position: the Assistant Vice President for Equity and Community Inclusion
- Revamping free speech policies
- Creating a “five-point plan” for handling protests
- Providing training and community conversations for faculty, staff and students
- Investigating a 2017 incident where the Hillel organization was excluded from a fair

California State Senator Scott Wiener told InsideHigherEd.com that the state legislature was not currently proposing legislative remedies to the situation, but

was watching closely to see how the University responded. He said, “I want to see the administration take a much more proactive and direct approach.”

Sources: insidehighered.com, 6/29/17; news.sfu.edu, 6/20/17; lawfareproject.org, 6/19/17; washingtonpost.com, 6/19/17

Beyond the Story

*Commentary from Executive Editors
Andrea Stagg and Joseph Storch*

Every institution in the country should sit down with key stakeholders to discuss a plan to deal with protests, whether or not it involves hosting a controversial speaker. Keep in mind that there may also be speakers who are unexpectedly controversial; it’s best to be prepared. Consider institutional policies that may affect activism—are the restrictions, if any, permissible?

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Are students aware of the policies? Are the policies enforced consistently? What is the responsibility of student affairs staff in attendance? Work with the communications team to consider the different responses that may be needed for an event gone wrong, including for faculty, alumni, students and parents.

Outsiders may not ever know what steps the plaintiffs here took internally, if any. Still, a lawsuit will bring forward many

Additional Information

- Read the students' complaint here: <http://thelawfareproject.org/wp-content/uploads/2017/06/SFSU-Federal-Complaint.pdf>
- Read the university's statement here: <https://news.sfsu.edu/announcements/san-francisco-state-university-statement-disputing-lawsuit-affirming-commitment>

records and recollections, including any internal complaint files. So long as there are divisive issues—which will be always—schools must be prepared to

de-escalate and respond to confrontations that occur, and prepare in advance as much as possible to ensure safety and civility.

U.S. Department Changes Office for Civil Rights Investigation Procedures

In a memo issued by the U.S. Department of Education's Office for Civil Rights (OCR) and published by ProPublica.org, Acting Assistant Secretary Candice Jackson informed OCR's regional directors that the Trump administration would immediately adjust procedures for new and current investigations. These procedures were put into place under the Obama administration.

Some of the key changes detailed by Jackson's June 6 memo include:

- "There is no mandate that any one type of complaint is automatically treated differently

than any other type of complaint with respect to the scope of the investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed...

- There is no longer a 'sensitive case' or 'call home' list. Rather, Headquarters and Regional Offices...will consult regularly to determine on a case-by-case basis whether...investigations require Headquarters review or intervention...
- OCR will no longer follow the existing investigative rule of obtaining three years of

past complaint data files in order to assess a recipient's compliance...

- There is no longer a 'one size fits all' approach to the investigation of any category of complaints...
- OCR will only apply a 'systemic' or 'class-action' approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant."

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U.S. Department Changes Office for Civil Rights Investigation Procedures



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Department of Education officials stated that the changes were made to clear a backlog of cases that had piled up in recent years, preventing OCR from completing investigations in its targeted 180-day time frame, reported *The New York Times*. The memo specifically mentions the handling of investigations into sexual assault and disproportionate disciplining of minority students.

While advocacy groups like the Foundation for Individual Rights in Education cheered the changes, hoping that it would scale back institutions' sexual assault hearings that the group describes as "kangaroo courts," civil rights groups like the bipartisan United States Commission on Civil Rights were wary of the changes. In particular, critics of the new changes worried that a failure to collect three years of data would cause the department to overlook systematic issues.

The Education department is currently deciding whether to keep the Obama administration's guidance about Title IX compliance, according to *The Washington Post*. Recently, Jackson told the *Times* that sexual assault investigations were imbalanced toward the rights of the accuser. Jackson stated, "The accusations — 90 percent of them — fall into the category of 'we were

both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'" Jackson later apologized for her remarks and said that all allegations should be taken seriously. Advocates for survivors of sexual assault were alarmed by these assertions.

Sources: NYTimes.com, 6/16/17; NYTimes.com, 7/12/17; <https://www.propublica.org/documents/item/3863019-doc00742420170609111824.html>; washingtonpost.com, 7/13/17

Beyond the Story

*Commentary from Executive Editors
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The instructions to the field offices have been thrown into the standard right v. left narrative. A neutral look could acknowledge that lengthy OCR

investigations—some which ultimately take several years—may not serve the needs of anyone involved. For example, an aggrieved individual student complainant could graduate in the time it takes for OCR to engage in a class action-style investigation of the college. Many colleges have provided OCR with reams of data by a designated due date only to wait months (or more) for any response.

Critics of the administration think this letter is a tool to limit the effectiveness of OCR. But rather than limiting investigations, the letter instead delegated power to local offices, and no longer requires review at headquarters. This change may help with OCR's timeline issues, but institutions may ultimately find inconsistent application of rules and guidance by OCR at the different regional offices.

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The Student Affairs Compliance Report & Analysis

Executive Editors: Andrea Stagg, Deputy General Counsel, Barnard College and Joseph Storch, Associate Counsel, SUNY Office of General Counsel

Compliance in Focus

Keeping the Community Informed Part 2: Issuing Emergency Notifications for Crimes and Immediate Threats to the Campus Community

By Joseph Storch, Executive Editor

Editor's Note: *The Higher Education Act requires that colleges and universities notify students in two ways about certain crimes and dangers in certain Clery Act geographic locations. This Compliance in Focus will serve as Part II of a deep dive into the most recent guidance on these two very different requirements. We cover Emergency Notifications here, while Timely Warnings were covered in the June 2017 SACRA.*

In brief, Timely Warnings notify the campus community about Clery Act crimes, occurring anywhere in your institution's Clery geography, that present a serious or continuing threat to students and employees. Emergency Notifications notify the campus community about confirmed threats to health and safety (that may, but do not have to be Clery Act reportable crimes) occurring in On Campus Clery geography. While these requirements seem straightforward, they have been the subject of program reviews and the Clery Act Handbook (<https://www2.ed.gov/admins/lead/safety/handbook.pdf>, Chapter 6) spends 17 pages on significant details in requirements. The

Department of Education (ED) has indicated an interest in continuing to audit compliance with these two requirements.

The Emergency Notification requirement was added in the 2008 Higher Education Opportunity Act amendments to the Clery Act, following the tragic murders at Virginia Tech. The requirement is often treated together with Timely Warnings, but they are very different and institutions should clarify policy statements and practices to ensure general and technical compliance.

Emergency notifications must be issued "immediately" upon "confirmation of a significant emergency or dangerous situation occurring on the campus that involves an immediate threat to the health or safety of students or employees" (6-2). Examples requiring an Emergency Notification are hazardous weather or acts of nature (tornado, fire, earthquake), violence (active shooter, terrorist attack) and other dangers (communicable disease outbreak, gas leak, chemical spill) (6-2). It should be clear that these do not necessarily overlap with Clery Act reportable crimes that require a Timely

Warning. Note that confirmation of an emergency does not require knowing all pertinent details, but "means that an institution official (or officials) has verified that a legitimate emergency or dangerous situation exists" (6-3).

There is no specific method of communication required by the regulations or Handbook but, as with Timely Warnings, notification must be active, and we cannot rely on community members to find passive notifications themselves. ED encourages use of the method most appropriate for warning appropriate community segments about a particular danger, and this flexible approach makes sense. For example, if the affected segment includes students in one residence hall affected by fire or a gas leak, the fire alarm will clear the building faster than a text message; conversely, a fire alarm could increase danger in the case of an active shooter situation (6-4). Institutions also have the flexibility to send emergency notifications to the affected segment—for the fire or gas leak example, emergency notice could be sent to residents and staff in

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the building, rather than the entire campus community (6-6).

ED encourages, but does not require, the use of overlapping methods to reach more members of the community (6-4). Unfortunately, whether it intended to be inflexible in its language or not, the Handbook states that institutions “must ensure that notifications and warnings can be transmitted quickly to **all** students and employees” (6-4, emphasis added). This sentence is new, the 2011 Handbook merely required colleges to include information on whether any notification systems require the community to sign up and how to do so (2011 Handbook at 100). Many institutions interpreted the 2011 guidance as allowing an opt-in (community members choose to sign up for Emergency Notifications) or opt-out (we automatically sign up community members who must affirmatively choose not to receive messages). This makes sense because during certain major emergencies, communication lines are jammed and adding additional traffic may make the situation worse (while many jurisdictions are able to prioritize emergency responder

communication traffic, this is not universal). Consider, for example, the difficulty communicating electronically during and after the Boston Marathon bombing, which took place in a major metropolitan area with greater bandwidth than the suburban and rural locations of many colleges. Experts on disaster response have advised that this new requirement may not align with best practices for responding to emergencies and notifying covered individuals appropriately.

In recent (not yet published) program reviews, it is reported that ED criticized Emergency Notifications that quickly reached well over 90% of the college community. It appears that the 2016 Handbook change to reaching “all” members of the community is in keeping with this view and does not allow institutions to use an opt-in or opt-out approach as a sole method of notification. ED states that an “institution would not be able to rely solely on a text messaging system if all members of the campus community are not required to participate in that system. Similarly, relying on an e-mail would not be adequate for institutions that do not establish an e-mail account for all students

and employees, or require each member of the campus community to register an e-mail address with the institution” (6-4). Such hard and fast language offers very little room for error and developing and tracking such a system will require sustained effort by institution staff.

Emergency Notification Policy

Actually issuing Emergency Notifications is only part of the compliance puzzle. An institution must also have a policy statement on Emergency Notifications in the Annual Security Report, and must follow that policy (6-2).

Institutions must include significant detail in such policy statements and must include them in the Annual Security Report. The policy must include the procedures used to immediately notify the relevant community upon confirmation of a covered emergency or dangerous situation, including an overt statement that the institution will so notify (6-3).

The policy must also include a detailed recounting of the method used to confirm an emergency or dangerous situation

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(6-6). This requires an in-depth discussion of the process, who is responsible (which may change depending on time of day or week or whether school is in session) and the relationship between parties (including outside parties) responsible for making such a determination.

Once the determination is made, the policy must include details on the method used for determining the appropriate segment or segments of the campus community who will receive the notification (note that all members of the community must be registered and able to receive Emergency Notifications [6-4] but not every community member must receive every Notification). ED encourages continuous assessment of the situation to determine whether additional alerts or inclusion of additional segments of the community are appropriate.

The policy must detail the process of determining the content (6-7) but does not provide significant guidance on what policy information is required. The policy must include information on how the Notification system is initiated, including the

method used and the person or office responsible for initiating the Notification system (6-7).

Reaffirming guidance first provided in 2011 (2011 Handbook at 102-103), the Handbook requires the following statement in the policy: As soon as the institution has confirmed that a significant emergency or dangerous situation exists, it will consider the safety of the campus community; determine what information to release about the situation; and begin the notification process (6-7—6-8). The policy must also state “that the only reason [the] institution would not immediately issue a notification for a confirmed emergency or dangerous situation would be if doing so would compromise efforts to assist a victim; contain the emergency; respond to the emergency; or otherwise mitigate the emergency” (6-8).

The policy must include a list of the titles of individuals or offices responsible for making these determinations and issuing the Notification (6-8). As a practice point, be careful about limiting such decision making to senior leadership or command-level personnel. There should always be at least one (and preferably more) person on campus

with the training and authority to issue an Emergency Notification, including on weekends, evenings and times the campus is closed where it may be difficult to reach the high-level officials with such authority. The policy must again state the method for distributing the Notification (6-9).

As with Timely Warnings, ED warns institutions that if their Emergency Notification policy is *broader* than required by law and guidance, the institution will be held to following that policy (and could be found in violation for not following its policy even where the specific warning would not have been required by law or guidance) (6-3). While an institution may in practice go beyond the core requirements, it is advisable to consider calling such a notification by another name (e.g. Campus Alert) to properly inform your students of pertinent (but not required) information but not invite additional compliance exposure.

Wisely, ED indicates in the Handbook that an institution may withhold certain details of its Emergency Response if publishing them could compromise safety (6-4).

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Testing the Emergency Notification System

In addition to issuing the Notifications and developing and maintaining a detailed policy, institutions must at least annually test (whether announced or not) each system and report out on the results of such tests (6-9—6-11). Tests must be scheduled and documented; institutions cannot simply write up the results of Notification in an actual emergency (6-9). While ED emphasizes that

institutions have “**flexibility** in designing tests” (6-10, emphasis in original), the policy language on such tests requires significant details, and institutions are commended to review the appropriate language on requirements before each test. Results of tests must be documented and published (6-10—6-11) and documentation must be retained for the seven year Clery Act retention period (6-11).

Overlap and Differences

If an institution issues an Emergency Notification about an event, it does not have to issue

the same information as a Timely Warning (although if additional follow-up information becomes available, that must also be provided to the campus community) (6-17). For a useful comparison chart, see Handbook 6-16.

Resources:

- Clery statute: <https://www.law.cornell.edu/uscode/text/20/1092>
- The 2016 Clery Act Handbook covers Emergency Notifications in Chapter 6

Emergency Notification and Timely Warnings: Sorting Out the Differences

Emergency Notification

- **Scope:** Wide focus on any significant emergency or dangerous situation (may include *Clery Act* crimes).
- **Why:** Emergency notification is triggered by an event that is currently occurring on or imminently threatening the campus. Initiate emergency notification procedures for any significant emergency or dangerous situation occurring on the campus involving an immediate threat to the health or safety of students or employees.
- **Where:** Applies to situations that occur on your campus.
- **When:** Initiate procedures immediately upon confirmation that a dangerous situation or emergency exists or threatens.

Timely Warning

- **Scope:** Narrow focus on *Clery Act* crimes.
- **Why:** Timely warnings are triggered by crimes that have already occurred but represent an ongoing threat. Issue a timely warning for any *Clery Act* crime committed on your *Clery Act* geography that is reported to your campus security authorities or a local law enforcement agency, and that is considered by the institution to represent a serious or continuing threat to students and employees.
- **Where:** Applies to crimes that occur anywhere on your *Clery Act* geography.
- **When:** Issue a warning as soon as the pertinent information is available.

Source: *The Handbook for Campus Safety and Security Reporting, 2016 Edition*, U.S. Dept. of Education



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In the Spotlight

In *Whitaker v. Kenosha*, the Seventh Circuit's Analysis of Gender Identity and Bathroom Use is Built to Last

By Joseph Storch, Executive Editor

Over the last few years, SACRA has included significant coverage of litigation brought by gender-nonconforming students regarding the use of bathrooms that align with their gender identity. The Fourth Circuit issued an important and noteworthy opinion in *G.G. v. Gloucester*, but that opinion relied upon a 2016 Dear Colleague Letter issued by the Obama administration's Office for Civil Rights. When the Trump administration rescinded that guidance, the proverbial floor upon which much of the opinion was built fell out, the Supreme Court dismissed a case it was poised to review and the case ended shortly afterwards (see more in the May 2017, April 2017, Dec. 2016 and Sept. 2016 issues).

But a case in the Seventh Circuit Court of Appeals, *Ash-ton Whitaker v. Kenosha Unified School District No. 1 Board of Education, et al.*, came to a similar conclusion, but used a very different path to analyze the case and, in doing so, is an opinion that is more likely to stand the test of time.

The facts as stated by the court reveal a transgender male plaintiff, Ash, as a

high-achieving student who has seen significant difficulties and harm due, at least in part, to the School District's (District) refusal to allow him to use the boys' bathroom and instead requiring him to use either the girls' bathroom or a single use bathroom located far away from his classes. While there was never a single complaint from fellow students, Ash was removed from class several times to discuss his use of the boys' bathroom, and a teacher reported seeing him use the sink in the boys' restroom to the school's administration. To make matters worse for Ash, he has a medical condition that requires him to drink six or seven bottles of water per day. Due to the difficult bathroom situation he faced in school, he severely restricted his water intake, causing fainting and dizziness. This was compounded by anxiety, depression and suicidal ideation.

Ash was diagnosed by multiple physicians with gender dysphoria and given medical documentation to use the boys' bathroom. The District cited its unwritten policy (never provided to the court) to say that Ash could only use the boys' bathroom after

gender reassignment surgery, which cannot be performed until a person turns 18.

Although the District denies it, there were reports of a plan in May 2016 to distribute bright green wristbands to Ash and other transgender students so they could be identified and have their bathroom use monitored.

The Seventh Circuit analyzed the matter using case law (principally Supreme Court cases) rather than a policy interpretation by the Department of Education. The Court denied the District's motion to dismiss, granted Ash a preliminary injunction preventing the district from limiting his use of the boys' bathroom, and received a very strong signal from the Court that he would ultimately succeed on the merits.

The Court found no demonstrated harm to the District or its students by allowing Ash to use the boys' bathroom but a significant and ongoing risk of harm to Ash that could not be cured by a later monetary verdict. Somewhat clumsily, the District had claimed that the privacy rights of 22,160 students were endangered by Ash's use of the boys' bathroom;

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the Court pointed out that most of those students did not go to Ash's high school. The Court used a heightened standard generally used for sex discrimination (sometimes called "intermediate scrutiny"), which requires that the District show that its policy is not only genuine, but also "exceedingly persuasive"—the government must show the policy has important governmental objectives and that the discrimination is substantially related to achieving those objectives.

The Court made quick work of dismantling the District's arguments, finding that they fell far short of "exceedingly persuasive" (it's possible that the Court would not have found the District's arguments persuasive even under a less stringent analysis such as rational basis). The Court found it hard to justify a separation for transgender students based on anatomy that looks different, especially considering the combined bathrooms for pre-and post-pubescent students "who do not look alike anatomically."

The Court found clear evidence of the physical and emotional harm to Ash of the District's policies, and all but no evidence of harm to the District.

The Court found that, a policy that on its face prohibits an individual from using a bathroom corresponding to their gender identity "punishes that individual for his or her gender non-conformance, which in turn violates Title IX."

The Court found that the District identified Ash as transgender and treated him differently solely because he did not meet the stereotypical gender norms. The Court cited a Supreme Court case, *PriceWaterhouse v. Hopkins* that adopted a theory of sex-stereotyping as sex discrimination. That is to say, you cannot treat a female differently in education or employment because she acts or looks a way that is not stereotypical for the female sex or gender. The Court found that, "by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." Therefore, a policy that on its face prohibits an individual from using a bathroom corresponding to their gender identity "punishes that individual for his or her gender non-conformance, which in turn violates Title IX." Providing Ash, who has a medically diagnosed and documented condition, with access only to the locked gender-neutral bathroom,

while prohibiting his use of the boys' bathroom violated this sex-stereotyping theory.

This is one of the rare cases where this writer would recommend reading the entire opinion. The opinion is straightforward and readable. Further, the integrity of this decision may be stronger as the Court slowly and methodically builds a case upon law and prior case law, not upon Dear Colleague Letters and interpretations of statutes that are, by their nature, cyclical with the political climate. A review of the case file at press time includes no information as to whether the District will appeal.

To date, other Circuits that have reviewed similar cases have also ruled in favor of the student. Generally (but not always), the Supreme Court will take a case when there is a split of opinions among the Circuits.

The same week that the opinion came out, Ash Whitaker graduated high school. He will attend the University of Wisconsin in the fall.



(<https://www.insidehighered.com>)



Colleges must not only respond to reports of sexual violence but also prevent it (essay)

Submitted by Joseph Storch on March 14, 2016 - 3:00am

The elevated attention paid to sexual and interpersonal violence, coupled with new legislative requirements, is leading colleges and universities to improve the ways that victims and survivors can report incidents of such violence. Providing additional resources and educating students about reporting options can lead to a significant increase in those reports. That is a positive step forward. However, surges in reporting can, in turn, stress institutional resources and delay or stop colleges and universities from shifting their focus to actually *preventing* sexual violence and bringing reporting numbers back down.

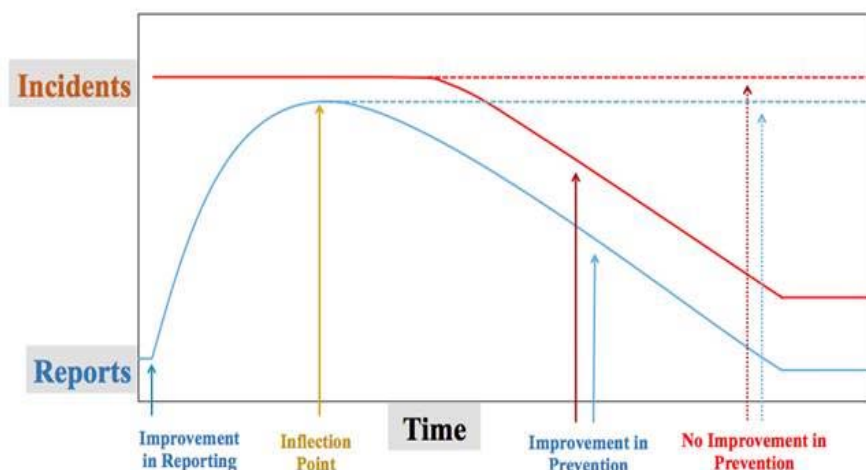
A valuable national conversation about the proper role for colleges and universities in appropriately responding to sexual and interpersonal violence and preventing such violence has followed upon the [April 2011 Office for Civil Rights Dear Colleague letter](#) ^[1] and its [2014](#) ^[2] and [2015](#) ^[3] progeny -- the [2013 reauthorization of the Violence Against Women Act](#) ^[4] and its [concomitant changes to the Clery Act](#) ^[5] -- as well as the [White House's April 2014 task force report](#) ^[6]. [Journalists' investigations](#) ^[7], books such as [Jon Krakauer's *Missoula*](#) ^[8] and student activism have further pushed the issue to the national forefront.

Traditionally, the Clery Act and Title IX looked backward toward reporting and response. The Clery Act requires institutions to report [certain delineated crimes](#) ^[9] occurring in [specifically defined geographic locations](#) ^[10] in the [previous three calendar years](#), and to [maintain policies to properly respond to crimes and violations](#) ^[11]. Title IX has required that institutions respond to reported sex discrimination, including sexual assault, in a way that [limits its effect and prevents recurrence](#) ^[12].

Yet more recent requirements of the 2013 Violence Against Women Act reauthorization and state legislation in [New York](#) ^[13] and [California](#) ^[14] demand colleges and universities to work more on preventing violence in the first place. This is a favorable development over all and one that should be celebrated. But shifting to prevention is easier said than done in a field that does not have decades of evidence-based solutions. Worse, institutions that are working through the compliance curve detailed here will have to expand prevention efforts at the exact time when the employees charged with implementing such programs are swamped dealing with reports.

In the past, sexual and interpersonal violent crimes and violations have been [rarely reported](#) ^[15]. The best data we have show that the [majority of such violations are never disclosed to anyone](#) ^[16], let alone police or college officials, and that reporting percentages are [even lower in same-sex violence](#) ^[17].

It isn't surprising, therefore, that the vast majority of institutions reported no rapes occurring in 2014 ^[18] -- at least in the specifically defined locations of the Clery Act that were disclosed to a campus security authority or local law enforcement. That was the case even as climate survey after climate survey has shown that a considerable portion of women and men have been victimized by such violations (although the precise number can differ between surveys ^[19]). Societally, the reporting level is low, and that applies to sexual violations in college as well. As shown below, at the beginning of the reporting curve, the number of violations is much higher than the number of reports.



But as institutions develop and improve their reporting methods and resources ^[20], and they endeavor to disrupt longstanding silos between different offices that can lose reports in bureaucracy, reports of sexual and interpersonal violence will skyrocket. It isn't unheard of for campuses to have such reports of sexual and interpersonal violence double or triple year over year in the midst of a campaign to educate students about reporting options on top of additional efforts to respond in a timely way to reports of violations. That spike puts substantial pressure on first responders, Title IX coordinators, judicial and conduct professionals, and counseling centers.

That pressure is a systemic risk, as the time and effort that campus officials spend responding to cases may draw attention away from the work needed to get to the next level: prevention programming. Such programming can include bystander intervention and engaging student leaders who can model behavior that changes the culture surrounding sexual and interpersonal violence. At this level, institutions can reach what I call the violence reduction inflection point (gold line), as shown in the figure above. It is at this most difficult point that resources are stretched thinnest -- and where many institutions become stuck, staff members become overwhelmed and morale can suffer.

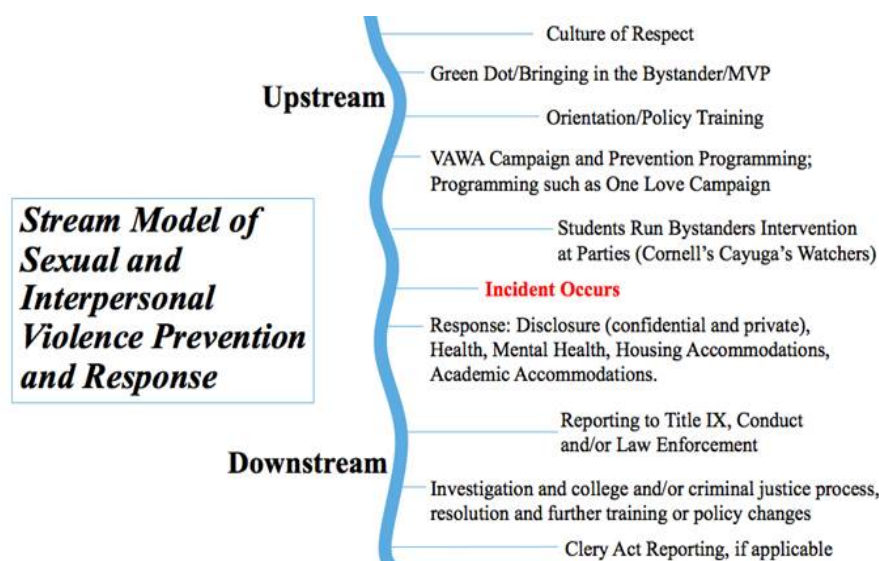
But it is exactly at this point that colleges and universities need to spend the most time, resources and intellectual bandwidth to shift to a prevention model. If institutions can properly commit resources to improvement in prevention, that work will lead to a reduction in overall incidents of violence (solid red line) with a concordant reduction in reports of violence (solid blue line). Note that the road back down is a gentler slope than the initial increase in reports, as the process will take longer. The danger is that if the improvement in prevention is not there, incidents will occur at the same rate (dotted red line) and reports of incidents -- while never encompassing all incidents that occur -- will nevertheless remain high (dotted blue line), continuing to strain resources as the institution attempts to respond to them all.

The fact is, at most institutions, greater prevention efforts will require not simply asking existing response personnel to take on more tasks related to prevention. It will also demand an investment in additional resources and personnel, or additional shared efforts in offices across the campus. While good models of prevention programming already exist and can be adopted or purchased, the ideal is for a campus to eschew buying an off-the-shelf product in favor of developing programming that, while building on the publicly available work of others, is tailored to its specific campus culture and population. Such efforts are absolutely crucial to bringing the number of reports down -- not because the reporting will return to a low percentage of incidents, but because the incidents themselves will decrease.

Although the field lacks a longstanding base of evidence as to what works best, we have some initial examples of prevention programs that are making a difference. These include bystander intervention programs such as [Green Dot](#) ^[21], [MVP](#) ^[22] and [Bringing in the Bystander/Know Your Power](#) ^[23], as well as homegrown programs such as [Binghamton University's 20:1](#) ^[24] and [SUNY Oneonta's Know Violence](#) ^[25]. Other promising programs coming online include [Culture of Respect](#) ^[26] and the dating violence-prevention work of the [One Love Foundation](#) ^[27].

While the dollar cost of acquiring access to some of these programs is low or nothing, the time and resource cost of implementing any of them at a campus can be high. Thus, it is easy and tempting for overworked Title IX and student affairs professionals to say, "I have so many investigations on my plate, I can't even begin to think about additional programming." That understandable impulse is penny-wise and pound-foolish. Without an intentional and significant shift of current and new resources into prevention programming and culture change, the number of incidents will stay high, as will the number of reports (albeit never as high as all occurring incidents). Without a greater focus on prevention, staff will be endlessly overwhelmed, and we in higher education won't make the dent in the prevalence of incidents and reports that we have the capacity to make.

The Stream Model of Sexual and Interpersonal Violence Prevention and Response outlined below can help people think about prevention and response in both upstream and downstream programs. While downstream efforts, such as responding to violence and violations, are vital, institutions should also be constantly looking upstream to bring new programming and policies online that reduce the number of incidents that require a response.



In short, it is not enough to strengthen resources to respond to violence. Federal law requires, and the current times and our educational mission demand, that higher education lead the way in developing, studying and implementing prevention programming so as to lower the incidents of these crimes and violations on and off the campus. Colleges and universities must work to ensure that their efforts not only to respond to and increase reporting about assaults but also to ultimately prevent them are consistently moving forward.

Joseph Storch is an associate counsel and chair of the student affairs practice group in the State University of New York's office of general counsel. The views expressed here are his own.

Section:

Strategies to Prevent Violence ^[28]

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Links:

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- [2] <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>
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- [27] <http://www.joinonelove.org/>
- [28] <https://www.insidehighered.com/news/news-sections/strategies-prevent-violence>
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Michigan State Draft of Clery Act Findings Report Contains Technical Compliance Blockbusters That Go Well Beyond The Headlines

By Joseph Storch, Executive Editor

One of the most shocking stories in all of higher education in years was the revelation in 2016 that Michigan State University (MSU) physician Larry Nassar had sexually assaulted hundreds of women and girls over twenty-five years. Millions watched riveted as survivor after survivor, including women who were teenagers in high school at the time of the abuse, student athletes at MSU and Olympic gymnasts, made victim impact statements in the courtroom during his sentencing hearing; they recounted incidents of sexual assault during supposed treatments for athletic injuries or conditions such as scoliosis.

Nassar was charged with multiple crimes, convicted and will likely spend the rest of his life in prison. Post-Nassar, there have been significant changes to leadership and staff at MSU, a leading land grant university that educates more than 50,000 people annually, and repercussions continue to this date.

In the report, Federal Student Aid officials used strong words like "serious noncompliance" and "systemic violations" to describe the Clery Act misdeeds.

On February 19, 2018, the Department of Education's Federal Student Aid (FSA) Office, the office that evaluates institutions for Clery Act compliance, commenced a program review at MSU. Note that there is also a pending Title IX investigation by the Department of Education's Office for Civil Rights, but no documents have been publicly released on that investigation as of this writing (<https://www.ed.gov/news/press-releases/us-department-education-launches-new-directed-investigation-msu-title-ix-compliance>).

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Michigan State Draft of Clery Act Findings Report Contains Technical Compliance Blockbusters That Go Well Beyond The Headlines

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Pursuant to a Freedom of Information Request by Paula Lavigne of the ESPN show “Outside the Lines,” the President’s Office at MSU released a December 14, 2018 Campus Crime Program Review Report from FSA. This document serves as an initial set of findings. There will likely be additional supplemental findings, responses from MSU and other correspondence before a final letter of findings is issued. In the report, FSA officials used strong words like “serious noncompliance” and “systemic violations” to describe the Clery Act misdeeds. The partial report comes after about ten months of investigating, including over 100 interviews.

At this time, we can speculate, based on experience reviewing other findings letters, that FSA will propose a hefty fine against MSU, perhaps for millions of dollars. While there have been a few news pieces that have touched on highlights from the summary, no organization has conducted a deep-dive analysis of the headline and technical statements of FSA, and how they can impact other campuses moving forward. This article is intended to fill that void (Disclosure: the

At this time, we can speculate, based on experience reviewing other findings letters, that FSA will propose a hefty fine against MSU, perhaps for millions of dollars.

author met with a now former MSU President about their conduct system, but there was no discussion of this investigation or Clery Act compliance; the conversation was not privileged and no attorney/client relationship was formed; all information included here comes from the text of the released letter and other public documents).

Michigan State University is one of the largest universities in the country. With over 50,000 students, it receives over \$423 million annually in federal funding. Yet FSA found that the institution lacked administrative capability in that it could not “demonstrate that it is capable of adequately administering the program under the standards.” Administrative capability has been used of late by FSA to show that a college lacks the policies, procedures, practices and the commitment of resources for an institution of its size to properly comply with the Clery Act. FSA wrote that MSU “substantially failed to develop and implement an adequate Clery

Act compliance program...[and] lacked the ability and/or willingness to properly administer” federal funds. FSA found that Clery compliance obligations were given to staff burdened by other tasks (sometimes referred to in the “other duties as assigned” class), and were not prioritized. It found a lack of policies, procedures and trainings, especially for one of the largest universities in the country. This led to a finding that MSU lacked sufficient administrative capability, or internal controls.

But beyond the headlines, the initial findings letter includes some fairly narrow issues in which the Department shows its hand as to how it may interpret the Clery Act in the future. While such a letter is sub-regulatory, and does not have the power of statute or regulation, the Department often repeats itself in future cases, and a careful review of these findings could assist other institutions in reducing their

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own risk of negative findings if they have a program review.

Failure to Properly Categorize and Disclose Reported Crimes and Failure to Issue Timely Warnings

All of Nassar's victims may not yet be known. All the times that a Nassar victim did disclose to a person who can be defined as a Campus Security Authority (CSA) under the Clery Act may likewise not yet be known. And yet the Department weaves together pages of examples of victims and survivors of Nassar's assaults who *did* disclose to people who should be CSAs (note that the Department itself calls these representative samples, meaning there may be more such situations; FSA says in the letter that MSU will identify additional examples in its forthcoming file review). Not only was no substantive action taken in those cases, but MSU did not count the statistics in their Annual Security Report (ASR) or issue Timely Warnings for covered crimes. Many of these examples involve a survivor disclosing to a head coach, assistant coach,

Some coaches allegedly warned off survivors from reporting, discussing consequences of doing so for the survivor. At least one told a survivor who disclosed that failing to submit to Nassar's prescribed treatment would make her ineligible to play, offering a devastating Hobson's choice to that student athlete.

team trainer, athletic department physicians, Associate Directors or other athletics employee who, under the Department's interpretations in its Handbook, would clearly be CSAs.

Some coaches allegedly warned off survivors from reporting, discussing consequences of doing so for the survivor. At least one told a survivor who disclosed that failing to submit to Nassar's prescribed treatment would make her ineligible to play, offering a devastating Hobson's choice to that student athlete. Remember that MSU is an elite Division I institution; many student athletes have worked for years to get to that level and their lives and social structures often revolve, at least in part, around their chosen

sport. One CSA is reported to have mediated a meeting with Nassar, which may have been prohibited or discouraged by then-current Title IX guidance. One person who received a disclosure was Nassar's choice for a 2014 panel that cleared him of wrongdoing. Another employee who received a disclosure was later terminated from MSU for improperly removing medical records at Nassar's behest. FSA found that there wasn't even a real reporting system within the medical division of athletics for the time of the review.

In each of the detailed cases, the employees who received the disclosure did not forward the statistic to the Clery coordinator. Some even asserted that they had been trained in the Clery reporting system shortly before receiving a disclosure and still chose not to report it. This means that the statistics were not included in the ASR and no Timely Warnings were issued. The Department states in its Handbook that Timely Warnings are appropriate for reports of Clery Act crimes occurring in Clery geography where there is a continuing danger. Inasmuch as Nassar continued to

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commit similar offenses against students for years, a number of which rose to the level of reportable Clery Act crimes, the continuing danger is there and the Department found the series of crimes “unquestionably posed a serious, ongoing threat to campus community members, and, most specifically, to female patients of MSU Sports Medicine.”

The Department in its review found other Timely Warning violations around burglaries and robberies. In some of the cases, there were multiple robberies fitting the same pattern in a short time period. In others, a pattern of targeting a specific group, such as Asian students, appears. In another, a crime was misclassified as a larceny when it should have been a robbery. In page after page of such cases, FSA found that a Timely Warning should have been issued but was not. In one example, 25 MSU students were burglarized over an eight-day period. MSU Police issued the Timely Warning on the ninth day. These examples are distinguishable from the “close call” types of Timely Warnings that are sometimes included in findings letters.

Who makes the call about whether to send an Emergency Notification or Timely Warning on your campus? How can you activate that decision tree in the off-hours?

Of note, the Department also wrote negatively about a report of a robbery at 11:00 p.m. for which a Timely Warning was issued at 8:30 a.m., or about 9.5 hours later. The Department has never set a specific timeline around “timely” in a Timely Warning and it is not clear if it is trying to do so here. It is notable that much or most of the campus was asleep for the time in which MSU police were preparing to issue the Timely Warning. Campuses should be aware of this interpretation when considering Timely Warnings. In telegraphing how it may address one potential defense to not issuing a Timely Warning, the Department wrote that “the mere fact that a subsequent crime, incident or event of the same or similar type did not actually occur is not, in and of itself, a justification for failing to issue a warning in response to an initial Clery-reportable offense or other incident or event that may have reasonably posed such a threat.” Campuses should consider this example when reviewing

crimes and assessing whether to send a Timely Warning. Who makes the call about whether to send an Emergency Notification or Timely Warning on your campus? How can you activate that decision tree in the off-hours? Some schools develop protocols for such situations, and a designated team reviews whether an alert should be sent and also determines the content.

As a result of these (and expected additional) findings, MSU will have to develop detailed policies and procedures for reporting, develop a new tool to collect reports and conduct training for CSAs. It will have to review all Clery-reportable offenses for each year and determine whether a Timely Warning (or, in more recent years, Emergency Notification) should have been issued. One interesting piece that this author has not seen before was a statement that “FSA strongly recommends that the University hire an independent

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professional or engage a consultant with the requisite knowledge, skills, and abilities to conduct the file review and to develop and implement compliant...policies.” It is unusual at best for the Department to “strongly” recommend the hiring of a private consultant.

Failure to Identify and Notify CSAs and To Establish an Adequate System of Collecting Data From CSAs

FSA found that MSU had not properly identified, notified or trained CSAs, calling it a “serious, systemic, and persistent condition [which] contributed significantly” to MSU’s compliance failures. FSA found that at least for some years, MSU counted only 50 CSAs for a campus with thousands of employees and a student population north of 50,000. For other years, MSU cannot identify with certainty how many CSAs it has and who they are. FSA states that it would expect at least 1,500 CSAs for a campus of that size.

FSA criticized the MSU Clery coordinators for being self-taught, stating that they “lacked a

sophisticated understanding of the statutes and regulations related to the Clery Act.”

FSA found that MSU had not properly identified, notified or trained CSAs, calling it a “serious, systemic, and persistent condition [which] contributed significantly” to MSU’s compliance failures.

FSA also criticized the MSU Clery CSA training program. MSU staff reported to FSA that they send CSAs an email with a memorandum and a PowerPoint that includes a quiz. There is no requirement that the quiz be returned or even be confirmed as completed by the CSA. The Department writes that “[a]s such, the University has no way of knowing whether the CSAs complete the training and quiz, and, thus, no assurances that the CSAs are capable of performing their assigned duties.” In Chapter 4 of its 2016 Handbook, FSA insists that CSA trainings are “recommendations, not requirements” for institutions and suggests that such training can “rang[e] from sending materials in an e-mail to

face-to-face meetings that include PowerPoint presentations and training manuals.” This statement may be the beginning of an FSA concentration in the area of proving that CSAs not only received training in the passive sense, but actively engaged with it in some way. These kinds of requirements, if implemented, would not be unheard of; some state laws require interactive training and/or signed acknowledgments that a particular training was completed, including for sexual harassment prevention training in the workplace.

Typo or Sea Change? Expanding Reportable Drug, Alcohol and Weapons Offenses

On page 21 of the letter, FSA states that institutions must publish statistics of arrests and referrals for discipline “related to violation of *Federal*, state, or local drug, liquor, and weapons laws” (emphasis added). It is possible that this is simply a misprint, but the inclusion of “federal” laws on drugs, alcohol and weapons is inconsistent with all three versions of the Clery Act Handbook (including pages 3-42 et seq. of the 2016 Handbook), which calls

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for recording and counting state and local violations. There is no mention of federal violations in the relevant sections of any Handbook or any other published documentation that this author is aware of. While, again, it is likely an error in the instant letter, such an extension to federal crimes would significantly complicate reporting in states that have legalized cannabis possession and possession of certain weapons. Such an inconsistency merits continued monitoring.

The Sexual Assault Program and Campus Security Authorities

In perhaps the most important section of the letter for those thinking about technical compliance with the Clery Act, the Department takes MSU to task for failing to report disclosures to the MSU Sexual Assault Program (SAP). The SAP is a response organization on campus for those impacted by sexual violence. Staffed by over 100 volunteers (with numbers increasing when revelations about Nassar became public), SAP offers “crisis intervention, advocacy services, individual therapy, support groups, and community education.”

In perhaps the most important section of the letter for those thinking about technical compliance with the Clery Act, the Department takes MSU to task for failing to report disclosures to the MSU Sexual Assault Program (SAP). The SAP is a response organization on campus for those impacted by sexual violence.

While its website reported serving 565 people in just a one-year period, MSU was not able to provide FSA with any records or documentation about crimes that were reported.

SAP staff “did not provide data for inclusion in the University’s crime statistics because officials and staff believed that they were exempt from *Clery Act* reporting requirements.” The Department considers the definition of “professional counselor” in its regulations and states that the “determination as to whether someone is a professional counselor for *Clery Act* purposes is based, not only on that individual’s professional licensing, but also on the official’s responsibilities. Moreover, the regulations do not authorize an institution to designate an entire entity as a professional counselor.”

The Department’s discussion of this exemption in its Handbook (2016 Handbook at 4-7 et seq.) contains neither of these statements. While the first statement

can be read as consistent with other statements in the Handbook, the other statement about not designating an entire entity appears to be new. It may be unartfully worded, and can be interpreted as meaning that each employee must be considered individually for an exemption based on that person’s responsibilities and licensing.

One additional statement FSA makes in its letter, regarding advocates “that serve in a dual role that includes both advocacy and counseling positions,” is consistent with guidance in the 2016 Handbook (page 4-8). In the letter, FSA writes that if “roles cannot be separated into confidential and non-confidential responsibilities, then that individual is considered to be a CSA” and obligated to report *any* covered Clery Act crimes. Of course, while consistent, it doesn’t make sense in either place. Students disclosing to someone whose office and title would indicate

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confidentiality to a reasonable person should not be expected to be aware that the person they are speaking to also has a part-time non-confidential role. This author is not aware of any pushback FSA has received to this provision, but it should concern institutions that offer confidential resources to students and employees.

In this findings letter, not only did FSA find that SAP volunteers should be CSAs, but it found that MSU had not even conducted an analysis as to whether they should or should not be so covered. This should serve as a warning to institutions to conduct such an analysis of its counseling, peer-counseling, and hybrid counseling and advocacy entities to determine whether the individuals employed or volunteering would meet the definition of CSA given this insight into FSA's interpretation. Institutions should document this analysis and periodically reassess to include new entities, roles and individual employees. Because it had not collected statistics from SAP staff and volunteers, FSA found that MSU had underreported significantly considering the high number of crimes reported to this entity.

The Department wrote that “an institution must have some means of documenting investigations undertaken and disciplinary sanctions imposed for violations of the law or its conduct standards” involving employees.

Human Resources, Greek Life and Athletics

The Department found that a proper audit of reportable crimes could not be easily established, because MSU had not properly identified CSAs in several departments and failed to keep proper records. FSA found that many staff members of Human Resources were CSAs, but because HR was decentralized and records were not correlated, it is unclear just how many Clery Act crimes were reported to HR staff.

The Department wrote that “an institution must have some means of documenting investigations undertaken and disciplinary sanctions imposed for violations of the law or its conduct standards” involving employees. It demanded that such records be able to be “produced and maintained in some type of organized

fashion” for analysis as to whether they included Clery reportable crimes. MSU's argument that it just simply did not have a system to track and report did not meet favor with the Department. FSA demanded that MSU figure out the records system and include such information in its response to the letter, and the Department will monitor the system developed.

MSU maintains a large Office of Greek Life (OGL) and multiple governing bodies. Crimes reported to CSAs that occurred at fraternities and sororities were not included in its statistics. FSA criticized the information gathering as being inaccurate and imprecise, and noted that while MSU generally defers to the student Greek Life decision-making bodies for discipline, it doesn't keep records of such cases. The Department indicated this “left FSA with serious concerns.” While the numbers in conduct charges against individuals appeared sound, “no such assurances exist for disciplinary actions taken against groups or teams because of the University's larger, systemic failure to identify and request statistics from CSAs.” MSU was only able to identify

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one CSA among its 63-chapter system. FSA found OGL and the governing bodies to be CSAs. This may be new, although it is not clear from the face of the letter whether the governing bodies are staff (which would be consistent with past guidance) or students (which would be a new requirement). It is possible that future documentation in this investigation may shed more light as many institutions have similar setups for discipline of Greek Letter organizations.

The Department found that MSU did not “properly identify, actively notify, and/or instruct CSA’s [in the athletic department] about their reporting obligations.” FSA listed a number of CSAs in athletics who declined or refused to forward on disclosures about Nassar. In one highlighted example, “the coach, who at that time, had recently received CSA training, admitted that he knew how to report such an incident, but ignored his training, choosing to speak to [MSU’s] Associate Director of Athletics about the matter instead...In an interview with the review team, the coach stated that he was aware that he had failed to follow his mandatory

reporting training, but had no intention at any time of correcting his mistake.”

Communication

The Department noted many communication failures between and among MSU staff who had roles to play in Clery Act compliance. Perhaps one of the most egregious was committed to a footnote, detailing communication challenges between the Clery Coordinator, Title IX Coordinator and MSU Police. The Department wrote that Clery and Title IX staff “are routinely required to either subpoena the production of MSUPD incident reports or seek them under the state open records law” calling the practice “disturbing.” The letter does not include the reasons proffered, but institutions should keep in mind that there are several methods to communicate such records in compliance with federal and state laws.

Conclusion

Considering the detailed self-study FSA is requiring of MSU and the demands for additional documentation, this is far from the last word on this case. Ultimate findings may take many more months or even years. But FSA seems to be throwing down

FSA seems to be throwing down a gauntlet that higher education institutions well beyond Michigan State should be aware of.

a gauntlet that higher education institutions well beyond Michigan State should be aware of.

Interestingly, although the Drug Free Schools and Communities Act has been a major focus of FSA in recent years and is referenced at the beginning of the letter, these findings make no major conclusions in that area. Such information may be included in supplemental letters.

The Department notes that MSU is implementing remedial measures but, consistent with past investigations, FSA cautions that “such remedial measures cannot and do not diminish the seriousness of these violations.” As with Penn State and other recent FSA audits, the violations that were made public as part of a scandal actually play a small part in the findings of violations. Most of the issues identified by FSA could occur on any college campus, and therefore present good lessons for compliance moving forward.

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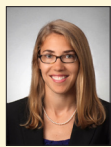
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GOVERNMENT AND REGULATORY AFFAIRS

BLAST**Risk Management Considerations Regarding the Clery Act, Violence Against Women Act (VAWA) and Title IX When Students Study Abroad¹***January 2016***STATUTE/REGULATION SOURCE**

The Clery Act, as amended by the Violence Against Women Act, 20 USC 1092(f); 34 CFR 668.46. Title IX of the Education Amendments of 1972, 20 USC 1681.

BRIEF DESCRIPTION

The Clery Act, as amended by the Violence Against Women Act, and Title IX of the Education Amendments of 1972 place requirements on colleges and universities to report certain crimes occurring in certain overseas locations and also to take action in response to reports of certain crimes and unequal treatment on the basis of sex. The laws do not have uniform rules and must be carefully read together to understand obligations. While it is important to comply with the laws, it is even more important to develop policies, procedures and training methods to prevent such violations and respond promptly to reported violations. Keeping students safe and successful in study abroad requires us to go beyond the minimum requirements of the law.

POTENTIAL/ACTUAL IMPACT TO HIGHER EDUCATION

The Clery Act and Title IX require colleges to respond to violence, report certain incidents of violence and develop prevention programming.

DISCUSSION

Two federal laws govern college and university reporting of and response to certain crimes and harassment. The Clery Act, as amended by the Violence Against Women Act (VAWA), requires that colleges report certain crimes that occur in certain geographic locations. Title IX requires that colleges appropriately respond to reports of unequal treatment on the basis of sex or gender in a way that tracks such reports and ameliorates the impact of unequal treatment. While the laws overlap in certain circumstances, they should be read and analyzed separately as they have different rules, standards, methods and enforcement entities.

The Clery Act

Initially passed in 1990, the Clery Act is primarily a consumer reporting law that requires colleges to disclose in an annual report and a crime log certain crimes occurring in certain geography for the preceding three calendar years. There are other requirements as well (timely warnings, missing persons, fire reporting, etc.) that are not treated in detail in this GRAC Blast.

For purposes of overseas reporting, the most common geographic location is a Non-Campus location.² To qualify as Non-Campus, a geographic location must be owned or controlled, defined by the Department of Education (ED) as having a written agreement for use, by the institution, frequently used by students and not within the same reasonably contiguous geographic area as the main campus. These include research facilities, hotels and apartment complexes, classroom buildings, and other locations owned or rented by a college where students stay for an extended period. There are also some On Campus locations overseas, if a geographic location can be defined as a branch or separate campus. On Campus locations may also have a public property reporting requirement.

Clery Act reportable crimes³ that occur in these locations must be reported in the Annual Security Report (ASR) and Crime Log (if the institution has a police or security department). Crimes must be included in the ASR and Crime Log if they are reported to a Campus Security Authority or local law enforcement.

Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

Title IX

Title IX of the Education Amendments of 1972 is a civil rights law that guarantees equal ability to participate in educational programs regardless of sex. In recent years, the ED's Office for Civil Rights (OCR) has placed an emphasis on preventing sexual violence, an extreme form of sexual harassment that can cause victims and survivors to not complete their education. Most prominently, the OCR issued an April 4, 2011, Dear Colleague Letter establishing standards for responding to such violations.⁴ Although courts are split, it is generally presumed that Title IX applies globally, not just in the United States.⁵

The Violence Against Women Act (VAWA)

In a way, the VAWA amendments to the Clery Act are a hybrid of traditional Clery and Title IX. The three new reportable Clery Act crimes (domestic violence, dating violence and stalking) are reported using traditional Clery geography. But while the reporting side of the law reads like traditional Clery, the action and response side of the law looks more like Title IX. That is, the law is concerned more with *who* is a victim of a crime rather than *where* geographically the crime occurred. Colleges are required to provide reporting victims with certain resources, take action against assailants that are within the jurisdiction of the college, and conduct programming to prevent such crimes.

ACTION

Thinking About the Laws and Risk Management in an Overseas Environment

Traditionally, the Clery Act and Title IX look backwards. The Clery Act requires colleges to report certain crimes occurring in certain locations in the three prior calendar years, and Title IX requires that colleges respond to unequal treatment on the basis of sex in a way that limits its effects and prevents its recurrence. VAWA looks both backwards and forwards. In addition to response, VAWA requires that colleges take proactive steps to educate students about violence, including both risk reduction and (importantly) bystander intervention.

Simply gathering statistics to publish in the Crime Log and ASR at a later date is insufficient. A reading of Title IX guidance and VAWA together requires a comprehensive (and time-sensitive) response to any sexual or interpersonal violence occurring overseas.

Action/Response:

While it is likely that all faculty and staff traveling with students overseas qualify as both Campus Security Authorities (CSA) under the Clery Act and Responsible Employees (RE) under Title IX,⁶ risk managers should consider simply making a blanket rule that institutional employees accompanying students overseas (except in the rare circumstance that the employee is present as a pastoral or professional counselor) are covered by both requirements and must report incidents of sexual and interpersonal violence to institution officials charged with response.

Conversely, third party providers would not technically qualify as CSAs or REs under ED's interpretations. The responsibility is with the institution, not external parties. Institutions can use contracts to require employees of third party providers to notify the institution of relevant incidents as if they were CSAs or REs.⁷

When a report of sexual assault, domestic violence, dating violence or stalking is received by an institution representative, whether employed by the institution or a third party, time is of the essence in responding. Institution representatives must be trained that they can never handle reports of violence "in house." That is to say, unless they have received appropriate training and responsibility for doing so, they should not conduct an investigation or take other action except in coordination with institution professionals charged with responding. Institution professionals should *never* seek to mediate reports of sexual assault or bring parties together to discuss and attempt to resolve complaints.

Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

When an institution receives a report of sexual or interpersonal violence, it has obligations to provide resources to victims⁸ and to investigate and potentially take action against assailants. Unlike the traditional Clery Act reporting requirements which are based on geography, Title IX and VAWA response/action requirements are based on whether the institution has jurisdiction over the student. In certain cases, a student from school A assaults a student from school B. In such a case, school B would be primarily responsible for providing resources while school A would be primarily responsible for investigation and discipline.

One difficulty in complying is that institutions often have many people accompanying students overseas, some of whom live at the location, and they may not have a strong relationship with the Title IX coordinator, counseling services and other key offices. To address this issue, the author developed a model, the Hub and Spoke model, for rapid communication and response when a report of such violence is received overseas. The “hub” in the Hub and Spoke model is a professional from international education (in the example below, the international program director) who is in regular communication with professionals from the offices of counseling, Title IX, university police or campus security, academics and student conduct.

The arrows in the model go both ways as these offices should be meeting with the hub on a regular basis to share information and cross-train. When a report comes in to a representative in the field, they should quickly contact the international program director. The director can then put into place training to gather information on resources, investigation and conduct while providing the appropriate information to relevant offices. In Step 2, these offices, through the director hub, provide this appropriate and customized information to the representative in the field and to local resources in the study abroad environment and, through them, provide resources to victims and begin investigations of actions by the perpetrator.

This is not the only model, but the key is having a person who can bridge the gap between offices that would rarely interact and, in bridging that gap, can accelerate the appropriate response to violence. A rapid response is an appropriate way to address violations that are often dangerous, violent and traumatic. Once received, the institution should, for the most part, respond using the same resource and conduct process that it does for violations committed on or near the campus.

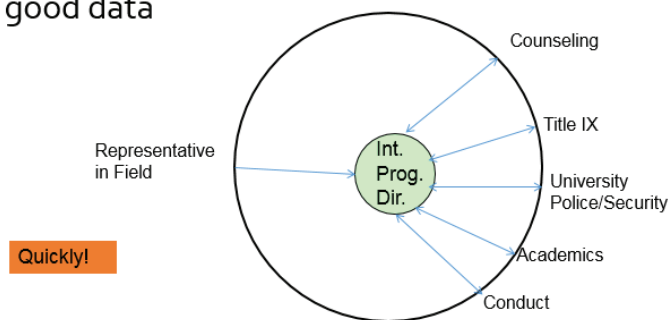
Education and Training

Prior to traveling overseas, students should receive training on risk reduction and violence prevention. Among other things, training must remind students that the institution prohibits VAWA crimes, define the crimes, define consent, provide information about safe and positive bystander intervention, and educate on risk reduction, including recognizing warning signs of abusive behavior and how to avoid potential attacks.

Over time, institutions should endeavor, alone or in partnership with other institutions, to develop sexual and interpersonal violence prevention trainings that are specific to the country or region being visited. Not all countries are the same. The risk profile is different in Canada and Saudi Arabia. Some countries are hostile to gays and lesbians, while others have laws surrounding sexual assault and domestic violence that differ significantly from protections in America. By training students to assist each other, to engage in bystander

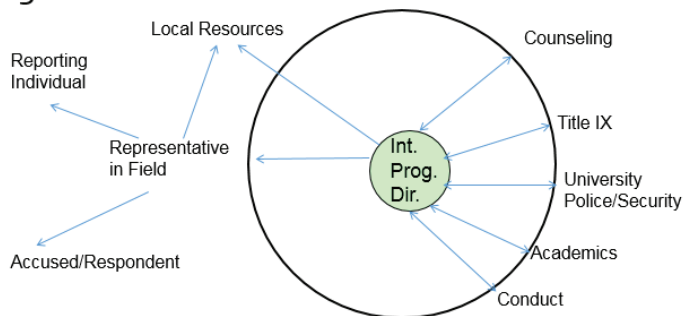
STEP #1:

Storch Model: Hub and Spoke for efficiency and good data



STEP #2:

Storch Model: Hub and Spoke for efficiency and good data



Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

intervention, and to understand the specific risks posed in that country, institutions can prevent many violations from occurring. Institutions should not and cannot simply offer training in risk reduction (walk in groups, watch your drink, lock your door) but must go beyond to educate about avoiding committing these violations and, if a bystander to such a violation, engaging in direct, distracting or delegated bystander intervention.

CONCLUSION

The Clery Act, Title IX and the Violence Against Women Act contain requirements for institutions to respond to sexual and interpersonal violence but also to provide advance training and guidance to help reduce violence. By carefully developing plans tailored to specific study abroad locations and mindful of the need to make connections between staff in the field and personnel on campus trained in responding to violations, institutions can prevent violence on study abroad and respond rapidly and effectively when such violence occurs.

SOURCES AND REFERENCES

1. Author Joseph Storch is an Associate Counsel at the State University of New York Office of General Counsel and Chair of the SUNY Student Affairs Practice Group. In addition to campus representation, he concentrates his practice on compliance with the Clery Act, Title IX and the Violence Against Women Act and assisting institutions in both complying with the law and in developing strategies to go beyond the legal requirements to best protect students. He is a graduate of SUNY Oswego, *summa cum laude*, has a Masters of Public Policy from the University at Albany, and a law degree from Cornell Law School. He has presented at two URMIA conferences.
2. Geographic reporting requirements are treated in more detail in Joseph Storch, "The Clery Act and Overseas/Distance Study: New Developments and Compliance Guidance," *NACUA Notes*, available at <http://www.higheredcompliance.org/resources/publications/CleryActAbroad.pdf> (Apr. 5, 2012) Pages 2-5.
3. A list of Clery Act reportable crimes and their definitions, updated following passage of the 2013 Violence Against Women Act Reauthorization, may be found at <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>, pages 62789-62790.
4. US Department of Education Office for Civil Rights, "April 4, 2011, Dear Colleague Letter," available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.
5. For a deeper analysis, see Joseph Storch, "Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices," National Association of College and University Attorneys Conference Paper, available at http://www.nacua.org/securedocuments/programs/June2015/05D_15_6_33.pdf (June 2015).
6. To learn more about reporting rules and distinctions between Campus Security Authorities and Responsible Employees, see Andrea Stagg and Joseph Storch, "Crime and Incident Reporting Guidelines for CSAs and Responsible Employees," available at http://www.nacua.org/documents/CrimeIncidentReportingGuidelinesCSA_September2014.pdf (Sep. 2014).
7. For example, see SUNY Clery and Title IX Procedure for International Programs, available at <http://forumea.org/wp-content/uploads/2014/08/SUNY-Clery-Policy-for-Council-on-International-Programs-FINAL-11-14.pdf>.
8. Among other things, institutions must inform victims of available sanctions and protective measures; evidence preservation; protective measures, such as no contact orders from the institution, orders of protection; procedures for institutional disciplinary procedures; Interim remedies, including options for and assistance with changing academic, living, transportation, and working situations, if requested and reasonably available; how institution will protect victim confidentiality while still doing public recordkeeping and providing protective measures; and how to report the offense on and off campus. Additionally, institutions must provide reporting victims with information about confidentiality, existing and available counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims both on and off campus; and equitable opportunities for victim and accused. For a free resource that can assist institutions in providing customized visa and immigration resources, see <http://www.suny.edu/violence-response/Visa-and-Immigration-Resource/>.

Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

FOR MORE INFORMATION

- Joseph Storch, "The Clery Act and Overseas/Distance Study: New Developments and Compliance Guidance," *NACUA Notes*, available at <http://www.higheredcompliance.org/resources/publications/CleryActAbroad.pdf> (Apr. 5, 2012), p. 2-5.
- Joseph Storch, "Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices," National Association of College and University Attorneys Conference Paper, available at http://www.nacua.org/securedocuments/programs/June2015/05D_15_6_33.pdf (June 2015).
- SUNY Clery and Title IX Procedure for International Programs, available at <http://forumea.org/wp-content/uploads/2014/08/SUNY-Clery-Policy-for-Council-on-International-Programs-FINAL-11-14.pdf>.
- Joseph Storch, "Implications of the Clery Act and Title IX for Overseas and Distance Locations," URMIA webinar, available at <https://www.youtube.com/watch?v=BaFEU8QihTM&feature=youtu.be> (Feb. 5, 2013).
- Joseph Storch, "Properly Classifying Geographic Locations for Clery Act Annual Security Report Purposes," available at http://www.higheredcompliance.org/resources/resources/ProperlyClassifyingGeoLocale_CleryAct.pdf (May 2013).
- Andrea Stagg and Joseph Storch, "Crime and Incident Reporting Guidelines for CSAs and Responsible Employees," available at http://www.nacua.org/documents/CrimeIncidentReportingGuidelinesCSA_September2014.pdf (Sep. 2014).
- Forum on Education Abroad Standards of Good Practice, <https://forumea.org/resources/standards-of-good-practice/>.
- Dana Wilkie, "Complying with Clery," *International Educator*, available at http://www.nafsa.org/_/File/_/ie_novdec14_supplement.pdf (Nov./Dec. 2014).
- Wilson Ring, "Sexual assaults in study-abroad programs draw new attention," *Associated Press*, available at <http://bigstory.ap.org/article/fe678066c1224607a2f5a0baad0aaab3/college-rape-debate-overseas-study-crimes-gain-attention> (Oct. 8, 2015).

This document is not legal advice. For legal advice, please contact your legal counsel.

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NACUANOTES

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TOPIC:

UPDATED: THE CLERY ACT AND OVERSEAS/DISTANCE STUDY: NEW DEVELOPMENTS AND COMPLIANCE GUIDANCE, 2016 EDITION

Editor's Note: Updated on April 5, 2012 to include additional guidance from the U.S. Department of Education and on September 26, 2016 to include further guidance from the Department as well as updated Handbook references.

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INTRODUCTION:

The original Clery Act^[2] guidance, the Handbook for Campus Crime Reporting ("Clery Act Handbook")^[3], issued in 2005, contained little mention of Clery Act reporting requirements for overseas locations.^[4] The 2005 Clery Act Handbook briefly stated that U.S.-owned institutions that actually *operated* locations abroad had to comply with the Clery Act^[5] and "make a good-faith effort to obtain statistics from the local police authorities,"^[6] but that simply sending students on exchange programs did not trigger reporting obligations.^[7]

That changed significantly when the Department of Education published revised guidance in February 2011. The 2011 Clery Act Handbook^[8] contained new references to counting crimes that occur overseas, including in private spaces and homes. Further guidance from the Department of Education in 2011 clarified and interpreted some of those then newly-published requirements.^[9] Most recently, the 2016 Clery Act Handbook included yet additional (and different) guidance on, among other things, reporting crimes occurring in certain distant locations.^[10]

The purpose of this NACUANOTE is to review the 2016 guidance and offer some tips for complying with it.^[11] Part I of this Note addresses some of the models that institutions use to send students to study overseas or to other locations within the United States, and provides guidance for complying with the Clery Act based upon those particular models. Part II of the Note highlights important information for

classifying and reporting Clery Act offenses occurring overseas or on distance campuses under various reporting situations.[12]

DISCUSSION:

I. Clery Reporting Requirements for Various Models of Sending Students Overseas

One of the most important principles of Clery Act compliance is that Clery Act reporting is not based on *who* the victim or assailant is, but on *where* the crime occurred. The Clery Act only requires that institutions report in the Annual Security Report crimes that occur in one of four geographic areas: on campus, in campus residence halls, on noncampus property (as defined below), and on public property immediately adjacent to and accessible from a campus.[13] Crimes that occur anywhere else are not reportable.[14]

A. Online or Correspondence Education Only (Including Military Education)

If an institution offers coursework in an online or correspondence environment only, there are no Clery Act requirements provided that the “students are never present on a physical campus.”[15] This rule applies regardless of whether the students are domestic or international. If your institution offers online or correspondence classes to soldiers located on a military base, or the institution sends faculty to teach at a base, but the institution does not own or have a written agreement to control *specific space* at that military base, then that space is not covered under the Clery Act.[16]

B. Students Overseas are Taught and Housed by a Local Institution or Third Party

As a geographically-based law, the Clery Act makes a distinction between agreements to send students to a distant location for a program versus agreements for use of specific physical space.[17] If your institution sends students abroad but does not maintain an overseas campus, and your institution does not own or control property abroad that is frequently used by students, then there is no Clery reporting requirement for crimes that occur in those locations regardless of whether your students, faculty, or staff are the victims or perpetrators.[18]

Controlling property is a defined term for Clery Act purposes. “*Controlled by* means that your institution. . . rents, leases or has some other type of *written* agreement (including an informal one, such as a letter or an e-mail) for use of a building or property, or a portion of a building or property.”[19] Further, “[e]ven if there is no payment involved in the transaction, for Clery Act purposes, a written agreement for the use of space gives your institution control of that space for the time period specified in the agreement.”[20]

If, for instance, your institution contracts with an overseas university or a third party agency to provide educational *programs* for your students, but your institution does not own or have a written agreement for specific space in a building or property, then crimes that occur there need not be reported for Clery Act purposes. However, if your institution sponsors a study abroad program with an overseas university and has some form of written agreement for housing and/or classroom *space*, your institution must report crimes for Clery purposes, as detailed in subsection F, *infra*.

C. Your Institution Maintains an Overseas or Distance Campus

As noted above, foreign campuses owned or controlled by a domestic institution that are covered by the Clery Act will likewise be covered as separate campuses, provided that they have an organized program of study and administrative personnel on campus.[21] The 2016 Clery Handbook includes new guidance on the Department of Education’s definition of these terms. “Organized program of study” means that the

location offers courses leading to a degree, certificate or other recognized credential, while administrative personnel includes those responsible for activities at the location, including directors, building coordinators, registrars or secretaries.[22] Locations where students can take some courses but not an entire program may still qualify as noncampus property.[23] Once you determine that such a campus is covered by the Clery Act, the rules for including policy statements and reporting crimes are the same as those that govern your main campus.[24]

Clery Act reportable on-campus property includes:

- (1) "Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and
- (2) Any building or property that is within or reasonably contiguous to the area identified in paragraph (1) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor)."[25] The 2016 Clery Handbook added a general standard of one mile to determine whether a location is reasonably contiguous, with exceptions for major separations between the locations.[26]

If your institution also maintains residence halls at such a campus and those residence halls are located on the campus or immediately adjacent to the campus, Clery Act reportable crimes or arrests or referrals for drugs, alcohol, or weapons that occur in those residence halls must be reported twice; once as on campus and once as on-campus residential.[27] The 2016 Clery Handbook states that if an institution-associated foundation or other institution-associated entity "owns or controls a building or property that is operated in support of, or in relation to, your institution's educational purposes, your institution is considered to be in control of that building or property." [28]

The public property requirement covers only public property around on-campus property, **not** around noncampus property owned or controlled by the institution.[29] For there to be a public property reporting requirement, the public property must be both adjacent to, and accessible from, the on-campus property.[30] If the campus is surrounded by a fence or other barrier to the public property, or is surrounded by private property, then there is no public property reporting requirement.[31]

In addition to reporting requirements, institutions that maintain a distance or overseas campus must also comply with the policy statements,[32] fire reporting (on-campus residence only),[33] missing persons (on-campus residence only),[34] crime log,[35] emergency notifications, and timely warning[36] requirements of the Higher Education Act.[37]

D. Your Institution Owns or Controls a Research Vessel, Ship, Van or Other Mobile Classroom Upon Which Your Students Travel, Study, or Stay

Crimes occurring on research boats, ships, vans or other mobile classrooms that carry students for educational purposes must be disclosed as noncampus incidents unless the mobile classroom otherwise meets the requirements of a separate campus as described above (note that the 2016 Handbook expanded this category beyond boats and ships).[38] This rule applies no matter where in the world the boat, ship or van happens to be at the time the crime occurs. If the institution owns the mobile classroom, then all crimes in all areas of such mobile classroom must be reported; if the institution controls parts of the mobile classroom, then only crimes occurring in those parts of the mobile classroom during the time in which your institution has control are reportable, as well as any crimes occurring in areas used to access the institution-controlled part of the mobile classroom.[39]

E. Students Studying Overseas are Housed in Private Homes

In discussing reporting requirements for noncampus property, the Handbook specifically states that “[h]ost family situations do not normally qualify as noncampus locations *unless* your written agreement with the family gives your school some significant control over space in the family home.”^[40] If your agreement with the host family gives your institution that control, any crimes occurring in that home that are reported to Campus Security Authorities or to the local police (from whom you will have to request statistics) need to be counted in the noncampus property category.

Such an agreement pursuant to which your institution has significant control over specific space in the home is likely to be rare. To the extent that your institution simply agrees with host families to host students, or contracts with a local third party to place the students, without reference to exercising control, there is no reporting requirement.

F. Your Institution Owns or Controls Overseas Property Frequently Used by Students

If your institution owns or controls property overseas or at a distance that does not meet the definition of a separate campus but is frequently used by students, crimes that occur there must be reported in the noncampus property category. Included in this definition is “[a]ny building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution’s educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.”^[41] The noncampus property does *not* include property that students do not frequently use (e.g., space for back office employees, housing or labs for researchers without students, etc.).^[42]

One area that can cause confusion is how to classify crimes that occur on day-long or overnight, college-sponsored trips. Typically, these crimes are not reportable because they do not occur on property “owned or controlled” by the institution.^[43] However, the Department of Education provided some additional clarification on this point regarding incidents that occur during overseas study programs at hotels or other locations to which students travel (including satellite trips from the main study location). The guidance has changed substantially between 2005 (where there was no reference to it) and 2016, where specific guidelines are included in the Handbook, so institutions should carefully review their programs and procedures again using the latest Handbook as guidance. The 2016 Handbook seems to have overturned 2012 guidance on the topic.^[44] The 2016 Handbook now states:

Repeated use of a location for school-sponsored trips: If your institution sponsors students on an overnight trip **every year** and the students stay in the **same hotel each year**, you must include portions of the hotel in your noncampus geography. For example, students in the debate club take a trip to Washington, D.C. and stay at the same hotel every year. You must include in your statistics any crimes that occur in the rooms used by your students and any common areas used to access the rooms (lobby, elevators, etc.) for the times and dates specified in the rental agreement. Note that what matters here is repeated use of a location that is owned or controlled by the institution, not the number of days it is used or whether it is used by the same students or different students.

Short-stay “away” trips: If your institution sponsors short-stay “away” trips of more than one night for its students, all locations used by students during the trip, controlled by the institution during the trip and used to support educational purposes should be treated as noncampus property. An example is a three-week marine biology study trip to Florida. Any classroom or housing space specified in the agreement between the institution and a third-party providing the space would be noncampus property. If your institution has entered into a written agreement with a third-party contractor to arrange housing and/or classroom space for a school-sponsored trip or study program (either domestic or foreign), it is assumed that the contractor is operating on behalf of the school as the school’s agent, putting the institution in control of this space. However, if your institution (or a contracted third party) does not have an agreement for the space used, your institution is not in control of the space and you are not required to count

it. For example, there are some situations, such as sports tournaments, for which the host institution makes all of the housing arrangements for visiting students. In these situations, the visiting institutions do not have a written agreement for the use of space and are not required to disclose crime statistics for the housing in which their students are located. However, the host institution would be responsible for disclosing crime statistics for the housing since they hold the agreement for the housing.

Study abroad programs: If your institution sends students to study abroad at a location or facility that you don't own or control, you don't have to include statistics for crimes that occur in those facilities. However, if your institution rents or leases space for your students in a hotel or student housing facility, you are in control of that space for the time period covered by your agreement[45].

Therefore, according to the clarification, Clery Act crimes are reportable as noncampus incidents if they occur:

- (1) In space that the institution owns or controls overseas or at a distance, and that space is used to support the institution's mission and is frequently used by students; or
- (2) On an overseas study trip which includes overnight trips and either:
 - a. The same hotel/hostel is used for one night by the same or different groups on repeated occasions (e.g., annually); or
 - b. The hotel/hostel is used by a single group for an overnight trip of two nights or more and the institution makes a written agreement for use of the space to house or offer programs to students.

Only crimes that occur during the time in which that hotel or housing company is used by the institution are reportable (e.g., if the institution hosts only a summer trip to France, a crime occurring in the winter at that location is not reportable).[46] Also, only crimes in the area that is actually controlled by the institution or in spaces that are necessary to access that area are reportable.[47] Thus, if the hotel blocks off the second floor for use by the institution's students, a crime that occurs in a student's room, in a public area of the second floor, or in the lobby, elevator, escalator, or stairwell to the second floor is reportable; a crime that occurs on the ninth floor or inside a hotel room not used by a student is not. Additionally, any crime that occurs in a public location accessible to students in the hotel during that time is reportable.[48]

This new 2016 Handbook language on short-stay away trips may complicate study abroad and short trips where the property used varies throughout a multi-day trip. For example, if a faculty-led student trip is more than one night but changes hotels every night along the way, the Handbook can be read to say that each hotel (and rented/leased classroom space) are noncampus property even if the stay is only one night. The 2012 Department of Education guidance reads as though the length of the trip is what matters, not the length of the stay in any particular place. If the trip is four days and each day a different classroom is used by written agreement, one reading of the Handbook would say that each of those classrooms are noncampus property for that duration. These changes may require more staff time devoted to tracking travel and compliance.[49]

Crimes that occur on trips or in locations that are organized by students, but are not officially organized by the institution are not reportable, as the institution has no agreement to own or control the location in which the crime or incident occurs.

As noted above, the public property reporting requirement does not cover public property around noncampus property owned or controlled by the institution.[50]

II. Properly Classifying, Counting, and Reporting Under the Clery Act

A. Learning About Reportable Crimes and Referrals

Institutions typically learn about Clery Act reportable crimes and referrals through Campus Security Authorities or through local law enforcement in the relevant jurisdiction.

1. Campus Security Authorities

Clery regulations define certain institutional employees as Campus Security Authorities and the Handbook makes clear that they are so even if they are overseas or away from the main campus of the institution.^[51] Campus Security Authorities include police or security personnel, others with responsibility for security, and officials with “significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline and campus judicial proceedings.”^[52] “Official” is defined rather broadly as “any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution.”^[53]

The individuals included above *must* be given the responsibilities of Campus Security Authorities. Institutions *may* also designate other personnel as Campus Security Authorities by listing those individuals in the Annual Security Report as individuals or organizations to which students and employees should report criminal offenses.^[54] Pastoral and professional counselors who are engaged in counseling when they receive a report of a crime are exempt from any requirements of Campus Security Authorities, even if they otherwise meet the requirements.^[55] Note there are differences between the Clery Act’s definition of a Campus Security Authority and the Department of Education’s Office for Civil Rights’ Guidance definition of a Responsible Employee for Title IX purposes.^[56] “While a person or vendor not employed by the institution does not fit squarely within any segment of the definition of Campus Security Authority, an institution may (but is not required to) give such third party similar or identical responsibilities by means of contract.”^[57]

Institutions must request statistics from all Campus Security Authorities each year to be included in the institution’s Annual Security Report.^[58] Campus Security Authorities must forward to the individual or office responsible for Clery Act incident collection (usually campus police, security, or student affairs) all allegations of Clery Act-covered crimes that the Campus Security Authority receives.^[59] At a minimum for Clery Act purposes, the Campus Security Authority should disclose the details of the crime and the location where the crime occurred.^[60] The Campus Security Authority *may* disclose the name and contact information of the victim or individual reporting the crime, or may agree to keep that information confidential at the request of the victim or individual reporting the crime.^[61] In the case of alleged dating violence, domestic violence, sexual assault, or stalking, the institution must protect the confidentiality of victims and other necessary parties.^[62]

All Campus Security Authorities should be trained in the obligations of Campus Security Authorities.^[63] In overseas programs, institutions may wish to designate and train all personnel working frequently with students as Campus Security Authorities, even if they do not meet the technical requirements of that designation. In that way, students abroad can feel they can speak to any institutional official overseas to report a crime. This suggestion is not a requirement but simply a good practice.

2. Local Law Enforcement

The 2016 Handbook instructs that a U.S. college with additional campuses or noncampus property in foreign countries or distance locations “has an obligation to make a good-faith effort to obtain statistics from local law enforcement authorities in that area.”^[64] However, domestic and international law enforcement authorities are not subject to the Clery Act, and some may not provide the information requested. U.S. institutions satisfy this Clery Act requirement by timely requesting appropriate statistics in writing from local law enforcement and being clear and specific about the information being requested.^[65] If the statistics are not supplied, this does not constitute a violation on the institution’s part^[66]. In such instances, institutions should consider adding a caveat to the Annual Report, indicating that the statistics were requested but were not supplied or were not supplied in a usable format.^[67] If

the statistics are supplied in a manner that can be utilized, then they must be included in the Annual Security Report.[68] If the local police agency requests payment to provide the statistics, “[institutions] may pay the agency, but [institutions] are not required to do so.”[69]

B. Using the Correct Law for Classifying and Counting Clery Act Crimes

Institutions must report crimes as well as certain arrests and referrals for drug, alcohol and weapons law violations that occurred on property subject to the Clery Act, so understanding the correct way to classify and count Clery crimes is important.

Criminal Offenses:[70] The Handbook requires that institutions categorize and report Clery Act Criminal Offenses (sometimes called Primary Crimes)[71] using Federal definitions[72]. Further, using the FBI’s Uniform Crime Reporting hierarchy rules, when more than one crime is committed, only the most serious Criminal Offense should be reported.[73] Completed and attempted crimes are both counted as completed.[74]

For jurisdictions in which your institution owns or controls on-campus or noncampus property (including residence halls and public property adjacent to, and accessible from, the campus), your institution must request that the local law enforcement provide those statistics using the U.S. Federal definitions, regardless of where in the world the jurisdiction is or whether the local law enforcement is familiar with these Federal definitions.[75] Again, law enforcement is under no compulsion to provide the statistics, so an institution is in compliance if it timely and clearly requests the statistics in writing, even if those statistics are not provided.[76]

Drug, Alcohol, and Weapons Law Arrests and Referrals for Discipline: Unlike Criminal Offenses, these offenses must be reported based on the local law for the jurisdiction in which the crime occurs.[77] This law may differ from the law that governs your home institution. For instance, if a Campus Security Authority finds an eighteen-year-old drinking a beer in London, it may be a violation of law in your institution’s home state, as well as a violation of institutional policy, but it is not a violation of the law in the United Kingdom and therefore a referral for disciplinary action for such activity would not count for Clery statistics. Likewise, possession of marijuana does not violate the law for students in Amsterdam (or in any U.S.[78] state that has legalized possession of marijuana) and so a referral for disciplinary action for such activity would not be included in your institution’s statistics. For institutions that operate a research vessel or semester-at-sea program, multiple countries’ laws or international maritime law may apply depending on the boat’s location. To be reportable, referrals for discipline for violations of drug, alcohol, or weapons laws must actually be *violations of law*, not just violations of your institutional policy.[79] In a case where a student is arrested and referred for discipline for the same action, count only the arrest.[80]

Hate Crimes: Institutions must report all Criminal Offenses (Primary Crimes) plus four Hate Crime-only crimes (larceny; simple assault; intimidation; and damage, destruction or vandalism of property) if motivated by bias against individuals in specific protected classes using Federal definitions.[81]

VAWA Crimes: Institutions must report incidents of domestic violence, dating violence, and stalking occurring in Clery Act geography using Federal definitions (with the narrow exception that state definitions are used, in part, to determine a covered person for domestic violence purposes).[82]

C. Distributing the Annual Security Report to Distance and Overseas Students

In addition to distributing the Annual Security Report to currently enrolled students and all employees (via a clear, stand-alone notice) at your institution’s main campus,[83] your institution may have requirements to distribute the Report to students overseas.[84] If your institution maintains a campus overseas, students at that campus must receive an Annual Security Report specific to that campus, since that campus has its own compliance requirements.[85]

If your institution does not maintain a separate campus and simply sends students overseas, either through a local campus or third party, or to noncampus property owned or controlled by the institution, then each student should receive a copy of the main institution's Annual Security Report (which may be sent electronically), as the Handbook requires that the Report be sent to "all currently enrolled students (including those attending less than full-time and those not enrolled in Title IV programs or courses)" as well as enrolled students on study abroad with another institution.^[86] The Report must be sent to all employees, with no exceptions.^[87]

The Clery Act also requires that institutions provide notice of the availability of the Annual Security Report, upon request, to prospective students and prospective employees.^[88] Based upon guidance in the 2016 Handbook and conversations with employees of the Department of Education, the following method should comply with the requirement to notify prospective students of your overseas programs (who may or may not be students at your institution): Place a clear, readable link to your institution's crime statistics on your overseas study or international education page. Additionally, place text somewhere in publications on overseas study or international education notifying readers of the existence of Clery Act statistics.^[89] Importantly, the Handbook states that this notice may be provided along with other information in a document.^[90]

D. Emergency Notifications, Timely Warnings, Crime Logs, and Missing Student Notifications for Overseas or Distance Locations

1. Emergency Notifications

If your institution does not maintain a separate campus and simply sends students overseas, either through a local campus or third party, or to noncampus property owned or controlled by the institution, then your institution does not have an obligation to develop and disclose emergency response and evacuation procedures for that location.^[91] Institutions may choose to develop such procedures—including providing appropriate emergency notifications for applicable incidents, crimes, or dangers—in which case your institution must include those procedures in your Annual Security Report policy statements.^[92]

2. Timely Warnings

Institutions must issue a timely warning for all Clery Act crimes that occur within the Clery Act geography, including crimes on noncampus property, "that are reported to Campus Security Authorities or local police agencies," and that are "considered by the institution to represent a serious or continuing threat to students and employees."^[93] If your institution is required to comply with Clery Act reporting for its overseas or distance locations, then the timely warning requirement will apply to those locations.

3. Crime Logs

If your institution maintains a separate campus overseas and that campus has a security department or campus police, then the campus must maintain a daily crime log.^[94] If your institution owns or controls noncampus property at an overseas or distance location, a criminal incident that occurs at the distant locations would only be recorded in the daily crime log if the incident was reported to the institution's campus police or security department.^[95]

4. Missing Student Notifications

If your institution maintains a separate campus overseas with on-campus student housing facilities, those campuses also must comply with missing student notification regulations. The 2016 Handbook specifically states that the missing student notification regulations do not apply to students who are residing off-campus while attending study abroad programs.^[96]

E. Retaining Clery Act Records from Overseas or Distance Locations

All Clery Act records must be retained for at least seven years to facilitate a Department of Education program review.^[97] Note that such documents include police and fire reports, judicial reports, crime logs, timely warnings and emergency notifications, letters to local jurisdictions requesting crime statistics, correspondence with Campus Security Authorities, and any other documents used to comply with the Clery Act.^[98] As a practical matter, auditors conducting a program review of Clery compliance have asked to see not only underlying reports of Clery Act crimes, but also underlying reports that were *not* Clery Act crimes to determine whether the institution is properly classifying incidents. To avoid difficulty in a program review, it would be a best practice to retain such documents for the applicable time period as well.

CONCLUSION:

This NACUANOTE is not intended as a replacement for a careful reading of the Clery Act statute, regulations, and Handbook, but is rather intended to highlight and explain subjects that are important for complying with the overseas and distance reporting requirements of the Clery Act. Institutions should carefully review their overseas and distance programs, determine what aspects (if any) of the Clery Act govern such programs, and train personnel to properly comply with the Act and correctly report applicable statistics to the campus community.

RESOURCES:

U.S. Dep't of Educ., Office of Postsecondary Educ., [THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING](#) (June 2016).

[NACUA Clery Act Resource Page](#)

Joseph Storch, Univ. Risk Mgmt. & Ins. Ass'n, [Risk Management Considerations Regarding the Clery Act, Violence Against Women Act \(VAWA\) and Title IX When Students Study Abroad](#) (Jan. 2016).

Joseph Storch and Natalie Mello, Nat'l Ass'n of Coll. & Univ. Attorneys, [Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices](#) (June 2015).

ENDNOTES:

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[2] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012); 34 C.F.R. § 668.46 (2015).

[3] U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 2005 [hereinafter 2005 HANDBOOK].

[4] For brevity, this Note may use the terms “overseas” or “abroad,” but the same rules apply to all distant properties owned or controlled by an institution, whether in another country or in another part of the United States (e.g., housing for students participating in a “semester in Washington” program).

[5] 2005 HANDBOOK, *supra* note 2, at 19.

[6] *Id.* at 56.

[7] *Id.* at 19.

[8] U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 2011 [hereinafter 2011 HANDBOOK].

[9] An argument could be made that nothing has changed; that the requirements were always there, but were not specified in the Handbook. Such a debate is outside the scope of this Note. This Note will seek simply to explain the recently published and clarified guidance from the Department of Education. It should be noted that the Handbook is a valuable tool, but it is not itself law. Where in conflict, the law and regulations take precedence. That said, it is the Handbook that guides auditors from the Department of Education when they conduct program reviews of compliance with the Clery Act, so an understanding of this guidance is critical. See U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 1-4, 15 [hereinafter 2016 HANDBOOK], <http://www2.ed.gov/admins/lead/safety/handbook.pdf>. For clarity, references to the differently-paginated 2016 Handbook will use the format (Chapter-Page, Page).

[10] *Id.*

[11] Previous NACUANOTES covering Higher Education Opportunity Act (HEOA) changes to the Clery Act and the distinctions between the 2005 and 2011 Handbooks, as well as a University Risk Management and Insurance Association White Paper on the distinctions between the 2011 and 2016 Handbooks, may afford in-depth background on these laws. See Joseph Storch, *Safety, Missing Students and Fire Reporting Requirements of the Higher Education Opportunity Act*, NACUANOTES, Vol. 8, Iss. 13 (Aug. 25, 2010), <http://www.nacua.org/docs/default-source/legacy-doc/nacuanotes/cleryfiresafety.pdf?sfvrsn=6>; Joseph Storch, *The 2011 Clery Handbook: New Developments and Important Changes*, NACUANOTES, Vol. 9, Iss. 12 (June 10, 2011), <http://www.nacua.org/docs/default-source/legacy-doc/nacuanotes/the-2011-clery-handbook-new-developments-and-important-changes.pdf?sfvrsn=0>; JOSEPH STORCH & ANDREA STAGG, UNIV. RISK MGMT. & INS. ASS'N, THE 2016 CLERY HANDBOOK: NEW DEVELOPMENTS AND IMPORTANT CHANGES (July 2016)

[hereafter URMIA WHITE PAPER]. This Note is limited to Clery Act reporting on study abroad. For a discussion of Title IX guidance and Violence Against Women Act Clery amendment *response* to violations, see JOSEPH STORCH, UNIV. RISK MGMT & INS. ASS'N, RISK MANAGEMENT CONSIDERATIONS REGARDING THE CLERY ACT, VIOLENCE AGAINST WOMEN ACT (VAWA) AND TITLE IX WHEN STUDENTS STUDY ABROAD (Jan. 2016) and JOSEPH STORCH & NATALIE MELLO, NAT'L ASS'N OF COLLEGE AND UNIV. ATTORNEYS, REPORTING ON STUDENT SAFETY AND SECURITY ABROAD: LEGAL REQUIREMENTS AND BEST PRACTICES (June 30, 2015), http://www.nacua.org/docs/default-source/legacy-doc/conference/june2015/05d_15_6_33.pdf.

[12] Foreign institutions not owned or maintained by domestic institutions are not governed by the Clery Act and have no Clery Act reporting requirements. 2016 HANDBOOK, *supra* note 9, at 1-4.

[13] *Id.* at 2-1 to 2-27, 24-50.

[14] The one exception is the crime log that each institution with a security or police department must maintain. In rare cases, departments will have an additional patrol area outside of the four geographic areas for reporting. In such cases, any crime (Clery reportable or otherwise) reported within that additional patrol jurisdiction must be noted in the crime log, although it need not be included in the statistics submitted to the Department of Education and published in the Annual Security Report. *Id.* at 2-15 to 2-16, 38-39; 5-1 to 5-8, 126-133; 13-6, 223.

[15] *Id.* at 1-3 to 1-4, 14-15. Note that if students only come to the institution to attend commencement or graduation, attendance at this event alone does not result in Clery Act obligations. *Id.* at 1-4, 15.

[16] *d.* at 2-8, 31.

[17] *Id.* at 2-21, 44. An institution's Clery Act obligations will arise from the institution's control over specific physical space. Whether an institution has incorporated as a foreign entity or established a registered office in a foreign country is not relevant to the determination of Clery Act reporting obligations. [18] This is not to say that you have no responsibilities or should not or may not take any action. Your institution may indeed take action in those circumstances pursuant to the institution's policies, the policies of the owners of the programs or space being utilized, or applicable legal requirements. Also, recall that Clery Act reporting is based on geographic location, not the identity of the victim or assailant. Crimes that occur in reportable geographic areas are included in Clery reporting even if the victim or assailant is a stranger to the institution. *Id.* at 4-1, 108.

[19] *Id.* at 2-2, 25.

[20] *Id.*

[21] *Id.* at 2-6 to 2-8, 29-31.

[22] *Id.* at 2-6 to 2-7, 29-30.

[23] *Id.* at 2-8, 31.

[24] *Id.* at 2-6, 29.

[25] *Id.* at 2-2, 25.

[26] *Id.* at 2-3 to 2-4, 26-27.

[27] *Id.* at 2-9 to 2-10, 32-33.

[28] *Id.* at 2-3, 26.

[29] *Id.* at 2-20, 43. For an in-depth discussion of public property reporting requirements, see Joseph Storch, *The 2011 Clery Handbook: New Developments and Important Changes*, *supra* note 11.

[30] 2016 HANDBOOK, *supra* note 9, at 2-11, 34. In some cases, where a public road or bike path runs through a campus, there can be public property within a campus, provided it is accessible from the on-campus property (e.g., a sealed highway running over a campus with no entrance or exit ramps from the campus is not accessible from the campus and so crimes occurring on that highway are *not* reportable as occurring on public property).

[31] *Id.* at 2-12 to 2-13, 35-36; 2-17, 40. If there is a gate that is accessible, the sidewalk, street, and sidewalk running the entire length of the side with the gate is public property. *Id.* at 2-17, 40.

[32] *Id.* at 7-1 to 7-9, 152-160.

[33] *Id.* at 11-1 to 14-6, 208-231.

[34] *Id.* at 10-1 to 10-7, 200-206.

[35] *Id.* at 5-1 to 5-8, 126-133.

[36] *Id.* at 6-1 to 6-17, 134-150.

[37] *Id.* at 2-6, 29.

[38] *Id.* at 2-22, 45.

[39] *Id.* at 2-21 to 2-22, 44-45.

[40] 2011 HANDBOOK, *supra* note 8, at 30-31 (emphasis added). One example provided by the Department of Education is a host family home that includes a separate apartment, and the institution is renting that apartment.

[41] 2016 HANDBOOK, *supra* note 9, at 2-18, 41.

[42] *Id.* at 2-18 to 2-19, 41-42.

[43] *Id.* at 2-25, 48.

[44] See DEP'T OF EDUC., CAMPUS SAFETY HELP DESK, CLERY CAMPUS SAFETY SURVEY (March 2012). In issuing the communication, the Department of Education requested that, if used as guidance, the communication be published as a single document. Since only the relevant part of the communication was used in the text, to honor that request, the entire text of the communication can be found at <http://counsel.cua.edu/res/docs/Clery-Campus-Safety-Survey.pdf>.

[45] 2016 HANDBOOK, *supra* note 9, at 2-25 to 2-26, 48-49 (emphasis added).

[46] *Id.* at 2-20, 43.

[47] *Id.* at 2-20 to 2-21, 43-44.

[48] *Id.* at 2-20, 43. While crimes occurring behind closed doors in hotel rooms not occupied by students are not reportable, the Department of Education has advised that crimes occurring in public places where access is granted to an institution's students through the written agreement (e.g., the hotel pool or sauna,

breakfast area, lounge, etc.) are reportable as crimes occurring in noncampus property. Note that if an institution owns the property, crimes occurring in any part of that property at any time are reportable, even if students are not present on that particular day. *Id.*

[49] See URMIA WHITE PAPER, *supra* note 11, at 6-7, for further examples.

[50] 2016 HANDBOOK, *supra* note 9, at 2-20, 43. For an in-depth discussion of public property reporting requirements, see Joseph Storch, *The 2011 Clery Handbook: New Developments and Important Changes*, *supra* note 11.

[51] 2016 HANDBOOK, *supra* note 9, at 4-2 to 4-5, 109-112.

[52] *Id.* at 4-2 to 4-3, 109-110.

[53] *Id.*

[54] *Id.* at 4-4, 11. to 4-5, 109-112.

[55] *Id.* 4-7 to 4-8, 114-115.

[56] Compare U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 14-17 (Apr. 2014) [hereinafter TITLE IX Q&A],

<http://www2.ed.gov/about/offices/list/ocr/docs/ga-201404-title-ix.pdf>, with 2016 HANDBOOK, *supra* note 9, at 4-5, 112. A Responsible Employee under Office for Civil Rights guidance is an employee required to address unequal treatment on the basis of gender, usually by notifying the Title IX Coordinator and following institution policy to address the unequal treatment and prevent its recurrence. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 13 (Jan. 2001); TITLE IX Q&A, *supra*, at 15-16.

[57] Whether or not your institution pays an individual is not a factor in determining whether that individual is a Campus Security Authority. 2016 HANDBOOK, *supra* note 9, at 4-3, 110.

[58] *Id.* at 4-1, 108, 4-9 to 4-11, 116-118.

[59] *Id.* at 4-5, 112.

[60] In this manner, the institution can properly determine how to classify the Clery Act crime and whether the crime occurred in one of the four applicable geographic locations. Please note that this does not mean that an institution may not or should not take appropriate additional actions, including involving local police, referring an assailant for judicial or conduct charges, providing counseling to a victim, or other actions; this is simply the minimum information gathering required for compliance with the Clery Act. In fact, other laws, such as Title IX, may require that institutions take certain additional actions when they know or should have known about certain incidents involving sexual harassment and sexual violence. See U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague: Title IX Requirements Related to Sexual Harassment and Sexual Violence* (April 4, 2011) [hereinafter April 2011 Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; JOSEPH STORCH, UNIV. RISK MGMT. & INS. ASS'N, *supra* note 11.

[61] 2016 HANDBOOK, *supra* note 9, at 4-8, 115, 4-11, 118.

[62] *Id.* at 8-12 to 8-13, 173-174. Note again the distinction between the Clery Handbook requirement for Campus Security Authority reporting and Title IX guidance requiring identification of the reporting individual to the Title IX Coordinator. See April 2011 Dear Colleague Letter, *supra* note 60.

[63] 2016 HANDBOOK, *supra* note 9, at 4-10, 117.

[64] *Id.* at 4-12, 119.

[65] *Id.* at 4-14 to 4-16, 121-123. As a best practice, institutions should send these letters early in the year to better ensure that the information is available in time to be included in the statistics submitted to the Department of Education and published in the Annual Security Report. *Id.* at 4-14. A program reviewer may not view letters sent to local law enforcement shortly before the deadline as a "good faith effort." The institution should include in the letter how to respond appropriately and in an efficient manner, as well as any other pertinent information that helps local law enforcement respond to the request. As a best practice, for those local law enforcement agencies that will not provide usable statistics, some institutions include language in the letter instructing the local law enforcement to notify the institution that they are not able to provide the appropriate statistics by responding to an email or mailing address. Institutions are also urged to send written follow-up requests to further evidence that a "good faith effort" was undertaken to obtain the requested statistics.

[66] *Id.* at 4-12, 119.

[67] *Id.* at 4-17 to 4-18, 124-25.

[68] *Id.* at 4-12 to 4-13, 119-20. For instance, if a city police department, foreign or domestic, provided an institution with statistics for all crimes that occurred in the city in a calendar year with no geographic or

temporal breakdown, those numbers are not in a form that can be utilized because the Clery Act requires that a college report crimes within designated geographic areas (and for certain noncampus property, only at times frequently used by students), not all crimes that occur in an entire city. *Id.* at 4-17, 124.

[69] *Id.* at 4-16, 123.

[70] Sometimes referred to as Primary Crimes or Part I offenses.

[71] Clery Act Criminal Offenses are described in the 2016 Handbook at 3-4 to 3-23, 55-74. They include Murder and Non-Negligent Manslaughter, Manslaughter by Negligence, Rape, Fondling, Incest, Statutory Rape, Robbery, Aggravated Assault, Burglary, Motor Vehicle Theft, and Arson.

[72] Regarding such Federal crime definitions, the 2016 Handbook instructs institutions to classify Criminal Offenses based on FBI Uniform Crime Reporting (UCR) definitions. *Id.* at 3-3, 54.

[73] *Id.* at 3-24 to 3-25, 75-76. Note that there are exceptions to the hierarchy rule. See *id.* at 3-24 to 3-35, 75-86; 3-41, 92.

[74] *Id.* at 3-6, 57; 3-9 to 3-10, 59-60; 3-13 to 3-15, 64-66; 3-20 to 3-21, 71-72; 3-28, 79; 3-47, 98; 3-49, 100; 3-51 to 3-54, 102-105; 11-3, 210; 12-5, 216. The exception to this rule is attempted murder and attempted manslaughter. If the victim does not die, this crime should be classified as an aggravated assault, not a murder/manslaughter. *Id.* at 3-4, 55.

[75] *Id.* at 4-12 to 4-18, 119-125.

[76] *Id.* at 4-12 to 4-13, 119-20; 4-17 to 4-18, 124-25.

[77] *Id.* at 3-42, 93; 3-47 to 3-49, 98-100.

[78] Cf. *id.* at 3-48, 99 (discussing not counting marijuana referrals for discipline in states that have decriminalized possession of marijuana).

[79] *Id.* at 3-42, 93.

[80] *Id.* at 3-44, 95. For information on hierarchy options in properly counting drug, alcohol, and weapons arrests, see Joseph Storch, [The 2011 Clery Handbook: New Developments and Important Changes](#), *supra* note 11, at 5-6.

[81] *Id.* at 3-2, 53; 3-25 to 3-35, 76-86.

[82] *Id.* at 3-2, 53; 3-36 to 3-41, 87-92.

[83] *Id.* at 9-7 to 9-8, 192-193.

[84] See *id.*

[85] See *id.* at 2-6, 29.

[86] See *id.* at 9-7 to 9-8, 192-193.

[87] *Id.* at 9-7, 192.

[88] *Id.* at 9-7, 192, 9-9 to 9-10, 194-195.

[89] *Id.* at 9-9 to 9-10, 194-195. The language must include a statement of the report's availability, a description of its contents, the exact URL at which Clery information may be found, and the opportunity to request a paper copy. *Id.* Please do not take this advice as an instruction to destroy current documents in use! That is wasteful and unnecessary. Rather, in an effort to continually improve Clery compliance, you may consider making this statement a part of appropriate *future* publications, and alerting and educating publications and marketing personnel of the need to include this statement somewhere in these documents.

[90] *Id.* at 9-9, 194.

[91] *Id.* at 6-1, 134.

[92] *Id.* at 6-1 to 6-2, 134-35.

[93] *Id.* at 6-12, 145.

[94] See *id.* at 5-1 to 5-2, 126-127.

[95] *Id.*

[96] *Id.* at 10-1, 200.

[97] *Id.* at 9-11, 196. Note that your institution or state may require specific retention periods for Clery Act records or the Annual Safety and Fire Reports that are longer than seven years.

[98] Depending upon the policies and practices of your institution, this is almost certainly *not* a comprehensive list.

Luggage, Sensible Shoes, Your Passport, and Federal Law: What To Pack (And Unpack) For International Programs

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The Forum on Education Abroad

I. Introduction:

Colleges and universities send large numbers of students each year to a myriad of international higher education experiences.¹ These experiences are a very important part of the educational experience for many students and almost all students have a positive and safe experience when they go abroad. A very small percentage of students who study internationally are arrested, go missing, or are injured or killed. While incidents occur domestically on and around campuses, and occur at higher relative numbers when compared to similar incidents in the international environment,² challenges in response and prevention can be heightened, a number of overlapping laws and standards apply, and those different laws and standards are compounded by language and cultural differences.

Several United States federal laws ostensibly govern higher education overseas study. These laws should not be confused with risk management standards or best practices for insuring safety. In fact, some of the laws when applied in certain ways may actually lead to greater danger for our students. Colleges should endeavor to comply with the laws discussed in this presentation and outline but take care when doing so increases risk.

This conference paper assumes a general knowledge of the Clery Act, Title IX and related obligations.³ Further, this conference paper concentrates on international reporting and response requirements, not general liability questions in study abroad.⁴ Included in this

¹ According to the latest Open Doors report, more than 330,000 students studied overseas in the 2016-2017 academic year. I.I.E. *Open Doors: U.S. Study Abroad Data*, available at <https://www.iie.org/Research-and-Insights/Open-Doors/Data/US-Study-Abroad/Destinations> (2018).

² Forum on Education Abroad, *Comparing College Student Mortality Rates in the U.S. With Mortality Rates While Abroad*, at 6, available at <https://forumea.org/wp-content/uploads/2018/03/ForumEA-Mortality-Rates-18.pdf> (2018).

³ Rather than including general information this paper will, where applicable, point towards resources that may assist in compliance.

⁴ Readers interested in the more general questions of liability are commended to a Journal of College and University Law article on point. See Footnote 20 in Robert J. Aalberts, Chad Marzen, and Darren Prum, *Studying is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 J. of College and Univ. L. 189 (2015) (collecting articles on point).

conference paper is a sample policy developed by The State University of New York as well as an article on risk management considerations published by the University Risk Management & Insurance Association.

II. Legal Requirements:

Federal law, regulations and sub-regulatory guidance require that colleges and universities report statistics of certain crimes in specific locations, and take certain actions when they learn of certain crimes. Depending upon the outcome of a pending regulatory process, there may also be obligations to respond to harassment, assault, or unequal treatment on the basis of sex. The laws and guidance overlap somewhat when students study overseas, but they use different standards and definitions that can be confusing to higher education professionals (and likely even more confusing to students), and the regulatory regimes leave substantial gaps that can be filled by institutional policy.

As a note, the Clery Act (including the 2013 Violence Against Women Act amendments) and Title IX are not risk management laws, nor should they be seen as prescriptions for running safe overseas programs.⁵ Primarily these laws require response and consumer reporting, and do very little to lower the risk of injury, illness, or victimization in study abroad the way evidence-based prevention programs and risk management processes may reduce harm.⁶ We will begin with information on these laws and special issues raised in the overseas environment.

A. The Clery Act:⁷

Prior to 2011, the 2005 Clery Act Handbook⁸ listed few requirements outside the United States. The 2011 Clery Act Handbook⁹ significantly expanded reporting and response requirements in certain international programs.¹⁰ These new administrative

⁵ For information on risk management standards, please see *Standards of Good Practice for Education Abroad* (5th Ed.), FORUM ON EDUCATION ABROAD, available at <http://www.forumea.org/wp-content/uploads/2014/08/Standards-2015.pdf> (2015). Note the 6th Edition is anticipated in 2020. For more information, see <https://forumea.org/resources/standards-of-good-practice/>.

⁶ There are aspects of the Violence Against Women Act that *do* address training and risk reduction in an effort to address and prevent future crimes and incidents.

⁷ For a more detailed treatment of precise Clery Act requirements in the distance and overseas environment, please see Joseph Storch, *Updated: The Clery Act and Overseas/Distance Study: New Developments and Compliance Guidance*, 2016 Edition, 15 NACUA Notes 1 (Sep. 26, 2016). Please ensure that you are using the 2016 version as federal sub-regulatory guidance changed after the NACUA Note was initially published in 2011 and updated in 2012. Please also note that the NACUA Note precedes the 2018 Title IX Notice of Proposed Rulemaking discussed below.

⁸ U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Crime Reporting*, Washington, D.C., 2005.

⁹ U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, Washington, D.C., 2011.

¹⁰ It should be noted that the Department, in a conversation, agreed that these requirements had never been issued in writing, but insisted that the same rules had always applied; they just had never been written down. There were no relevant statutory or regulatory changes to Clery Act geography during the time period between 2005 and 2011.

reporting requirements generally maintain the Clery Act's geographic rules (with some new wrinkles) and require reporting of certain incidents that occur in certain locations, (often referred to as Clery geography). In 2013, the reauthorization of the Violence Against Women Act (VAWA)¹¹ amended the Clery Act to add new reporting within the standard Clery geographic locations. Interestingly, while reporting under VAWA maintains the traditional geographic standards, the law added certain response requirements that eschew geography and require action based on crime victim status, regardless of where an incident occurred. This aspect of the VAWA looks more like "classic" Title IX, discussed below.

B. Title IX:

Title IX prohibits unequal treatment on the basis of sex in access to educational programs. While the text of Title IX begins "No person in the United States shall...", the Department of Education has been inconsistent in its interpretation of this law in international environments. For many years, different regional offices of the Office for Civil Rights have said that Title IX does not apply outside of the United States while others insist that Title IX is completely applicable outside of the United States and, in fact, is not based on geographic location at all.

Case law is similarly split on whether Title IX applies outside of the U.S.¹² Recent judicial opinions on unrelated federal laws have ruled that if Congress intends for a law to apply internationally, it must specifically say so, and agencies or law enforcement may not simply assume international application where silent.¹³ In its 2011 Dear Colleague Letter (withdrawn in 2017¹⁴), the Department stated that Title IX applies "in connection with all the academic, educational, extracurricular, athletic, and other programs of the school . . ." including those activities occurring off-campus or on a study abroad program.¹⁵ In 2018, The Department of Education proposed regulations governing Title IX.¹⁶ One provision would change the obligation to respond under Title IX to harassment or assault that occurs outside of the United States. As of the date of this conference paper, the regulations have not been finalized and may differ from their proposed language.

¹¹ P.L. 113-4, Mar. 7, 2013; Codified at 20 U.S.C. §1092(f).

¹² Compare King v. Board of Control of Eastern Michigan University, 221 F.Supp. 2d 783 (E.D. Mich. 2002) with Mattingly v. Univ. of Louisville, 2006 WL 2178032 (W.D. Ky. July 28, 2006) and Phillips v. St. George's University, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007). For an excellent in-depth discussion of each of these cases in a very recent Journal of College and University Law, please see Aalberts, *supra* Note 4.

¹³ See Generally RJR Nabisco, Inc., Et Al. v. European Community Et Al., 579 U.S. ___, 136 S. Ct. 2090 (2016) ("The question is not whether we think 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmatively and unmistakably instructed that the statute will do so. 'When a statute gives no clear indication of an extraterritorial application, it has none.'" (internal citations omitted)); See Also Morrison v. National Australia Bank Ltd., 561 U. S. 247, 255 (2010); Microsoft Corp. v. AT&T Corp., 550 U. S. 437, 454 (2007).

¹⁴ OFFICE FOR CIVIL RIGHTS, U.S.DEPT. OF EDUCATION, Q&A ON CAMPUS SEXUAL MISCONDUCT (Sept. 1, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

¹⁵ OFFICE FOR CIVIL RIGHTS, U.S.DEPT. OF EDUCATION, DEAR COLLEAGUE LETTER (Apr. 4, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

¹⁶ U.S. Department of Education, Title IX Proposed Regulations, Vol. 83, Fed. Reg., pp. 61473, 61479, 61483, 61497 (Nov. 29, 2018).

While this change may be seen as consistent with the aforementioned court cases, this raises significant inconsistencies with the response requirements of the VAWA amendments to the Clery Act (which themselves are only a few years old). Those requirements on the face of the Regulations are not limited to Clery Act geography. The Regulations apply the response obligations to the institution regardless of whether the incident disclosed occurred on campus or off campus. Institutions must have a policy statement explaining the process and procedure for disclosures of sexual assault (and three other crimes) and the policy statement would apply “whether the offense occurred on or off campus.”¹⁷ In its 2016 Clery Handbook, the Department clearly states and emphasizes that “[y]ou must follow the procedures described in your statement (of response, investigation and adjudication policy) **regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred** (i.e., on or off your institution’s Clery Act geography).”¹⁸

The Department, even while defining sexual harassment to include, in part, sexual assault as defined in the Clery Act, uses a very different standard of geographic jurisdiction. In its Proposed Regulations, the Department now states that “[t]he requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.”¹⁹ This means that the Federal Student Aid office of the Department may fine an institution for not appropriately responding to a sexual assault occurring overseas even as the Office for Civil Rights of the Department assigns the institution no response obligation whatsoever.

Whether the Regulations are finalized or not, it appears that the current Office for Civil Rights will not find a college out of compliance with Title IX for an assault, harassment, or unequal treatment on the basis of sex/gender that occurs overseas.²⁰ This has no impact on the work of the Federal Student Aid office that interprets and audits for compliance with the Clery Act, and that office has issued no guidance on whether its approach will change concomitant with the approach of the Office for Civil Rights. Regardless, institutions should look to their own policies, including their Code of Conduct, to determine what actions the institution would take to respond to reports of sexual and interpersonal violence on study abroad.

¹⁷ Violence Against Women Act, 79 Fed. Reg. at 62786.

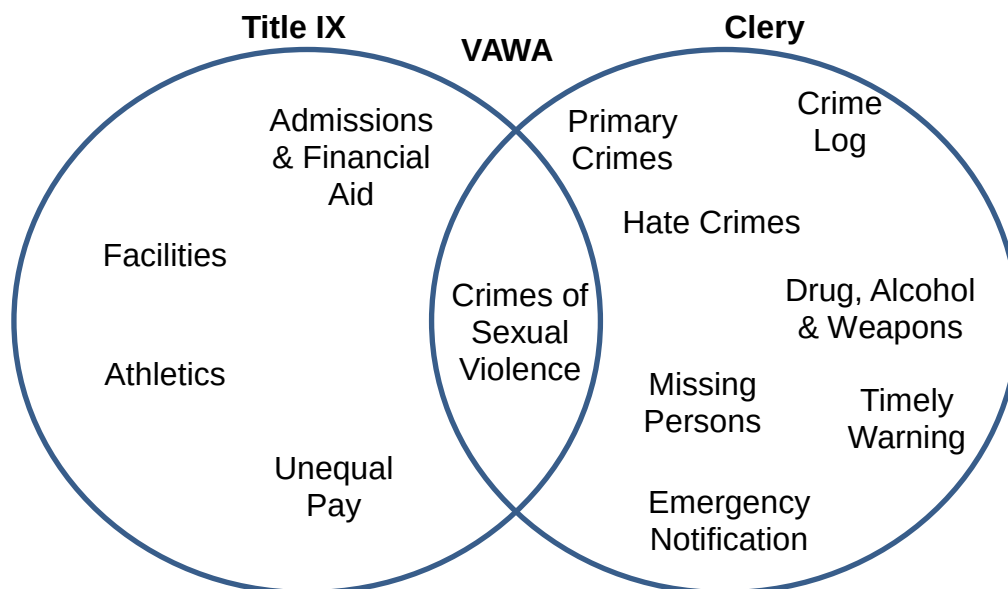
¹⁸ U.S. DEPARTMENT OF EDUCATION, THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 2016 EDITION, pp. 8-16, available at <https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf> (emphasis in original) (hereafter 2016 Clery Handbook).

¹⁹ Title IX Proposed Regulations, at 61496.

²⁰ It goes without saying that it is a best practice, often reflected in campus policy, to address discrimination, including sex discrimination, whether it is technically required or not.

C. Where VAWA and Title IX Meet:²¹

Though often discussed together, most of Title IX *does not* overlap with most of the Clery Act. In addition to using different standards, very little of each law is also included in the other law. The following Venn diagram²² shows where these laws do not overlap and highlights the very limited area where these laws and the concepts in these laws overlap.



Venn diagram of the Clery Act & Title IX

Title IX and VAWA/Clery meet in the area of response to (most)²³ sexual and interpersonal violence. Colleges must provide certain notifications to all students and other notifications to all victims/survivors of these crimes. Further, the law and the guidance create rules that govern the conduct process. Whether or not the Title IX rules end up applying overseas, institutions (and their vendors and partners) should understand the

²¹ For a more detailed discussion of the requirements of the Violence Against Women Act, please see Andrea Stagg and Joseph Storch, *An Overview of the Violence Against Women Act (VAWA) Amendments to the Clery Act*, UNIVERSITY RISK MANAGEMENT AND INSURANCE ASSOCIATION GOVERNMENT AND REGULATORY AFFAIRS WHITE PAPER, available at https://higherlogicdownload.s3.amazonaws.com/URMIA/9c74ddba-4acc-4dcd-ba3a-d6cd4c945342/UploadedImages/documents/grac/GRAC_WP_VAWA-Clery_20170530.pdf (May 2017).

²² Prepared with Barnard College Deputy General Counsel Andrea Stagg.

²³ Many in the popular media conflate these two laws, but higher education professionals must be careful as they do not completely overlap. There are several VAWA reportable crimes that do not implicate Title IX. For instance, if a student constantly contacts a professor regarding a paper, and the professor contacts student affairs to complain of the incessant contact, the report may count as a VAWA stalking if it meets all the applicable requirements (course of conduct directed at a specific person that could cause a reasonable person to suffer emotional distress, and either the student is on Clery property when sending the messages or the professor is on Clery property when reviewing the messages). But there is no unequal treatment on the basis of sex. Similarly if a father meets up with his son, a student, in institutional-owned property overseas and commits an aggravated assault against the student, that would be reportable as an aggravated assault and as a domestic violence felony or misdemeanor crime of violence, but it does not implicate Title IX responsibilities.

reporting and response requirements of sexual and interpersonal violence under the VAWA/Clery in the study abroad environment.

D. Reporting for Clery/VAWA Overseas:

The Clery Act requires that we report all Clery Act countable crimes that occur on relevant Clery geography that are reported either to a Campus Security Authority or to local law enforcement.²⁴ The Department of Education, in oral guidance to the author, stated that it looks positively on a policy of declaring all faculty and staff who travel overseas with students as Campus Security Authorities. This makes sense as our college students are most likely to look to faculty and staff from their home institution for support in crisis. The other requirement, querying local law enforcement is a bit more challenging.

Clery Act Part I (often called Primary Crimes or “classic” Clery crimes), Part III (hate crimes), and Part IV (VAWA crimes and incidents) are reportable using United States F.B.I. Uniform Crime Reporting definitions.²⁵ It goes without saying that local law enforcement in small towns and big cities outside of the U.S. look askance at being asked to report statistics using such definitions. While there is no empirical data on reporting rates, anecdotal evidence is that few if any schools receive useful information for Clery reporting when requesting statistics from overseas law enforcement. Colleges are in compliance simply by sending the letter,²⁶ even if they never hear back from the local law enforcement, or the data received back cannot be used.²⁷

But requesting such statistics is not without cost. Anecdotal stories have come back of local law enforcement in certain countries reacting very poorly to these requests. They become suspicious of the programs, especially since many of the questions revolve around sexual assaults, which they may view very differently than we do in the United States. On occasion, the request has led to heated discussions with program providers. The Department has declined to exempt overseas locations from the requirement that we request statistics from local law enforcement, even when presented with an argument about how little data institutions receive back. The Department sees no difference between the law enforcement surrounding the main campus property or domestic Noncampus property, and such property on another continent, even in countries where requesting such statistics might actually create more danger than it prevents (more on this in Section II(G) below).

While Clery Act crimes in Parts I, III, and IV require that an institution report all reports of such crimes, regardless of whether victim or assailant is identified, and

²⁴ See 2016 Clery Handbook, Chapter 4.

²⁵ See 2016 Clery Handbook at 3-3. On occasion, the Department looks to definitions from the National Incident Based Reporting System.

²⁶ See 2016 Clery Handbook at 4-12 — 4-13.

²⁷ For example, if a request for statistics from local law enforcement after a semester in Paris where the institution rented apartments for students yields all the crimes in all of Paris for all dates, an institution need not report all those crimes unless they can be broken down to Clery Act crimes occurring in the relevant Clery geography during the times that the students lived in the apartments. Further, institutions need not pay for statistics or purchase special software to view statistics. See 2016 Clery Handbook at 4-12 — 4-13.

regardless of whether there is an arrest, trial, or conviction, for Part II drug, alcohol and weapons arrests and referrals for discipline, we only count arrests or referrals for discipline for breaking local law.²⁸ This leads to significant comparison issues domestically (some states ban all guns from campus while others allow open or concealed carry; state law on possession of marijuana can differ significantly) and even more difficulty internationally.

For example, a 19-year-old student becomes very drunk on a trip to England and is referred for campus discipline at the home campus for possession of alcohol and other deleterious behavior. While such a violation at the home campus would count for Clery, it does not here as such drinking does not violate local law in London. Additional examples abound. To correctly report, an institution must know what the local law is for each such violation. Frankly, this is a difficult bureaucratic exercise with little practical return for student consumer information. Neither the Department, nor any other federal agency, have published a list of drug, alcohol and weapons laws in other countries, making reporting difficult and leading to inconsistent reporting among different institutions.

E. Confusion in Defining On Campus Property Overseas:

In recent years, many institutions have opened campuses in overseas locations. These locations may count as On Campus property under the Clery Act if they meet the definitions established in the Handbook.²⁹ The most important of these definitions for international programs is the definition of “separate campus.”³⁰ This definition covers distant locations owned or controlled by the institution that have an “organized program of study” and “at least one person on site acting in an administrative capacity.”³¹ The 2011 Clery Act Handbook initially did not define organized program of study (and the concept was completely absent from the 2005 Handbook, the statute and the regulations), but in oral guidance, a Department representative told the author that this is a location wherein a student can complete a degree, diploma or certificate without ever taking a class at the main campus of the institution. Consistent with that oral guidance, the Department wrote in a Final Program Review Determination³² that “for Clery Act reporting purposes, educational instruction at a location does not have to result in a certification or a degree to be included in the crime statistics. Such locations may include satellite, extension, or similar types of noncontiguous sites that have an organized program of study regardless of length or resulting credentials.”³³ Though inartful, this sentence discussing On Campus and Non Campus property seems to support the oral guidance provided by the Department. In the 2016 Handbook, the Department added the following brief definition: “An organized program of study means that the location offers courses in educational programs leading

²⁸ Regardless of the United States definition. See 2016 Clery Act Handbook at 3-42.

²⁹ See 2011 Clery Handbook, Chapter 2.

³⁰ See 2011 Clery Handbook at 2-6 — 2-8.

³¹ *Id.*

³² Letter from Cynthia Thornton, Area Case Director, School Participation Team, Dallas, United States Department of Education to V. Burn Hargis, President, Oklahoma State University, *available at* <https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/cleryact/oklahomastate/OklaFinalFPRD080411.pdf> (Aug. 4, 2011).

³³ *Id.* at 13.

to a degree, certificate, or other recognized credential.”³⁴ While this seems consistent with the Program Review and oral guidance, the language is a bit less clear, which could create compliance challenges.

F. Confusion in Defining Non Campus Property Overseas:

Study abroad mostly makes use of the second definition of Noncampus property.³⁵ The first definition of Noncampus property³⁶ mostly applies to fraternity and sorority houses near the institution’s On Campus property, and rarely applies overseas. Yet the Department requires that colleges combine all Noncampus statistics into a single column for reporting in the Annual Security Report.³⁷ Frankly, this makes the data all but useless. Combining crimes that occur in certain recognized Greek letter organization housing with the same crimes that occur on a study abroad trip does not provide useful data either about Greek letter housing or international crimes. Thus, even if colleges work diligently to appropriately collect data from overseas local law enforcement and Campus Security Authorities, and even if they provide useful statistics, those statistics are made unusable when combined with the crimes that occur at certain houses near the campus.

The Department has never “officially” drawn the lines for when an international location must be counted as Noncampus property by means of regulations (and the statute is silent). The Department has issued various sub-regulatory guidance that often conflicts with each other and has become more confusing as the years progress. The Department of Education issued approved clarifications³⁸ in March of 2012 that outlined two methods where a location for which an institution has a written agreement can rise to the level of Noncampus property.³⁹ The 2016 Handbook seems to have overturned this 2012 guidance (which has never officially been withdrawn). The 2016 Handbook now states:

“Repeated use of a location for school-sponsored trips: If your institution sponsors students on an overnight trip every year and the students stay in the same hotel each year, you must include portions of the hotel in your noncampus geography. For example, students in the debate club take a trip to Washington, D.C. and stay at the same hotel every year. You must include in your statistics any crimes that occur in the rooms used by your students and any common areas used to access the rooms (lobby, elevators, etc.) for the times and dates specified in the rental agreement. Note that what matters here is repeated use of a location that is

³⁴ See 2016 Clery Handbook at 2-6.

³⁵ “any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution’s educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.” 2016 Clery Handbook at 2-18.

³⁶ “Any building or property owned or controlled by a student organization that is officially recognized by the institution” 2016 Clery Handbook at 2-18.

³⁷ See 2016 Clery Handbook, Chapter 2.

³⁸ Department of Education, *Approved Clarifications*, available at http://www.nacua.org/documents/Clery_Campus_Safety_Survey.pdf (Mar. 26, 2012).

³⁹ Either an institution makes “repeated use of a location” or an institution sponsors a “trip of longer duration.” For longer duration, the clarification gave the *example* of “a three week art study trip to another city for a series of art lectures and demonstrations at a museum.”

owned or controlled by the institution, not the number of days it is used or whether it is used by the same students or different students.

Short-stay “away” trips: If your institution sponsors short-stay “away” trips of more than one night for its students, all locations used by students during the trip, controlled by the institution during the trip and used to support educational purposes should be treated as noncampus property. An example is a three-week marine biology study trip to Florida. Any classroom or housing space specified in the agreement between the institution and a third-party providing the space would be noncampus property. If your institution has entered into a written agreement with a third-party contractor to arrange housing and/or classroom space for a school-sponsored trip or study program (either domestic or foreign), it is assumed that the contractor is operating on behalf of the school as the school’s agent, putting the institution in control of this space. However, if your institution (or a contracted third party) does not have an agreement for the space used, your institution is not in control of the space and you are not required to count it. For example, there are some situations, such as sports tournaments, for which the host institution makes all of the housing arrangements for visiting students. In these situations, the visiting institutions do not have a written agreement for the use of space and are not required to disclose crime statistics for the housing in which their students are located. However, the host institution would be responsible for disclosing crime statistics for the housing since they hold the agreement for the housing.

Study abroad programs: If your institution sends students to study abroad at a location or facility that you don’t own or control, you don’t have to include statistics for crimes that occur in those facilities. However, if your institution rents or leases space for your students in a hotel or student housing facility, you are in control of that space for the time period covered by your agreement.”⁴⁰

Therefore, according to the latest Handbook, Clery Act crimes are reportable as Noncampus incidents if they occur:

1. In space that the institution owns or controls overseas or at a distance, and that space is used to support the institution’s mission and is frequently used by students; or
2. On an overseas study trip which includes overnight trips and either:
 - a. The same hotel/hostel is used for one night by the same or different groups on repeated occasions (e.g., annually); or
 - b. The hotel/hostel is used by a single group for an overnight trip of two nights or more and the institution makes a written agreement for use of the space to house or offer programs to students.

This obviously presents significant classification and counting challenges for overseas

⁴⁰ 2016 Clery Handbook at 2-25 to 2-26, 48-49 (emphasis added).

study and other programs that include travel (such as athletics).⁴¹

G. Issues with VAWA (and classic Title IX) Response Overseas:

The Clery Act, as amended by VAWA, requires responses to reports of VAWA crimes. Title IX classically was interpreted as requiring responses to reports of discrimination on the basis of sex, though that may change in the regulatory process. The VAWA response requirements include providing information/access to counseling, medical assistance, resources, the student conduct process and the opportunity to report to local law enforcement (as well as the choice not to report).⁴² These rules apply uniformly with no flexibility for programs in the international environment.

But there are countries where colleges and universities bring students to study at which a report to local law enforcement will have significant negative repercussions for the reporting student. Some countries do not recognize sexual assault for the crime that it is, while other countries severely punish gays and lesbians, even potentially including the death penalty.⁴³ Russia has a widely reported “gay propaganda” law that can present risks to LGBTQI+ students who post on social media while studying there.⁴⁴ While academic freedom supports the notion of studying in countries and cultures that have very different views as the United States, institutions should be especially careful in training students (as well as faculty and staff) about the consequences of reporting to local law enforcement (and even the consequences of seeking medical care locally, as some locations are mandated to report to law enforcement). The VAWA requires that the student make the final decision on whether to report to local law enforcement, but they should do so with eyes wide open through useful and accurate advice by institutional personnel.

Waiver Considerations: Institutions may choose to interim suspend a student accused of certain crimes from a program. It is recommended that in the initial waivers and information that the students sign, that notice be given that a student accused of certain crimes or policy violations of the home institution (as well as the policies of the host institution and third parties) may be interim suspended and sent home at their own expense. This will alleviate difficult conversations with parents (and their lawyers) who will seek institutional reimbursement for the expensive last minute flight from the international location that their student had to purchase. Institutions should also prepare (and work with third party providers to plan and prepare) accommodations for victims and survivors of crimes and policy violations that can include access to counseling (whether local or with

⁴¹ The NACUA Note referenced in Footnote 7, *supra* includes a significant discussion that may be useful for such personnel.

⁴² For detailed information on these requirements, see Stagg and Storch NACUA Note, *supra* Note 21.

⁴³ See Terri Rupgar, *Here are 10 Countries Where Homosexuality May be Punished By Death*, THE WASHINGTON POST, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2014/02/24/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death/> (Feb. 24, 2014). The countries referenced are Yemen, Iran, Iraq, Mauritania, Nigeria, Qatar, Saudi Arabia, Sudan, and United Arab Emirates. Note that this is not a complete list.

⁴⁴ See Michael Garcia Bochenek and Kyle Knight, *Russia: ‘Gay Propaganda’ Law Endangers Children*, HUMAN RIGHTS WATCH, available at <https://www.hrw.org/news/2018/12/12/russia-gay-propaganda-law-endangers-children> (Dec. 2018).

institutional counselors over Skype or Google Chat, if permitted by the counselor's license), academic and housing accommodations, and access to the student conduct process, even from a distance. Responses to violations abroad are best when offered with knowledge of specific challenges of the country.

H. Differences With Study Abroad Home Stays:

While the Department's Handbook uses the terms "ownership" or "control" to describe when property is covered under the definition of Clery geography, they only stray from that term once, in the area of home stays. There, the Department's sub-regulatory guidance says "Host family situations do not normally qualify as noncampus locations unless your written agreement with the family gives your school some **significant control** over space in the family home.." ⁴⁵ Significant control is not defined, however. In oral guidance to the author of this conference paper, the Department indicated that "significant control" means that the students enter and exit the home through a separate entrance, rather than through the same entrance as the homeowners. The comparison told to the author was an "in-law apartment." It is not clear why this is a difference that matters for Clery Act reporting, but that oral statement is the only guidance found on defining the difference between "control" and "significant control."

I. Obligations Rarely Applying Overseas:

In the 2008 Higher Education Opportunity Act, Congress added a requirement that institutions with on campus student housing collect data on certain fires and issue an Annual Fire Report concurrent with the Annual Security Report. ⁴⁶ Likewise, institutions with on campus student housing must have policies for addressing missing on campus residential students. ⁴⁷ To the extent that an institution is not operating an actual campus overseas that contains on campus student housing, neither of these obligations apply. Further, the Emergency Notification component of that same law only covers emergencies occurring in On Campus property as defined under the Clery Act. ⁴⁸ The related Timely Warning provisions of the Clery Act apply for any Clery Act geography, regardless of whether that property is domestic or overseas. ⁴⁹

III. The Importance of Communication and Record Keeping:

In order for any institution to appropriately comply with the Clery Act (and potential Title IX) requirements discussed above, clear communication channels and prior planning are required. No longer can a college assign one office the role of complying with these laws and assume all is well. While there are many methods to approach these requirements, this author recommends a "hub and spoke" approach to addressing violations in study abroad.

⁴⁵ See 2016 Clery Handbook at 2-26 (emphasis added).

⁴⁶ See 34 CFR 668.49 et seq.

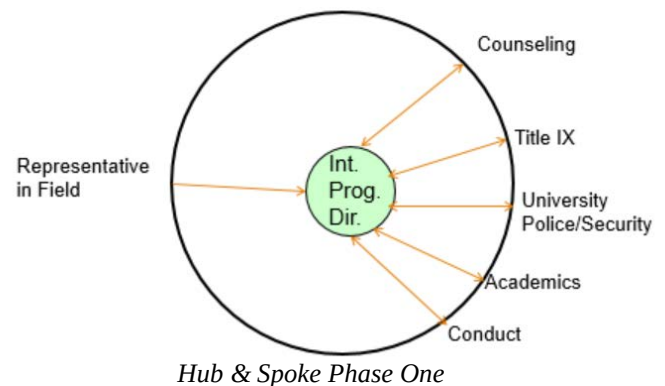
⁴⁷ See 34 CFR 668.46 et seq.

⁴⁸ See 2016 Clery Handbook at 6-1.

⁴⁹ See 2016 Clery Handbook at 6-12.

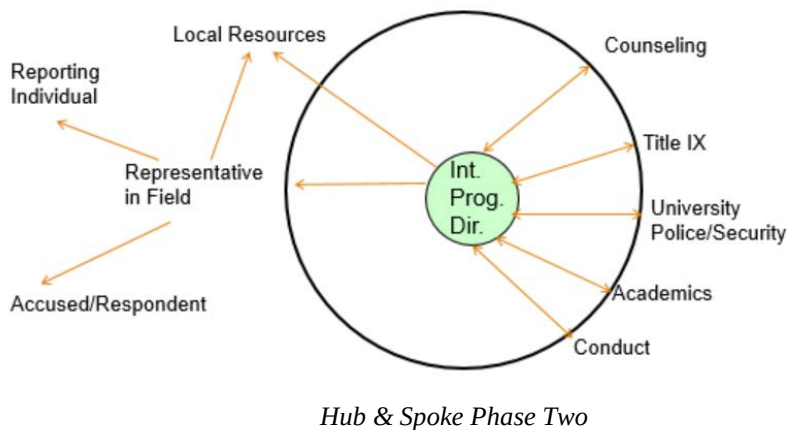
Each faculty or staff advisor who is accompanying students overseas should be declared as both a Campus Security Authority (Clery/VAWA) and a Responsible Employee (Title IX) and offered training on the meaning of those

Hub and Spoke for efficiency and good data



requirements.⁵⁰ When a reportable crime or incident occurs, those individuals should immediately⁵¹ contact the individual designated by the college or university as the spoke in the wheel (likely a Study Abroad Director or similarly titled individual). That individual can

Hub and Spoke for efficiency and good data



then reach out to the appropriate offices and individuals at the main campus, including the Title IX Coordinator, campus police or security, student affairs, conduct, counseling and health, president's office, media relations and others. This will only work if the college or university has planned out such communication in advance and either has written protocols or has run table top simulations (or both). The ideal result is that the hub can have individuals and offices at the various spokes work together to address all aspects of the incident. In the first diagram, the report comes in from the field and the hub is in constant contact with relevant offices. In the second diagram, information is sent out to the involved students in an efficient way, without the need to build relationships between the relevant offices and those in the field.

Record keeping is also important. Statistics for an Annual Security Report may be prepared for publication months or more than a year after the incident or crime occurs. Memories fade, and so returning to a Campus Security Authority for details 18 months

⁵⁰ For a chart comparing the reporting requirements of Campus Security Authorities and Responsible Employees in various crimes, please see Andrea Stagg and Joseph Storch, *Crime and Incident Reporting Guidelines for CSAs and Responsible Employees*, State University of New York, available at <http://system.suny.edu/media/suny/content-assets/documents/compliance/Crime-and-Incident-Reporting-Guidelines-for-CSAs-and-Responsible-Employees-FINAL.pdf> (Sep. 2014). Note that the Proposed Title IX Regulations would reduce response requirements in a way that would likely eliminate the concept of Responsible Employee.

⁵¹ Or as soon as practicable taking into consideration emergency medical and other requirements. It should go without saying that immediate emergency needs must be addressed on site, but the study abroad office should be brought in as soon as possible.

after they receive a report of a crime may not yield accurate information for Clery Act reporting. We are well-served by getting this information right at or near the time of the event. Regardless of what method is used to collect and catalog information, auditors from the Department of Education may request data to determine whether Clery Act reportable crimes occurring in relevant Clery geography are counted in the appropriate columns in the Annual Security Report.

Just as important as internal communication is communication between entities. It is not unheard of for a student from College A to attend a study abroad trip organized by College B, located at International College C, alongside students from Colleges D, E, F, G, and H. If a College A student sexually assaults a College E student in Clery geography (each of the colleges has a written agreement for use of the space, or as the Clery Handbook refers to it, “control”), then it is reportable in each college’s Annual Security Report, and College A has responsibilities under the conduct process for its student, while College E (and perhaps College B) has responsibilities to provide the victim with resources and accommodations. At a minimum, it is incumbent upon College B and College C to share information with Colleges A and E such that they may take the required action.

This can be complicated, especially inasmuch as each of these students’ records are covered by FERPA. The solution is agreements between the institutions to properly respond to these reports. Additionally, institutions may have students waive in writing their FERPA rights vis-à-vis these other institutions in the limited set of circumstances that require exchange of information after report of a crime or policy violation.

IV. Legislation Specifically Covering Study Abroad:

There has been an uptick in state and federal interest in injuries, crimes and accidents in overseas programs. The State of Minnesota passed reporting legislation, and a member of Congress proposed legislation that may be considered as part of the renewal of the Higher Education Act.

A. Minnesota Legislation:

In 2014, the State of Minnesota adopted legislation requiring that all higher education institutions report health and safety statistics to the State Office of Higher Education.⁵² For privacy purposes, institutions report statistics to the Office of Higher Education and the Office compiles them and issues a report on its website. The law requires reports of deaths, accidents, illnesses requiring hospitalization.⁵³

Colleges and universities in Minnesota worked closely with the Office of Higher Education to implement the requirements in a workable way.⁵⁴ The law may become a

⁵² 2014 Minnesota Session Law, Chapter 312-H.F. No. 3172, Section 5.41, *available at* <https://www.revisor.mn.gov/laws/?year=2014&type=0&doctype=Chapter&id=312>.

⁵³ *Id.*

⁵⁴ For an analysis of the legislation and implementation, please *see* Minnesota Office of Higher Education, *Study Abroad Health and Safety Regulation: Report to the 2015 Legislature*, *available at*

model for other states to adopt, and is a model for federal legislation introduced in the last Congress that is discussed below.

B. Federal Legislation:

Ironically, some of the worst crimes that led to lawsuits and media attention occurred outside of Clery geography and, thus, are not reportable in the Annual Security Report.⁵⁵⁵⁶ Proposed legislation (called the Ravi Thackurdeen Students Study Abroad Act⁵⁷) would amend the Clery Act to require extensive reporting of crimes, injuries, accidents, illnesses and deaths that occur on study abroad over a 10 year period.⁵⁸ Further, these incidents would be reportable internationally without regard for traditional Clery Act geography.⁵⁹ The Bill has not come up for a vote.⁶⁰ The language of the Bill may be included in the upcoming reauthorization of the Higher Education Act.

The main problem with such a regime is that the numbers of incidents from any individual institution (even those that send dozens of students to a single location) would be so small as to be statistically meaningless when analyzed within the hundreds of thousands of students that study overseas each year. The numbers would not be large enough to analyze the relative safety or danger of a specific location with any type of statistical confidence.

<http://www.ohe.state.mn.us/pdf/StudyAbroadReport.pdf> (Jan. 29, 2015); Forum on Education Abroad, *The Implications of New Legislation in the State of Minnesota*, available at <http://www.forumea.org/wp-content/uploads/2014/10/Minnesota-Legislation-Oct-13.pdf> (Oct. 15, 2014); Kris Kaplan, Interim General Counsel, *PowerPoint: Study Abroad: Meeting the New Reporting Requirements and More!*, Minnesota State Colleges and Universities Office of General Counsel, available at <http://www.ogc.mnscu.edu/documents/2ndThurs2015FebPowerPoint.pdf> (Feb 2015).

⁵⁵ Perhaps the most famous case of a crime while studying abroad, the accusation that Amanda Knox murdered her roommate Meredith Kercher is not reportable as both Kercher and Knox were apparently renting space in a private apartment (not arranged for by an American institution) while studying in Italy. Knox was apparently on leave from the University of Washington to study at the University for Foreigners Perugia in Italy at the time of the murder. See Kristi Oloffson, *Amanda Knowx, Convicted of Murder in Italy*, TIME, available at <http://content.time.com/time/world/article/0,8599,1945430,00.html> (Dec. 4, 2009). Her conviction was later overturned. Kercher was a British student on an exchange program. Nick Squires, *Amanda Knox freed: tears of joy as four-year nightmare is over*, THE TELEGRAPH, available at <http://www.telegraph.co.uk/news/worldnews/europe/italy/8805395/Amanda-Knox-freed-tears-of-joy-as-four-year-nightmare-is-over.html> (Oct. 4, 2011). Thus, for all the attention given to this case, no college had to report the crime in an Annual Security Report.

⁵⁶ For a detailed list and analysis of crimes committed by and against American students studying overseas, see Aalberts, *supra* Note 4 at 208-214. A careful analysis of the facts of each case cited by Aalberts et al. would show that not a single one would be reportable in a Clery Act Annual Security Report.

⁵⁷ H.R.5485 - Ravi Thackurdeen Safe Students Study Abroad Act, 113th Congress, available at <https://www.congress.gov/bill/113th-congress/house-bill/5485/text> (Nov. 17, 2014); H.R. 4410 - 115th Congress, available at <https://www.congress.gov/bill/115th-congress/house-bill/4410> (Nov. 15, 2017).

⁵⁸ *Id.*

⁵⁹ “with respect to the incidents described in items (aa) through (dd) of subclause (II), whether the incidents occurred— (aa) on campus; (bb) in or on a noncampus building or property; (cc) on public property; (dd) in dormitories or other residential facilities for students; or (ee) at a location not described in items (aa) through (dd) of this subclause, without regard to whether the institution owns or controls a building or property at the location.” *Id.* at § III.

⁶⁰ As of the date of this conference paper, the Bill has not been re-introduced in the 116th Congress.

V. Research on Dangers in Study Abroad

The Forum on Education Abroad is a 501(c)(3) non-profit, membership association recognized by the U.S. Department of Justice and the Federal Trade Commission as the [Standards Development Organization \(SDO\)](#) for the field of education abroad. The Forum provides training and resources to education abroad professionals and its *Standards of Good Practice* are recognized as the definitive means by which the quality of education abroad programs may be judged. The Quality Improvement Program for Education Abroad (QUIP) and The Professional Certification for Education Abroad Program provide quality assurance for the field through use of the *Standards* in rigorous self-study and peer reviews for institutions and professional certification for individuals.

The Forum on Education Abroad's mission is to develop and disseminate comprehensive *Standards of Good Practice* for the field of education abroad. It promotes best practices and excellence in curricular design, engages in data collection and research, conducts program assessment and quality improvement, and advocates on behalf of its members and the field of education abroad. The Forum serves institutions and organizations that sponsor and support education abroad programs for students enrolled at U.S. colleges and universities. The Forum also collaborates with international member institutions and organizations to identify and facilitate best practices and standards for education abroad. <http://www.forumea.org/>

Efforts continue in the U.S. at both the federal and state levels to pass legislation related to the perceived safety of students during education abroad. Those in favor of this legislation argue that education abroad is an educational activity that carries a greater degree of risk of death, thus laws must be passed to help to ensure the safety of students. However, these interpretations are not corroborated by any objective data.

Since 2010, The Forum has collected information on critical incidents involving students participating in education abroad as part of its Critical Incident Database (CID) project. A Report on the 2014 CID data is available on The Forum's website.⁶¹ The CID initiative, while voluntary, is the first attempt in the field to move data collection from anecdotal reports to data-driven accounts of incidents such as crime, injuries, illnesses, sexual misconduct and deaths. The data collected has informed the education abroad field's understanding of what happens to students when off campus. However, the CID sample set is not large enough to make any claims. However, the 2014 Report does point to correlations of note, for example alcohol use and sexual misconduct incidents, and gastrointestinal illness prevalence in South America and Africa. These lessons could be valuable in preparing students for their experience off campus.⁶²

⁶¹ To view the Report: <https://forumea.org/wp-content/uploads/2014/08/Critical-Incident-Database-2014-report.pdf>.

⁶² For more discussion of the CID see Storch, J. & N. A. Mello, *Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices*, 2015 NACUA Annual Conference Proceedings, June 2015, Washington, DC.

The Forum recognized the need to gather more information on education abroad critical incidents that supplements the CID data, to further inform the field, the public, and potential legislation related to the safety of education abroad. To that end, The Forum approached major insurance providers that provide services to the education abroad field and requested that they share anonymous claims data with The Forum, thus giving access to a robust sample and an objective measure of the range, type, and number of education abroad student incidents.

With the cooperation of insurance providers that insured over 50% of study abroad participants, The Forum on Education Abroad embarked on a research project⁶³ to compare mortality rates of undergraduates who live on campus versus those who travel off campus on study abroad. The purpose of the report was to provide data that offer students, parents, faculty and administrators, legislators, and the general public objective information regarding one aspect of safety while abroad. While the conclusion of this report provided some comfort in concluding that, at the very least, study abroad does not carry a greater risk of death than does domestic education in the U.S., critics pointed at a flaw in the research. The report only spanned one year of data – what if 2014 were an aberrant year?

Responding to this criticism, The Forum undertook a larger study that studied insurance data from the years 2010 through 2016 and published *Comparing College Student Mortality Rates in the US with Mortality Rates While Abroad*⁶⁴ in 2018. This seven year study also concluded that US college and university students are less likely to die during study abroad experiences than while studying on their home campus in the States. The authors of this study have submitted a paper to *The Journal of American College Health*.

VI. Best Practices for Student Conduct Record Review and Codes of Conduct

The *Standards of Good Practice for Education Abroad*⁶⁵ directly address the issue of student codes of conduct while off campus with Standard 5: Student Code of Conduct and Disciplinary Measures. The Standard reads: “The organization articulates clear and accessible guidelines for student behavior and consequences resulting from violations.”⁶⁶ This Standard requires that students be informed of the expectations around student conduct including policies regarding drug and alcohol use, sexual misconduct, and other rules that would carry disciplinary sanctions if violated. The Standard goes on to address issues of appropriate sanctions and the need for an appeal process. Currently, best practice in education abroad stipulates that all policies pertaining to student behavior are communicated to students before they apply to a program, during preparation and while on site. Policies must effectively represent the expectations of the college, university or

⁶³ “Insurance Claims Data and Mortality Rate for College Students Studying Abroad,” 2016. The Forum on Education Abroad, available at https://forumea.org/wp-content/2016/04/ForumEA_InsuranceClaims_MortalityRateStudentsAbroad.pdf.

⁶⁴ “Comparing College Student Mortality Rates in the US with Mortality Rates While Abroad”, 2018 The Forum on Education Abroad, available at <https://forumea.org/wp-content/uploads/2018/03/ForumEA-Mortality-Rates-18.pdf>.

⁶⁵ Available at <https://forumea.org/wp-content/uploads/2014/08/Standards-2015.pdf>.

⁶⁶ Available at <https://forumea.org/resources/standards-of-good-practice/standard-4>.

program for student behavior and the consequences for violations of those rules. Program personnel – including faculty – have an obligation to uphold the code of conduct that travels off campus with students, to follow established adjudication procedures, and to dispense sanctions that are appropriate to the infraction. No part of that should be left to be decided until bad behavior occurs or should be left entirely up to the faculty or staff leaders to resolve without guidance from the articulated code of conduct.

VII. Best Practices and Models for Responding to Reports of Violence Overseas

Again, looking to the *Standards of Good Practice for Education Abroad*, best practice regarding training for health, safety and security risks is clearly addressed with Standard 8 which reads: “The organization prioritizes the health, safety, and security of its students through policies, procedures, advising, orientation, and training.”⁶⁷ The following text of this Standard specifically states “Staff⁶⁸ are trained to anticipate and respond responsibly to student health, safety or security issues; students are trained to responsibly manage their own health, safety and security while abroad...”⁶⁹ There are a series of queries that are designed to help programs assess how well they meet these expectations. And two specific queries ask how these populations are trained to respond to any health, safety or security issue that might reasonably be anticipated. Best practice includes mandatory preparation for all students and staff before they leave for any site that covers general health and safety concerns as well as site specific concerns. And best practice would also include continual and routine training as appropriate once on site.

While once at the cutting edge, many colleges and universities now mandate training for their faculty leaders.⁷⁰ There are several guiding principles that inform best practice when preparing faculty to handle unconventional roles beyond the classroom. Collaboration with other professionals on a campus is critical as colleagues who deal with student life issues routinely (the director of counseling services, dean of student life, the university risk manager, the diversity officer, the director of academic resources, etc.) can provide their expertise regarding appropriate ways of handling a variety of issues. Institutions would be wise to draw on their own institutional experiences when developing training for faculty – provide case studies (while providing anonymity) of things that have happened in the past. People respond best if they believe that these things really can and have happened in the same context. Consulting with those same campus professionals can assist in anticipating issues that can arise – what are the trends on a campus that faculty need to be aware of when off campus? Of course it is critical to evaluate the training provided for both faculty and students. Determining if participants got the information needed and that it was valuable can provide insight into future training development. These four guidelines for developing training for student and faculty are important to meeting best practice.

⁶⁷ Available at <https://forumea.org/resources/standards-of-good-practice/standard-8/>.

⁶⁸ Staff includes any person employed by the program, college or university with any responsibility for students or the academic program – in other words, faculty.

⁶⁹ Available at <https://forumea.org/resources/standards-of-good-practice/standard-8/>.

⁷⁰ Mello, Natalie A., *Managing Off Campus Risk through Faculty Training*, 2010 Capstone Design Conference Proceedings, June 7-9, 2010, Boulder, CO.

VIII. Conclusion:

While several federal laws require reporting and action by institutions when incidents occur during study abroad, the requirements do not align or use the same definitions, and they lack clear lines for institutions to rely upon. Institutions should use best practices and a good faith effort to develop policies and protocols that not only comply with the requirements but (more importantly) take steps toward providing a safer environment for our students when they travel overseas.



The State University
of New York

Office of General Counsel

State University Plaza
Albany, New York 12246

www.suny.edu

TO: SUNY Council on International Education Members
FROM: Joseph Storch
Associate Counsel, Office of General Counsel
DATE: November 28, 2016

Re: SUNY Proposed Clery and Title IX Procedure for International Programs

In light of recent changes to New York State law pursuant to Education Law 129-B and new interpretations of the Clery Act by the U.S. Department of Education (“ED”), attached please find an updated Clery and Title IX Procedure for International Programs.

I look forward to discussing this procedure and answering any questions.

Copy: Joseph Porter
Sandra Casey
Seth Gilbertson
Liz Droz
Paul Berger
Michael Bailey
James Pasquill, III

APPROVED BY SUNY Council on International Education November 2016

To Learn
To Search
To Serve



SUNY Clery & Title IX Reporting Procedure for International Programs

This procedure is intended to assist SUNY campuses (institution) in complying with the Clery Act, Title IX guidance, and New York State Education Law 129-B in an effective and consistent manner. Individual facts may require specific solutions not described in the procedure below.

While the Clery Act generally requires reporting and response in specific geographic locations, Title IX and Education Law 129-B are not specific to geography. This procedure is limited to reporting and responding to covered crimes and violations and does not cover training, prevention, and other requirements under the relevant laws.

I- SUNY institutions will include all Clery reportable crimes and incidents in the Annual Security Report when those incidents occur in geographic locations covered by the Clery Act. These locations include:

- On-Campus
 - All campuses of the institution.
 - At a Separate Campus, defined as a geographic location staffed by administrative personnel and where a student can take an organized program of study. An “organized program of study” means an entire educational program from which a student can attain a degree, diploma, or certificate. It does not include locations where a student can simply take a course.
 - At any location designated as On Campus property, the institution will also collect and include crimes occurring in Public Property adjacent to and accessible from the On Campus property.
- Noncampus
 - All of the following factors must be met in order to make crimes at a given property reportable in the relevant¹ Noncampus category:
 - Building or property;
 - Owned or controlled by the institution;
 - Used in direct support of, or in relation to, the institution’s educational purposes;
 - Frequently used by students; and
 - Not within the same reasonably contiguous geographic area.
 - Property is controlled by the institution if the institution has a written agreement for use of the geographic location or parts thereof, and it meets all the factors above. Analyze the following to determine whether the agreement meets the factors:
 - Geographic locations within one mile of the main campus, if not separated by a major natural or human barrier (such as a body of water or an un-

¹ Another definition of Noncampus property applies to property owned or controlled by recognized or registered student groups that is generally not applicable to study abroad.

crossable highway) are generally considered On Campus and not Noncampus.

- Geographic locations that are owned or controlled by the institution that are only used by faculty/staff are not frequently used by students and so do not count for Clery reporting purposes.
 - The determination of whether an agreement for space meets the delineated factors will be determined based on an analysis of:
 - What the parties specifically agree to, whether the agreement outlines the terms of an experience without reference to any specific geographic location or whether the agreement includes information regarding access and control of a specific geographic location (e.g., building names or street addresses);
 - Whether the institution maintains documents stating that students will live or study at a specific geographic location; and
 - Who makes the living or academic arrangements:
 - If the student makes arrangements directly, the property does not count for Clery Act purposes; but
 - If the institution makes the arrangements, the property may count if it meets the factors delineated above.
 - Frequently used by students: Third party property, hotels, and hostels: Property is frequently used by students if it is used for a “short stay away trip” of more than one night or is subject to “repeated use” (including for a single night).
 - Short Stay Away Trip: For student trips of more than one night, all locations used by students during the trip, controlled by the institution during the trip and used to support educational purposes should be treated as Noncampus property. This includes classroom or housing space specified in the agreement between the institution and a third-party providing the space (including a provider operating as the institution agent for securing program property). If there is no agreement for the space used, there is not control for Clery Act purposes.
 - Repeated Use: A student overnight trip occurring every year and using the same hotel is included as Noncampus property.
 - For hotels/hostels that count for Clery Act purposes, crimes are counted if they occur in a student’s room or any common areas used to access the rooms (e.g. elevators, escalators, stairs, lobby, breakfast area) for the times and dates in which the institution has control (rental agreement times).
 - Host families: Count crimes in the geographic location used for housing students with a host family only if the institution has “significant control” of the space. For example, an institution has significant control over a property when the students have a separate entrance to their living space, but not in homes where the students and the host family use the same entrance.
- If an institution owns property, crimes are reportable year round.
 - If an institution controls property pursuant to a written agreement, crimes are only reportable during the times when the institution has control, not before or after.

- There is no reporting obligation for public property around Noncampus property.

Crimes committed at locations that do not meet Clery geography definitions are not counted for Clery Act purposes, although certain crimes may need to be reported to institution officials pursuant to Title IX and other laws.

II- To properly learn of and report crimes that occur in international and domestic education, Campus Security Authorities shall report crimes to the institution's designated Clery compliance official. In addition, the institution will query local law enforcement and Campus Security Authorities for information about crimes occurring in qualifying geographic locations during times of institutional use and/or control (as defined in Part I).

- Campus Security Authorities are:
 - Police/Campus Security (Department members and others affiliated);
 - Those designated by the institution as Campus Security Authorities; and
 - Faculty/staff with significant responsibility for students and campus activities.
 - All faculty or staff travelling with students overseas or to a distant location that meets Clery geographic definitions established in Part I, are designated as Campus Security Authorities, regardless of whether they ordinarily possess significant responsibility for student and campus activities.
- Responsible Employee for Title IX purposes:

All faculty or staff travelling with students overseas or to a distant location regardless of whether it meets Clery geographic definitions established in Part I, are designated as Responsible Employees for Title IX purposes, and are required to report learned of or observed cases of sex discrimination, including sexual violence, to the institution's Title IX Coordinator or designee.
- The institution will query local law enforcement for locations that meet the definitions of Clery Act geography in Part I asking for records of Clery Act reportable crimes occurring during the timeframes in which the institution controlled the property (or if the property is owned, during the entire calendar year). The institution will use "good faith" to contact these law enforcement entities via paper mail, telephone, or electronic messaging, and will keep a record of the contact and whether or not any statistics were received.
- Reporting Crimes:
 - Campus Security Authorities must report all crimes to the individual designated by the institution, with no exceptions.
 - Crimes are to be reported immediately or as soon as possible.
 - It is *never* appropriate for faculty or staff to handle crimes in house, investigate, or adjudicate, except as specifically instructed by institution officials.
 - It is *never* appropriate for faculty or staff to attempt to mediate an accusation of sexual assault or sexual violence.
 - With the exception of crimes that include sexual violence or sexual harassment, the Campus Security Authority may keep the identity of the victim private.

- If the Campus Security Authority receives a report of sexual harassment, including sexual violence, s/he is required to report to the Title IX Coordinator (or designee) regardless of where or when the incident is alleged to have occurred.
- If the Campus Security Authority is a pastoral or professional counselor, s/he may keep reports confidential pursuant to law and policy.
- Timely Warnings: The College will provide students with Timely Warnings of crimes occurring in relevant Clery Act geography.
 - For Clery act crimes occurring in Clery Act geography:
 - The institution, trip leader or designee will notify students on the trip of such crimes in a timely fashion;
 - Notification may occur by use of paper or digital messaging or may have an oral warning come through the group leader;
 - While there is no defined method, the Timely Warning must be active, not passive.

III- To ensure student safety and Title IX compliance, SUNY institutions will follow the protocol established below when informed about cases of sex discrimination, including sexual violence or interpersonal violence, involving SUNY students or employees.

- Definitions:
 - Home Institution: Student's original institution, from which the degree is anticipated, or to which the study abroad credits will transfer.
 - Host Institution: Domestic or overseas institution in which one or more students from Home Institution will be temporarily enrolled for a term or set length of time. A Host Institution may also meet the definition of a Provider.
 - Provider (Program, Administering, Sponsor): A private or public for-profit or not-for-profit Non-SUNY institution or entity that provides international or domestic travel, support, and/or education services for students at a Host Institution or a non-campus environment.
 - Reporting Individual: Encompasses the terms victim, survivor, complainant, claimant, witness with victim status, and any other term used by an institution to reference an individual who brings forth a report of a violation.
 - Accused: A person accused of a violation who has not yet entered an institution's judicial or conduct process.
 - Respondent: A person accused of a violation who has entered an institution's judicial or conduct process.
- Host Institutions and Providers that learn about incidents of sex discrimination, including sexual violence, will work collaboratively with the Home Institution(s) of the reporting individual(s) and accused/respondent(s) to ensure the following:
 - The reporting individual is notified of any and all options, remedies, resources, and services available through the Home, Host and Provider;

- The appropriate institution or entity can conduct a prompt, impartial investigation, which may lead to adjudication through the formal student conduct or Title IX grievance process.
- Students participating in study abroad through a Host or Provider are subject to the policies and procedures of the Provider or Host, as well as those of his or her Home Institution.
 - Which institution takes the lead in investigating and responding to allegations of sexual harassment and/or violence shall be determined immediately following the reporting of an incident. Factors to consider include:
 - the location of the incident;
 - the enrollment status of the student(s) involved;
 - the nature and duration of the program;
 - the timing of the report (during or after a program).
 - Generally, the institution with immediate and primary control over the parties and evidence shall lead the investigation and response.
 - At all times the fairness of the process, effectiveness of the investigation/response, and best interests of the parties shall govern the decision making of SUNY officials.
- The Title IX Coordinators of SUNY institutions, in collaboration with International Programs staff, should consider all incidents and allegations consistent with their responsibilities to spot patterns and track complaints.
- Consistent with working collaboratively, a Host Institution or Provider will promptly provide any incident reports and related information to the Home Institution.

GOVERNMENT AND REGULATORY AFFAIRS

BLAST**Risk Management Considerations Regarding the Clery Act, Violence Against Women Act (VAWA) and Title IX When Students Study Abroad¹***January 2016***STATUTE/REGULATION SOURCE**

The Clery Act, as amended by the Violence Against Women Act, 20 USC 1092(f); 34 CFR 668.46. Title IX of the Education Amendments of 1972, 20 USC 1681.

BRIEF DESCRIPTION

The Clery Act, as amended by the Violence Against Women Act, and Title IX of the Education Amendments of 1972 place requirements on colleges and universities to report certain crimes occurring in certain overseas locations and also to take action in response to reports of certain crimes and unequal treatment on the basis of sex. The laws do not have uniform rules and must be carefully read together to understand obligations. While it is important to comply with the laws, it is even more important to develop policies, procedures and training methods to prevent such violations and respond promptly to reported violations. Keeping students safe and successful in study abroad requires us to go beyond the minimum requirements of the law.

POTENTIAL/ACTUAL IMPACT TO HIGHER EDUCATION

The Clery Act and Title IX require colleges to respond to violence, report certain incidents of violence and develop prevention programming.

DISCUSSION

Two federal laws govern college and university reporting of and response to certain crimes and harassment. The Clery Act, as amended by the Violence Against Women Act (VAWA), requires that colleges report certain crimes that occur in certain geographic locations. Title IX requires that colleges appropriately respond to reports of unequal treatment on the basis of sex or gender in a way that tracks such reports and ameliorates the impact of unequal treatment. While the laws overlap in certain circumstances, they should be read and analyzed separately as they have different rules, standards, methods and enforcement entities.

The Clery Act

Initially passed in 1990, the Clery Act is primarily a consumer reporting law that requires colleges to disclose in an annual report and a crime log certain crimes occurring in certain geography for the preceding three calendar years. There are other requirements as well (timely warnings, missing persons, fire reporting, etc.) that are not treated in detail in this GRAC Blast.

For purposes of overseas reporting, the most common geographic location is a Non-Campus location.² To qualify as Non-Campus, a geographic location must be owned or controlled, defined by the Department of Education (ED) as having a written agreement for use, by the institution, frequently used by students and not within the same reasonably contiguous geographic area as the main campus. These include research facilities, hotels and apartment complexes, classroom buildings, and other locations owned or rented by a college where students stay for an extended period. There are also some On Campus locations overseas, if a geographic location can be defined as a branch or separate campus. On Campus locations may also have a public property reporting requirement.

Clery Act reportable crimes³ that occur in these locations must be reported in the Annual Security Report (ASR) and Crime Log (if the institution has a police or security department). Crimes must be included in the ASR and Crime Log if they are reported to a Campus Security Authority or local law enforcement.

Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

Title IX

Title IX of the Education Amendments of 1972 is a civil rights law that guarantees equal ability to participate in educational programs regardless of sex. In recent years, the ED's Office for Civil Rights (OCR) has placed an emphasis on preventing sexual violence, an extreme form of sexual harassment that can cause victims and survivors to not complete their education. Most prominently, the OCR issued an April 4, 2011, Dear Colleague Letter establishing standards for responding to such violations.⁴ Although courts are split, it is generally presumed that Title IX applies globally, not just in the United States.⁵

The Violence Against Women Act (VAWA)

In a way, the VAWA amendments to the Clery Act are a hybrid of traditional Clery and Title IX. The three new reportable Clery Act crimes (domestic violence, dating violence and stalking) are reported using traditional Clery geography. But while the reporting side of the law reads like traditional Clery, the action and response side of the law looks more like Title IX. That is, the law is concerned more with *who* is a victim of a crime rather than *where* geographically the crime occurred. Colleges are required to provide reporting victims with certain resources, take action against assailants that are within the jurisdiction of the college, and conduct programming to prevent such crimes.

ACTION

Thinking About the Laws and Risk Management in an Overseas Environment

Traditionally, the Clery Act and Title IX look backwards. The Clery Act requires colleges to report certain crimes occurring in certain locations in the three prior calendar years, and Title IX requires that colleges respond to unequal treatment on the basis of sex in a way that limits its effects and prevents its recurrence. VAWA looks both backwards and forwards. In addition to response, VAWA requires that colleges take proactive steps to educate students about violence, including both risk reduction and (importantly) bystander intervention.

Simply gathering statistics to publish in the Crime Log and ASR at a later date is insufficient. A reading of Title IX guidance and VAWA together requires a comprehensive (and time-sensitive) response to any sexual or interpersonal violence occurring overseas.

Action/Response:

While it is likely that all faculty and staff traveling with students overseas qualify as both Campus Security Authorities (CSA) under the Clery Act and Responsible Employees (RE) under Title IX,⁶ risk managers should consider simply making a blanket rule that institutional employees accompanying students overseas (except in the rare circumstance that the employee is present as a pastoral or professional counselor) are covered by both requirements and must report incidents of sexual and interpersonal violence to institution officials charged with response.

Conversely, third party providers would not technically qualify as CSAs or REs under ED's interpretations. The responsibility is with the institution, not external parties. Institutions can use contracts to require employees of third party providers to notify the institution of relevant incidents as if they were CSAs or REs.⁷

When a report of sexual assault, domestic violence, dating violence or stalking is received by an institution representative, whether employed by the institution or a third party, time is of the essence in responding. Institution representatives must be trained that they can never handle reports of violence "in house." That is to say, unless they have received appropriate training and responsibility for doing so, they should not conduct an investigation or take other action except in coordination with institution professionals charged with responding. Institution professionals should *never* seek to mediate reports of sexual assault or bring parties together to discuss and attempt to resolve complaints.

Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

When an institution receives a report of sexual or interpersonal violence, it has obligations to provide resources to victims⁸ and to investigate and potentially take action against assailants. Unlike the traditional Clery Act reporting requirements which are based on geography, Title IX and VAWA response/action requirements are based on whether the institution has jurisdiction over the student. In certain cases, a student from school A assaults a student from school B. In such a case, school B would be primarily responsible for providing resources while school A would be primarily responsible for investigation and discipline.

One difficulty in complying is that institutions often have many people accompanying students overseas, some of whom live at the location, and they may not have a strong relationship with the Title IX coordinator, counseling services and other key offices. To address this issue, the author developed a model, the Hub and Spoke model, for rapid communication and response when a report of such violence is received overseas. The “hub” in the Hub and Spoke model is a professional from international education (in the example below, the international program director) who is in regular communication with professionals from the offices of counseling, Title IX, university police or campus security, academics and student conduct.

The arrows in the model go both ways as these offices should be meeting with the hub on a regular basis to share information and cross-train. When a report comes in to a representative in the field, they should quickly contact the international program director. The director can then put into place training to gather information on resources, investigation and conduct while providing the appropriate information to relevant offices. In Step 2, these offices, through the director hub, provide this appropriate and customized information to the representative in the field and to local resources in the study abroad environment and, through them, provide resources to victims and begin investigations of actions by the perpetrator.

This is not the only model, but the key is having a person who can bridge the gap between offices that would rarely interact and, in bridging that gap, can accelerate the appropriate response to violence. A rapid response is an appropriate way to address violations that are often dangerous, violent and traumatic. Once received, the institution should, for the most part, respond using the same resource and conduct process that it does for violations committed on or near the campus.

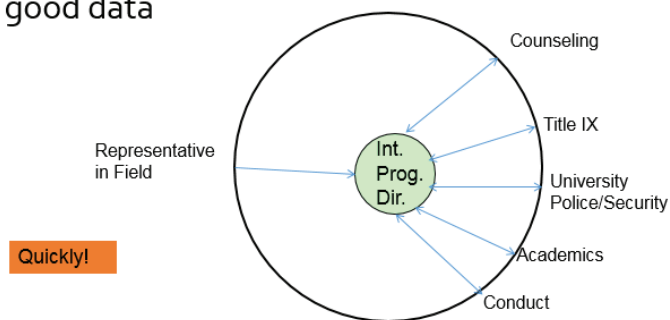
Education and Training

Prior to traveling overseas, students should receive training on risk reduction and violence prevention. Among other things, training must remind students that the institution prohibits VAWA crimes, define the crimes, define consent, provide information about safe and positive bystander intervention, and educate on risk reduction, including recognizing warning signs of abusive behavior and how to avoid potential attacks.

Over time, institutions should endeavor, alone or in partnership with other institutions, to develop sexual and interpersonal violence prevention trainings that are specific to the country or region being visited. Not all countries are the same. The risk profile is different in Canada and Saudi Arabia. Some countries are hostile to gays and lesbians, while others have laws surrounding sexual assault and domestic violence that differ significantly from protections in America. By training students to assist each other, to engage in bystander

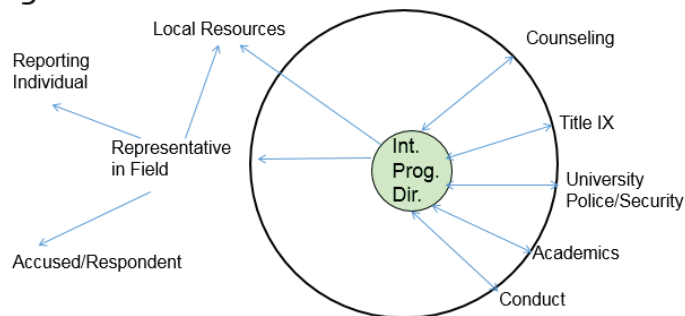
STEP #1:

Storch Model: Hub and Spoke for efficiency and good data



STEP #2:

Storch Model: Hub and Spoke for efficiency and good data



Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

intervention, and to understand the specific risks posed in that country, institutions can prevent many violations from occurring. Institutions should not and cannot simply offer training in risk reduction (walk in groups, watch your drink, lock your door) but must go beyond to educate about avoiding committing these violations and, if a bystander to such a violation, engaging in direct, distracting or delegated bystander intervention.

CONCLUSION

The Clery Act, Title IX and the Violence Against Women Act contain requirements for institutions to respond to sexual and interpersonal violence but also to provide advance training and guidance to help reduce violence. By carefully developing plans tailored to specific study abroad locations and mindful of the need to make connections between staff in the field and personnel on campus trained in responding to violations, institutions can prevent violence on study abroad and respond rapidly and effectively when such violence occurs.

SOURCES AND REFERENCES

1. Author Joseph Storch is an Associate Counsel at the State University of New York Office of General Counsel and Chair of the SUNY Student Affairs Practice Group. In addition to campus representation, he concentrates his practice on compliance with the Clery Act, Title IX and the Violence Against Women Act and assisting institutions in both complying with the law and in developing strategies to go beyond the legal requirements to best protect students. He is a graduate of SUNY Oswego, *summa cum laude*, has a Masters of Public Policy from the University at Albany, and a law degree from Cornell Law School. He has presented at two URMIA conferences.
2. Geographic reporting requirements are treated in more detail in Joseph Storch, "The Clery Act and Overseas/Distance Study: New Developments and Compliance Guidance," *NACUA Notes*, available at <http://www.higheredcompliance.org/resources/publications/CleryActAbroad.pdf> (Apr. 5, 2012) Pages 2-5.
3. A list of Clery Act reportable crimes and their definitions, updated following passage of the 2013 Violence Against Women Act Reauthorization, may be found at <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>, pages 62789-62790.
4. US Department of Education Office for Civil Rights, "April 4, 2011, Dear Colleague Letter," available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.
5. For a deeper analysis, see Joseph Storch, "Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices," National Association of College and University Attorneys Conference Paper, available at http://www.nacua.org/securedocuments/programs/June2015/05D_15_6_33.pdf (June 2015).
6. To learn more about reporting rules and distinctions between Campus Security Authorities and Responsible Employees, see Andrea Stagg and Joseph Storch, "Crime and Incident Reporting Guidelines for CSAs and Responsible Employees," available at http://www.nacua.org/documents/CrimeIncidentReportingGuidelinesCSA_September2014.pdf (Sep. 2014).
7. For example, see SUNY Clery and Title IX Procedure for International Programs, available at <http://forumea.org/wp-content/uploads/2014/08/SUNY-Clery-Policy-for-Council-on-International-Programs-FINAL-11-14.pdf>.
8. Among other things, institutions must inform victims of available sanctions and protective measures; evidence preservation; protective measures, such as no contact orders from the institution, orders of protection; procedures for institutional disciplinary procedures; Interim remedies, including options for and assistance with changing academic, living, transportation, and working situations, if requested and reasonably available; how institution will protect victim confidentiality while still doing public recordkeeping and providing protective measures; and how to report the offense on and off campus. Additionally, institutions must provide reporting victims with information about confidentiality, existing and available counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims both on and off campus; and equitable opportunities for victim and accused. For a free resource that can assist institutions in providing customized visa and immigration resources, see <http://www.suny.edu/violence-response/Visa-and-Immigration-Resource/>.

Risk Management Considerations Regarding the Clery Act, VAWA and Title IX When Students Study Abroad (cont.)

FOR MORE INFORMATION

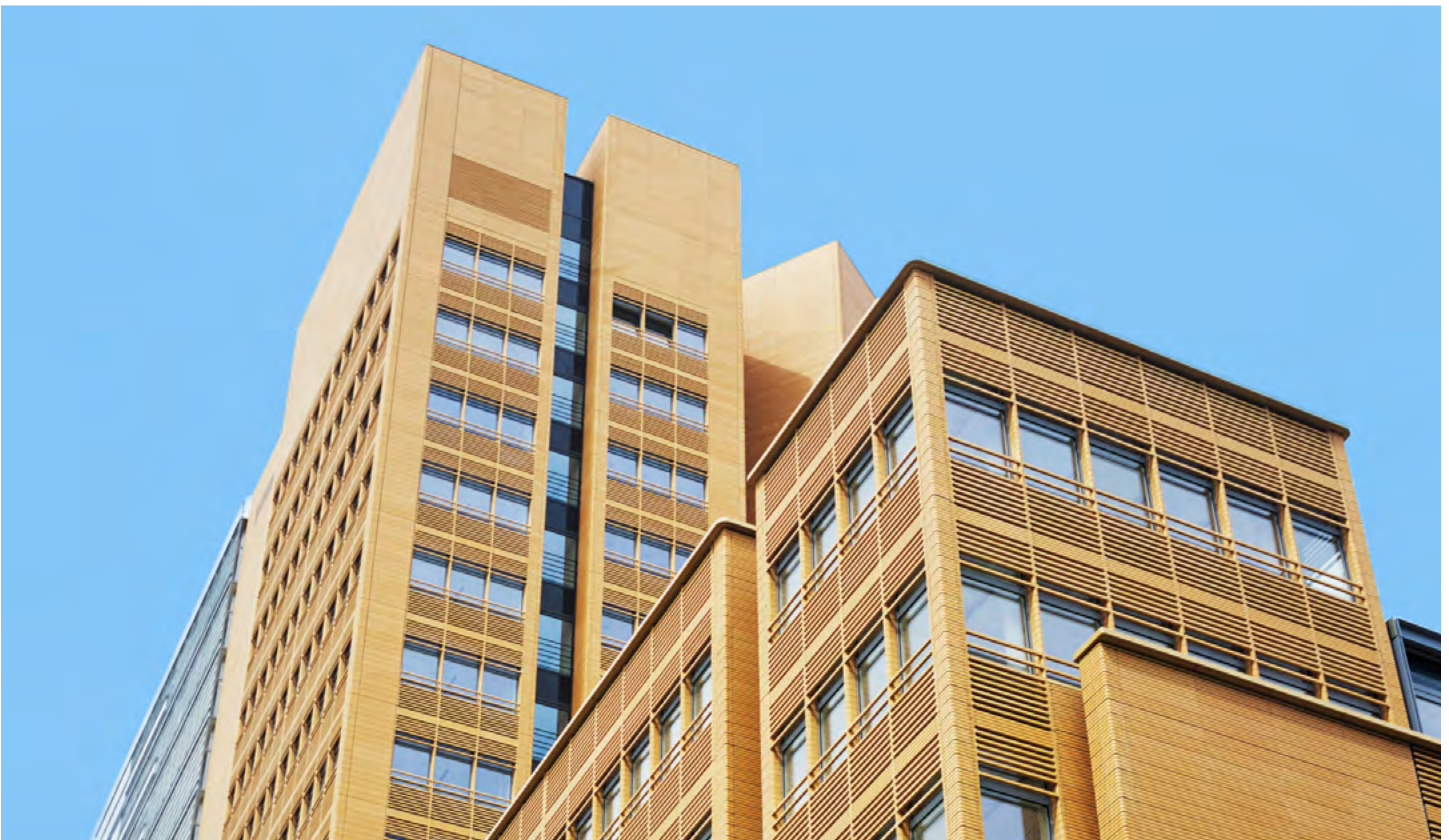
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The Handbook for Campus Safety and Security Reporting 2016 Edition



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The Handbook for Campus Safety and Security Reporting

2016 Edition

U.S. Department of Education
Office of Postsecondary Education

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June 2016

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Content contact: HandbookQuestions@ed.gov

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ABBREVIATIONS

AD: Athletics director

*Clery Act: Jeanne Clery Disclosure of Campus Security Policy and
Campus Crime Statistics Act*

Clery Act geography: Buildings or property that meet the definition of
On Campus, Public Property, or Noncampus buildings or
property as defined by the *Clery Act* and discussed in Chapter 2
of this handbook

CSA: Campus Security Authority

DUI: Driving under the influence

DWI: Driving while intoxicated

FERPA: Family Educational Rights and Privacy Act

FBI: Federal Bureau of Investigation

FSEOGs: Federal Supplemental Educational Opportunity Grants

GO: General order

HEA: Higher Education Act of 1965

LEAP: Leveraging Educational Assistance Partnership

MOU: Memorandum of Understanding

NIBRS: Uniform Crime Reporting National Incident-Based Reporting
System

PPA: Program Participation Agreement

RA: Resident assistant

SOP: Standard operating procedure

The Department: U.S. Department of Education

UCR: Uniform Crime Reporting

VAWA: Violence Against Women Act

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Introduction:

An Overview of Campus Safety And Security Reporting

CHAPTER 1



Choosing a postsecondary institution is a major decision for students and their families. Along with academic, financial and geographic considerations, the issue of campus safety is a vital concern. In 1990, Congress enacted the *Crime Awareness and Campus Security Act of 1990* (Title II of Public Law 101-542), which amended the *Higher Education Act of 1965 (HEA)*. This act required all postsecondary institutions participating in *HEA*'s Title IV student financial assistance programs to disclose campus crime statistics and security information. The act was amended in 1992, 1998, 2000 and 2008. The 1998 amendments renamed the law the *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act* in memory of a student who was slain in her dorm room in 1986. It is generally referred to as the *Clery Act* and is in section 485(f) of the *HEA*.

On March 7, 2013, the *Violence Against Women Reauthorization Act of 2013 (VAWA)* (Public Law 113-14) was signed into law. *VAWA* includes amendments to the *Clery Act*. These changes require institutions to disclose statistics, policies and programs related to dating violence, domestic violence, sexual assault and stalking, among other changes. Specifically, these changes added or modified requirements related to

- disclosure of statistics of the number of dating violence, domestic violence, sexual assault and stalking incidents;
- disclosure of statistics of new categories of Hate Crimes;
- implementation by institutions and disclosure of programs to prevent dating violence, domestic violence, sexual assault and stalking, including
 - primary prevention and awareness programs for incoming students and employees; and

Although the *HEA* is the law that governs the administration of all federal higher education programs, as used in this handbook, *HEA* refers only to the *Clery Act* and other safety- and security-related requirements applicable to institutions under the *HEA*.

- ongoing prevention and awareness campaigns for students and employees;
- disclosure of procedures victims should follow if a crime of dating violence, domestic violence, sexual assault or stalking has occurred; and
- implementation by institutions and disclosure of procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault and stalking, including
 - descriptions of each disciplinary proceeding used by the institution, the standard of evidence used during each disciplinary proceeding, possible sanctions imposed following the results of disciplinary proceedings, and the range of protective measures that the institution may offer a victim;
 - provisions to ensure that proceedings will be prompt, fair and impartial;
 - provisions that state that proceedings will be conducted by officials who receive annual training; and
 - ensuring equal opportunities for the accuser and accused to have others present during proceedings, including an advisor of their choice.

Although the *HEA* is the law that governs the administration of all federal higher education programs, as used in this handbook, *HEA* refers only to the *Clery Act* and **other** safety- and security-related requirements applicable to institutions under the *HEA*.

How to Determine If Your Institution Must Comply With the *HEA*

Does your institution participate in federal Title IV student financial assistance programs? All public and private postsecondary institutions that participate in any of the Title IV programs must comply with the *HEA*. Title IV institutions have signed Program Participation Agreements (PPAs) with the U.S.

Department of Education (the Department) to administer these financial assistance programs. The programs include Pell Grants, Federal Supplemental Educational Opportunity Grants (FSEOGs), the Federal Work-Study Program, Federal Perkins Loans, the Federal Direct Loan Program, and the Leveraging Educational Assistance Partnership (LEAP). If you are not sure whether your institution participates in the Title IV programs, contact your institution's financial aid officer or chief executive officer.

Note that:

- Your institution must comply with the *HEA*'s requirements beginning on the date your PPA goes into effect (i.e., the date it is signed by the secretary of education). If your institution is Title IV eligible, but has a location or locations that serve students who are not receiving Title IV student aid, you must still comply with the *Clery Act* and other safety- and security-related *HEA* requirements for all locations. These requirements apply based on institutional eligibility, not location eligibility.
- If your institution primarily serves secondary school students, but enrolls even one postsecondary school student and participates in the Title IV programs, you must comply.
- If your institution does not participate in the Title IV programs or has a "deferment only" status (i.e., it does not provide student loans or grants through Title IV programs but does have students who are eligible to defer federal student loans while they are enrolled in your school), you are not required to comply with the requirements described in this handbook.

Title IV institutions that are exempt from compliance:

- If your institution is a **distance education-only** school and your students are never present on a physical campus, you do not have to comply with the requirements discussed in this handbook. This means that students do not go to a physical location to enroll, seek guidance, study, work, intern, etc. The

This revised handbook replaces the previous versions of the handbook.

only exception to this rule is an annual graduation ceremony. If the only time students are present on a physical campus is to attend a graduation ceremony at a location that your institution owns or controls, your institution is still exempt from compliance.

- **Foreign institutions** are exempt from the requirements; however, foreign campuses of U.S. institutions are not exempt and must comply with the *Clery Act* and other safety- and security-related requirements discussed in this handbook.

If you have determined that your institution is a Title IV institution and must comply, read on.

Purpose of the Handbook

This handbook reflects the Department's interpretations and guidance, as of the date of publication, and was written to assist you, in a step-by-step and readable manner, in understanding and meeting the various *HEA* requirements. It is intended for use by the Department's program reviewers who are responsible for evaluating an institution's compliance with the requirements as well as postsecondary institutions and outside reviewers.

This revised handbook replaces the previous versions of the handbook. It does not supplant or replace the *HEA*. The *HEA* and its regulations take precedence if there are any differences between them and the handbook. Your institution is responsible for ensuring that it complies with any changes made to them.

Handbook Organization

Chapter 2 assists you in laying the proper foundation for complying with the *Clery Act* and other *HEA* safety- and security-related reporting requirements by explaining the important role geography has in complying with the law and its regulations. We discuss in detail how to identify which buildings and property owned or controlled by your institution fall into the various *HEA*-related geographic categories. Getting this foundation right is key to knowing

- what crimes and fires to report and in which reporting categories to include them;

- from whom to collect crime and fire reports;
- whether a campus alert must be issued;
- whether a crime or a fire report must be entered into a log;
- what policy statements your institution must have on record;
- what training programs your institution must provide for your students and employees; and
- what annual reports your institution must publish.

Subsequent chapters describe and discuss the various requirements by topic. We suggest reading the chapters in order because some chapters contain information that builds upon previous topics. For example, Chapter 3 provides definitions of crimes and discusses how to count those that occur on your *Clery Act* geography for inclusion in your statistics. Chapter 4 helps you determine from whom within your institution and from which local law enforcement agencies you must obtain such crime information. There are also cross-references throughout the handbook for the times you just want to research a particular regulation or issue.

The handbook also contains citations for the applicable laws and regulations, highlights important information in side notes, provides examples of crime and fire scenarios, and suggests helpful practices to assist you in determining if your policies and procedures are compliant. There are a number of appendices at the back of the handbook, which are referenced throughout the chapters, along with an index to help you locate specific terms and topics, and a list of abbreviations used frequently throughout the handbook. And, because no handbook could cover every situation, help desk contact information is provided if you need further assistance.

The Requirements

The *HEA* contains specific campus safety- and security-related requirements, but allows institutions a great deal of flexibility in complying with them. This flexibility acknowledges the myriad differences in types, locations and configurations of postsecondary schools. Although **all institutions have immediate, ongoing and annual**

We suggest reading the chapters in order because some chapters contain information that builds upon previous topics.

Although all institutions have immediate, ongoing and annual requirements, compliance might differ in some respects from one institution to another.

requirements, compliance might differ in some respects from one institution to another. For example, compliance for an institution with on-campus student housing facilities differs from compliance for a small commuter school located in a strip mall. A single institution might have some different compliance requirements for each of its campuses. In any case, whatever the requirements are for your specific institution, they must be met completely and on time. As discussed throughout the handbook, remember to maintain detailed documentation of your compliance with each requirement. Institutions are routinely required to provide this documentation to Department officials during the conduct of program reviews.

The requirements fall into three categories based on the configuration of an institution: (1) *Clery Act* crime statistics and security-related policy requirements that must be met by every institution; (2) an additional *Clery Act* crime log requirement for institutions that have a campus police or security department; and (3) *HEA* missing student notification and fire safety requirements for institutions that have at least one on-campus student housing facility. Following is a list of the requirements by category along with the number of the applicable handbook chapter or chapters.

1. Every institution must do the following:

- **Collect, classify and count crime reports and crime statistics.**

The regulatory requirements for classifying and counting crimes are discussed in Chapter 3. The regulatory requirements for collecting crime reports and statistics are discussed in Chapter 4.

- **Issue campus alerts.** To provide the campus community with information necessary to make informed decisions about their health and safety, you must
 - issue a **timely warning** for any *Clery Act* crime that represents an ongoing threat to the safety of students or employees; and
 - issue an **emergency notification** upon the confirmation of a significant emergency or dangerous situation involving an immediate

threat to the health or safety of students or employees occurring on the campus.

The regulatory requirements regarding these topics are discussed in detail in Chapter 6.

- **Provide educational programs and campaigns.** To promote the awareness of dating violence, domestic violence, sexual assault and stalking, you must
 - provide primary prevention and awareness programs to all incoming students and new employees; and
 - provide ongoing prevention and awareness campaigns for students and employees.

The regulatory requirements regarding these topics are discussed in detail in Chapter 8.

- **Have procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault and stalking.** Disclose your policy and procedures in the annual security report. The regulatory requirements regarding these topics are also discussed in detail in Chapter 8.
- **Publish an annual security report** containing safety- and security-related policy statements and crime statistics and distribute it to all current students and employees. Schools also must inform prospective students and employees about the availability of the report.

The regulatory requirements regarding crime statistics are discussed in Chapter 3 and the regulatory requirements for the annual security report are discussed in Chapters 7–9.

- **Submit crime statistics to the Department.** Each year in the fall you must participate in a Web-based data collection to disclose crime statistics by type, location and year.

The regulatory requirements for the data collection are discussed in Chapter 9. The comprehensive user's

guide for the survey is located online at <https://surveys.ope.ed.gov/campussafety>.

2. In addition to the requirements for all institutions listed under no. 1, if your **institution maintains a campus police or security department**, you must keep a daily crime log of alleged criminal incidents that is open to public inspection.

The regulatory requirements regarding the daily crime log are discussed in Chapter 5.

3. In addition to the requirements for all institutions listed under no. 1, if your **institution has any on-campus student housing facilities**, you must

- disclose **missing student notification** procedures that pertain to students residing in those facilities; and
- disclose **fire safety information** related to those facilities. Specifically, you must
 - keep a **fire log** that is open to public inspection;
 - publish an **annual fire safety report** containing **policy statements** as well as **fire statistics** associated with each on-campus student housing facility, including the number of fires, cause of fires, injuries, deaths and property damage, and inform prospective students and employees about the availability of the report; and
 - submit **fire statistics** to the Department each fall in the Web-based data collection.

The regulatory requirements regarding missing student notification are discussed in Chapter 10 and the regulatory requirements regarding fire safety are discussed in Chapters 11–14.

Compliance Timetable

Compliance with the *HEA*'s campus safety- and security-related requirements is not a once-a-year event. Many requirements must be satisfied before an institution can be considered in full compliance. Some requirements are ongoing, such as crime information collecting, campus alerts and log updating, while other requirements are less frequent, such as the annual reports and the online survey you submit to the Department.

Table 1 is an overview of the basic requirements and time frames for the main components of compliance. (Note that Appendix C provides a detailed checklist for compliance.)

Compliance with the *HEA*'s campus safety- and security-related requirements is not a once-a-year event.

Table 1. Components of *Higher Education Act* compliance regarding campus safety and security reporting: Basic requirements and time frames

What to Do	When to Do It
Have emergency notification and evacuation procedures for alerting the campus community about significant emergencies or dangerous situations. Disclose your policies and procedures in the annual security report.	Use emergency notification procedures whenever there is an immediate threat to the health or safety of students or employees on campus.
Have in place primary and ongoing prevention and awareness programs and campaigns for students and employees. Disclose your policies and procedures in the annual security report.	Provide the primary education programs as part of the orientation process for new students and employees whenever they start. Ongoing campaigns should be visible throughout the year.
Issue timely warnings to alert the campus community about crimes that pose a serious or continuing threat to safety. Disclose your policy in the annual security report.	Issue a warning whenever there is a threat that a crime is ongoing or may be repeated.
Keep a crime log that records, by date reported, all crimes reported to the campus police or security department. ^a	Update your log within two business days of the crime report. Make the log available to the public during business hours.
Keep a fire log that records by date reported, all fires in on-campus student housing facilities. ^b	Update your log within two business days of the fire report. Make the log available to the public during business hours.
Collect crime reports from campus security authorities within the institution.	Identify campus security authorities at the beginning of the calendar year and collect crime reports on an ongoing basis.

Table 1. Components of *Higher Education Act* compliance regarding campus safety and security reporting: Basic requirements and time frames—Continued

What to Do	When to Do It
Request crime statistics from local law enforcement in the jurisdictions where the institution is located.	Make a request annually, ideally at the beginning of the calendar year.
Submit crime and fire statistics to the Department via a Web-based data collection. ^b	Submit statistics each fall, by the dates provided by the Department in a letter to your institution sent each year in July.
Have procedures for institutional disciplinary action in cases of dating violence, domestic violence, sexual assault and stalking. Disclose your policy and procedures in the annual security report.	Follow required procedures whenever a student or employee chooses to pursue institutional disciplinary action for alleged dating violence, domestic violence, sexual assault or stalking. Ensure prompt proceedings.
Have missing student notification procedures to aid in determining if a student is missing and in notifying law enforcement personnel. Disclose your policy and procedures in the annual security report. ^b	Follow required procedures whenever a student is determined to have been missing for 24 hours. Offer students the opportunity to register a contact annually.
Publish an annual security report containing campus security policy disclosures and statistics for the previous three years.	Publish and distribute your report or provide a notice of its availability annually by Oct. 1.
Publish an annual fire safety report containing policy disclosures and fire statistics for on-campus student housing facilities for the previous three years. ^b	Publish and distribute your report or provide a notice of its availability annually by Oct. 1.

^aThe crime log is mandatory for all institutions that maintain a campus police or security department.

^bThe fire log, annual fire safety report, disclosure of fire statistics and missing student notification procedures are mandatory for any institution that has an on-campus student housing facility.

Getting Additional Help

For questions that are not answered by this handbook, assistance is available by e-mailing HandbookQuestions@ed.gov.

Please include the following information and we will respond as soon as possible:

- Your name and title;
- The name of your school; and
- A detailed description of the assistance you need.

Before Moving On ...

Now that we have introduced you to the basics of *HEA* compliance, you need to be aware of the consequences of noncompliance. In addition to providing guidance on the implementation of regulations, and collecting and disseminating crime and fire data to Congress and the public, the U.S. Department of Education is also responsible for monitoring compliance.

The Department can issue civil fines of up to \$35,000 **per violation** for a substantial misrepresentation of the number, location or nature of the crimes required to be reported or for a violation of any other provision of the safety- and security-related *HEA* regulations. Final Program Review Determination Reports are public records. Note that the *HEA* includes a **whistle-blower protection provision** making it clear that nothing in the law shall be construed to permit a school to take retaliatory action against anyone with respect to the implementation of the *Clery Act* and the other *HEA* safety- and security-related requirements in the *HEA* and the Department's regulations.

Again, Chapter 2 presents a detailed look at *Clery Act* geography, what it is and why it's the cornerstone of safety- and security-related reporting. We strongly urge you to read it prior to reading the remaining handbook chapters, even if you are a reporting veteran.

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Geography:

Location, Location, Location

CHAPTER 2



The *Clery Act* requires institutions to disclose statistics for reported crimes based on

- **where** the crimes occurred,
- **to whom** the crimes were reported,
- the **types** of crimes that were reported, and
- the **year** in which the crimes were reported.

This chapter identifies and breaks down the physical parameters of reporting and explains how to apply these parameters to institutions of different sizes and in different settings.

You must disclose statistics for reported *Clery Act* crimes that occur (1) on campus, (2) on public property within or immediately adjacent to the campus, and (3) in or on noncampus buildings or property that your institution owns or controls. The definitions for these geographic categories are *Clery Act*-specific and are the same for every institution regardless of its physical size or configuration. It doesn't matter whether your campus consists of leased space in a strip mall, occupies 10 city blocks or consists of a couple of buildings on another school's campus. "*Clery Act* geography" is defined the same way.

Understanding each of these geographic categories as defined by the *Clery Act* is vital to complying with the law. You must provide a breakdown of the statistics by category. You must disclose, for example, an Aggravated Assault that occurred on your campus, or on the public sidewalk in front of your campus or in a high school classroom in a nearby city that your institution rents for creative writing classes. Remember, **location** is the key here—crimes that don't occur within your *Clery Act* geography are not included in your *Clery Act* statistics, even if your students or employees are involved. As you read through the description of each of the three categories, it may be helpful to create a list of the buildings and

*Geographic breakdown
citation*
34 CFR 668.46(c)(4)

The definitions for these geographic categories are *Clery Act*-specific and are the same for every institution regardless of its physical size or configuration.

On-campus definition
citation
34 CFR 668.46(a)

properties associated with your institution that fit each defined area.

How to Identify Your On-campus Geography

Under the *Clery Act*, the **on-campus** category includes the following:

Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and

Any building or property that is within or reasonably contiguous to the area identified in paragraph (1) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).

The first part of this definition states that, for *Clery Act* reporting purposes, your campus includes buildings and properties that meet all of the following criteria:

- Your institution owns or controls them;
- They are reasonably contiguous to one another; and
- They directly support or relate to the institution's educational purposes.

So what does this mean?

Controlled by means that your institution (or an institution-associated entity as described below) directly or indirectly rents, leases or has some other type of **written** agreement (including an informal one, such as a letter or an e-mail) for use of a building or property, or a portion of a building or property. Even if there is no payment involved in the transaction, for *Clery Act* purposes, a written agreement for the use of space gives your institution control of that space for the time period specified in the agreement. For example, if your campus consists of leased space comprising the entire third floor of an office building, you are in control of the third

floor. A reported crime that occurs on the third floor (rooms, hallway, restrooms), or in the lobby, stairwell or elevator that students must use to access the third floor, is considered to have occurred “on campus.” If the agreement gives your institution use of the parking lot or specific spaces in the lot, the parking lot or the specified section of the lot is also part of your on-campus geography. To emphasize: Your control extends as far as the space specified in your written agreement along with any area your students and employees have to use to access that space. So, if you lease the third floor of the building and a crime occurs on an elevator in the building during the period of time covered by your lease, you must include that crime in your *Clery Act* statistics.

Note that for the purposes of the *Clery Act*, if you have an **institution-associated foundation, holding company, subsidiary, alumni association, athletic booster club, or any other institution-associated entity** that owns or controls a building or property that is operated in support of, or in relation to, your institution’s educational purposes, your institution is considered to be in control of that building or property. **State ownership** of a building or property used in support of, or in relation to, the educational purposes of a state school also establishes institutional control of that building or property.

Institution-associated hospitals and/or medical centers that are controlled by your institution and reasonably contiguous with your campus should be included as part of your campus. Beyond formal legal arrangements, other factors that are considered in determining whether, for *Clery Act* purposes, the institution controls a hospital or medical center include overlapping faculty/doctors, overlapping boards of directors or officers, use of the hospital or medical center as part of the institution’s educational program, geographic proximity, an ongoing relationship between the institution and the hospital, and whether students consider the hospital or medical center to be part of the campus.

Reasonably contiguous refers to a building or property your institution owns or controls that’s in a location that you and your students consider to be, and treat as, part of your campus. An example might be a house two blocks from campus that’s owned by your institution and which is used as an art studio for your students. Generally speaking, it is reasonable to consider locations within one mile of your campus border to be reasonably contiguous with your campus. However, this determination must be made on a case by case

basis by taking into consideration the circumstances of the campus and the location. A location that is within one mile of campus but separated from campus by a river or a six-lane highway might not be considered contiguous unless a pedestrian bridge or tunnel connects the two sides. If you exclude from the definition of campus for *Clery Act* purposes a building or property your institution owns or controls that is within one mile of your campus you must be able to explain your basis for this decision.

Directly support, or relate to, the institution's educational purposes refers to the function of the building or property. For example, the dorms on your campus that house your students support the school's educational purposes. However, a high school that is located on your campus, but is otherwise not associated with your institution and is not used by your students or employees for any reason, does not. On the other hand, if the high school is used by your students and employees as part of your institution's educational program it would be part of your campus.

The second part of the on-campus definition requires you to include buildings and properties within your campus, or reasonably contiguous to it that meet all three of the following criteria:

- Your institution owns but does not control them;
- They are frequently used by your students; and
- They are used to support the institution's educational purposes.

Examples are a bookstore or a fast-food restaurant that leases space in your student center. Remember that these entities are considered to be part of your "on-campus" geography because you own the building, your students frequently use the space, and it supports your institution. Joe's Fried Chicken Emporium across the street from your student center would not be included in your on-campus geography even though many of your students eat there daily, if your institution does not own or control it.

Other On-campus Considerations

Listed below are examples of how to apply the “on-campus” parameters to nontraditional campuses and multiple campuses.

- **Institutions that share a campus:** If your institution shares a campus with another Title IV institution, both institutions must include in their separate *Clery Act* statistics all of the *Clery Act* crimes that occur anywhere on the campus. The reasons for this are (1) the *Clery Act* requires every Title IV institution to report statistics and (2) crime statistics are maintained on the Department’s public website and are retrieved for viewing by entering the name of a specific institution. Your statistics must be available to any interested party who searches the website’s database for your institution.
- **Institutions that lease space on another institution’s campus:** If your institution leases some buildings and property on another institution’s campus, your campus is determined by the specifics of that contract. For example, if you have sole use of a dorm, a classroom building, an administration building and a parking lot, that is your campus. If your contract also allows your students to share a dining hall with students from the host institution, that dining hall is also included. If the host institution also participates in Title IV programs, both schools must include the shared dining hall in their on-campus geography.
- **Institutions that offer dual classes and degrees:** If your institution has a partnership with another institution to offer dual classes and degrees and the agreement specifies only that your students can attend classes at the other institution and that the other school’s students can attend classes at your school, you do not have to disclose reported *Clery Act* crimes that occur on the other campus because you do not own or control it. The other institution will need to include any crimes in its statistics even if the crimes involve students from your institution.
- **Institutions that lease space in strip malls:** Your campus consists of any space within the strip mall

If your institution has more than one campus, each campus must comply independently with all of the *Clery Act* and the fire- and safety-related *HEA* requirements described in this handbook.

that is covered by your written agreement. If the lease includes use of the parking lot, or selected spaces in the lot, include the lot (or selected spaces) as part of your campus. If your students need to use stairwells or elevators or hallways to access the space your institution controls, include them as part of your campus as well. Do not include any of the strip mall's stores, restaurants, offices, etc., in your on-campus category unless your institution owns or controls them.

- **Institutions located in institution-owned strip malls:** Your campus consists of any space within the strip mall that is used for the institution's educational purposes. Do not include any of the strip mall's stores, restaurants, offices, etc., in your on-campus category if your institution leases that space to private individuals and businesses, and the space isn't used for your institution's educational purposes.

Institutions With More Than One Campus

If your institution has more than one campus, each campus must comply independently with all of the *Clery Act* and the fire- and safety-related *HEA* requirements described in this handbook, including publishing its own annual security report as discussed in Chapter 9 (or your institution may publish and distribute to students and employees a single annual security report as long as it clearly differentiates each campus's policies and statistics). For the purpose of these requirements, consider an additional location a **separate campus** if it meets all of the following criteria:

- Your institution owns or controls the site;
- It is not reasonably geographically contiguous with the main campus;
- It has an organized program of study; and
- There is at least one person on site acting in an administrative capacity.

An **organized program of study** means that the location offers courses in educational programs leading to a degree, certificate, or other recognized credential.

Administrative personnel encompass a variety of individuals who may have some responsibility for the activities that take place at the location; administrative personnel include, for example, a director, a building coordinator, a registrar or a secretary. It is not necessary for administrative personnel to be on site at all times for the location to qualify as a separate campus; the location might share a rotating administrator who is scheduled to be on site once a week. If your institution owns or controls noncontiguous academic locations where students take a course or two and there are no administrative personnel on site, those are not separate campuses. For *Clery Act* reporting purposes, they are noncampus locations and they are discussed later in this chapter under “How to Identify Your Noncampus Buildings or Property.”

Examples of separate campuses

- **Branch:** A branch campus is always a separate campus. **Branch campus** is a specific Department designation. It is defined as *a location of an institution that is geographically apart and independent of the main campus of the institution. A location of an institution is considered independent of the main campus if the location is permanent in nature, offers courses in educational programs leading to a degree or other recognized educational credential, has its own faculty and administrative or supervisory organization, and has its own budgetary and hiring authority.*
- **School:** A school is a division of an institution that is organized to give instruction of a defined type, such as a school of business, law, medicine or nursing. A school may be, but is not always, a separate campus. For example, if your institution has a school of law that is reasonably geographically contiguous with the main campus, include it as part of your main campus. If the school of law has an organized program of study and administrative personnel on-site, and is not reasonably contiguous to the main campus, treat it as a separate campus. Note that if you have a beauty school or technology school, etc., with multiple locations that each function as a main campus, each campus must comply independently with the *Clery Act*’s requirements.

*Branch campus definition
citation*
34 CFR 600.2

- **Other locations:** Other institution-owned or -controlled locations may include satellite, extension or similar types of noncontiguous sites that have an organized program of study and administrative personnel on-site. For example:
 - **Research campuses:** If your institution owns a farm, agricultural or horticultural center, or other noncontiguous research facility that has an administrator on-site and that is used by students for recurring classes, recurring field trips, internships, student jobs or other regularly scheduled use, it should be considered a separate campus. If student attendance at these locations is determined by individual research needs and there is no regularly scheduled use of the facility by students (i.e., student use is sporadic), it is not a separate campus.
 - **Athletic campuses or complexes:** If your institution owns a noncontiguous athletic complex that has administrators on site and houses classrooms used for courses that are part of an organized program of study (for example, the complex includes one or more large auditorium-style classrooms to be used by large courses in any department, or houses one or more regular classrooms used for courses towards a golf course management degree), the athletic complex is a separate campus.
- **Foreign locations:** A foreign location that a U.S. institution owns or controls that has an organized program of study and administrative personnel on-site is a separate campus.
- **Military bases:** If your institution has a written agreement giving it use of a defined space within the base, and the location otherwise meets the definition of a campus, it's a separate campus. If your school simply sends instructors to the base, it's not a separate campus.

On-campus Subset: On-campus Student Housing Facilities

Under the *Clery Act*, an institution that has on-campus student housing facilities must separately disclose two sets of on-campus statistics:

- The total number of crimes that occurred on campus, **including** crimes that occurred in student housing facilities; and
- The number of crimes that occurred in on-campus student housing facilities as a subset of the total.

Definition of an On-campus Student Housing Facility

For purposes of the *Clery Act* (as well as the *HEA* missing student notification and fire safety regulations, which are discussed in Chapters 10 and 11–14, respectively), *any student housing facility that is owned or controlled by the institution, or is located on property that is owned or controlled by the institution, and is within the reasonably contiguous geographic area that makes up the campus is considered an on-campus student housing facility.*

This definition includes the following types of housing:

- Undergraduate, graduate and married student housing.
- Single family houses that are used for student housing.
- Summer school student housing.
- Buildings that are used for student housing but also have faculty, staff or other individuals living there. (Do not include faculty-only housing in this category. Institution-owned or controlled faculty-only housing that is located on the campus belongs only in the “on-campus” category.)
- Buildings that are owned by a third party that has a written agreement with your institution to provide student housing. It doesn’t matter whether the rent is paid to the third party by the institution on behalf of the students or paid directly by the students. These

Crimes by location citation
34 CFR 668.46(c)(4)(ii)

On-campus student housing facility definition citation
34 CFR 668.41(a)

Properly defining what's "on campus" is vital—not just for disclosing on-campus crime statistics, but also for accurately identifying another category of *Clery Act* geography: public property.

locations could include buildings that are used exclusively for student housing, or hotels or apartment buildings in which a sub-set of the available units have been leased for student housing. In multi-use buildings that are reasonably contiguous with the campus, the portion of the building leased for student housing, as well as common areas and areas used to access the student housing, should be counted as an on-campus student housing facility. Include any unoccupied apartments that are specifically reserved for student housing. You do not have to include the apartments, rooms or floors of the building that are not reserved for student housing or apartments, or rooms or floors of the building that are reserved for faculty or staff.

- Housing for officially and not officially recognized student groups, including fraternity or sorority houses, that are owned or controlled by your institution or are located on property that your institution owns or controls.
- Parking facilities and dining halls that are physically attached to and accessed directly from student housing facilities must be included as part of the on-campus student housing facility.

Note that it doesn't matter whether the housing falls under the management of a residential life or similar office, your real estate office or another office. Be sure to include any facility that meets the definition of an "on-campus student housing facility."

If your **institution shares an on-campus student housing facility with another Title IV institution**, both institutions are considered to be in control of that facility and both institutions must include it when complying with the campus safety and security regulations.

Before Moving On ...

Properly defining what's "on campus" is vital—not just for disclosing on-campus crime statistics, but also for accurately identifying another category of *Clery Act* geography: public property. If you can't determine the boundaries of your campus under the *Clery Act*, you will not be able to properly identify your campus' public property.

How to Identify Your Public Property

Under the *Clery Act*, **public property** encompasses the following:

All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.

Public property refers to property owned by a public entity, such as a city or state government. An example of public property is a parking lot with a sign that reads, “City of Rockville Public Parking.” A parking lot with a sign that reads, “Joe’s 24-Hour Parking” is not public property despite the fact that the public can park there.

No matter where your campus is located, your *Clery Act* public property category consists solely of two limited areas.

The first is public property **within** your campus. An example is a public road or public bike path that runs through the campus. You must report statistics for crimes that occur on the section of the road or bike path that touches your campus. A private road or private driveway running through your campus is not public property. A public or municipal parking lot that bisects your campus is part of your public property. A privately owned parking lot that bisects your campus is not. However, regardless of whether the parking lot is publicly or privately owned, if your institution has a written agreement giving it use of the parking lot, include the lot in your on-campus geography, not your public property geography.

The second area is public property that immediately borders **and** is accessible from the campus. In many cases this property consists of a public sidewalk that borders the campus, the public street along the sidewalk and the public sidewalk on the other side of the street (i.e., sidewalk, street, sidewalk). Again, only the portions of the sidewalk, street and sidewalk that are adjacent to your campus are included in your public property. If you have an urban campus that comprises 100 buildings that have public sidewalks and public streets separating them, the same rules apply. You must identify the public property associated with each of these campus buildings, generally: sidewalk, street, sidewalk.

*Public property definition
citation*

34 CFR 668.46(a)

**No matter where
your campus is
located, your *Clery
Act* public property
category consists
solely of two
limited areas.**

So how do you determine whether the public property immediately adjacent to your campus is **accessible**? Look for one of two conditions to be present:

- There is no barrier of any kind between your campus border and public property. For example, you can step off your campus directly onto a public sidewalk.
- A standard of use has been established by your students. This means that although some type of barrier is present, your students frequently ignore, overcome or even use it, to gain access to public property. Some examples are:
 - A wall that students frequently climb over.
 - A fence that students frequently climb over, under or through. This includes a fence with a hole in it that students frequently crawl through.
 - A fence with a missing or broken gate that students frequently walk or drive through.

Other Public Property Considerations

- **Sidewalk, street, sidewalk:** Your public property does not include anything beyond the second sidewalk. (If there isn't a second sidewalk, it doesn't include anything beyond the street.)

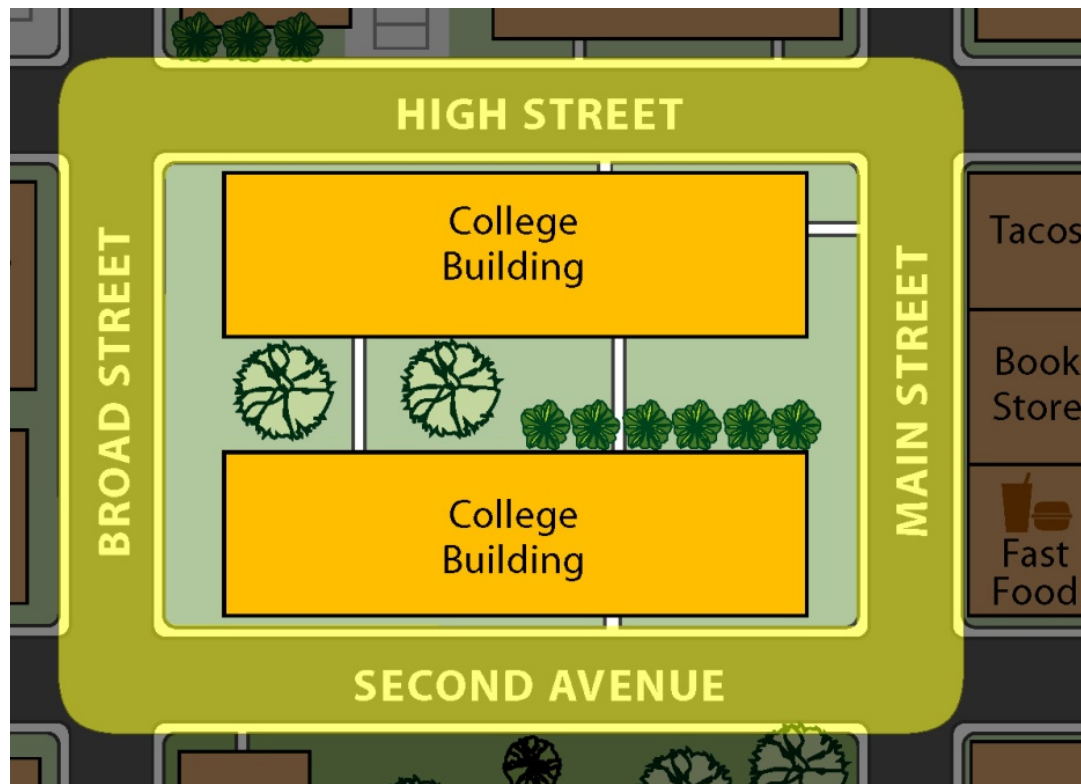


Figure 1. Example of public property: sidewalk, street, sidewalk. In this illustration, the college's public property consists of the public sidewalk, street, and opposite sidewalk along all four borders of the campus. Nothing beyond the second sidewalk is included in the college's public property.

- Private homes and businesses are not included:** Public property does not include any businesses or any private homes (i.e., businesses or homes not owned or controlled by your institution) even if they immediately border your campus. This means that your public property does not include Joe's Coffee House even if it's located right next to your campus and many of your students hang out there every day. Nor does it include a privately owned house next to your campus that some of your students rent.
- Public Parking:** If there is a public or municipal parking facility or lot bordering your campus, it is part of your public property. If the parking facility or lot that borders your campus is owned by an individual or a business, it is not. Your public property does not include a public parking facility or lot on the other side of the street across from your campus.

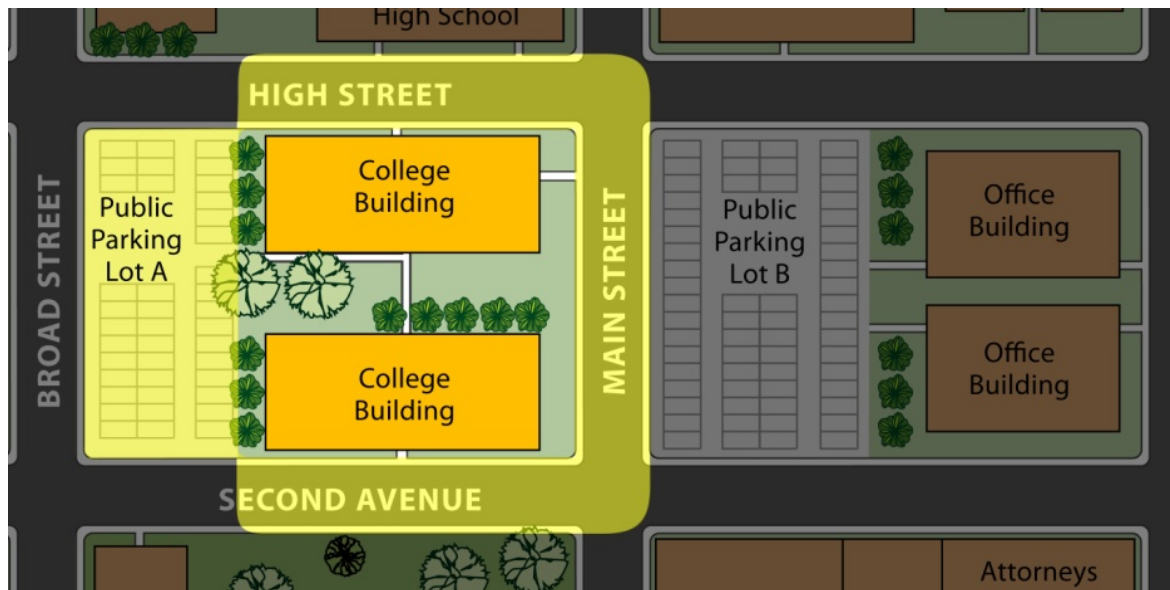


Figure 2. Example of public property: parking lot. In this illustration, Public Parking Lot A is included in the college's public property category because it's immediately adjacent to and accessible from the campus. Public Parking Lot B is not included in the college's public property category because it's not immediately adjacent to the campus. A sidewalk, street and sidewalk separate it from the campus.

- **Public property associated with campuses in malls or office buildings:**

- If your campus is within a mall or office building and you step outside onto a public sidewalk, include the sidewalk in your public property.
- If your agreement includes use of the mall or office building parking lot, the lot is part of your on-campus geography because under the *Clery Act*, the contract is treated as giving you control of the lot. If there is a public street running adjacent to the parking lot, that's your public property.
- If your agreement does not include use of the parking lot owned by the mall or office building, do not include the parking lot in your on-campus or your public property category. It is a private parking lot.
- If there is a public parking lot bordering the mall or office building (i.e., a parking lot

owned by a public entity), include it in your public property. If you lease a section of the lot, you are in control of that section and that section is part of your on-campus geography. If your lease allows you to park anywhere in the lot along with all of the other tenants, include the entire lot in your on-campus geography.

- **Public parks:** If there is a public park or similar type of public area immediately adjacent to your campus, we recommend that you extend the reporting area one mile into the portion of the property that borders your campus. We consider this to be a reasonable walking distance from the campus. However, if the portion of the park adjacent to your campus is fenced in or otherwise inaccessible from your campus, it is not your public property. If the park is gated on the portion that borders your campus, and the gate is open at specific times, the park is your public property at the times it is accessible from your campus. If the public park is on the opposite side of the street from your campus, do not include it in your public property category.
- **Public waterways:** If the public property that is immediately adjacent to your campus is a public waterway, it should be treated the same as a park. We suggest that you extend the reporting area one mile into the area of the river, lake, ocean, etc., that borders your campus. However, if the portion of the waterway adjacent to your campus is inaccessible from your campus, it is not your public property. If the waterway is accessible at specific times, it is your public property at the times it is accessible from your campus.
- **Public transit stops:** A public transit stop (e.g., subway or metro station, trolley or bus stop) located on your campus or immediately adjacent to your campus is included in your public property category up to the point at which a rider is required to pay a fare. For a subway or metro station, your public property would end at the fare gates. For a trolley or bus stop, it would end when someone gets on the vehicle. Apply this guidance to all other types of transit stops as well. (If your institution has a campus police or security department whose patrol

jurisdiction extends beyond the point where a fare is required, crimes reported there would be included in your daily crime log. An example is campus police who patrol the waiting platform of a commuter train station. More about the crime log in Chapter 5.)

- **Public buildings:** Buildings or property belonging to a public college or university are not considered public property under the *Clery Act*. Nor are buildings that are open to the public in private institutions.

Do not include the inside of a public building such as a public high school or public library in your public property category.

Some state institutions have charters specifying that state-owned roads running through the campus are under the control of the campus. Such roads are on-campus roads, not public property.

- **Institutions that share a campus:** If you share an entire campus with another Title IV institution, both institutions have the same public property.
- **No public property:** It's possible that your campus does not have any public property. Some examples are:
 - An institution that is located on, and completely surrounded by, the campus of another institution. If you cannot step out of one of the buildings you control without stepping onto property owned or controlled by the other institution, you don't have any public property.
 - All property within your campus boundaries is owned or controlled by your institution and there are no public streets, sidewalks, thoroughfares or parking facilities immediately adjacent to your campus.
 - An institution that is located in a mall or office building if the parking lot and streets surrounding the building are privately owned by an individual or business.

- A campus entirely surrounded by a gated fence that restricts access (e.g., it is opened only by a guard or some type of pass). However, if the gate remains open for a specific period of time, and the gate opens onto a public road, the portion of the road along the gated side of the campus is public property during the times the gate is open. (Do not limit this public property to the area immediately in front of the gate.)

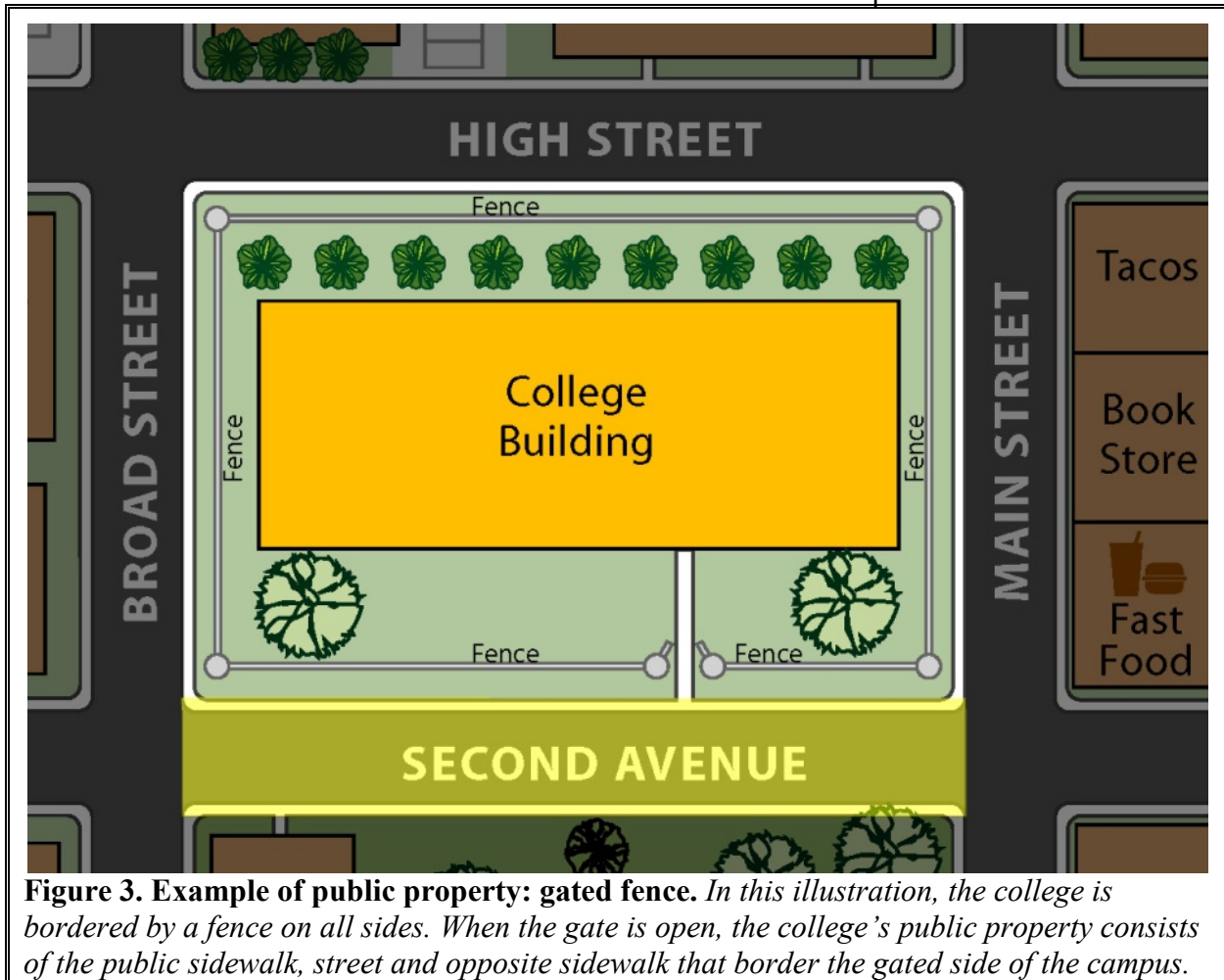


Figure 3. Example of public property: gated fence. *In this illustration, the college is bordered by a fence on all sides. When the gate is open, the college's public property consists of the public sidewalk, street and opposite sidewalk that border the gated side of the campus.*

Before Moving On ...

It is important that all Title IV institutions use the same geographic parameters when disclosing statistics in the annual security report and reporting those statistics to the Department. However, we are aware that some institutions want to report statistics for public property that is near their campus but outside the public property definition for *Clery Act* purposes. In those cases, the institution may include statistics for those areas in a caveat or table that is clearly separate from the official *Clery Act* statistics.

How to Identify Your Noncampus Buildings or Property

Does your institution own or control any buildings or property located off campus, in another city or even in another country? Does it have any officially recognized student organizations? If so, you may have what the *Clery Act* refers to as “noncampus buildings or property.”

The noncampus category encompasses two distinct types of buildings and property: those owned or controlled by officially recognized (or registered) student organizations, and those located off campus but owned or controlled by your institution. The *Clery Act* definition of **noncampus buildings or property** is:

Any building or property owned or controlled by a student organization that is officially recognized by the institution; or

any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution’s educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.

The first part of the definition applies to any building or property that is owned or controlled by a student organization **if** the organization is officially recognized by or registered with your institution. If it’s owned or controlled by the student organization, it’s considered noncampus under the *Clery Act*. There is one exception to this rule. If a fraternity or sorority house is located within the confines of the campus on land that is owned by the institution, the building is considered to be “on

*Noncampus definition
citation*
34 CFR 668.46(a)

campus” even if the building is owned or controlled by the fraternity or sorority.

The second part of the definition applies to additional locations that are associated with the campus but are not separate campuses. For example, you might lease a municipal athletic field for your team’s home soccer games or you might rent classroom space in a local high school two nights a week to hold creative writing classes for your students. Perhaps your institution owns an apartment building a few miles from the campus that you use for student housing. These locations are examples of what the *Clery Act* calls noncampus buildings and properties, and because your institution owns or controls them, you must disclose statistics for reported crimes that occur there. These are some of the more common types of noncampus locations, but you should include any location (except a separate campus) that

- is owned or controlled by the institution;
- supports or is used for the institution’s educational purposes;
- is frequently used by students; and
- is not considered part of the core campus.

Because an institution may rent, lease or otherwise control a location for varying amounts of time, we suggest that you give someone at your institution responsibility for monitoring the status of all buildings and properties for which you have a written agreement to use. If your institution rents a classroom location only for a semester, the following semester that location would no longer be included in your noncampus category. If you rent a location for classes, but later use the same rented location only as offices for your payroll personnel, and it is no longer frequently used by students, it would cease to be a noncampus location. Regardless of the time period involved (e.g., a month, a semester or an entire calendar year), you must disclose *Clery Act* statistics for the days and times that your institution owns or controls any buildings or property that meet the noncampus definition.

Noncampus locations do not have a public property reporting requirement.

Other Noncampus Considerations

- **Noncampus locations do not have a public property reporting requirement:** Although you must disclose *Clery Act* statistics for public property that is within or immediately adjacent to and accessible from your campus, you are not required to do so for public property within or adjacent to noncampus buildings or property.
- **There is a difference between owning and controlling a noncampus building or property:** If your institution owns a noncampus building or property you must disclose statistics for crimes that occur there at any time. If you do not own the location, under the *Clery Act* you have to disclose statistics only for crimes that occur when your institution has control of the space, that is, for the dates and times specified in your lease, rental or other agreement. Additionally, if your agreement is for a section of a building or property, for example the third floor of an office building, you have to disclose statistics only for the third floor, **plus** any other areas of the building that your students or employees must use to access the contracted space. So, suppose you have an agreement for the third floor of a building for Sept. 1 through Nov. 30, Monday through Thursday, 7 a.m. to 12 p.m. You must include statistics for *Clery Act* crimes that occur Sept. 1 through Nov. 30, Monday through Thursday, 7 a.m. to 12 p.m. on the third floor, the stairwell and elevators, the main lobby if it's used to access the stairwell and elevators, etc. If your contract includes the use of the parking lot, include any crimes that occur in the lot. Note that if your agreement specifies 7 a.m. to 12 p.m., you must disclose statistics for that time period even if your students and employees occupy the space only for part of that time, for example, from 8 to 11:30 a.m.
- **Limits of control:** Suppose your institution rents one half of a building—for example, a public high school—for specific days and times in order to offer some classes but not an organized program of study. The rented section of the high school falls under the noncampus category for the dates and times it is rented, regardless of whether the institution rents it once or more than once. One night while one of your

classes is in session, a criminal incident occurs in the part of the building not leased by your institution. You are not required to include this crime in your statistics because your institution doesn't have control over the part of the building you don't lease. This is true even if the crime involved one of your students.

- **Space versus program agreements:** Perhaps your institution sends students to an off-campus site for internships, externships, clinical training or student teaching. If you own or control the site or any space within the site, include the site or the specified space in your noncampus category. If you do not own or control the space, don't include it. If you have an agreement, even a written agreement, to send your students to a location for one of the aforementioned reasons, **but that written agreement is for the program rather than for use of the physical space**, you do not have control of the location and do not have to include statistics for crimes that occur there. For example, if you have a written agreement to send students to a privately owned hospital for clinical training, but you don't have a written agreement for use of the hospital or any space within the hospital, you do not have to include statistics for crimes that occur there. However, if you rent classroom space for your students within the same hospital, you are required to include crime statistics for that space, as well as for any other areas, such as a lobby or hallways and elevators used to access that space for the period of time specified in the agreement.
- **Corporate offices:** Include corporate offices that are owned or controlled by your institution and are not reasonably contiguous to your campus in the noncampus category if they are frequented by your students for any reason, including student jobs or internships.
- **Prisons:** If your institution sends faculty to a prison to teach, do not include the prison in your *Clery Act* statistics as you do not own or control it.
- **Military bases:** If you have a written agreement, such as a memorandum of understanding, giving you control over some part of a military base, include the

space in your noncampus category. Include statistics for crimes that occur in that space for the days and times specified in the agreement. If you simply send faculty to a military base, but do not have a written agreement with the base giving you control of any space there, do not include the base in your noncampus geography.

- **Research boats/ships/vans or other mobile classrooms:** If your institution owns or controls mobile classrooms that carry students for educational purposes, you must include *Clery Act* crimes that occur in or on those classrooms in your statistics. If the mobile classroom meets the criteria for a separate campus for any part of a calendar year, it should be considered a separate campus for *Clery Act* purposes for that full year.
- **Institutions with shared campuses:** If your institution shares a campus with another institution that has noncampus buildings or property, you are not required to including crime statistics for those noncampus buildings or properties unless you have a written agreement to use them as well.
- **A noncampus location that becomes a separate campus:** It's possible for a location to be noncampus for a period of time and then become a separate campus. For example, suppose your institution rents a few rooms in a building where your students take one or two writing classes. This is a noncampus location. A year and a half later it's become a very popular location and you decide to rent additional space there and offer a certificate program in technical writing. You hire a program director and administrative assistant to work there. Now the location offers an organized program of study and has administrative personnel on-site. It's a separate campus and must comply with all of the applicable requirements under the *HEA*. If the situation changes and the location is once again used only for a class or two, it reverts back to being a noncampus location. If a location meets the criteria for a separate campus at any point during a calendar year, it should be treated as a separate campus for that full year.

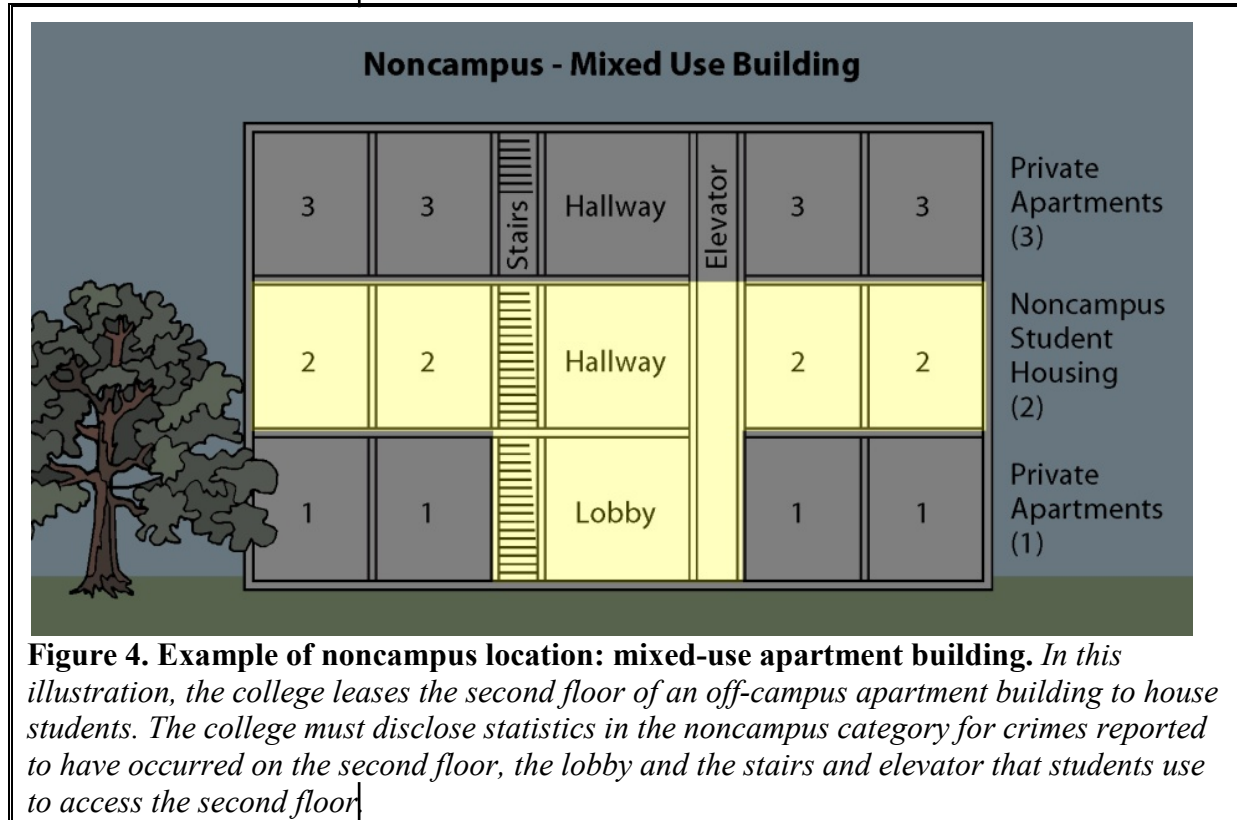
Off-Campus Student Housing Considerations

- **Third-party contracts:** If there is an apartment building across town from your campus that's owned by a third party that has a written agreement with your institution to provide student housing, it is a noncampus location. Some examples of this type of arrangement are a hotel, apartment building or student housing facility on another campus used for overflow housing. The hotel rooms, apartments or housing facilities and associated common areas specified in your written agreement are considered noncampus property. It doesn't matter whether the rent is paid to the third party by your institution on behalf of the students or paid directly by the students.

If multiple institutions contract with the apartment building owner to provide student housing, you still must report crime statistics for the property based on the details of your agreement. This means that if your agreement is limited to apartments on the north wing of the first floor, include statistics for the apartments on that wing plus any common areas, such as the laundry room and the lobby, and the hallway used to access the apartments. If your agreement doesn't specify which apartments are reserved for use by your institution's students, you must include statistics for the entire building except for the interior of the apartments that are used by another school's students.

- **Institution-owned apartments and management companies:** If your school owns an off-campus apartment building and puts a management company or a leasing agent in charge, but doesn't use the building for student housing or direct students to live there, do not include the building in your noncampus category even if some of your students happen to rent apartments there. The building doesn't support the institution's educational purposes.
- **Mixed-use apartment buildings:** If your school owns or controls an off-campus apartment building and reserves certain apartments or floors of apartments for student housing, the areas used for that housing, as well as common areas and areas used to access the student housing, are included in your noncampus category. Include any unoccupied

apartments that are specifically reserved for student housing. Do not include the apartments or floors of apartments that are not reserved for student housing. Do not include floors or apartments that are reserved for your faculty or staff.



- **Preferred leasing:** If you steer students toward recommended off-campus housing, but the housing is not owned or controlled by your institution (e.g., there is no written agreement between the third party and your institution to provide student housing, no residential life staff are located in the building, the building does not follow the institution's student housing policies), you aren't required to include statistics for crimes that occur there.

Considerations for Trips to Off-Campus Locations

- **Field trips:** You are not required to include statistics for crimes that occur on field trips at locations your institution does not own or control.
- **Overnight, school-sponsored trips:** If your institution sponsors students on an overnight trip, for example to see a play, and they rent motel rooms, you don't have to include crimes that occur in those rooms in your *Clery Act* statistics because the motel rooms don't meet the frequently-used-by-students criterion.
- **Repeated use of a location for school-sponsored trips:** If your institution sponsors students on an overnight trip **every year** and the students stay in the **same hotel each year**, you must include portions of the hotel in your noncampus geography. For example, students in the debate club take a trip to Washington, D.C. and stay at the same hotel every year. You must include in your statistics any crimes that occur in the rooms used by your students and any common areas used to access the rooms (lobby, elevators, etc.) for the times and dates specified in the rental agreement. Note that what matters here is repeated use of a location that is owned or controlled by the institution, not the number of days it is used or whether it is used by the same students or different students.
- **Short-stay “away” trips:** If your institution sponsors short-stay “away” trips of more than one night for its students, all locations used by students during the trip, controlled by the institution during the trip and used to support educational purposes should be treated as noncampus property. An example is a three-week marine biology study trip to Florida. Any classroom or housing space specified in the agreement between the institution and a third-party providing the space would be noncampus property. If your institution has entered into a written agreement with a third-party contractor to arrange housing and/or classroom space for a school-sponsored trip or study program (either domestic or foreign), it is assumed that the contractor is operating on behalf of

the school as the school's agent, putting the institution in control of this space.

However, if your institution (or a contracted third party) does not have an agreement for the space used, your institution is not in control of the space and you are not required to count it. For example, there are some situations, such as sports tournaments, for which the host institution makes all of the housing arrangements for visiting students. In these situations, the visiting institutions do not have a written agreement for the use of space and are not required to disclose crime statistics for the housing in which their students are located. However, the host institution would be responsible for disclosing crime statistics for the housing since they hold the agreement for the housing.

- **Study abroad programs:** If your institution sends students to study abroad at a location or facility that you don't own or control, you don't have to include statistics for crimes that occur in those facilities. However, if your institution rents or leases space for your students in a hotel or student housing facility, you are in control of that space for the time period covered by your agreement. Host family situations do not normally qualify as noncampus locations **unless** your written agreement with the family gives your school some significant control over space in the family home.

Use of Maps

Although the *Clery Act* does not require institutions to provide a map to show their campus and noncampus buildings, or property or public property areas, some institutions choose to provide one in their annual security report to help the campus community better understand where reported crimes occurred. A map is also useful if your institution is subject to a program review to help identify the buildings and property that make up your institution's *Clery Act* geography, and to pinpoint the patrol jurisdiction of your campus police or security personnel, if you have any. If you use a map it must present an accurate picture of the geographic locations it depicts, and you should update it as necessary. If you have

several campuses and choose to provide maps, you must have a separate map for each campus.

When in Doubt ...

Remember that keeping track of the buildings and properties your institution owns and controls, and what they are used for, is an institutional responsibility. If you are still unsure how to identify your *Clery Act* geography or if you have a unique situation that isn't covered here, help is always available. Please see "Getting Additional Help" in Chapter 1 (p. 1-11) for information on e-mailing our help desk.

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Crime Statistics:

Classifying and Counting

Clery Act Crimes

CHAPTER 3



Consider the following scenarios:

A student enters three unlocked rooms in an on-campus student housing facility and takes several items from two of them.

Campus security breaks up a party in a noncampus student housing facility and six students get referred for disciplinary action for possession of marijuana.

A school employee calls the police to report spray-painted racial slurs on the side of an on-campus dining hall.

A student seems to show up at every activity attended by his ex-girlfriend and sends her several suggestive emails.

Are these incidents *Clery Act* crimes? Must you include them in the crime statistics in your annual security report and the Web-based data collection? Should you count crimes in dorm rooms the same way you count crimes in academic offices? What's the difference between Burglary and Larceny?

This chapter discusses the types of crimes that are included in the *Clery Act* crime statistics reports and the rules for classifying and counting them. Throughout the discussion, there are examples that illustrate the rules and the exceptions to the rules. To read about how to present the statistics in your annual security report, see Chapter 9. For step-by-step instructions on entering the statistics in the Web-based survey, see the users guide located at <https://surveys.ope.ed.gov/campusafety>.

*Reported crime statistics
citation*

34 CFR 668.46(c)

The *Clery Act* requires your institution to include four general categories of crime statistics:

- **Criminal Offenses**¹—Criminal Homicide, including Murder and Non-negligent Manslaughter, and Manslaughter by Negligence; Sexual Assault,² including Rape, Fondling, Incest and Statutory Rape; Robbery; Aggravated Assault; Burglary; Motor Vehicle Theft; and Arson.
- **Hate Crimes**—Any of the above-mentioned offenses, and any incidents of Larceny-Theft, Simple Assault, Intimidation, or Destruction/Damage/Vandalism of Property that were motivated by bias;
- **VAWA Offenses**—Any incidents of Domestic Violence, Dating Violence and Stalking. (Note that Sexual Assault is also a *VAWA* Offense but is included in the Criminal Offenses category for *Clery Act* reporting purposes); and
- **Arrests and Referrals for Disciplinary Action** for Weapons—Carrying, Possessing, Etc. Law Violations, Drug Abuse Violations and Liquor Law Violations.

Statistics must be disclosed separately for each of these four general categories. This means that when an incident meets definitions in more than one of these categories, it must be reported in each category. For example, any Criminal Offense that is also a Hate Crime or *VAWA* Offense, or results in an arrest or disciplinary action for a Weapons, Drug Abuse or Liquor Law Violation, should be counted as a Criminal Offense and also as a Hate Crime, *VAWA* Offense, arrest, or disciplinary referral, as appropriate. The Hierarchy Rule discussed on pages 3-24 and 3-25 applies only when counting crimes within the Criminal Offenses category.

Note: Whenever “*Clery Act* crimes” or “crimes” are mentioned in this handbook, all of the categories above are included.

¹ Also referred to as Primary Crimes.

² Also referred to as Sex Offenses.

Crime Definitions

Under the *Clery Act*, for the purposes of counting and disclosing Criminal Offense, Hate Crime, arrest and disciplinary referral statistics you must do so based on definitions provided by the Federal Bureau of Investigation's (FBI's) Uniform Crime Reporting (UCR) Program. The definitions for *Murder, Rape, Robbery, Aggravated Assault, Burglary, Motor Vehicle Theft, Arson, Weapons Carrying, Possessing, Etc. Law Violations, Drug Abuse Violations, and Liquor Law Violations* are from the *Summary Reporting System (SRS) User Manual* from the FBI's UCR Program. The definitions of *Fondling, Incest and Statutory Rape* are from the FBI's *National Incident-Based Reporting System (NIBRS) Data Collection Guidelines* edition of the UCR. Hate Crimes are classified according to the FBI's *Uniform Crime Reporting Hate Crime Data Collection Guidelines and Training Manual*. Note that, although the law states that institutions must use the UCR Program definitions, *Clery Act* crime reporting does not have to meet all of the other UCR Program standards.

For the categories of *Domestic Violence, Dating Violence and Stalking*, the *Clery Act* specifies that you must use the definitions provided by the *Violence Against Women Act of 1994* and repeated in the Department's *Clery Act* regulations.

It is possible that institutions may be asked to code incidents using different definitions for purposes other than *Clery Act* reporting. However, for *Clery Act* purposes, **it is essential that institutions classify and count reported incidents based on the definitions specified by the *Clery Act*.**

In this chapter, crime definitions appear in italics. Some of the text that is provided to help you classify criminal incidents is taken directly from FBI materials or federal statutes and some has been condensed or paraphrased. Some crime examples are taken or adapted from FBI materials, and others were created for this handbook based on questions schools and practitioners have asked us over the years.

You must **include in your crime statistics the number of all reported offenses**, without regard to the findings of a court, coroner or jury, or the decision of a prosecutor. Classify and count crimes from the records of calls for service, complaints and investigations. More information on how to collect these statistics is found in Chapter 4.

Uniform Crime Reporting
Program *definitions citation*
34 CFR 668.46(c)(7)

Violence Against Women Act
of 1994 *definitions citation*
34 CFR 668.46(c)(6)(A)(i)

You must include in your crime statistics the number of all reported offenses, without regard to the findings of a court, coroner or jury, or the decision of a prosecutor.

Types of Criminal Offenses

1. Criminal Homicide. These offenses are separated into two categories: Murder and Non-negligent Manslaughter, and Manslaughter by Negligence.

- a) **Murder and Non-negligent Manslaughter** is defined as *the willful (non-negligent) killing of one human being by another*. **Count one offense per victim.**

Include as Murder and Non-negligent Manslaughter:

Any death caused by injuries received in a fight, argument, quarrel, assault or the commission of a crime.

Do not include as Murder and Non-negligent Manslaughter:

- Suicides.
- Fetal deaths.
- Traffic fatalities.
- Accidental deaths.
- Assaults with intent to Murder and attempts to Murder. (Classify assaults and attempts to Murder as Aggravated Assaults.)
- Situations in which a victim dies of a heart attack as the result of a crime, even in instances where an individual is known to have a weak heart.
- Justifiable homicide (which is defined as and limited to *the killing of a felon by a peace officer in the line of duty, or the killing of a felon during the commission of a felony, by a private citizen*).

Examples of Murder and Non-negligent Manslaughter

Scenario 1: A gunman enters a classroom on campus and kills two students and a faculty member before being subdued and arrested. Include three incidents of on-campus Murder and Non-negligent Manslaughter in your crime statistics.

Scenario 2: Two groups of students get into an argument in a campus parking lot. Jim punches Joe and causes him to hit his head on a concrete sidewalk, inflicting severe head trauma. Two days later, Joe dies. Include one incident of on-campus Murder and Non-negligent Manslaughter in your crime statistics.

Scenario 3: A husband and wife have an argument at a married student housing facility owned by the institution that is five miles from campus, and the wife shoots and kills her husband. Include one incident of noncampus Murder and Non-negligent Manslaughter in your crime statistics. Also include one incident of noncampus Domestic Violence. (Domestic Violence is discussed on pages 3-37 and 3-38.)

Scenario 4: A nonstudent is shot and killed during an armed Robbery on a city-owned sidewalk in front of a building on campus. Include one incident of public property Murder and Non-negligent Manslaughter in your crime statistics.

Scenario 5: Two students get into an argument at a popular off-campus bar. Bob attacks Brad with a broken bottle and Brad pulls out a gun and kills Bob. Do not include this incident in your *Clery Act* statistics because the incident occurred at a private facility off campus.

b) Manslaughter by Negligence is defined as *the killing of another person through gross negligence. Count one offense per victim.*

Include as Manslaughter by Negligence:

Any death caused by the gross negligence of another. In other words, it's something that a reasonable and prudent person would not do.

Do not include as Manslaughter by Negligence:

- Deaths of persons due to their own negligence.
- Accidental deaths not resulting from gross negligence.
- Traffic fatalities.

Remember that the findings of a court, coroner's inquest, etc., do not affect classifying or counting criminal incidents.

Example of Manslaughter by Negligence

Scenario: Two students, Jim and Mike, are handling a gun at an on-campus fraternity house owned by the institution, and Jim “jokingly” points the gun at Mike. Jim fires the gun, and Mike is killed. Jim claims no knowledge of the gun being loaded. Include this as one Manslaughter by Negligence in the on-campus category and one Manslaughter by Negligence in the on-campus student housing facility category.

2. Sexual Assault (Sex Offenses). *Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.* Include attempted Sexual Assaults, but do not include in your Clery Act statistics any Sexual Assaults other than the four types of Sexual Assaults described in this chapter.

- a) **Rape** is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females. **Count one offense per victim.**

Include the crime as Rape, regardless of the age of the victim, if the victim did not consent or if the victim was incapable of giving consent. If the victim consented, the offender did not force or threaten the victim, and the victim was under the statutory age of consent, include the crime as Statutory Rape.

- b) **Fondling** is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity. **Count one offense per victim.** Fondling is recognized as an element of the other sex offenses. Therefore, count Fondling only if it is the only sex offense.

- c) **Incest** is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law. **Count one offense per victim.**

- d) **Statutory Rape** is *sexual intercourse with a person who is under the statutory age of consent. Count one offense per victim.*

The statutory age of consent differs by state and can get complicated. For example, in Maryland, the statutory age of consent is 16 years of age (which means the victim must be under 16); however, 14- and 15-year-olds may consent if the offender is less than four years older than the victim. In Nevada, the age of consent is 16; however, sexual intercourse with someone who is under 16 years of age is illegal only if the defendant is at least 18 years of age (the age at which the defendant can be prosecuted). We recommend that you consult your state's statutes to determine the statutory age of consent. **Remember, if force was used or threatened, or the victim was incapable of giving consent because of his/her age or temporary or permanent mental impairment, the offense is Rape, not Statutory Rape.** The ability of the victim to give consent must be a professional determination by a law enforcement agency.

Note that, while the definitions of Sexual Assault include lack of consent as an element of the offense, for the purposes of including a reported Sexual Assault in *Clery Act* statistics, no determination as to whether that element has been met is required. Therefore, all Sexual Assaults that are reported to a campus security authority must be included in your *Clery Act* statistics and also included in your crime log (if you are required to have one), regardless of the issue of consent.

All Sexual Assaults that are reported to a campus security authority must be included in your *Clery Act* statistics, regardless of the issue of consent.

Examples of Sexual Assault

Scenario 1: A female student reports that she was raped by an unidentified male while jogging along a campus trail. Include this as one on-campus Rape.

Scenario 2: A female student reports that her ex-boyfriend had sex with her in her campus residence hall room while she was unconscious after a night of drinking alcohol. Include this as one Rape in the on-campus category and one Rape in the on-campus student housing facility category. Also include one incident of Dating Violence in both the on-campus and on-campus student housing facility categories (Dating Violence is discussed on pages 3-36 and 3-37).

Scenario 3: A male student reports that another male student fondled him in a campus building while telling him that he was glad they could finally be alone. Include this as one on-campus Fondling.

Scenario 4: A female student reports to the campus police that she was raped in her car in a parking lot on her school's campus by students from another college. Include this as one on-campus Rape.

Scenario 5: Three female students report that they were each raped by five male students at an off-campus fraternity house owned by a recognized fraternity. Each male raped each of the female students. Include this as three noncampus Rapes.

Scenario 6: A female student reports that an unknown male attempted to rape her on a city-owned sidewalk outside a classroom building on campus, but that he was frightened away by another pedestrian before completing the attack. Include this as one public property Rape.

Scenario 7: A woman is walking on a public sidewalk in front of your campus and a man pinches her buttocks as he runs by her. Include this as one public property Fondling only if the victim reports that it was sexual in nature.

Scenario 8: A female student reports that she has been raped three times since January by someone who lives in the same on-campus student housing facility. All three of the sexual assaults occurred in this housing facility. Include this as three Rapes in both the on-campus category and on-campus student housing facility category.

Scenario 9: A 21-year-old student has sex with a 15-year-old juvenile in the student's on-campus apartment. There is no use of force or threat of force (the statutory age of consent is 16). Include this as one Statutory Rape in the on-campus category and one Statutory Rape in the on-campus student housing facility category.

Scenario 10: Campus police respond to a call from the dean reporting that an unknown man exposed himself to a group of female students on campus. Do not include this incident in your *Clery Act* statistics as it is not a *Clery Act* crime.

3. Robbery. Robbery is *the taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.* In any instance of Robbery, **count one offense for each distinct operation (i.e., incident), including attempts.** Do not count the number of victims robbed, the number of those present at the Robbery or the number of offenders.

Essential Elements of a Robbery:

- Committed in the presence of a victim (usually the owner or person having custody of the property).
- Victim is directly confronted by the perpetrator.
- Victim is threatened with force or put in fear that force will be used.
- Involves a Theft or Larceny.

Because some type of assault is an element of Robbery, do not report an assault as a separate crime as long as it was performed in furtherance of the Robbery. However, if the injury results in death, classify the incident as Murder and Non-negligent Manslaughter.

Aids to Classifying Incidents as Robberies

The classification of Robbery includes both armed robbery and robberies where only personal weapons are used. Armed robbery includes incidents commonly referred to as stickups, hijackings, holdups, heists, carjackings, etc. Carjacking is a Robbery offense in which a motor vehicle is taken through force or threat of force. In such case, following the Hierarchy Rule, report **only** a Robbery, **not** a Motor Vehicle Theft. (The **Hierarchy Rule** is discussed on pages 3-24 and 3-25). Robberies in which only personal weapons, such as hands, arms, fists, feet and teeth, are used or threatened to be used may be referred to as “strong-arms” or “muggings.”

The UCR considers a weapon to be a commonly known weapon (a gun, knife, club, etc.) or any other item that, although not usually thought of as a weapon, becomes one in the commission of a crime. Robbery also includes crimes involving pretend weapons or those in which the weapon is not seen by the victim, but the robber claims to possess one.

Remember, the use or threat of force is an essential element of Robbery.

Remember, the use or threat of force is an essential element of Robbery. For example, pocket-picking or purse-snatching where force is neither used nor threatened is Larceny-Theft. However, if force or threat of force is used to overcome the active resistance of the victim in a purse-snatching or other such crime, include the offense as Robbery.

Example of Robbery

Scenario: Two students returning to campus from a night at a local bar are approached by three armed men on a city sidewalk outside their residence hall and told to hand over their wallets. The students comply, and the three armed men leave without harming the students. Include this as one Robbery on public property.

4. Aggravated Assault. Aggravated Assault is *an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. Count one offense per victim.* However, if a number of persons are involved in a dispute or disturbance, and the aggressors cannot be distinguished from the victims, count the number of persons assaulted as the number of offenses.

Include as Aggravated Assaults:

- Assaults or attempts to kill or Murder.
- Poisoning (including the use of date rape drugs).
- Assault with a dangerous or deadly weapon.
- Maiming.
- Mayhem.
- Assault with explosives.
- Assault with disease (as in cases when the offender is aware that he or she is infected with a deadly disease and deliberately attempts to inflict the disease by biting, spitting, etc.).

Count all assaults by one person upon another with the intent to kill, maim or inflict severe bodily injury with the use of any dangerous weapon. It is not necessary that injury result from an Aggravated Assault when a gun, knife or other weapon

that could cause serious personal injury is used. Also count attacks using personal weapons, such as hands, arms, feet, fists and teeth that result in serious or aggravated injury. In making determinations about whether or not an assault that is carried out using a body part such as hands and feet is aggravated, the institution must consider not only the intent of the attacker but also the extent of the injuries. If an attack results in broken bones, a loss of consciousness or significant blood loss, or requires medical treatment or hospitalization, such as stitches or casting (regardless of whether or not the victim accepts such assistance), the incident must be classified as an Aggravated Assault.

As stated earlier, the UCR considers a weapon to be a commonly known weapon (a gun, knife, club, etc.) or any other item that, although not usually thought of as a weapon, becomes one in the commission of a crime. For example, if an individual intentionally drives a car into another occupied car, classify the incident as an Aggravated Assault because, regardless of the extent of injury sustained by the victim, the car was used as a weapon. If the victim dies, however, classify the death as Murder and Non-negligent Manslaughter.

The use of drugs to subdue a victim, such as the use of date rape drugs, should be counted as Aggravated Assault because it can be assumed that the intent was to inflict aggravated bodily harm. However, if the use of the drugs results in Rape or Murder within the same incident, follow the Hierarchy Rule, and count the more serious offenses. (The **Hierarchy Rule** is discussed on pages 3-24 and 3-25.)

Be aware that assault cases might be categorized as assault and battery, disorderly conduct, domestic violence or simple assault by some local jurisdictions, even though a knife, gun or other weapon was used in the incident. These should be classified as Aggravated Assault for *Clery Act* reporting purposes.

Examine and count assaults according to the standard UCR definitions, regardless of whether they are labeled “misdemeanors” or “felonies” by local definitions.

Aid for Classifying Assaults

Carefully consider the following factors in classifying assaults:

- The type of weapon used or the use of an object as a weapon;
- The seriousness of the injury; and
- The intent of the assailant to cause serious injury. The intent to cause death or severe bodily harm can arise after the parties to an incident have already engaged in some consensual contact. For example, consider a situation where friends are on opposite teams in an intermural basketball game or where roommates are wrestling in their dorm room. Aggressive but consensual “horseplay” can become a violent altercation. For example, where one of the players in the basketball game punches a member of the opposing team instead of defending the goal, rendering him unconscious, or one roommate wants to stop wrestling and the other applies a violent headlock, causing a serious neck injury. Both of these examples count as Aggravated Assault.

Often, the weapon used or the extent of the injury sustained will be the deciding factor in distinguishing Aggravated from Simple Assault.

Do not classify an incident as an Aggravated Assault based solely on prosecutorial policy in a jurisdiction. Examine and count assaults according to the standard UCR definitions, regardless of whether they are labeled “misdemeanors” or “felonies” by local definitions.

Examples of Aggravated Assault

Scenario 1: Sarah and Anne have a heated argument at a party at a sorority house owned by a recognized sorority located a mile from the campus. Sarah grabs a lacrosse stick and repeatedly beats Anne across the back with it, breaking several ribs. Include this as one Aggravated Assault in the noncampus category.

Scenario 2: Two students are involved in a fist fight in the laundry room in their on-campus dormitory. Both sustain head injuries and are treated at a hospital. Include this as two Aggravated Assaults in the on-campus category and two Aggravated Assaults in the on-campus student housing facility category.

Scenario 3: Brad and Tim are involved in a physical altercation in a campus parking lot behind their dormitory. Brad pulls a canister of Mace from his pocket and sprays Tim in the face, causing him severe burning and discomfort. Tim flees the scene and seeks medical attention. Include this as one on-campus Aggravated Assault.

Scenario 4: Campus police respond to a disturbance call on a public sidewalk in back of the campus and find a fight in progress. Most of the participants escape except for four injured individuals. None of the individuals would cooperate and the campus police could not determine who started the fight. The four individuals suffered from severe knife wounds. Include this as four Aggravated Assaults on public property.

Scenario 5: A male student slips a date rape drug into a female student's drink at a noncampus fraternity house. Before he can lure the victim away from her friends, however, someone notices what he had done and summons the police. Count this as one noncampus Aggravated Assault.

5. Burglary. Burglary is *the unlawful entry of a structure to commit a felony or a theft*. **Count one offense per each distinct operation.** It is imperative that institutions carefully evaluate the operative facts of each reported incident to determine if it fits into any subpart of this definition.

Classify as Burglary:

- Offenses that are classified by local law enforcement agencies as Burglary (any degree); unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts at these offenses.
- **Forcible Entry:** All offenses where force of any kind is used to unlawfully enter a structure for the purpose of committing a theft or felony. This rule applies

It is imperative that institutions carefully evaluate the operative facts of each reported incident to determine if it fits into any subpart of this definition.

when a thief gains entry by using tools; breaking windows; forcing windows, doors, transoms or ventilators; cutting screens, walls or roofs; and where known, using master keys, picks, unauthorized keys, celluloid, a mechanical contrivance of any kind (e.g., a passkey or skeleton key) or other devices that leave no outward mark but are used to force a lock. This includes Burglary by concealment inside a building followed by exiting the structure.

- **Unlawful Entry–No Force:** The entry of a structure in this situation is achieved by use of an unlocked door or window. The element of trespass to the structure is essential in this category, which includes thefts from open garages, open warehouses, open or unlocked dwellings (such as dorm rooms) and open or unlocked common basement areas in apartment houses where entry is achieved by someone other than the tenant who has lawful access, or others whom the tenant allows to have free and regular access to the structure. If an item was taken from an unlocked dorm room and you can establish that neither the tenant nor those friends with free and regular access to the room have taken the item, then unlawful access has occurred. In this context, it is important to note that a “breaking” occurs when a perpetrator crosses the threshold of a boundary that results in a trespass. As such it is possible for a burglar to “break” an open doorway or window. There is no requirement that entry be forced in any way or that damage to a door, window or frame be evident.
- **Attempted Forcible Entry:** A situation where a forcible entry into a locked structure is attempted but not completed. An attempt to commit the crime of Burglary must be evaluated in context based on all available information. Such incidents must not be classified merely as “suspicious activity” or “vandalism” where the totality of facts indicates that a Burglary was in fact attempted. Possible indicators of an attempted Burglary may include, but are not limited to, damage to a door or window, the presence of Burglary tools, a recurring or similar modus operandi or “signature” that ties an incident to other similar offenses (sometimes referred to as “common

plan and scheme”), and/or proximity in time and place to a pattern of other similar crimes.

Do not classify as Burglary:

- Thefts from automobiles, whether locked or not.
- Shoplifting from commercial establishments.
- Thefts from coin boxes or coin-operated machines.
- Thefts from areas of open access. If a perpetrator steals an item from an area of open access (i.e., there is no unlawful entry), the incident is a Larceny, not Burglary. For example, if a student leaves his backpack under the table in a campus dining hall and another student takes it, it’s a Larceny. However, if a student leaves his backpack under the table in a campus dining hall and another student breaks into the building after hours and steals the backpack, it’s a Burglary.
- Robbery. A structure can be burglarized, but it cannot be robbed. It is possible, however, for an attempted Burglary to become a Robbery. For example, a student returns to her dorm room and surprises a burglar. The burglar physically attacks the student, steals her purse and flees. Because the burglar attacked the student and took her property, include this incident as a Robbery. If the student had not been physically confronted by the burglar and merely observed the burglar leaving her room, the incident would be a Burglary, even if the burglar left empty-handed.
- A forcible entry or unlawful entry in which no theft or felony occurs, but acts of vandalism, malicious mischief, etc., are committed, provided investigation clearly established that the unlawful entry was for a purpose other than to commit a felony or theft.

An incident must meet **three conditions** to be classified as a Burglary:

1) There must be evidence of unlawful entry (trespass). This means that the person did not have the right to be in the structure at the time the incident occurred.

If a perpetrator steals an item from an area of open access (i.e., there is no unlawful entry), the incident is a Larceny, not Burglary.

Examples of lawful access include:

- A student uses her keycard to enter her dorm. She lets five other students who do not have keycards for that dorm into the building. All six of the students have lawful access to the building.
- A student has a party in her dorm room with four guests. All five students have lawful access to the dorm room.
- A faculty member has an office in the science building. Students are in and out of the office while the science building is open. Anyone from the campus community going in the office during this time has lawful access.

Examples of unlawful access include:

- A student uses her keycard to enter a dorm. Without her knowing, a student without a keycard to the building walks in after her. The student without the keycard does not have lawful access to the building.
- A student has a party in her dorm room with four invited guests. When the party is over the host asks everyone to leave. She leaves the door unlocked while she goes to visit another student. One of the students who attended the party opens the door and takes some money off of the desk. That student does not have lawful access to the room.
- A faculty member has an office in the science building. One night when the science building is locked, a maintenance worker who does not have a work order for the building, uses a maintenance key to unlock the building and then unlock the faculty member's door and steals a computer. The maintenance worker does not have lawful access to the office.

2) The unlawful entry must occur within a **structure**, which is defined as *having four walls, a roof, and a door*.

The UCR definition of a structure includes:

- Apartment, barn, cabin, church, condominium, dwelling house, factory, garage, house trailer or houseboat (if used as a permanent dwelling), mill, office, other building, outbuilding, public building, railroad car, room, school, stable, storage facility, vessel (ship) and warehouse.
- Any house trailer or other mobile unit that is permanently fixed as an office, residence or storehouse.

The UCR definition of a structure does not include:

- Motor vehicles.
- Tents, tent trailers, motor homes, house trailers or other mobile units that are being used for recreational purposes.
- A telephone booth.
- A gym locker or cubby.

3) The structure was unlawfully entered to commit a felony or a theft. If the intent was not to commit a felony or a theft, the incident is not a Burglary. For example, if a homeless student unlawfully entered a structure to sleep, do not include the incident as a Burglary.

Special Rules for Counting Burglaries

Burglaries in individual student rooms: Because residents of rooms in student housing facilities are not considered transient, the Burglary of each room is a separate offense. This means that if an offender unlawfully enters five dorm rooms on one floor of a student housing facility for the purpose of taking something, you should count this as five Burglaries.

Burglaries in suites: Each bedroom in a student housing facility suite is considered a separate dwelling. Count the Burglary of four bedrooms and the common room in a suite during a single incident as five Burglaries.

Burglaries in private academic offices: Unlike a student housing facility in which each room is considered to be a separate dwelling, the various rooms within an academic building are typically under the control of a single firm (the college or university). Count the Burglary of an academic structure as one offense, regardless of the number of interior rooms entered or items stolen if the rooms were all burglarized during the same time frame. (If, however, the rooms were burglarized within different time frames, for example one office on Monday and a second office the following day, count this as two Burglaries.)

Burglaries in patient rooms in campus or noncampus medical centers: Because residents in patient rooms in hospitals or medical centers are transient, offenses are most likely to be reported to law enforcement by the institution. Count the Burglary of a number of patient rooms during the same time frame as a single offense.

Examples of Burglary

Scenario 1: A room in an on-campus dormitory is broken into and a laptop is stolen by a student living down the hall. Because the student unlawfully entered the room, include this as one on-campus Burglary and one on-campus student housing facility Burglary.

Scenario 2: A student living in an on-campus dormitory invites another student into her room. The invited student takes a ring from the top of a dresser when the owner leaves to use the restroom. Because the perpetrator was invited into the room, there is no element of trespass. Do not include this incident in your *Clery Act* statistics because it is a Larceny.

Scenario 3: A perpetrator enters five on-campus dorm rooms without permission on the same night looking to steal money. He takes a wallet from one room, but takes nothing from the other four rooms. Include this as five Burglaries in both the on-campus category and on-campus student housing facility category.

Scenario 4: Someone enters an unlocked dorm room on campus and steals a student's wallet. Investigation determines that the student's roommate did not take the wallet. Because no one else had lawful access to the dorm room at the time the wallet was taken, it had to have been taken by someone who did not have lawful access. Include this as one on-campus Burglary and one on-campus student housing facility Burglary.

Scenario 5: A patient in a hospital room in an on-campus medical center reports a stolen watch. Police investigate and cannot determine who took the watch. Because there is no evidence that someone unlawfully entered the room to steal the watch, this is a Larceny. Do not include this incident in your *Clery Act* statistics.

Examples of Burglary (continued)

Scenario 6: A school is bordered by a municipal parking garage that has four walls, a roof and a door. Parking is allowed by permit only. Someone without a permit enters the garage and steals a GPS from a car. Include this as one public property Burglary.

Scenario 7: A school is bordered by a parking garage that has four walls, a roof and a door. Anyone who pays can park there. Someone enters the garage and steals a GPS from a car. Because the garage has open access there was no element of trespass. Do not include this incident in your *Clery Act* statistics because it is a Larceny.

Scenario 8: After his team practice session a member of the football team breaks into the locker of a teammate and takes his wallet. Because a locker is not a structure, this is a Larceny. Do not include this incident in your *Clery Act* statistics.

Scenario 9: A member of the football team climbs through an open window in the campus gym after hours and then breaks into a teammate's locker looking for drugs. He leaves empty-handed. Because the perpetrator trespassed into the gym with the intention of stealing drugs, include this as one on-campus Burglary.

Scenario 10: A maintenance worker with a work order uses his keys to enter an on-campus office to fix an air conditioner, and while he is there he decides to steal a laptop. This incident is a Larceny because the maintenance worker had a right to be in the office at the time of the theft. Do not include this incident in your *Clery Act* statistics.

Scenario 11: A maintenance worker without a work order uses his keys to enter a locked on-campus office to search for something to steal. Include this as one on-campus Burglary because the maintenance worker did not have a right to be in the office at the time of the theft. He unlawfully entered the office with the intent to steal something. (Because the intent was to steal something, it's a Burglary even if the maintenance worker leaves empty-handed.)

6. Motor Vehicle Theft. Motor Vehicle Theft is *the theft or attempted theft of a motor vehicle*. **Count one offense for each stolen vehicle.**

Classify as Motor Vehicle Theft:

- Theft of any self-propelled vehicle that runs on land surface and not on rails, such as sport utility vehicles, automobiles, trucks, buses, motorcycles, motor scooters, trail bikes, mopeds, all-terrain vehicles, self-propelled motor homes, snowmobiles, golf carts and motorized wheelchairs.
- All incidents where automobiles are taken by persons not having lawful access even though the vehicles are later abandoned. Include joyriding in this category. If a vehicle is stolen in conjunction with another offense, classify the crime using the procedures for classifying multiple offenses (i.e., the **Hierarchy Rule**, pages 3-24 and 3-25).

Do not classify as Motor Vehicle Theft:

- Theft of any of the following: Farm equipment, bulldozers, airplanes, construction equipment, water craft (motorboats, sailboats, houseboats or jet skis).
- Taking a vehicle for temporary use when prior authority has been granted or can be assumed, such as in family situations, rental car agreements, or unauthorized use by chauffeurs and others having lawful access to the vehicle.
- A forcible or unlawful entry of a building to steal a motor vehicle. Include this offense as a Burglary.
- Thefts **from** motor vehicles. Theft from a motor vehicle is Larceny, which is not a *Clery Act* crime unless it's motivated by bias (i.e., a Hate Crime). (More about this in the Hate Crimes section of this chapter on pages 3-25 through 3-35.)

Examples of Motor Vehicle Theft

Scenario 1: A faculty member's car is reported stolen from a campus parking garage and is later recovered a block off campus. Include one on-campus Motor Vehicle Theft.

Scenario 2: A car stereo and CDs are reported stolen from a car parked along a city-owned street on campus. Do not include this incident in your *Clery Act* statistics because it is theft **from** a motor vehicle, not Motor Vehicle Theft.

Scenario 3: A student's car is stolen from a city street outside a classroom five miles from campus. Do not include this incident in your *Clery Act* statistics because it occurred on public property adjacent to a noncampus location.

7. Arson. Arson is *any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.* **Count one offense for each distinct incident of Arson occurring on your *Clery Act* geography.**

Classify as Arson:

- Only fires determined to have been willfully or maliciously set.
- Attempts to burn.
- Any fire that investigation determines to meet the UCR definition of Arson regardless of the value of any property damage.
- Incidents where an individual willfully or maliciously burns his or her own property.

The *Clery Act* requires institutions to disclose all Arsons that occur on their *Clery Act* geography. This includes seemingly minor fires such as burning wastebaskets or bulletin boards, regardless of whether they are discovered while burning or after being extinguished. **All of the evidence for any fire not known to be accidental (such as a cooking fire) must be considered by the institutional official designated to make such determinations.** Some jurisdictions have specific rules that state that a fire is not to be classified as Arson unless and until a fire marshal makes a determination of malicious burning. The *Clery Act's* Arson definition does

All of the evidence for any fire not known to be accidental (such as a cooking fire) must be considered by the institutional official designated to make such determinations.

not require that any findings be made by a fire official before classifying an incident.

Do not classify as Arson:

- Fires of suspicious origin.
- Fires of unknown origin.

Cautions in Disclosing Arson statistics

Point of origin:

- If a fire (determined to be Arson) starts in a privately owned house located next to your campus and spreads to a building on your campus, you are not required to include the fire in your Arson statistics because the point of origin for the Arson was not your *Clery Act* geography.
- If the situation is reversed, and an on-campus fire (determined to be Arson) spreads to the house, you **must** include the on-campus Arson in your *Clery Act* statistics.
- If the private home and the on-campus building are burning, and investigators later determine that the cause was Arson, but the point of origin could not definitively be determined, your school is responsible for including the Arson in your statistics for the on-campus building.
- Count incidents in which persons are killed as a direct result of Arson as both Criminal Homicides and Arson. Similarly, report the number of persons severely injured during an Arson as Aggravated Assaults along with the Arson. When other reportable offenses are committed during the same distinct operation as the Arson offense, report the most serious offense along with the Arson. (More about the **Hierarchy Rule** on pages 3-24 and 3-25.)

An important note for institutions that have **on-campus student housing facilities**: Arsons in on-campus student housing facilities must also be included in your fire statistics. This means that in Scenario 5, for example, you must also include the incident as one intentional fire in the on-campus

student housing facility in which the fire occurred. (See Chapter 13 for more information on fire statistics.)

Examples of Arson

Scenario 1: A student is killed by what an investigation determines was a deliberately set fire in his campus residence hall room. Include this as one Murder and Non-negligent Manslaughter and one Arson in the on-campus category and one Murder and Non-negligent Manslaughter and one Arson in the on-campus student housing facility category.

Scenario 2: A suspicious fire is reported in a campus academic building, but fire authorities cannot determine if it was intentionally set. Do not include this incident as Arson in your *Clery Act* statistics.

Scenario 3: A resident of a noncampus Greek house sets fire to his couch on the lawn in front of the house in celebration of a school football victory. Investigators determine that the incident was Arson. Include this as one Arson in the noncampus category.

Scenario 4: A fire is reported in a campus dormitory. Ten students are killed as a direct result of the flames and asphyxiation. Two more students die from internal injuries when they attempt to jump to safety. Six people are hospitalized with second- and third-degree burns. Investigation determines that the fire was intentional. Include this as one Arson in the on-campus category and the on-campus student housing facility category and 12 Murder and Non-negligent Manslaughters and six Aggravated Assaults in the on-campus category and the on-campus student housing facility category. This Arson, along with the resulting deaths and injuries, must also be included in your fire statistics described in Chapters 12 and 13.

Scenario 5: A student is seen setting fire to a paper advertisement on an on-campus dormitory bulletin board. Investigation determines that the student willfully set fire to the paper. Include this as one Arson in the on-campus and the on-campus student housing facility categories and also as one intentional fire in your fire statistics described in Chapters 12 and 13.

Hierarchy rule citation
34 CFR 668.46(c)(9)

There are exceptions to using the Hierarchy Rule when counting Arson, Sexual Assaults and Hate Crimes.

Beyond the Basics—Additional Rules for Counting and Disclosing Crimes

The Hierarchy Rule

When counting multiple offenses, you must use the FBI's UCR Hierarchy Rule. Under this rule, **when more than one Criminal Offense was committed during a single incident you should only count the most serious offense.** A single incident means that the offenses were committed at the same time and place. That is, the time interval between the offenses and the distance between the locations where they occurred were insignificant. Beginning with the most serious offense, the following list shows the hierarchy for *Clery Act* reporting:

- Murder and Non-negligent Manslaughter
- Manslaughter by Negligence
- Sexual Assault
- Robbery
- Aggravated Assault
- Burglary
- Motor Vehicle Theft

An example based on the Hierarchy Rule might be if a student is both raped and robbed during a single incident. In this case, include only the Rape in the statistics, because it is classified as the more serious crime in the hierarchy.

There are **exceptions** to using the Hierarchy Rule when counting offenses. They apply to Arson, Sexual Assaults, Hate Crimes and *VAWA* Offenses. Arson and Sexual Assaults are defined above and the rules for counting them are discussed here. (See pages 3-25 through 3-35 in the Hate Crime section for the rules for counting Hate Crimes. See page 3-42 in the *VAWA* Offenses section for the rules for counting *VAWA* Offenses.)

The rules for counting Arson are:

- Always count Arson regardless of the nature of any other offenses that were committed during the same incident.
- When multiple offenses are committed during the same distinct operation as the Arson offense, report the most serious offense along with the Arson.
- Include incidents in which persons are killed as a direct result of Arson as Murder and Non-negligent Manslaughter and Arson or Manslaughter by Negligence and Arson.

The rules for counting Sexual Assaults are:

- If Rape, Fondling, Incest or Statutory Rape occurs in the same incident as Murder, count both the sexual assault and the Murder.
- Fondling is recognized as an element of the other Sexual Assaults. Include a Sexual Assault as Fondling only if it is the only Sexual Assault. If Fondling occurs in the same incident as Murder, count both the Fondling and the Murder.

Hate Crimes

The second category of statistics you must disclose after Criminal Offenses is Hate Crimes. A **Hate Crime** is a *criminal offense that manifests evidence that the victim was intentionally selected because of the perpetrator's bias against the victim.*

Although there are many possible categories of bias, under the *Clery Act*, only the following eight categories are reported:

- **Race.** *A preformed negative attitude toward a group of persons who possess common physical characteristics, e.g., color of skin, eyes, and/or hair; facial features, etc., genetically transmitted by descent and heredity which distinguish them as a distinct division of humankind, e.g., Asians, blacks or African Americans, whites.*

Hate crime citation
34 CFR 668.46(c)(4)

- **Religion.** *A preformed negative opinion or attitude toward a group of persons who share the same religious beliefs regarding the origin and purpose of the universe and the existence or nonexistence of a supreme being, e.g., Catholics, Jews, Protestants, atheists.*
- **Sexual Orientation.** *A preformed negative opinion or attitude toward a group of persons based on their actual or perceived sexual orientation. Sexual Orientation is the term for a person's physical, romantic, and/or emotional attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual, and heterosexual (straight) individuals.*
- **Gender.** *A preformed negative opinion or attitude toward a person or group of persons based on their actual or perceived gender, e.g., male or female.*
- **Gender Identity.** *A preformed negative opinion or attitude toward a person or group of persons based on their actual or perceived gender identity, e.g., bias against transgender or gender non-conforming individuals. Gender non-conforming describes a person who does not conform to the gender-based expectations of society, e.g., a woman dressed in traditionally male clothing or a man wearing makeup. A gender non-conforming person may or may not be a lesbian, gay, bisexual, or transgender person but may be perceived as such.*
- **Ethnicity.** *A preformed negative opinion or attitude toward a group of people whose members identify with each other, through a common heritage, often consisting of a common language, common culture (often including a shared religion) and/or ideology that stresses common ancestry. The concept of ethnicity differs from the closely related term "race" in that "race" refers to a grouping based mostly upon biological criteria, while "ethnicity" also encompasses additional cultural factors.*
- **National Origin.** *A preformed negative opinion or attitude toward a group of people based on their actual or perceived country of birth. This bias may be against people that have a name or accent associated with a national origin group, participate in*

certain customs associated with a national origin group, or because they are married to or associate with people of a certain national origin.

- **Disability.** *A preformed negative opinion or attitude toward a group of persons based on their physical or mental impairments, whether such disability is temporary or permanent, congenital or acquired by heredity, accident, injury, advanced age or illness.*

For *Clery Act* purposes, Hate Crimes include any of the following offenses that are motivated by bias.

- Murder and Non-negligent Manslaughter
- Sexual Assault
- Robbery
- Aggravated Assault
- Burglary
- Motor Vehicle Theft
- Arson
- Larceny-Theft
- Simple Assault
- Intimidation
- Destruction/Damage/Vandalism of Property

The first seven offenses are defined and discussed in the Criminal Offenses section earlier in this chapter. In addition to those offenses, **Larceny-Theft, Simple Assault, Intimidation, and Destruction/Damage/Vandalism of Property are included in your *Clery Act* statistics only if they are Hate Crimes.**

1. **Larceny-Theft** is *the unlawful taking, carrying, leading or riding away of property from the possession or constructive possession of another.* (Larceny and theft mean the same thing in the UCR.) **Constructive possession** is *the condition in which a person does not have physical custody or possession,*

Larceny-Theft, Simple Assault, Intimidation, and Destruction/Damage/Vandalism of property are included in your *Clery Act* statistics only if they are Hate Crimes.

but is in a position to exercise dominion or control over a thing.

Classify as Larceny:

- Thefts of bicycles or automobile accessories.
- Shoplifting.
- Pocket-picking.
- The stealing of any property or article that is not taken by force and violence or by fraud.
- Any of the above regardless of the value of the item or items taken (For example, include the unlawful taking of a parking sticker that is peeled off a car windshield.)
- Attempted larcenies.

Do not classify as Larceny:

- Motor Vehicle Theft.
- Attempted Motor Vehicle Theft.
- Embezzlement.
- Confidence games.
- Forgery.
- Worthless checks.

2. Simple Assault *is an unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.*

Include all assaults that do not involve the use of a firearm, knife, cutting instrument or other dangerous weapon, and in which the victim did not sustain serious or aggravated injuries.

- 3. Intimidation** is to unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.

A person is assumed to be placed in “reasonable fear” if he or she reports threatening words or other conduct to law enforcement personnel. To be the victim of Intimidation, one doesn’t have to be the intended target of the offender. For example, a person who reports seeing anti-gay threats on a bathroom wall to law enforcement is considered a victim. (For the Intimidation to be considered a Hate Crime there would have to be other supporting evidence of bias as well.) Include in this category cyber-intimidation if the victim is threatened via electronic means while on your *Clery Act* geography.

- 4. Destruction/Damage/Vandalism of Property** is to willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

Classify as Destruction/Damage/Vandalism of Property a wide range of malicious behavior directed at property, such as:

- Cutting auto tires.
- Drawing obscene pictures on restroom walls.
- Smashing windows.
- Destroying school records.
- Defacing library books.

Do not classify as Destruction/Damage/Vandalism of Property:

Incidents of burning that willfully or maliciously destroy, damage or deface property. Classify such incidents as Arson.

Classifying a crime as a Hate Crime is sometimes difficult. The following information adapted from the FBI’s *Hate Crime Data Collection Guidelines and Training Manual* should be useful in guiding you.

Before an incident can be classified as a Hate Crime, sufficient objective facts must be present to lead a reasonable and prudent person to conclude that the offender's actions were motivated, in whole or in part, by bias. **While no single fact may be conclusive, facts such as the following, particularly when combined, are supportive of a finding of bias:**

- a. The offender and the victim were of a different race, religion, disability, sexual orientation, ethnicity, national origin, gender or gender identity. For example, the victim was African American and the offender was white.
- b. Bias-related oral comments, written statements or gestures were made by the offender, that indicate the offender's bias. For example, the offender shouted a racial epithet at the victim.
- c. Bias-related drawings, markings, symbols or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue, anti-Islamic statements on the wall of a mosque, or anti-gay graffiti on the door of an LGBTQ center.
- d. Certain objects, items or things which indicate bias were used. For example, the offenders taped a photo of a burning cross to the door of an African American student's dorm room.
- e. The victim is a member of a racial, religious, disability, sexual orientation, ethnicity, national origin, gender or gender identity group that is overwhelmingly outnumbered by other residents in the student housing facility where the victim lives and the incident took place. This factor loses significance with the passage of time (i.e., it is most significant when the victim first moved into the facility, and becomes less and less significant as time passes without incident).
- f. Several incidents occurred in the same location at or about the same time, and the victims were all of the same race, religion, disability, sexual orientation, ethnicity, national origin, gender or gender identity.

- g. A substantial portion of the campus community where the crime occurred perceived that the incident was motivated by bias.
- h. The victim was engaged in activities related to his or her race, religion, disability, sexual orientation, ethnicity, national origin, gender or gender identity. For example, the victim was a member of the National Association for the Advancement of Colored People (NAACP) or participated in an LGBTQ Pride celebration.
- i. The incident coincided with a holiday or a date of particular significance relating to a race, religion, disability, sexual orientation, ethnicity, national origin, gender or gender identity, e.g., Martin Luther King Day, Rosh Hashanah or the Transgender Day of Remembrance.
- j. The offender was previously involved in a similar Hate Crime or is a hate group member.
- k. There were indications that a hate group was involved. For example, a hate group claimed responsibility for the crime or was active on the campus.
- l. A historically established animosity existed between the victim's and the offender's groups.
- m. The victim, although not a member of the targeted racial, religious, disability, sexual-orientation, ethnic, national origin, gender or gender identity group, was a member of an advocacy group supporting the precepts of the victim group.

Additional considerations in determining whether an incident is a Hate Crime:

- **Need for a case-by-case assessment of the facts.** The aforementioned factors are not all-inclusive of the types of objective facts that evidence bias motivation. Therefore, examine each case for facts that clearly provide evidence that the offender's bias motivated him or her to commit the crime.
- **Misleading facts.** Be alert to misleading facts. For example, the offender used an epithet to refer to the

Remember, it is the perception of the offender, not the perception of the victim that determines whether a crime is classified as a Hate Crime.

victim's race, but the offender and victim were of the same race.

- **Feigned facts.** Be alert to evidence left by the offenders that is meant to give the false impression that the incident was motivated by bias. For example, students of a religious school vandalize their own school, leaving anti-religious statements and symbols on its walls in the hope that they will be excused from attending class.
- **Offender's mistaken perception.** Even if the offender was mistaken about the victim's race, religion, disability, sexual-orientation, ethnicity, national origin, gender or gender identity, the offense is still a Hate Crime as long as the offender was motivated by bias against that group. For example, a non-gay student leaving a publicized LGBTQ meeting in a noncampus fraternity house is followed back to campus and attacked behind a dorm by six teenagers who mistakenly believed the victim is gay. Although the offenders were mistaken, the offense is a Hate Crime because it was motivated by the offenders' anti-gay bias.

Remember, it is the perception of the offender, not the perception of the victim that determines whether a crime is classified as a Hate Crime. Also, knowing that an offender is prejudiced is not enough to classify a crime as a Hate Crime. There must be evidence that the offender was motivated by that prejudice to commit the crime.

Rules for Counting Hate Crimes

Hate Crimes are counted in the same manner that the offenses are when they are not Hate Crimes except that the **Hierarchy Rule does not apply to Hate Crimes**. This means that:

- You must count all of the offenses committed in a multiple offense incident that are bias-motivated. For example, there is a single reported incident involving an Aggravated Assault and a Motor Vehicle Theft that were both motivated by bias. Include the incident in the statistics for both crimes.

- In reporting the number of Hate Crimes, you must include only the crimes that are bias-motivated as Hate Crimes in a multiple-offense incident. For example, three armed men commit a Robbery on the porch of a fraternity house. Two of the offenders go inside the house intending to rob more students. One of them spots a Hispanic woman, grabs her, and rapes her. The two offenders were later arrested and the investigation showed that although the Robbery was not bias-motivated, the Rape was. Include only the Sexual Assault as a Hate Crime.
- For any Criminal Offense that is also a Hate Crime, your statistics should indicate the offense and also the offense with the category of bias. For example, if an Aggravated Assault is a Hate Crime, include one Aggravated Assault in the statistics in the Criminal Offenses category and one Aggravated Assault motivated by (category of bias) in the Hate Crime category.
- The exception is when the Aggravated Assault is not included in the Criminal Offenses category because of the hierarchy rule. For example, for a single incident involving both a Rape and an Aggravated Assault that were both Hate Crimes, include only the Rape in the Criminal Offenses category and both the Rape and the Aggravated Assault in the Hate Crimes category.

Examples of Hate Crimes

Scenario 1: One night a student with known anti-gay sentiments steals a number of books by LGBTQ authors from a campus library exhibit. He leaves a note on the exhibit table that reads, “Gay and lesbian books don’t belong in our library.” When he is caught leaving the library with a large bag of books, he starts shouting that LGBTQ students have been getting too much attention on campus and he was tired of it. Include this as one on-campus Larceny-Theft characterized by Sexual Orientation bias.

Scenario 2: A white student causes a disturbance in an on-campus classroom during a discussion on race relations. The student begins shouting racial epithets while pointing at black students. The instructor calls campus security for assistance. A white security officer and a black security officer arrive. When the black officer tries to subdue the student, the student starts shoving the officer and shouting racial epithets at him. Include this as one on-campus Simple Assault characterized by racial bias.

Examples of Hate Crimes (continued)

Scenario 3: A campus police officer overhears a white student and a black student arguing over a parking space on campus. They are shouting obscenities at one another and the white student shoves the black student who scrapes his hand on the asphalt when he falls. The officer approaches the students and asks for an explanation for the argument. The students tell him that one of them was driving toward the parking space first but didn't use his turn signal to indicate he wanted to park there. The other student drove into the space not knowing that the first student had intended to park there. The officer did not find any evidence that the Simple Assault was motivated by bias. Do not include this incident as a Hate Crime in your *Clery Act* statistics.

Scenario 4: During finals week, a gay faculty member gets a series of phone calls in his noncampus office. When he answers, the caller says that she hates gay people and then hangs up. On the third night, the caller says that the faculty member had better be careful because something terrible was about to happen to gay people at the school. The faculty member is afraid and calls the local police to report the threat. Include this as one noncampus Intimidation based on Sexual Orientation bias.

Scenario 5: Several students call the campus security office to report swastikas spray-painted on the walls in a hallway of an on-campus student housing facility. Campus security personnel investigate but cannot find conclusive evidence that the markings were bias-motivated. Do not include this incident as a Hate Crime in your *Clery Act* statistics.

Scenario 6: Several students call the campus security office to report swastikas spray-painted on the hallway walls of an on-campus student housing facility on the floor where members of a Jewish student group live. The spray-painting follows a week of escalating tension between some Jewish and non-Jewish students over news about the Israeli-Palestinian conflict. Campus security personnel investigate and, based on the evidence, conclude that a Hate Crime was committed. Include this as one on-campus Intimidation characterized by religious bias and one on-campus student housing facility Intimidation characterized by religious bias.

Scenario 7: An on-campus student center features a photo exhibit of famous Muslim-Americans and their achievements. Next to the display case is a second unrelated photo exhibit that features several well-known school alumni. An employee who is prepping the coffee bar for the day notices that there are what appear to be permanent ink markings on the glass over some of the facial features of photos of the Muslim-Americans. There are no markings on the other exhibit case. The employee reports the incident to the school's public safety officer who is on the other side of the campus and in the process of examining defaced posters announcing a meeting of the school's Muslim-American student group. After examining all of the evidence the officer concludes that a Hate Crime was committed. Include this as one on-campus Destruction/Damage/Vandalism of Property incident characterized by religious bias.

Examples of Hate Crimes (continued)

Scenario 8: The office of the Arab-American Student Center on the third floor of the campus student union contains both Arabic and English writing on the outside of the door. One night the office is vandalized, with anti-Arab threats and disparaging anti-Arab messages. Include this as one on-campus Destruction/Damage/Vandalism of Property incident characterized by Ethnicity bias.

Scenario 9: Two students are walking on campus, speaking Spanish. Five other white students surround them, shove them and throw them to the ground, shouting “You’re in America. This is our country. We speak English here! Go back to your own country if you don’t like it!” Include this as two on-campus Simple Assaults characterized by National Origin.

Scenario 10: A white student ran by another student in front of the Student Union, shoved him to the ground, and forcibly pulled his Dastaar (Sikh Turban) and said, “Take that thing off your head—we don’t want your kind in this neighborhood!” In the process of the attack, the Sikh student suffered a concussion. When campus police responded to the scene, a witness to the attack identified the perpetrator as a part-time clerk at a local convenience store near a predominately Sikh community. Include this as one on-campus Aggravated Assault characterized by religious bias.

Scenario 11: A transgender women was leaving the campus bookstore when three men walking toward her said, “Hey, what’s your problem? Huh?” She kept walking, trying to ignore them. However, as they got close, one yelled “We don’t want no she-males around here!” and a second one knocked her to the ground. Include this as one on-campus Simple Assault characterized by Gender Identity bias.

Scenarios 12: For a fraternity prank, two students forcibly bring a developmentally disabled student back to their house on campus. They shave the student’s head, spelling out the word “retard” in his remaining hair. They record the incident on their cell phones and post it on the fraternity website, all the while mocking his disability and his slurred-speech protests. Include this as one on-campus Simple Assault characterized by Disability bias.

VAWA Offenses citation
34 CFR 668.46(c)(1)(iv)

VAWA Offenses

The third category of crime statistics you must disclose are those added to the *Clery Act* by the *Violence Against Women Act*. These are Dating Violence, Domestic Violence, Sexual Assault and Stalking. Sexual assault is included by the FBI as a Criminal Offense and is discussed in the Criminal Offense section earlier in this chapter. Domestic Violence, Dating Violence and Stalking are considered crimes for the purposes of *Clery Act* reporting and are defined and discussed in this section.

Dating Violence is defined as *violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.* For the purposes of this definition—

- *Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.*
- *Dating violence does not include acts covered under the definition of domestic violence.*

We caution that differences in the culture of different people and their use of terms may mean that a reporting party may describe a dating relationship using different terms from how an institutional official might describe “dating.” When the reporting party asserts that there was a dating relationship, you should assume that the victim and perpetrator were in a dating relationship to avoid incorrectly omitting incidents. The victim’s use of terms such as “hanging out” or “hooking up” rather than “dating,” or whether or not the relationship is described as “monogamous” or “serious” should not be the determining factor. No matter who reports the incident, whether it is the victim or a third party, it is the responsibility of the institution to determine whether the incident should be included as Dating Violence.

Examples of Dating Violence

Scenario 1: A female student cuts her ex-boyfriend with a knife during an altercation in an on-campus dining hall. Include this as one incident of on-campus Dating Violence and one on-campus Aggravated Assault.

Scenario 2: A female student reports that her boyfriend forced her into nonconsensual sex in her on-campus dorm room. Include one Rape in both the on-campus category and the on-campus student housing facility category, and one incident of Dating Violence in both the on-campus category and the on-campus student housing facility category.

Scenario 3: After a party on campus, John walked back to his apartment in a noncampus housing complex with Matt, whom he has hooked up with a few times over the past month. When they reached John's apartment, it became clear that Matt was angry that John had been talking with other men at the party, causing Matt to punch two holes in the wall and threaten to beat John if he sees him flirting with any other men on campus. John now fears for his safety around Matt. Include one incident of noncampus Dating Violence for the threat of physical abuse.

Scenario 4: A dating couple is arguing on a public sidewalk in front of a campus building. The male slaps the female and her face is red. Include this as one public property incident of Dating Violence.

Domestic Violence is defined as *a felony or misdemeanor crime of violence committed—*

- *By a current or former spouse or intimate partner of the victim;*
- *By a person with whom the victim shares a child in common;*
- *By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;*
- *By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;*
- *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*

To categorize an incident as Domestic Violence, the relationship between the perpetrator and the victim must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

Examples of Domestic Violence

Scenario 1: A student's wife is waiting for her husband outside of his on-campus classroom building. She attacks her husband with a knife when he exits the building. Include this as one on-campus incident of Domestic Violence and one on-campus Aggravated Assault.

Scenario 2: A neighbor reports yelling in the apartment next door in a university housing complex. The officer who arrives at the apartment finds a husband and wife having an argument. Neither party reports any physical injuries and neither party reports being intimidated. Do not include this incident in your *Clery Act* statistics.

Scenario 3: An employee reports to the campus police that her ex-husband has physically assaulted her four times. All four assaults occurred at the employee's private residence; however, he has also recently showed up in the noncampus parking lot outside her office and threatened to hurt her. Include one noncampus Domestic Violence incident for the Intimidation that occurred in the noncampus parking lot. Do not include the Aggravated Assaults in your *Clery Act* statistics because they did not occur on *Clery Act* geography. Do not include the Intimidation as a Hate Crime in your *Clery Act* statistics because there was no evidence that it was motivated by bias. Also include one incident of noncampus Stalking (Stalking is discussed below).

Scenario 4: A father argues with his son at a football game in the on-campus stadium. He eventually hits his son, breaking his jaw. Include this as one on-campus incident of Domestic Violence and one Aggravated Assault.

Stalking is defined as *engaging in a course of conduct directed at a specific person that would cause a reasonable person to—*

- *Fear for the person's safety or the safety of others; or*
- *Suffer substantial emotional distress.*

For the purposes of this definition—

- **Course of conduct** means *two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or*

about a person, or interferes with a person's property.

- **Reasonable person** means *a reasonable person under similar circumstances and with similar identities to the victim.*
- **Substantial emotional distress** means *significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.*

Additional Guidance for Counting Stalking

Record each report of Stalking as occurring at only the first location within the institution's *Clery Act* geography in which either the perpetrator engaged in the Stalking course of conduct or the victim first became aware of the Stalking. It is not necessary for all activities in the course of conduct to occur on *Clery Act* geography in order to count the incident. A Stalking incident in which only one or some of the activities took place on *Clery Act* geography must be included in the reported statistics.

A single course of conduct may include varying Stalking activities and may include acts committed over electronic communication (e.g., emails, texts or social media).

When recording reports of Stalking that include activities in more than one calendar year, an institution must record a crime statistic for each and every year in which the course of conduct is reported to a local police agency or to a campus security authority.

Although not required in the statistical reporting, an institution may provide additional information to further describe the reports of Stalking included in the crime statistics.³ For example, you may find it useful to explain whether a report represents Stalking that continued across multiple calendar years, whether the Stalking continued despite interventions by the institution or other parties, whether it lasted for a short but intense period or occurred intermittently over several months, and whether the perpetrator or the victim was located on or within the institution's *Clery Act* geography.

³ This information can be included as text in the Annual Security Report and/or in a caveat box of the online survey.

It is not necessary for all activities in the course of conduct to occur on *Clery Act* geography in order to count the incident.

However, in providing any additional information the institution must not include information that will identify the victim or the perpetrator.

You are not required to follow up with victims each year to determine whether the behavior has continued, although you are not precluded from doing so. If the institution learns that the behavior has continued into another calendar year, the institution must record the behavior as a new report of Stalking in that year. Otherwise, institutions must record only reports that they receive in each year.

If Stalking occurs on more than one institution's *Clery Act* geography and is reported to a campus security authority at each institution, both institutions must include the Stalking in their statistics. Although the *Clery Act* does not require an institution that learns of Stalking occurring on another campus to alert the other campus, other laws may require such an alert and we strongly encourage an institution in this situation to do so.

Examples of Stalking

Scenario 1: A female student reports that she is being followed by a man she met at her job at a café off-campus. He began showing up at the café and would not leave her alone. Since then she has also noticed him following her around campus and she fears for her safety. Include this as one incident of Stalking on-campus since the first occurrence on *Clery Act* geography occurred when the victim noticed the perpetrator following her on-campus.

Scenario 2: Several students belonging to the university association of Hispanic students have reported being watched or followed by the same unknown man on various parts of campus. All of the students reported fearing for their safety as a result of his behavior but none of the students saw the man more than once. Do not include this as Stalking in your *Clery Act* statistics because, given that the man has never approached the same student more than once, the course of conduct was not directed at a single individual,

Scenario 3: A female student reported that she is afraid for her safety because her ex-boyfriend has been sending harassing emails to her private email account over the past several weeks. She opened the first five emails in her off-campus apartment. However, earlier that day she opened another email on her mobile phone while walking on campus. She came directly to the Campus Police to report the behavior. The location of the ex-boyfriend when he was sending the harassing messages is unknown. Include this as one on-campus Stalking because the first incident in the course of conduct to occur on *Clery Act* geography was the victim reading the email on-campus.

Examples of Stalking (continued)

Scenario 4: A male student reports that his ex-girlfriend has been sending him harassing text messages. The ex-girlfriend attends another university 200 miles away. While at home over summer break, the ex-girlfriend showed up at the student's house every day asking if he has a new girlfriend at school. Now that he has returned to school, she sends him daily text messages threatening to "check-in" on him on-campus. The ex-girlfriend sends these text messages late at night and the victim receives them when he is inside his on-campus dorm room. Include one incident of Stalking in both the on-campus category and in the on-campus student housing facility category **if the male student fears for his safety as a result of this behavior.**

Scenario 5: A male student reported a Stalking course of conduct to Campus Police during the spring semester. During the investigation, Campus Police established that the first incident in the Stalking course of conduct to occur on *Clery Act* geography took place on public property. When the student returned to campus for the fall semester, the Stalking continued when the perpetrator repeatedly waited for the victim in the hallway outside the victim's dorm room in an on-campus student housing facility. Since the spring and fall Stalking incidents involved the same victim and the same perpetrator, the fall incidents should be considered a continuation of the Stalking course of conduct that started in the spring. Include this as one Stalking incident on public property.

Rules for Counting VAWA Offenses

The Hierarchy Rule does not apply to *VAWA* Offenses. Therefore, for any Criminal Offense, Hate Crime, or arrest for Weapons, Drug or Liquor Law Violations that is also a *VAWA* Offense, your statistics must reflect the original offense and the *VAWA* Offense. For example, if an Aggravated Assault is also Domestic Violence, include the incident as one Aggravated Assault in the Criminal Offenses category and as an incident of Domestic Violence in the *VAWA* Offenses category.

Arrests and referrals citation
34 CFR 668.46(c)(1)(ii)

Do not include violations of your institution's policies that resulted in persons being referred for disciplinary action if there was no violation of the law.

Note that arrests and referrals for these law violations are not covered by the Hierarchy Rule used to count Criminal Offenses.

Arrests and Disciplinary Referrals for Violation of Weapons, Drug Abuse and Liquor Laws

The fourth category of crime statistics you must disclose is the **number of arrests** and the **number of persons referred for disciplinary action** for the following law violations:

1. Weapons: Carrying, Possessing, Etc.;
2. Drug Abuse Violations; and
3. Liquor Law Violations.

You must report statistics for **violations of the law that occur on your Clery Act geography and result in arrests or persons being referred for disciplinary action**. Do not include violations of your institution's policies that resulted in persons being referred for disciplinary action if there was no violation of the law. For example, if a student of legal drinking age in the state in which your institution is located violates your institution's "dry campus" policy and is referred for disciplinary action don't include that incident in your *Clery Act* statistics because the referral was not the result of a law violation. Because state laws and local ordinances vary widely, you need to ascertain the specific laws and ordinances that apply to your institution.

If an individual is both arrested and referred for disciplinary action for an offense, **include only the arrest in your statistics**.

Note that **arrests and referrals for these law violations are not covered by the Hierarchy Rule used to count Criminal Offenses. Therefore, you must count arrests for Weapons, Drug Abuse and Liquor Law Violations in addition to the most serious Criminal Offense when occurring in a single incident**. For example, if an Aggravated Assault is committed with the use of a firearm in violation of a weapons law, count both the Aggravated Assault and the arrest or referral for the Weapons Law Violation.

Arrest for *Clery Act* purposes is defined as *persons processed by arrest, citation or summons.*

Classify as arrests:

- Those persons arrested and released without a formal charge being placed against them. (An arrest has occurred when a law enforcement officer detains an adult with the intention of seeking charges against the individual for a specific offense(s) and a record is made of the detention.)
- Juveniles taken into custody or arrested but merely warned and released without being charged. A juvenile should be counted as “arrested” when the circumstances are such that if the individual were an adult, an arrest would have been counted.
- Any situation where a young person, in lieu of actual arrest, is summoned, cited or notified to appear before the juvenile or youth court, or similar official for a violation of the law.
- Only violations by young persons where some police or official action is taken beyond a mere interview, warning or admonishment.

Do not classify as arrests incidents in which:

- Police contact a juvenile who has not committed an offense.
- Police take a juvenile into custody for his or her own protection, but the juvenile did not commit a crime.
- Officers make call backs or follow-up contacts with young offenders for the purpose of determining their progress.
- An individual makes a “citizen’s arrest.”
- The arrest was for something other than a violation of a weapons, drug abuse or liquor law (e.g., an arrest for an Aggravated Assault).
- A civil citation is issued.

Rules for Counting Arrests for Weapons: Carrying, Possessing, Etc., Drug Abuse Violations; and Liquor Law Violations

- Count the number of arrests for Weapons: Carrying, Possessing, Etc., the number of arrests for Drug Abuse Violations and the number of arrests for Liquor Law Violations.
- If a single incident involving a Liquor Law Violation resulted in the arrest of 10 students, count this as 10 arrests.
- If the same person is arrested for multiple incidents in the same calendar year (e.g., one arrest in February and one arrest in March), count this as two arrests. Count this as two arrests even when both arrests are for the same type of violation (e.g., both were Drug Abuse Violations).
- If an individual is arrested for one type of law violation and referred for disciplinary action for a different type of law violation during a single incident (e.g., arrested for a Drug Abuse Violation and referred for a Liquor Law Violation), count only the arrest.
- If a person is both arrested and referred for disciplinary action for a single incident involving a law violation (e.g., a Drug Abuse Violation), count only the arrest.
- If a person is arrested for multiple violations during a single incident (e.g., violations of both drug abuse and liquor laws), law enforcement or security officer discretion should be used to determine which violation to count. We recommend that you document the justification for this determination. Officer discretion is allowed only for Weapons, Drug Abuse and Liquor Law Violation arrests *resulting from a single incident*.

Do not combine statistics for arrests and persons referred for disciplinary action.

Documentation of the arrest must be maintained for purposes of *Clery Act* compliance for three years from the latest publication of the annual security report to which they apply, even if the record is expunged by the court. (See Chapter 9 for more on documentation requirements.)

Referred for disciplinary action is defined as *the referral of any person to any official who initiates a disciplinary action of which a record is established and which may result in the imposition of a sanction.*

The disciplinary process at your institution might be called “disciplinary action,” “mediation,” “judicial process” or some other term. The referral may, but doesn’t have to, originate with the police. Regardless of what you call it, if the process involves the following three criteria, it’s a disciplinary action under the *Clery Act*:

- The official receiving the referral must initiate a disciplinary action,
- A record of the action must be established, and
- The action may, but does not have to, result in a sanction.

Note that a disciplinary action can be initiated in an informal as well as a formal manner. It can include an interview or an initial review of names submitted to an official. So too, sanctions can be formal or informal, punitive or educational. For example, requiring completion of a “Dangers of Alcohol” education seminar in lieu of an arrest for underage alcohol possession must be included as one referral for disciplinary action for a Liquor Law Violation.

Documentation of the referral must be maintained for purposes of *Clery Act* compliance for three years from the latest publication of the annual security report to which they apply. (See Chapter 9 for more on documentation requirements.)

Rules for Counting Referrals for Disciplinary Action for Weapons: Carrying, Possessing, Etc., Drug Abuse Violations; and Liquor Law Violations

- Count the number of persons who were referred for Weapons: Carrying, Possessing, Etc., the number referred for Drug Abuse Violations and the number referred for Liquor Law Violations.
- Do not count the number of persons who were referred for disciplinary action solely for violation of institutional policy. Only count the number of persons referred for violations of the law.
- If a person is referred for disciplinary action for multiple incidents in the same calendar year (e.g., one referral in February and one referral in March), count this as two referrals for disciplinary action. It is counted as two referrals even if both referrals are for the same type of violation (e.g., both were Drug Abuse Violations).
- If an individual is arrested for one type of law violation and referred for disciplinary action for a different type of law violation during a single incident (e.g., arrested for a Drug Abuse Violation and referred for a Liquor Law Violation), count only the arrest.
- If a person is referred for disciplinary action for multiple violations during a single incident (e.g., violations of both drug abuse and liquor laws), law enforcement or security officer discretion should be used to determine which violation to count. We recommend that you document justification for this determination. Officer discretion is allowed only for Weapons, Drug Abuse and Liquor Law Violation referrals **resulting from a single incident**.
- If a person is issued a civil citation for a law violation (e.g., in lieu of an arrest) do not count as an arrest. If the person is also referred for disciplinary action for the same violation, count the disciplinary referral.

How to Classify the Law Violations

1. Weapons: Carrying, Possessing, Etc., is defined as *the violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices or other deadly weapons. This classification encompasses weapons offenses that are regulatory in nature.*

Classify as a Weapons: Carrying, Possessing, Etc., Violation:

- Manufacture, sale, or possession of deadly weapons.
- Carrying deadly weapons, concealed or openly.
- Using, manufacturing, etc., of silencers.
- Furnishing deadly weapons to minors.
- Aliens possessing deadly weapons.
- Attempts to commit any of the above.

This type of violation is not limited to “deadly” weapons; it also applies to weapons used in a deadly manner. For example, if there is a local or state law prohibiting the possession of brass knuckles, and an individual is arrested for possessing them on your *Clery Act* geography, the arrest must be included in your *Clery Act* statistics.

2. Drug Abuse Violations are defined as *the violation of laws prohibiting the production, distribution and/or use of certain controlled substances and the equipment or devices utilized in their preparation and/or use. The unlawful cultivation, manufacture, distribution, sale, purchase, use, possession, transportation or importation of any controlled drug or narcotic substance. Arrests for violations of state and local laws, specifically those relating to the unlawful possession, sale, use, growing, manufacturing and making of narcotic drugs.*

The relevant substances include opium or cocaine and their derivatives (morphine, heroin, codeine); marijuana; synthetic narcotics—manufactured narcotics that can cause true

addiction (Demerol, methadone); and dangerous non-narcotic drugs (barbiturates, Benzedrine).

Classify as a Drug Abuse Violation:

- All drugs, without exception, that are illegal under local or state law where your institution is located. This means that if you have campuses in different states, the laws may differ for each of them.
- All illegally obtained prescription drugs.

Do not classify as a Drug Abuse Violation:

- Possession of a small amount of marijuana in states that have decriminalized this conduct, meaning that the conduct is no longer a criminal offense. Referrals that occur for this decriminalized conduct should not be counted for *Clery Act* reporting purposes.
- Use of legally obtained, personal prescription drugs used by the owner in a manner not consistent with the instructions provided by the physician.

3. Liquor Law Violations are defined as *the violation of state or local laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession or use of alcoholic beverages, not including driving under the influence and drunkenness.*

Classify as a Liquor Law Violation:

- The manufacture, sale, transporting, furnishing, possessing, etc., of intoxicating liquor.
- Maintaining unlawful drinking places.
- Bootlegging.
- Operating a still.
- Furnishing liquor to a minor or intemperate person.
- Underage possession.
- Using a vehicle for illegal transportation of liquor.
- Drinking on a train or public conveyance.

- Attempts to commit any of the above.

Do not classify as a Liquor Law Violation:

- Drunkenness (unless state law classifies drunkenness as internal possession and a violation of possession laws).
- Driving under the influence.

We recommend that you review your state laws and local ordinances to determine all of the applicable Weapons, Drug Abuse and Liquor Law Violations in your jurisdiction.

Examples of Arrests and Referrals

Scenario 1: In an on-campus student housing facility room three underage students and a nonstudent are found drinking alcohol in violation of state law. The students are referred for disciplinary action, while the nonstudent is given a written citation. Include three referrals for Liquor Law Violations in both the on-campus category and in the on-campus student housing facility category as well as one arrest for a Liquor Law Violation in the on-campus category and in the on-campus student housing facility category.

Scenario 2: A party at an off-campus, university-owned fraternity house is busted, and 30 students are both arrested and referred for disciplinary action for state Liquor Law Violations by campus police. Include this as 30 noncampus arrests for Liquor Law Violations.

Scenario 3: A 21-year-old student is referred for disciplinary action for possessing a beer at an on-campus fraternity house on a “dry” campus. Do not include this incident in your *Clery Act* statistics because no violation of the law occurred.

Scenario 4: A dozen students are cited for underage drinking by campus police at a popular off-campus bar. Do not include these violations in your *Clery Act* statistics as they occurred on private property off campus.

Scenario 5: A student is referred for disciplinary action for smoking a marijuana cigarette in his on-campus dorm room. Because this is his first offense, he is issued a warning and no sanction is imposed. A record is established of the action. Include this as one on-campus referral and one on-campus student housing facility referral.

Scenario 6: Two nonstudents are arrested during an on-campus football game for possession of cocaine. Include this as two on-campus arrests for Drug Abuse Violations.

Scenario 7: A student is cited for having a firearm in his or her residence hall room in violation of state law. Include this as one arrest for Weapons: Carrying, Possessing, Etc., in the on-campus category and one arrest for Weapons: Carrying, Possessing, Etc., in the on-campus student housing facility category.

Examples of Arrests and Referrals (continued)

Scenario 8: A faculty member is referred for disciplinary action for having a firearm in his or her office in violation of school policy. The state in which the campus is located does not have a law against possessing a firearm on campus. Do not include this incident in your *Clery Act* statistics because there was no violation of the law.

Scenario 9: Police respond to an incident at a noncampus, institution-owned sorority house where there are underage students drinking at a party. The officers list all 10 of the students in their report, which is forwarded to the campus Judicial Affairs office. A Judicial Affairs official interviews the students and finds that two of them had not been drinking. Those students are not charged. Judicial Affairs continues the disciplinary process against the eight students who were drinking. Include this as 10 noncampus referrals for disciplinary action because all 10 students were referred for underage drinking.

Scenario 10: A resident assistant (RA) has the duty of loading disciplinary information into an electronic database. She enters the names of 15 students who were referred for disciplinary action as a result of being at an on-campus party where there was underage drinking in violation of state law. The RA's supervisor begins the disciplinary action process by reviewing the information in the database. She determines that five of those students were present in a location where illegal drinking took place but that these five students did not violate any liquor laws. Nothing more is done in terms of disciplinary action for those five individuals. The disciplinary process continues for the remaining 10 individuals who were at the party. Include this as 15 referrals for disciplinary action in the on-campus category because 15 students were referred for underage drinking.

Scenario 11: Two students are caught smoking marijuana before class in the stairwell they use to access their classroom in a noncampus building. The students are brought before a panel of their peers for a disciplinary hearing. The dean of students is present to monitor the proceedings. The panel of students determines that the two students broke the law and requires them to attend drug abuse counseling sessions at the school health clinic. A record of the disciplinary action is established by the institution. Include this as two Drug Abuse Violation referrals in the noncampus category.

Scenario 12: A Burglary occurs at a business down the street from campus. The suspect is chased by police and apprehended on campus. The suspect is carrying a firearm in violation of state law and arrested for both Burglary and a Weapons Violation while on campus property. Include this as one on-campus arrest for Weapons: Carrying, Possessing, Etc. Do not include the Burglary in your *Clery Act* statistics because the Burglary did not occur on *Clery Act* geography.

Unfounded Crimes

Beginning with the reports due in 2015, institutions have been required to include in the Web-based survey and the annual security report statistics for the total number of crime reports that were “unfounded” and subsequently withheld from crime statistics during each of the three most recent calendar years.

For *Clery Act* purposes, the standard for unfounding a reported crime is very high. You may classify a crime as unfounded only after a full investigation by sworn or commissioned law enforcement personnel. A crime is considered unfounded for *Clery Act* purposes **only if sworn or commissioned law enforcement personnel make a formal determination that the report is false or baseless**. Crime reports can be properly determined to be false only if the evidence from a complete and thorough investigation establishes that the crime reported was not, in fact, completed or attempted in any manner. Crime reports can be determined to be baseless only if the allegations reported did not meet the elements of the offense or were improperly classified as crimes in the first place. **A reported crime cannot be designated “unfounded” if no investigation was conducted or the investigation was not completed. Nor can a crime report be designated unfounded merely because the investigation failed to prove that the crime occurred; this would be an inconclusive or unsubstantiated investigation.** As such, for *Clery Act* purposes, the determination to unfound a crime can be made only when the totality of available information specifically indicates that the report was false or baseless.

The recovery of stolen property or the low valuation of stolen property is not adequate grounds for unfounding a reported Robbery, Burglary, or Larceny-Theft. Similarly with regard to sex offenses, subsequent acts or inactions on the part of a victim, a witness, or a third party are not an independent ground for unfounding a reported crime. A reported crime may not be unfounded solely because a victim or witness fails to follow an institution’s rules for filing a complaint or is unwilling to provide additional information or evidence, or to otherwise assist in an investigation or prosecution. Moreover, a crime may not be unfounded simply because a complainant agrees to execute a “Declination to Prosecute” form or because a prosecutor subsequently decides not to pursue criminal charges. The mere lack of sufficient evidence to make an arrest is not adequate grounds to unfound a crime report either.

Unfounded crimes citation
34 CFR 668.46(c)(2)(iii)

A case cannot be designated “unfounded” if no investigation was conducted or the investigation was not completed.

Finally, determinations by a coroner, court or jury may not be used to unfound reports of offenses or attempts. A verdict that a particular defendant is not guilty of a particular charge (or, more technically, that there was not sufficient admissible evidence introduced demonstrating beyond a reasonable doubt that the accused committed the crime) does not mean that the crime did not occur. The inclusion of a reported crime in the *Clery Act* statistics is not based on the identity of a specific perpetrator.

Aid for Counting Unfounded Crimes

To count a crime as unfounded for *Clery Act* purposes, the reported crime must have been

- a *Clery Act* crime;
- reported to have occurred on *Clery Act* geography;
- thoroughly investigated by sworn or commissioned law enforcement personnel; and
- found through investigation to be false or baseless, meaning that **the crime did not occur and was never attempted.**

Do not count as unfounded crimes:

- Crimes that were initially misclassified. Do not count a crime as unfounded if investigation shows that a crime has occurred but the initial description of the crime was inaccurate. For example, an Aggravated Assault is reported to authorities but police investigation determines that the crime is Simple Assault, not Aggravated Assault. The initial crime report was not unfounded. The crime was reclassified.
- Crimes that were initially reported as occurring on *Clery Act* geography but determined through investigation to have occurred outside of *Clery Act* geography.
- Burglary, Robbery, or Larceny-Theft incidents in which the property was returned. The crimes still occurred. (Unfounded Larceny-Theft would be included only if it was reported as a Hate Crime.)

- Reports of Weapons: Carrying, Possessing, Etc. Violations, Drug Abuse Violations, or Liquor Law Violations in which officers were unable to substantiate the report and no arrests were made. For example, if an officer investigates a report of marijuana smoke and does not find any Drug Abuse Violation, the report is unsubstantiated, not unfounded. There is no crime to unfound.
- Reports from local law enforcement of unfounded arrests. Arrests cannot be unfounded.
- Disciplinary referrals in which it is determined through the disciplinary process that no law violation occurred or no sanction is imposed. Once a student has been referred for disciplinary action, a record has been initiated and the referral must be counted. Disciplinary referrals cannot be unfounded.
- Reports from local law enforcement of crimes that were unfounded because the victim refused to cooperate with authorities or there was not enough evidence to press charges. To be unfounded, investigation must prove that the crime did not occur and was never attempted.
- Findings of a judge, jury, disciplinary committee or any other person or entity that is not a sworn or commissioned law enforcement officer. A district attorney may unfound a crime only if he or she is also a sworn or commissioned law enforcement officer.
- Reports of crimes where the victim later retracts his or her statement, or withdraws a complaint, unless a thorough investigation proves that the crime did not occur and was never attempted. A victim might retract his or her statement because he or she does not want to continue to answer questions or is being pressured by the perpetrator or other parties. A retracted statement or withdrawal of a complaint alone is not sufficient evidence to prove that the crime did not occur.

Do count as unfounded crimes:

- Motor Vehicle Thefts where investigation determined that the car was misplaced by the owner and a Motor Vehicle Theft did not occur and was never attempted.
- Burglaries where investigation determined that the items were misplaced by the owner and Burglary did not occur and was not attempted.

If a crime is unfounded, it should not be included in the *Clery Act* statistics for the associated crime category, and should be removed from any previously reported statistics for that crime category. The unfounded crime should be included in the total count of unfounded crimes for the year in which the crime was originally reported. Consistent with other recordkeeping requirements that pertain to the Title IV, *HEA* programs, if a crime was not included in the *Clery Act* statistics for the associated crime category because it was unfounded, you must maintain accurate documentation of the reported crime and the basis for unfounding the crime. This documentation must demonstrate that the determination to unfound the crime was based on the results of the law enforcement investigation and evidence.

In addition, institutions that have a campus security or police department must include all reported crimes in their crime log. The crime log must include the nature, date, time and general location of each crime, as well as the disposition of the complaint. If a crime report is determined to be unfounded, you must update the disposition of the complaint to unfounded in the crime log within two business days of that determination. You may not delete the report from the crime log.

If you disclose a crime statistic and the crime is unfounded in a subsequent year, you should revise your statistics. Use a caveat to note that the change in a prior year's statistics reflects the unfounding of a crime.

Excluded Crimes

There are some crimes that you should not include in your institution's *Clery Act* statistics and others that you may exclude under particular circumstances. They are:

- **Non-Clery Act crimes.** If you disclose statistics for non-*Clery Act* crimes, disclose them in a manner separate from your *Clery Act* statistics. (More about how to present your statistics in Chapter 9.)
- **Crimes not committed in geographic locations specified by the *Clery Act*.** For example, although Rape is a *Clery Act* crime, where it was committed is important in determining if the crime must be included in the annual security report and the Web-based data collection. If a student reports being raped over spring break, the statistic for the Rape must be included if it occurred on campus, in or on a noncampus building or property, or on public property as defined by *Clery Act* regulations. If the Rape did not occur in one of these locations, do not include it in your *Clery Act* statistics.

A Final Reminder ...

Statistics for all *Clery Act* crimes must be reported by the type of crime that was committed, the year in which the crime was reported and the geographic location where the crime occurred. If you are uncertain about how to classify a specific incident for *Clery Act* reporting, we encourage you to contact any law enforcement in your area for assistance.

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Collecting Statistics: Authorities and Law Enforcement Agencies

CHAPTER 4



Now that you know all of the categories of crimes, arrests and referrals to disclose and how geography fits into compliance with campus safety and security regulations, you need to know how to obtain reportable statistics associated with that geography. This requirement involves collecting information from individuals and organizations associated with your institution (i.e., campus security authorities or CSAs) about crimes, arrests and referrals that have been reported to them, and requesting crime and arrest statistics from local law enforcement agencies. We'll begin by discussing campus security authorities.

Although every institution wants its campus community to report criminal incidents to law enforcement, we know that this doesn't always happen. Even at institutions with a police department on campus, a student who is the victim of a crime may report it to someone other than the campus police. For example, a victim of a sexual offense may turn to a resident advisor for assistance, or a student whose car was stolen may report the theft to the school's director. For this reason, the *Clery Act* requires all institutions to collect crime reports from a variety of individuals and organizations that are considered to be "campus security authorities" under the law.

Under the *Clery Act*, a crime is "reported" when it is brought to the attention of a campus security authority, the institution's police department or campus safety office, or local law enforcement personnel by a victim, witness, other third party or even the offender. It doesn't matter whether or not the individuals involved in the crime, or reporting the crime, are associated with the institution. If a campus security authority receives a report, he or she must include it as a crime report using whatever procedure has been specified by your institution.

What you must include, therefore, are **statistics based on reports of alleged criminal incidents**. It is not necessary for the crime to have been investigated by the police or a campus

It is not necessary for the crime to have been investigated by the police or a campus security authority, nor must a finding of guilt or responsibility be made to include the reported crime in your institution's crime statistics.

Campus security authority
definition citation
34 CFR 668.46(a)

security authority, nor must a finding of guilt or responsibility be made to include the reported crime in your institution's crime statistics.

How to Identify Your Institution's CSAs

“Campus security authority” is a *Clery Act*-specific term that encompasses four groups of individuals and organizations associated with an institution.

- *A campus police department or a campus security department of an institution.* If your institution has a campus police or security department, all individuals who work for that department are campus security authorities. A security department can be as small as one person. (More about this in Chapter 5.)
- *Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department (e.g., an individual who is responsible for monitoring the entrance into institutional property).* Include individuals such as those who provide security at a campus parking kiosk, monitor access into a campus facility, act as event security, such as for sporting events or large, registered parties, or escort students around campus after dark (including other students).
- *Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.* As mentioned in Chapter 1, your institution must publish a number of safety- and security-related policy statements. (These are discussed in Chapters 7 and 8.) If you direct the campus community to report criminal incidents to anyone or any organization in addition to police or security-related personnel, that individual or organization is a campus security authority.
- *An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline and campus judicial proceedings.* An

official is defined as *any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution.*

Because official responsibilities and job titles vary significantly on campuses, we are not providing a list of specific job titles. To determine specifically which individuals or organizations are campus security authorities for your institution, consider the **function** of that individual or office. Look for officials (i.e., not support staff) whose functions involve relationships with students. **If someone has significant responsibility for student and campus activities, he or she is a campus security authority.** Note that whether or not your institution pays an individual is not a factor in determining whether that individual is a CSA. Be sure to keep your CSA list current so that you do not omit any individual or organization that fits the definition of a CSA.

Examples of individuals (outside of a police or security department) who generally meet the criteria for being campus security authorities include

- a dean of students who oversees student housing, a student center or student extracurricular activities;
- a director of athletics, all athletic coaches (including part-time employees and graduate assistants);
- a faculty advisor to a student group;
- a student resident advisor or assistant;
- a student who monitors access to dormitories or buildings that are owned by recognized student organizations;
- a coordinator of Greek affairs;
- a Title IX coordinator;
- an ombudsperson (including student ombudspersons);
- the director of a campus health or counseling center;
- victim advocates or others who are responsible for providing victims with advocacy services, such as

Be sure to keep your CSA list current so that you do not omit any individual or organization that fits the definition of a CSA.

assisting with housing relocation, disciplinary action or court cases, etc.;

- members of a sexual assault response team (SART) or other sexual assault advocates; and
- officers from local law enforcement who are contracted by the institution to provide campus safety-related services.

If your institution directs students or employees to report crimes to other individuals, then those individuals are also CSAs. These individuals could include

- physicians in a campus health center;
- counselors, including peer counselors (except for professional or pastoral counselors addressed later in this chapter); and
- health educators, including peer health educators.

Examples of individuals who would not meet the criteria for being campus security authorities include

- a faculty member who does not have any responsibility for student and campus activity beyond the classroom; and
- clerical or cafeteria staff.

The total number of CSAs at your institution depends on the number of individuals or organizations involved in security or that have significant responsibility for student and campus activities, not on the size of your school. Even a small school can have a number of CSAs. For example, your school may have a director, a registrar and a faculty advisor who fit the CSA definition. On the other hand, perhaps only the director fits the definition. If your school does not have security personnel but has one administrator who has all of the responsibility for student and campus activities at the school, that administrator is your only CSA.

Remember, too, that because personnel and job positions can change, someone who is a CSA one year might not be a CSA the following year or vice versa. For example, suppose that you have a computer science instructor who is teaching at

the main campus. She isn't a CSA because she doesn't have any responsibility for student and campus activity beyond the classroom. The following year, this instructor is teaching computer science at one of your institution's **noncampus** locations. Because there aren't any security personnel on site, your institution's security policy identifies this instructor as the person to whom students should report crimes or other emergencies that occur there. This instructor is now a campus security authority. Institutions are advised to reevaluate the CSA status of all employees (including student employees) on at least an annual basis and document the rationale of the determinations.

Please note that, while there may be some overlap, persons considered to be CSAs for *Clery Act* reporting are not necessarily the same as those defined as "responsible employees" for Title IX.

What Does a Campus Security Authority Do?

The function of a campus security authority is to report to the official or office designated by the institution to collect crime report information, such as the campus police or security department, those allegations of *Clery Act* crimes that he or she receives. CSAs are responsible for reporting allegations of *Clery Act* crimes that are reported to them in their capacity as a CSA. This means that CSAs are **not** responsible for investigating or reporting incidents that they overhear students talking about in a hallway conversation; that a classmate or student mentions during an in-class discussion; that a victim mentions during a speech, workshop, or any other form of group presentation; or that the CSA otherwise learns about in an indirect manner.

While there may be some overlap, persons considered to be CSAs for *Clery Act* reporting are not necessarily the same as those defined as "responsible employees" for Title IX.

Examples of Collecting Crime Information

Scenario 1: A resident assistant who has been identified as a CSA is told by a fellow student that she has been raped and is seeking emotional and medical support. The resident assistant should forward the report to the institution's designated official for inclusion in the statistics regardless of whether the victim chooses to file a report with law enforcement or press charges.

Scenario 2: A student mentions to her boyfriend that a number of rooms on her dorm floor were broken into during the previous night's football game. Later that day, her boyfriend tells the athletics director (AD) what he heard. The AD asks which dorm it was and what, if anything else, the boyfriend knows about the incident. The AD should document the information and forward it to the school's campus security department or the institution's designated official for inclusion in the statistics per the school's crime reporting policy.

Scenario 3: Ms. Jones, director of Student Housing at your school, gets a call from the director of a counseling center in town. The caller wants to let the director know that four students from the school sought assistance at the center and told the center's counselors that they had been sexually assaulted on campus and were seeking emotional support. They did not want police investigations. These are third-party reports and Ms. Jones, having no reason to believe that they were not made in good faith, should document all of the information she was given and forward the reports to the person or office responsible for collecting *Clery Act* crime reports at her institution.

Scenario 4: Jane, a resident advisor, is attending a Take Back the Night rally at her school. She attends the event as a participant and is not involved in providing any counseling services. As part of the event's programming, a student gives a speech in which she says that she was raped on campus last year. In response to hearing the speech, three other students decide to address the crowd and disclose their own experiences being sexually assaulted. After the event, Jane returns to her room where a student from her housing facility knocks on her door and tells her that she was sexually assaulted at an on-campus party in another housing facility three months ago. Jane should forward the report of the incident that was reported to her as she was acting in her capacity as an RA for her housing facility. Jane should not report the Sexual Assaults that she heard discussed at the Take Back the Night event.

What Shouldn't a Campus Security Authority Do?

A campus security authority is not responsible for determining authoritatively whether a crime took place—that is the function of law enforcement personnel. A campus security authority should not try to apprehend the alleged perpetrator of the crime. That too is the responsibility of law enforcement.

It's also not a CSA's responsibility to try and convince a victim to contact law enforcement if the victim chooses not to do so.

Exemption for Pastoral and Professional Counselors

There are two types of individuals who, although they may have significant responsibility for student and campus activities, are not campus security authorities **under the Clery Act**:

- **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 the counselor's 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.

The pastoral or professional counselor exemption is intended to ensure that these individuals can provide appropriate counseling services without an obligation to report crimes they may learn about. This exemption is intended to protect the counselor-client relationship. However, even the legally recognized privileges acknowledge some exemptions, and there may be situations in which counselors are in fact under a legal obligation to report a crime.

To be exempt from disclosing reported offenses, pastoral or professional counselors must be acting in the role of pastoral or professional counselors. State licensing requirements for professional counselors typically include completion of a minimum of 3,000 hours of post-master's degree supervised clinical experience, performed within two years before a license is awarded. If an unlicensed counselor has completed his or her master's degree course work, and is acting in the role of a licensed counselor under the supervision of a licensed professional in order to gain the required supervised clinical

*Campus security authority
exemptions citation*
34 CFR 668.46(a)

experience in a two-year period, he or she would be exempt from CSA requirements. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution. However, a dean of students who has a professional counselor's license but is employed by the institution only as a dean and not as a counselor, is not exempt from reporting. If that same dean is employed by the institution as **both** a professional counselor and an academic counselor, and she learns of a criminal incident while she is engaged in academic counseling, she is not exempt from reporting that incident. Note also, that if your institution has an individual with dual roles, one as a professional or pastoral counselor and the other as an official who qualifies as a CSA, **and the roles cannot be separated**, that individual is considered a campus security authority and is obligated to report *Clery Act* crimes of which they are aware.

An individual who is counseling students and/or employees, but who does not meet the *Clery Act* definition of a pastoral or professional counselor, is not exempt from being a campus security authority **if** they otherwise have significant responsibility for student and campus activities. This may include a triage nurse at the student health center or crisis intervention staff at the rape crisis clinic at your institution.

In most cases it is possible for a CSA to fulfill his or her responsibilities while still maintaining victim confidentiality. CSA reports are used by the institution to compile statistics for *Clery Act* reporting and to help determine if there is a serious or continuing threat to the safety of the campus community that would require an alert (i.e., a timely warning or emergency notification discussed in Chapter 6). However, those responsibilities can usually be met without disclosing personally identifying information.⁴ A CSA report does not need to automatically result in the initiation of a police or disciplinary investigation if the victim does not want to pursue this action.

⁴ "Personally identifying information" is defined in section 40002(a)(20) of the *Violence Against Women Act of 1994* and is incorporated into the *Clery Act* regulations; therefore, this handbook uses the term "personally identifying information" when discussing *Clery Act* requirements.

Recommendations

The *Clery Act* regulations do not address coordinating your crime reporting process or training your campus security authorities. However, because the role of CSAs is vital to compliance with the law, many schools have requested suggestions for doing so. The following section addresses those requests by providing **recommendations—not requirements**—which your school can adapt to meet its unique configuration and needs. As you read them, please keep in mind that the effort and coordination needed to comply with the requirement to collect crime reports varies significantly depending on several factors, such as the size of your school, the number of individuals or offices that meet the campus security authority definition, whether your school has law enforcement or security personnel and whether you provide student housing.

- **Designate an individual or office to coordinate and oversee your campus security authorities.**

This can be particularly helpful for schools with a large number of CSAs. Assign someone who is knowledgeable about the *Clery Act* to coordinate everything from identifying your institution's CSAs to making sure all CSAs provide information on any crimes reported to them.

Rather than assuming that because a CSA hasn't forwarded a crime report to the appropriate individual or office no crimes were reported to that CSA, a coordinator can be charged with canvassing each CSA to request crime reports from them. CSAs who don't have crimes to report can be asked to document this in writing. This could be as simple as writing a statement that reads, "From _____ to _____ I was not aware of, and did not receive, any reports of criminal incidents, arrests or disciplinary actions for *Clery Act* crimes." Even if crime reports are submitted online, it's a good idea to ask CSAs to indicate if they have no crimes to report.

- **Make sure your campus security authorities know they are campus security authorities.**

To do this, we suggest that you update the job descriptions of individuals at your institution who fit the definition of a CSA. Make this designation an official part of their job description so that they know what's required of them. You may also want to contact all CSAs annually in writing to

remind them of this obligation. Because of turnover, or a change in job descriptions, you may have to notify some individuals mid-year.

- **Provide training.**

CSAs have an important job to do and providing them with training will help to ensure that they do it properly. Training can be provided in a variety of ways, ranging from sending materials in an e-mail to face-to-face meetings that include PowerPoint presentations and training manuals. Whatever form your training takes, page 4-11 provides some elements you might want to include.

- **Forward crime reports to your campus police or security department, if you have one.**

Provide a simple mechanism for CSAs to report information to the person or office responsible for compiling the institution's crime statistics. CSA crime reports should include sufficient detail, such as dates and locations, and, where appropriate, personally identifying information, including name and contact information if available. Encourage CSAs to immediately forward reports of crimes to the designated officials, whether they be your campus police or security department if you have one, or to another official charged with this responsibility. This is because a CSA crime report may be the basis for determining if there is a serious or continuing threat to the safety of the campus community that would require an alert (i.e., a timely warning or emergency notification). Also, if your institution has a campus police or security department and a crime is reported to a non-police/security CSA, the report should be forwarded to your campus police or security department so that it will be entered in your institution's daily crime log in a timely manner. (More about the crime log in Chapter 5.)

- **Keep documentation of all crime reports.**

Keep hard copy or electronic documentation for all CSA-reported crimes and make sure that more than one person knows where the documentation is kept. If there is reason to believe that a crime report was not made in good faith, and your institution does not include the reported incident in its crime statistics, we strongly suggest that you document the justification for not including the crime in those statistics.

If your institution contracts with a third party to provide security services, ensure that the contracted company shares documentation of all incidents so that you can meet *Clery Act* requirements for retaining records. As discussed further in Chapter 9, you must retain all records used in compiling your annual security report for three years from the latest publication of the report to which they apply.

Figure 5. Suggested Training Elements for Campus Security Authorities

Describe the role of a CSA—The *Clery Act* is a federal law that requires the institution to identify individuals and organizations that meet the definition of a campus security authority. CSAs have an important role in ensuring that the school complies with the law. Explain that CSA crime reports are used by the school to

- fulfill its responsibility to annually disclose accurate crime statistics; and
- to issue or facilitate the issuance of timely warnings or emergency notifications for crimes that pose a serious or continuing threat to the campus community.

If an individual reporting an incident needs assistance, a CSA should explain how to get help. Let a victim know that help is available even if he or she does not want an investigation conducted. The decision to act on this option is the victim's. In the midst of an emergency situation, such as a physical assault, however, a CSA should contact the campus police or call 911, as appropriate.

Provide reporting materials—Good recordkeeping can help minimize the chances of double reporting crimes. Suggested materials are

- descriptions, a map, or both, of the school's *Clery Act* geography;
- a list of *Clery Act* crimes and definitions; and
- hard copy or electronic Crime Report forms for documenting criminal incidents.

Discuss the importance of documentation—Explain that if a CSA is unsure of whether an incident is a *Clery Act* crime, or even if it's criminal in nature, they should report it.

- Stress the importance of providing as much information about a reported incident as possible to aid law enforcement in addressing and categorizing the crime.
- Explain that CSA crime reports should include personally identifying information if available. This is important for law enforcement purposes and to avoid double counting crimes. If a victim doesn't want the report to go any further than the CSA, the CSA should explain that he or she is required to submit the report for statistical purposes, but it can be submitted without identifying the victim.

Emphasize the need for timely report submission—Explain that if a crime is reported to a CSA, but goes no further than that, the school won't have fulfilled its obligation under the law, and campus community members might not have the information they need to stay safe on campus. Instruct CSAs on

- how to submit their crime reports in a timely manner; and
- to whom reports should be submitted.

Requesting local police
statistics citation
34 CFR 668.46(c)(9)

You must ask for law enforcement statistics for *Clery Act* crimes that occurred on any area included in your institution's *Clery Act* geography: on campus, public property and noncampus locations, if you have any.

Requesting Statistics From Local Law Enforcement Agencies

In addition to collecting crime **reports** from campus security authorities, the *Clery Act* requires that every institution make a “reasonable, good-faith effort” to obtain *Clery Act* crime **statistics** from all local law enforcement agencies that have jurisdiction over the school’s *Clery Act* geography. Local law enforcement agencies do not include your campus police or security department (if you have one). The campus police and security departments are campus security authorities.

Local law enforcement refers to outside law enforcement agencies or departments with jurisdiction over some or all of your *Clery Act* geography. If there are several agencies involved, for example, city police, tribal police, the county or parish sheriff’s office and state police, you must request statistics from all agencies with jurisdiction over areas in your school’s *Clery Act* geography. You don’t need to request statistics from local agencies that only provide court security, administer the jail, transport prisoners or serve papers, etc.

You must ask for law enforcement statistics for *Clery Act* crimes that occurred on any area included in **your institution’s *Clery Act* geography**: on campus, public property and noncampus locations, if you have any. It doesn’t matter what the institution’s relationship is with local law enforcement, nor does it matter if you’ve requested *Clery Act* statistics from them in the past and haven’t gotten a response; you must make the request annually. If your institution has multiple campuses, each campus must make this request to the appropriate local law enforcement agencies. And remember, if your institution has an additional campus in a foreign country, that campus also has an obligation to make a good-faith effort to obtain statistics from local law enforcement authorities in that area.

Good-faith Effort

The *Clery Act* doesn’t require local law enforcement agencies to provide institutions with crime statistics. If you make a reasonable, good-faith effort to obtain the statistics, your institution is not responsible for the failure of the local or state police agency to supply them. The law states that an institution “may rely on the information supplied” by a local or state police agency. The phrase “may rely on” means that an institution is not required to verify the accuracy of the statistics that are provided; however, you are required to ensure that the

statistics you receive cover your *Clery Act* geography and not other areas. Remember that, in most cases, you will need to request only crime statistics, not the actual law enforcement reports, unless there are known issues with the way incidents were classified by a particular law enforcement agency.

That said, you should be aware of **red flags** that alert you to the possibility that an agency misunderstood your request. In such a case, you should contact the agency for clarification. Red flags include:

- Statistics for Burglaries on public property: A Burglary is the unlawful entry of a structure to commit a felony or a theft. A structure has four walls, a roof and a door. To be a Burglary on public property, there must be an element of trespass into a public structure on public land within your campus or immediately bordering your campus. For most institutions, public property is the public sidewalk, street and opposite sidewalk bordering the campus. Some institutions may also have public parking facilities in their public property category. A Burglary in this category is a rare event.
- Large numbers of crimes on public property: Public property is narrowly defined by the *Clery Act*. Large numbers may indicate statistics for private homes and businesses or for an entire police jurisdiction.
- Missing geography: The statistics you received are for crimes that occurred only on public property; however, you are certain that there were on-campus *Clery Act* crimes that were reported to the local police department. This indicates that the police did not understand that you wanted statistics for all of your *Clery Act* geography: on campus, public property and noncampus locations, if you have any.
- Statistics for Incest and Statutory Rape. Because one doesn't expect many of these crimes on *Clery Act* geography, it's very likely that the crimes were committed in locations other than your *Clery Act* geography.

How Do You Obtain Statistics From Local Law Enforcement?

Other than making a good-faith effort, the *Clery Act* doesn't specify how an institution has to obtain the statistics. For institutions that are not experienced in these matters, we offer the following suggestions:

- **Determine the correct law enforcement authorities and develop a relationship with them.**

You should request statistics from every law enforcement agency that has jurisdiction over areas in your institution's *Clery Act* geography. If you are unsure where to begin, call your local area information number (generally 411), and give your institution's address to the operator. He or she can give you the telephone number of the local police who respond to calls for your location. You can also find this information on the Internet by searching for "law enforcement" along with the zip code in which your institution is located.

Call that agency, and ask to speak with a supervisor or public affairs office. They should be able to point you to the appropriate person. Ask that individual what other law enforcement agencies have concurrent jurisdiction in the area where your institution is located. Be sure to include state law enforcement agencies. Remember to provide addresses for noncampus buildings or property if your institution has any. If you have an out-of-state noncampus location, you need to ask for the local law enforcement agency number for that zip code as well. (A sample letter to a law enforcement agency is included in Appendix B.)

- **Contact local law enforcement early in the year.**

Contact agencies early in the calendar year for crime statistics for the previous year. Agencies, particularly those with extensive jurisdictions or those with a very small number of personnel, need time to collect the information you request. Providing them adequate advance notice may increase your chances of getting the requested statistics in a timely manner.

- **Document your good-faith effort to obtain the statistics, including follow-up requests.**

After you know who or what department to contact at each agency, we suggest that you write a letter, on your institution's official letterhead, if possible, explaining the following:

What you need. Ask for statistics for all *Clery Act* crimes for

- your campus;
- on-campus student housing facilities, if you have any;
- public property; and
- noncampus buildings or property, if you have any.

Provide a list of the applicable crimes and addresses for your buildings and property. Be very specific about what constitutes public property for *Clery Act* reporting purposes. For example, ask for "crime statistics for the sidewalk, street and opposite sidewalk between the 1200 and 1400 blocks on Elm Street," rather than "crime statistics for public property around the school." State that you do not need statistics about crimes at private homes or businesses. If your institution uses a map to identify its *Clery Act* geography, include the map with your request.

Why you need it. State that the information is required by the federal *Clery Act* for disclosure in an annual security report and a Web-based data collection.

The format in which you need it provided—preferably in writing (either paper or electronic). Ask for statistics for crimes classified according to the UCR. If the local police agency does not use UCR classifications, and can't provide them, ask what classifications are used (e.g., state crime classifications).

When you need it. Explain that you must disclose the statistics by Oct. 1 and suggest a reasonable deadline that will allow you some leeway. It may take considerable time and effort to review the statistics to prevent double counting the crimes reported by your institution's CSAs and the crime statistics reported by local law enforcement agencies.

Where it should be sent. Provide your institution's mailing or e-mail address.

To whom it should be sent. Provide the name and title of the person who is responsible for collecting these data for your institution.

Even if you make a phone call asking for this information, we suggest that you **follow up** with a letter or an e-mail for the purpose of documenting your good-faith effort. Also document any response, or lack of response, from each agency that you contact. If your deadline for disclosing the crime statistics is fast approaching and you haven't heard from an agency, contact them again and inquire about the status of your request.

What to Do If You Are Directed to a Website

In some jurisdictions, local law enforcement statistics are available on a public access website. In this case, the police may instruct you to visit the site to obtain the statistics. If you can identify the statistics for your school's *Clery Act* geography from the statistics, and you can confirm that the website is up-to-date, this is an acceptable means of meeting the requirement. You are still, however, required by law to make an initial request for statistics annually directly to the agency.

What to Do If an Agency Requests Payment for the Statistics

If an agency requests payment in return for providing your institution with statistics, you may pay the agency, but you are not required to do so.

What to Do If You Obtain Non-UCR Statistics

The *Clery Act* requires institutions and the Department to use the definitions of crimes in the FBI's Uniform Crime Reporting Program when compiling crime statistics for *Clery Act* purposes, but not all law enforcement agencies use these definitions. If you know that the statistics you obtained aren't classified according to UCR definitions, and you have campus police personnel familiar with UCR definitions, they might be able to reclassify the crimes. For example, if under the Robbery classification you received statistics for "robbery of an apartment" or "safe robbery," the UCR equivalent would be

“Burglary.” (See “Burglary” in Chapter 3.) An incident classified by some agencies as “breaking and entering with intent to commit a larceny,” is also classified as “Burglary” in the UCR. You can also request clarification from the local law enforcement agency if you are not sure how a crime should be listed. If you cannot reclassify the statistics, include them in your disclosures with an explanation that UCR classifications were not used for crimes reported to local law enforcement agencies and included in the statistics.

What to Do If You Obtain Statistics That You Can’t Attribute to Your *Clery Act* Geography

In some jurisdictions, local law enforcement agencies cannot provide a breakdown of statistics specific to *Clery Act* geographic areas. For example, the police may provide your institution with statistics for the entire jurisdiction or the entire city, or they may include statistics for private residences and businesses. If the statistics are all zeros, that isn’t a problem. **If not, we suggest that you request addresses for the crimes included in the statistics to help you determine if any of the crimes occurred on your *Clery Act* geography.** If you can determine that some of the crimes occurred in or on your *Clery Act* geography, but you can’t determine if they occurred on your campus or public property, disclose those statistics in an additional table or in a caveat explaining why they are separated from your other *Clery Act* statistics.

If you cannot determine whether any of the crime statistics apply to or include your *Clery Act* geography, provide a caveat in your annual security report explaining that the statistics were requested but were not available in a usable format for *Clery Act* reporting. (More about how to disclose statistics in your annual security report and in the Web-based survey in Chapter 9.)

What to Do If Your Request for Statistics Is Denied

If a law enforcement agency that you contact does not comply with your request for crime statistics, document both your request for the statistics and the response, or lack of response, from the agency. You should also consult state and local open records laws to see if law enforcement agencies are required to provide crime statistics to citizens and organizations that request them. If some of the agencies provide you with statistics and others don’t, be sure to include

the statistics you did receive in your reported crime statistics. Add an explanation to tell the reader that not all of the agencies responded to your request for statistics, or that not all of the agencies could provide the statistics as requested.

Remember, requesting *Clery Act* crime statistics from local law enforcement agencies is an institutional obligation. This means that if you assign someone the responsibility to request and review the statistics, and that person for whatever reason is unable to do so, your institution is still responsible for complying with the law. You must make this effort in time to include the statistics in your annual security report which must be published by Oct. 1. The same statistics must also be entered in the Web-based data collection in the fall.

The Daily Crime Log: Recording Crimes Reported To Campus Police or Security Personnel

CHAPTER 5



Does your institution have a campus police or security department? Any institution, regardless of whether it's public or private, that has a campus police or security department, **must** create, maintain and make available a daily crime log.

For *Clery Act* purposes, there are various arrangements that constitute a campus police or security department. For example, some institutions choose not to provide such services with institution staff, and instead contract with a private company to handle campus security. Others have agreements with municipal, county or state law enforcement agencies for security services. It doesn't matter if your security staff is paid by your institution or by a contractor, or if you have one security officer or a police department. Any of these arrangements put your institution in the category of "having a security department."

On the other hand, your institution is not considered to have a security department and, therefore, is not required to maintain a crime log if you only have

- local law enforcement personnel who patrol on or near your campus, but the local law enforcement agency does not have a written agreement or contract with your institution for these services;
- an individual or individuals with limited responsibility for campus security (e.g., someone monitoring access to a campus building by checking student IDs) but who does not perform other security services; or
- security personnel employed or contracted by a landlord from whom your institution rents classroom space.

Daily crime log citation
34 CFR 668.46(f)

The purpose of the daily crime log is to record all criminal incidents and alleged criminal incidents that are reported to the campus police or security department.

The determination of whether or not your institution's security personnel constitute a campus police or security department must be consistent with the campus security policy statement you disclose in your annual security report (more about this in Chapter 7).

Purpose of the Daily Crime Log

The purpose of the daily crime log is to record all **criminal incidents** and **alleged criminal incidents** that are reported to the campus police or security department. For example, if a student tells your security office that he lost his wallet in the parking lot behind a dorm, it is not a criminal incident, and you aren't required to record it in the log. However, if a student tells your security office that his wallet was stolen from his dorm room, this is an alleged criminal incident which must be recorded in the log.

Some traffic violations are criminal in nature and, if reported, must be recorded. They are driving under the influence (DUI), driving while intoxicated (DWI), hit-and-run (of a person) and vehicular manslaughter. However, you are not required to record violations that aren't considered "crimes" (i.e., citations for moving violations).

What to Do If Your Institution Also Has a State Crime Log

Many institutions are also required by state law to maintain a log. If your institution maintains such a log, you may use it for your daily crime log as well, if it meets all *Clery Act* requirements. However, if the state crime log requires the victims' names to be listed, the log would not meet the requirements of the *Clery Act*, which provides that a crime log entry may not jeopardize the confidentiality of the victim.

Combining the Daily Crime Log and the Fire Log

If your institution has any on-campus student housing facilities, you are required to maintain a fire log. You may, but are not required to, use one log to meet the crime log and the fire log requirements if you label the log accordingly and the common log meets all of the requirements for both logs. To learn what information must be contained in the fire log, please see Chapter 12.

How the Crime Log Differs From Other Campus Safety and Security Disclosures

The crime log differs from other disclosure requirements in some important ways:

- Crime log entries include **all** crimes reported to the campus police or security department for the required geographic locations, not just *Clery Act* crimes.
- The crime log includes specific information about criminal incidents, not crime statistics.
- The log is designed to provide crime information on a more timely basis than the annual statistical disclosures. A crime must be entered into the log within two business days of when it was reported to the campus police or security department. This includes crimes that are reported directly to the campus police or security department, as well as crimes that are initially reported to another campus security authority or to a local law enforcement agency, which subsequently reports them to the campus police or security department.
- The UCR Hierarchy Rule does not apply to the crime log. If multiple Criminal Offenses are committed during a single incident, all of the offenses must be recorded in the log.
- The log has a more specific location focus than the statistical disclosures. For example, the location might be recorded as “on the second floor of the administration building” rather than “on campus.”
- There is an **additional geographic location that applies exclusively to the crime log**. In addition to recording reported crimes that occurred on campus, in or on noncampus buildings or property or on public property within the campus or immediately adjacent to and accessible from the campus, reports of **crimes that occurred within the patrol jurisdiction of the campus police or security department** must also be entered into the crime log.

A patrol jurisdiction (also referred to as a “patrol zone”) is any property that does not meet any of the

Crime log entries include *all* crimes reported to the campus police or security department for the required geographic locations, not just *Clery Act* crimes.

A patrol jurisdiction (also referred to as a “patrol zone”) is any property that does not meet any of the *Clery Act* geographic area definitions, but which is regularly provided with police or security patrol services by the campus agency.

Clery Act geographic area definitions, but which is regularly provided with police or security patrol services by the campus agency. These services are typically performed by the campus agency pursuant to a formal agreement with the local or state government, a local civic association or other public entity. Your institution should document the security or patrol jurisdiction. For example, you may have a map of the patrol jurisdiction, a standard operating procedure (SOP) or a general order (GO) that describes the patrol jurisdiction.

Creating Your Log

As with all aspects of *Clery Act* compliance, documentation is vital. Begin by clearly identifying your log as a Daily Crime Log. One method of formatting a crime log is shown in the following example.

Figure 6. Sample Daily Crime Log With Required Elements

Daily Crime Log Calendar Year 2015

Nature (classification)	Case Number	Date/Time Reported	Date/Time Occurred	General Location	Disposition
Larceny	2015-0003	01/20/15 1505hrs	01/10/15 0800hrs	Admin. Building	Closed 05/24/15
Vandalism	2015-00010	01/27/15 1231hrs	01/17 - 01/22/15	Jacobson Hall	Closed 05/24/15
Vandalism	2015-00035	04/12/15 1937hrs	04/12/15 1930hrs	Lester Hall	Open
Liquor Law Violation	2015-0040	04/23/15 0300hrs	04/23/15 0300hrs	South Parking Lot	Judicial Referral
Simple Assault – Dating Violence	2015-0042	05/01/15 1735hrs	05/01/15 1735hrs	Smith Student Union	Closed 07/23/15

Required Crime Log Elements

The sample log above is meant to be illustrative, not prescriptive. The law requires you to have a written log that can be easily understood. It also mandates specific categories of information that you must include. If you omit a category, your institution is not in compliance with the crime log requirement. The daily crime log is not intended to be a general, catch-all incident log. You may include other data elements or columns in your crime log in keeping with internal campus security record-keeping procedures, but such

additional information is not required by the *Clery Act*. For example, the sample log includes a column for case numbers, which aids in recording and tracking a crime report.

The Date the Crime Was Reported

Enter a crime into the log by the date it was reported to the campus police or security department. A reported crime must be logged **regardless of how much time has passed** since it occurred. Crime reports received from local law enforcement agencies (for example, in response to your request for annual statistics) that cannot be matched to other crimes already entered in the crime log should be entered into the log by the date your campus police or security department received the report from the local law enforcement agency.

The Date and Time the Crime Occurred

Enter the date and the time that the crime occurred. If the exact date and time are not known, use a range or indicate that it is unknown. You may use either military time, as shown in the sample log, or standard time.

The Nature of the Crime

Enter a description of the reported criminal incident. This can be a brief description such as “Simple Assault,” or a more detailed description such as “Simple Assault—non-student victim involved in an encounter with a student offender.” Use an easy-to-understand text definition as opposed to using a code, terms such as “agency assist” or initials for the crime. You can use state crime classifications (i.e., non-UCR classifications) for the crime log; however, using UCR classifications may help in ensuring that your institution’s crime statistics are consistent with the reports in the crime log.

If a crime is reported and entered into the crime log but the resulting investigation shows that the initial description was inaccurate, you should update the description. Do not list the initially recorded crime as unfounded due to misclassification, or delete an entry once it has been made. Update the nature of the crime instead.

The General Location of the Crime

Record any crime that occurs on your *Clery Act* geography: on campus, in or on noncampus buildings or

An entry, an addition to an entry or a change in the disposition of a complaint must be recorded within two business days of the reporting of the information to the campus police or the campus security department.

property, on public property or within the patrol jurisdiction of your campus police or security department. Enter the general location of the crime using a description that will mean something to the campus community, such as referring to “North Campus Hall” rather than “in a dormitory.” However, do not use a location that will lead to the identification of the victim such as Room 407, North Campus Hall. You may also use landmarks in describing a location.

The Disposition of the Complaint, if Known

Include the current status of each complaint in the log, if known; for example, “pending,” “judicial referral” or “criminal arrest.” **Do not delete an entry once it’s been made;** update the disposition instead.

Again, anyone reading a log entry should be able to readily understand the information provided.

Maintaining Your Log

An entry, an addition to an entry or a change in the disposition of a complaint must be recorded within **two business days** of the reporting of the information to the campus police or the campus security department. For example, if the disposition of a crime is “pending” and you later receive word that an arrest has been made, you have two business days to update the disposition on the original entry to reflect the arrest. A business day is Monday through Friday, except for days when the institution is closed (for example, closed for holidays or other scheduled breaks when no security personnel are present). The only exceptions to this rule are

- if the disclosure is prohibited by law; or
- if the disclosure would jeopardize the confidentiality of the victim.

We suggest that you have more than one person responsible for making entries in your log in case of personnel changes or work absences. Note that your institution is not required to update the disposition of a crime log entry if the disposition changes after 60 days have passed. This means 60 days after the entry was made in the log—not 60 days after the crime occurred. You may temporarily withhold information

only if there is clear and convincing evidence that the release of information would

- jeopardize an ongoing investigation;
- jeopardize the safety of an individual;
- cause a suspect to flee or evade detection; or
- result in the destruction of evidence.

Your institution may withhold only that information that could cause a specifically identified adverse effect, and you must disclose such information once the adverse effect is no longer present. This means that if it is determined that information you would normally include in the crime log would cause a harmful effect, you may withhold that information temporarily until the information is no longer likely to prove harmful. The individual making the judgment to withhold information should document the reason for doing so. If your institution has a security department but not a campus police department we suggest that you consult with local law enforcement with regard to withholding crime log information.

If a reported crime is fully investigated by sworn or commissioned law enforcement personnel, and, based on the results of the investigation, they make a formal determination that the crime report is false or baseless, the log should indicate, as the disposition of the report, that the crime is “unfounded.” Only sworn or commissioned law enforcement authorities that investigate the crime can make this determination. A campus security authority who is not a sworn or commissioned law enforcement authority cannot unfound a crime. (See Chapter 3, under “Unfounded Crimes,” for a more detailed discussion of the process required to unfound a crime.)

Making Your Log Available

Your log must be accessible on-site. This means if you have an additional campus with a campus police or security department, a separate log must be available at, or accessible from, that campus as well.

- **Format:** Your log may be either hard copy or electronic. If your institution has an electronic log and there are technical problems that make it

unusable, use a hard copy log as a temporary replacement until the problems are resolved.

- **Publicize Availability:** Let students and employees know that the log is available, what it contains and where it is. You may post a notice on your website, in your security office, in your student and employee handbooks or anywhere else it's likely to be seen.
- **Accessibility:** The crime log for the most recent 60-day period must be open to public inspection, free of charge, upon request, during normal business hours. You cannot require a written request. Anyone may have access to the log, whether or not they are associated with your institution. This includes the media. Make any portion of the log that is older than 60 days available within two business days of a request for public inspection.

Entries in the crime log should be used, along with additional information, to gather the statistics that are required for inclusion in the annual security report and the annual Web-based data collection. Use only *Clery Act* crimes that occur in the geographic locations described in Chapter 2 of the handbook for this purpose. Archived logs should be kept for seven years in a location where they can be accessed if necessary. As noted above, members of the public may request to review past logs. You may be required to produce logs during a Department program review. (See "Retaining Records" in Chapter 9 for more information regarding records retention.)

Emergency Notification And Timely Warnings: Alerting Your Campus Community

CHAPTER 6



The *HEA* has specific requirements intended to help you keep your students and employees informed about threats to their safety and health in a manner that allows them to protect themselves. This chapter discusses two different types of alerts and when and why you are required to issue them. The first part of the chapter provides a breakdown of the emergency response and evacuation procedures requirement. The second part discusses the timely warning requirement. The third part describes the differences between an emergency notification and a timely warning, and provides sample scenarios to help you understand when it's appropriate to use one or the other.

Emergency Response and Evacuation Procedures

The *Clery Act* requires every Title IV institution, without exception, to have and disclose emergency response and evacuation procedures that would be used in response to a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus. (See Chapter 2 for a definition of “on campus.”) This requirement does not apply to emergency situations in or on noncampus buildings or property. If, however, your institution has emergency response and evacuation procedures for noncampus buildings or properties as well, make certain that your disclosures identify which procedures apply to your on-campus property and which apply to your noncampus buildings or properties.

The emergency response and evacuation requirements are intended to ensure that your institution has sufficiently prepared for an emergency situation on campus, that you are testing these procedures to identify and improve any weaknesses and that you have considered how you will inform the campus community and other individuals, such as parents

*Disclosure of emergency
response and evacuation
procedures citation*
34 CFR 668.46(b)(13)

and guardians, in the event of an emergency. In other words, you must **have an emergency plan, test it, evaluate it and publicize it**.

The *Clery Act* requires you to include a statement of policy regarding your emergency response and evacuation procedures in your annual security report along with your other security-related policy statements. (See Chapter 9 for a discussion on publishing and distributing the annual security report.) In developing and disclosing your procedures, be sure to address the who, what, when and how elements. For example, explain who makes decisions and initiates procedures, the procedure for reporting an emergency, when information is released, how information is provided, etc. There is no prescribed manner in which to present the information as long as it's accurate, complete and understandable. You can use lists, flow charts, maps or other means to describe what you do in emergency situations. The important thing is that you **say what you do and do what you say**.

When is an emergency notification necessary?

Under the *Clery Act*, every institution is required to immediately notify the campus community upon confirmation of a significant emergency or dangerous situation occurring on the campus that involves an immediate threat to the health or safety of students or employees. An “**immediate**” threat as used here includes an imminent or impending threat, such as an approaching forest fire, or a fire currently raging in one of your buildings.

Some other examples of significant emergencies or dangerous situations are

- outbreak of meningitis, norovirus or other serious illness;
- approaching tornado, hurricane or other extreme weather conditions;
- earthquake;
- gas leak;
- terrorist incident;

- armed intruder;
- bomb threat;
- civil unrest or rioting;
- explosion; and
- nearby chemical or hazardous waste spill;

Examples of situations that would not necessitate an emergency notification under the *Clery Act*:

- Power outage.
- Snow closure.
- String of larcenies.

These are situations in which your institution might choose to alert the campus community; however, they do not meet the threshold of a significant emergency or dangerous situation for the purposes of this regulation. (If your institution has a policy that requires issuing an emergency alert for these or similar events, however, you must follow that policy.)

Your emergency response and evacuation procedures statement must include items 1–4 below.

- 1. The procedures the institution will use to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.**

What does this mean?

Inherent in this requirement is a statement that your institution **will** immediately notify the campus community upon confirmation of an emergency or dangerous situation. **Confirmation** means that an institution official (or officials) has verified that a legitimate emergency or dangerous situation exists. Confirmation doesn't necessarily mean that all of the pertinent details are known or even available.

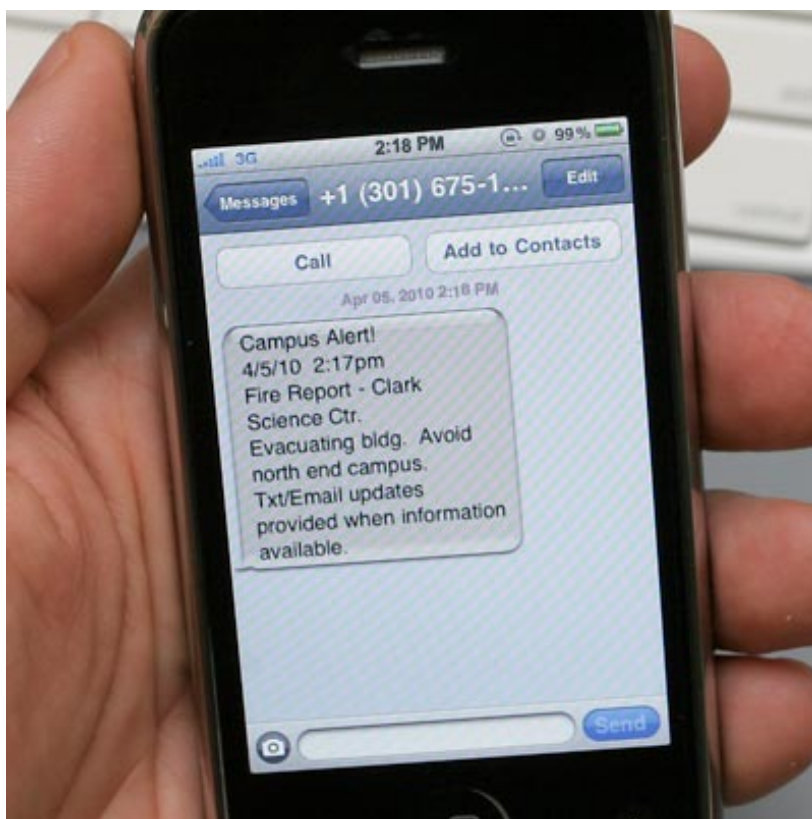
*Requirements for
emergency response and
evacuation procedures
statement citation
34 CFR 668.46(g)*

Provide a description of the procedures your institution will use in a significant emergency or a dangerous situation. You aren't required to publish in great detail how your institution would respond to specific emergencies as this may compromise safety. For example, you can say that you will "secure the residence halls" without saying how you will do this, or you can say that "students and employees will be directed to a safe location," without naming the location.

Include all of your procedures and describe them in a manner that lets the campus community and others know what you will do, and who or what office or organization will be responsible for each step along the way. Be sure to provide information about how an individual can report an emergency.

The regulations don't require your institution to use a particular mode of communication. For example, in the case of a gas leak, your institution may determine that the most effective mode of communication is a fire alarm, whereas in other situations, it might be best to use a text message system. We encourage you to consider overlapping means of communication in case one method fails or malfunctions. Make a complete disclosure of whatever methods will be used (or will potentially be used depending on the situation): a public address system, text messaging, e-mail messaging, electronic signboards, emergency phone lines, phone trees, bulletins posted on building entrances and exits, etc. If any of the emergency notification services require the campus community to sign up, include specific information on how to do this. Institutions must ensure that notifications and warnings can be transmitted quickly to all students and employees. Therefore, an institution would not be able to rely solely on a text messaging system if all members of the campus community are not required to participate in that system. Similarly, relying on an e-mail would not be adequate for institutions that do not establish an e-mail account for all students and employees, or require each member of the campus community to register an e-mail address with the institution.

Figure 7. Example of Emergency Notification via Text Message



Note that you must describe your procedures for **both response and evacuation** in emergency or dangerous situations. If you don't have a campus police or security department, or personnel trained in emergency management, we suggest that you consult with local law enforcement or emergency management personnel regarding how to appropriately design procedures for your institution.

2. A description of the process the institution will use to

- a. confirm that there is a significant emergency or dangerous situation as described in no. 1 above**

What does this mean?

This part of your statement describes how your institution will confirm that there is an emergency or dangerous situation. Saying, for example, that “the school will size up the situation to determine whether there’s an emergency” is not adequate. You have to describe the **process** your school will use. For example, is the director of your school solely responsible for confirming an emergency, or are there multi-layers of information gathering? If there are multiple people or offices involved, what is the relationship among them? Do you rely on outside resources for certain types of emergencies or for all emergencies? How is this process coordinated?

- b. determine the appropriate segment or segments of the campus community to receive a notification**

What does this mean?

You have the flexibility to alert only the segment of the population that you determine to be at risk. For example, in the case of a gas leak, you may choose to notify only individuals in the building that has the leak, whereas for a meningitis outbreak, you may choose to notify the entire campus community.

Describe **how** you will make the decision to notify or not notify specific segments of the campus community. For example, you may state that the entire campus community will be notified when there is at least the potential that a very large segment of the community will be affected by a situation, or when a situation threatens the operation of the campus as a whole. You may also indicate that there will be a continuing assessment of the situation and that additional segments of the campus community may be notified if a situation warrants such action.

c. determine the content of the notification

What does this mean?

Describe **how** your institution will determine what information will be contained in a notification. For example, you might state that your campus police department will determine how much information is appropriate to disseminate at different points in time. Depending on what segments of the community your notification targets, the content may differ. In the case of an approaching tornado, you may want to tell dorm residents to take shelter in the basement but you may want to tell commuter students to stay away from the campus.

d. initiate the notification system

What does this mean?

Describe **how** your institution initiates notifying the campus community that there's an emergency or dangerous situation. For example, does your institution have first responders who are alerted before anyone else? Will you use fire alarms or public address systems to alert the campus community and follow up with text messages and posted bulletins as more specific information becomes available? Who is responsible for initiating the system?

- 3. A statement that the institution will, without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system, unless issuing a notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to or otherwise mitigate the emergency.**

What does this mean?

This statement is mandatory. You must tell the campus community that as soon as your institution has confirmed that a significant emergency or dangerous situation exists, you will

- take into account the safety of the campus community;
- determine what information to release about the situation; and

- begin the notification process.

You also must state that the only reason your institution would not immediately issue a notification for a confirmed emergency or dangerous situation would be if doing so would compromise efforts to

- assist a victim;
- contain the emergency;
- respond to the emergency; or
- otherwise mitigate the emergency.

The law doesn't specify who may or may not be a responsible authority except to qualify that they use professional judgment. Your institution is responsible for identifying these authorities.

4. A list of the titles of the person or persons or organization or organizations responsible for carrying out the actions described in nos. 2(a) through 2(d) above.

What does this mean?

Provide a list of individuals (by title or position) or organizations (by name) responsible for carrying out the procedures you describe in your annual security report. If different people or organizations will be responsible for different procedures or for responding to different types of emergency or dangerous situations, make this clear. For example, you might indicate that the local Public Health Department will be asked to confirm a serious virus outbreak. A campus located in a strip mall might call upon the mall security office to confirm a significant emergency situation. When designating individuals and organizations for your plan, avoid potential conflicts of responsibilities. For example, if the individual responsible for issuing an emergency notification is also responsible for containing the emergency, efforts to mitigate the emergency may be compromised.

5. The institution's procedures for disseminating emergency information to the larger community.

What does this mean?

This part of your statement addresses **how** your institution disseminates emergency information to individuals and/or organizations outside of the campus community. You can use different methods to target different segments of the community. For example you might want to send cell phone alerts to your students' parents and guardians, and use radio and/or TV alerts for the neighboring community. If the procedures differ depending on the situation, explain this. Include information about who or what office is responsible for developing the information to be disclosed, and who or what office is responsible for disseminating the information to the larger community.

6. The institution's procedures to test the emergency response and evacuation procedures on at least an annual basis, including

a. tests that may be announced or unannounced

What does this mean?

The *Clery Act* regulations define a **test** as regularly scheduled drills, exercises and appropriate follow-through activities, designed for assessment and evaluation of emergency plans and capabilities. You must conduct at least one test a year and you can choose to announce it or not. To comply with the *Clery Act* requirement the test must meet all of the criteria in the definition. It must

- be scheduled. You cannot say that an actual emergency situation or a false emergency alarm served as a test of your institution's procedures.
- contain drills. A drill is an activity that tests a single procedural operation (e.g., a test of initiating a cell phone alert system or a test of campus security personnel conducting a campus lockdown).
- contain exercises. An exercise is a test involving coordination of efforts (e.g., a test of the coordination of first responders, including police, firefighters and emergency medical technicians).

- contain follow-through activities. A follow-through activity is an activity designed to review the test (e.g., a survey or interview to obtain feedback from participants).
- be designed for assessment of emergency plans and capabilities. This means that your test should have measureable goals. For example, “Everyone involved in the emergency response and notification procedures will understand his or her role and responsibility.”
- be designed for evaluation of emergency plans and capabilities. Design the test so that, using the assessments, you can judge whether or not the test met its goals. For example, “The evacuation process accounted for/did not account for the diverse needs of all members of the campus community.”

You have **flexibility** in designing tests. For example, you may conduct a tabletop exercise (i.e., a simulated scenario) or conduct a live test. Whichever method you use, your test must **address** emergency response and evacuation on a campuswide scale. “Campuswide” scale means that tests must address your plan for evacuating all of your campus buildings. This does not mean that your plan must involve evacuating the entire campus at once. Rather, it means you must have a plan for each building. We recognize that a shelter-in-place contingency might be the best procedure to use in certain circumstances when evacuation is not a reasonable option.

b. publicizing its emergency response and evacuation procedures in conjunction with at least one test per calendar year

What does this mean?

This part of your statement addresses **how** your institution gets the word out about its emergency procedures. Time the publication to coincide with one test every calendar year. You may conduct more tests and you may publicize your procedures along with other tests, but you aren’t required to do so. Use a method that will attract attention to the information you’re disseminating; don’t make people search for it. Sending a “blast” e-mail or text message containing a link to your institution’s procedures would suffice; however, simply posting a notice on your school’s website would not.

Determine the appropriate means of reaching different target audiences. You may use a combination of methods. For example, you might want to include parents and guardians on a blast e-mail, but issue a press release to the local media. Another method might be informing parents and guardians that they can sign up for e-mail alerts. The alert can direct them to a website or radio station for details.

- c. documenting, for each test, a description of the exercise, the date, time and whether it was announced or unannounced**

What does this mean?

This part of your statement describes how your institution will document each test. (Although the law requires only one test each year, if you have multiple tests in a year, you're required to document each one.) Be sure to address each component:

- A description of the exercise (i.e., the test).
- The date the test was held.
- The time the test started and ended.
- Whether the test was announced or unannounced.

As with all other *Clery Act*-related documentation, your institution is required to keep emergency test documentation for seven years.

A warning should be issued as soon as pertinent information is available.

Timely warning citation
34 CFR 668.46(e)

The Timely Warning

All of us want to be alerted promptly to potentially dangerous criminal situations near our homes or workplaces so that we have both the time and the information necessary to take appropriate precautions. Apply this to your institution, and you have the concept of the “timely warning.” The *Clery Act* requires you to alert the campus community to certain crimes in a manner that is **timely and will aid in the prevention of similar crimes**. Although the *Clery Act* doesn’t define “timely,” **the intent of a warning regarding a criminal incident(s) is to enable people to protect themselves**. This means that **a warning should be issued as soon as pertinent information is available**. This is critical; even if you don’t have all of the facts surrounding a criminal incident that represents a serious and continuing threat to your students and employees you must issue a warning. The warning should contain information about the type of criminal incident that has occurred, although you can provide additional information as it becomes available.

Timely Warning Policy

All Title IV institutions, without exception, are subject to the timely warning regulation. You are required to include in your annual security report a policy statement that accurately reflects your institution’s current timely warning procedures (See Chapter 7 for more information about policy statements.)

Crimes Subject to a Timely Warning

You must issue a timely warning for all *Clery Act* crimes that occur on your *Clery Act* geography that are

- reported to campus security authorities or local police agencies; and
- considered by the institution to represent a serious or continuing threat to students and employees.

The requirement for timely warnings is not limited to violent crimes or crimes against persons so you should not have a timely warning policy that contains this restriction. Timely warnings could be needed for crimes that represent threats to property. For example, it’s possible to have a rash of dormitory Burglaries or Motor Vehicle Thefts that merit a warning because they present a continuing threat to your

campus community. A number of incidents involving the possession of date rape drugs may also trigger the need for a warning.

Your timely warning policy should not be limited to certain types of *Clery Act* crimes and it may include non-*Clery Act* crimes. That is, although the *Clery Act* mandates timely warnings only for *Clery Act* crimes, nothing in the law prohibits timely warnings for other crimes that may pose a serious or continuing threat to the campus community (e.g., a kidnapping on campus or a rash of robberies in a public parking lot across the street from the shopping plaza where your school is located). If your policy states that you also will issue timely warnings for these or similar types of situations, you must follow that policy.

Crimes Exempt From the Timely Warning Requirement

Your institution is not required to provide a timely warning for non-*Clery Act* crimes or for crimes reported to a pastoral or professional counselor. (See Chapter 4 for definitions of pastoral and professional counselors.) There are no other exemptions.

Making the Decision to Issue a Timely Warning

Whether you issue a timely warning must be decided on a **case-by-case basis** in light of all the facts surrounding a crime, including factors such as the following:

- **The nature of the crime.** This means that you should consider the type of crime that was reported. Was it a *Clery Act* crime? Did two students get drunk and attempt to steal a golf cart from the campus one night, or does it appear that professional car thieves are preying on your campus?
- **The continuing danger to the campus community.** This means that after a *Clery Act* crime is reported you should consider whether your students and employees are at risk of becoming victims of a similar crime. For example, if a Rape is reported on campus and the alleged perpetrator has not been caught, there is a risk of similar crimes. If the alleged perpetrator was reported or apprehended, there may not be a continuing risk. However, you should still

The intent of the warning is to enable members of the campus community to protect themselves.

evaluate other factors such as whether the apprehended perpetrator had accomplices or had already set other attacks in motion. Does a criminal incident appear to be a one-time occurrence or does it fall into a pattern of reported crimes? For example, if your students set some posters on fire after your school's team lost the homecoming football game, the Arsons are probably a one-night event. If an unknown person is randomly setting fires on campus, there is a continuing threat.

- **The possible risk of compromising law enforcement efforts.** This factor does not mean that in the event of a serious or continuing threat to your students or employees you should decide not to issue a timely warning. It means that the institution should consider the potential impact on various law enforcement operations as it issues these warnings. For example, you should warn students if there is a serial rapist preying on female joggers along the bike paths running through campus; you should not compromise law enforcement efforts by disclosing that two undercover female officers have been assigned to patrol the bike path.

We recommend that your institution consult with campus security personnel and/or local and state law enforcement authorities to discuss the timely warning requirement. We also recommend that your institution request that local law enforcement keep you informed on an immediate basis of crimes that may require timely warnings. This request may be made as part of your annual letter to law enforcement agencies requesting crime statistics. (See Chapter 4 for more information about this letter.) Institutions cannot outsource the requirement to issue timely warnings to local law enforcement agencies and must not enter into agreements that prohibit the issuance of such warnings.

Determining the Content of a Timely Warning

The Department's *Clery Act* regulations do not specify what information has to be included in a timely warning. However, because the intent of the warning is to enable members of the campus community to protect themselves, the warning should include all information that would promote safety and that would aid in the prevention of similar crimes. Issuing a warning that cautions the campus community to be

careful or to avoid certain practices or places is not sufficient. You must include pertinent information about the crime that triggered the warning. Your institution's policy regarding timely warnings should specify what types of information will be included.

Issuing a Timely Warning

Although there is no required format for a timely warning, the warning must be reasonably **likely to reach the entire campus community**. Therefore, timely warnings must be issued in a manner that gets the word out quickly and effectively communitywide. The warning may be e-mailed, posted around campus, provided as a text message or otherwise **distributed according to your institution's policy**. A combination of dissemination methods may be used.

Timely warnings may not be issued in a manner or posted in a location that requires the campus community to make requests for them or to search for them. The responsibility for getting the warning out rests solely with the institution.

The Family Educational Rights and Privacy Act (FERPA) and the Timely Warning Requirement

An institution may, in appropriate circumstances, include personally identifiable information in a timely warning. Although personally identifiable information is generally protected from disclosure under *FERPA*, such information may be released in an emergency situation. The Department's *FERPA* regulations, at 34 CFR 99.36, describe the rule relating to the disclosure of information in health and safety emergencies.

*FERPA and the Timely
Warning citation*
34 CFR 99.31(b)(6) and
99.36

Emergency Notification and Timely Warnings: Sorting Out the Differences

Emergency Notification

Scope: Wide focus on any significant emergency or dangerous situation (may include *Clery Act* crimes).

Why: Emergency notification is triggered by an event that is currently occurring on or imminently threatening the campus. Initiate emergency notification procedures for **any significant emergency or dangerous situation occurring on the campus involving an immediate threat to the health or safety of students or employees.**

Where: Applies to situations that occur on your campus.

When: Initiate procedures immediately upon confirmation that a dangerous situation or emergency exists or threatens.

Timely Warning

Scope: Narrow focus on *Clery Act* crimes.

Why: Timely warnings are triggered by crimes that have already occurred but represent an ongoing threat. Issue a timely warning for any ***Clery Act* crime** committed on your *Clery Act* geography that is reported to your campus security authorities or a local law enforcement agency, and that is considered by the institution to represent a serious or continuing threat to students and employees.

Where: Applies to crimes that occur anywhere on your *Clery Act* geography.

When: Issue a warning as soon as the pertinent information is available.

The Department's regulations specify that "an institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed."

Consider the following scenarios and whether a timely warning is warranted.

Figure 8. Sample Scenarios Regarding Emergency Notification and the Timely Warning

Scenario 1: In a single night there are several random Arsons in unoccupied classrooms and basements of buildings on campus. Upon confirmation that there is an arsonist on campus, you follow your emergency notification procedures. There is no need to issue a timely warning for the Arsons as well. As soon as it's available, disseminate pertinent follow-up information to the campus community.

Scenario 2: An employee spots an armed intruder in a classroom building. The employee alerts a campus police officer who is present in the building and who confirms the situation. Following your emergency notification procedures, the officer alerts the campus police chief who initiates campus-wide emergency notification procedures. In the course of trying to apprehend the intruder, the intruder shoots and wounds two people trying to flee the building. Although emergency notification procedures were initiated, the circumstances have changed, and you must issue a timely warning for the shootings (i.e., the crimes of Aggravated Assault).

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Policy Statements:

What You Do and How You Do It

CHAPTER 7



A major requirement of the *Clery Act* is to disclose policy statements in your annual security report. Due to the number and nature of the statements, this handbook devotes two chapters to the subject.

This chapter focuses on policies regarding

- how students and others should report crimes or other emergencies occurring on campus;
- security of and access to campus facilities;
- crime prevention;
- campus law enforcement and security; and
- alcohol and drugs.

Chapter 8 discusses policies, procedures and programs regarding

- dating violence, domestic violence, sexual assault, and stalking; and
- obtaining registered sex offender information.

Regardless of which policy you're addressing there are some general guidelines to keep in mind:

- **Language.** Use language that will be understood by the general public (i.e., avoid heavily legal language).
- **Accuracy.** Your statements or descriptions of policies must accurately reflect your institution's **current procedures and practices**. If your institution does not have a policy or program responding to one or more of the categories listed in the regulations, you must disclose this fact. If you are compiling security reports for **multiple campuses**,

*Annual security report policy
statements citation*
34 CFR 668.46(b)

If you are compiling security reports for multiple campuses, make sure your policy statements accurately reflect the current policies and practices of each separate campus.

Your institution's policy statements must reflect your institution's unique security policies, procedures and practices.

make sure your policy statements accurately reflect the current policies and practices of each separate campus. Do not just repeat your policy statements from year to year; make sure that the statements of policy actually reflect your institutions' procedures and practices.

- **Required components.** Pay close attention to the requirements of each policy statement. Include detailed information that addresses each part of the requirement. In general, the law does not prescribe policies and procedures for schools to follow; however, the law and the regulations set minimum requirements for specific information that must be addressed in your institution's annual security report.
- **Missing policies.** Failure to have a required policy or to disclose all of the required policy statements means that your school is not in compliance with the law. As always, please consult our Campus Safety and Security Help Desk if you have questions that are not answered by the policy chapters in this handbook.

The required policy statements are presented in the following section. Where applicable, the statements are broken down into components to emphasize the content you must include. Explanations of statements are preceded by "What does this mean?" **Your institution's policy statements must reflect your institution's unique security policies, procedures and practices.**

You may present your policy statements in any order. You may also combine statements as long as they are clearly labeled. For example, if your institution has a combined alcohol and drug policy, you may identify it as a combined policy and present it that way.

Campus Security Policies That Must Be Addressed in the Annual Security Report

1. Provide a statement of **current campus policies regarding procedures for students and others to report criminal actions or other emergencies occurring on campus.** This statement **must include** the institution's policies

concerning its response to these reports, and must specifically address the following areas:

- a. Policies for making timely warning reports to members of the campus community regarding the occurrence of *Clery Act* crimes.**

What does this mean?

As discussed in the latter part of Chapter 6, your institution must have a policy regarding its timely warning report system. We suggest that your policy include the following:

- Circumstances for which a warning will be issued;
- Identity of the individual(s) or office(s) responsible for issuing the warning; and
- Manner in which the warning will be disseminated.

- b. Policies for preparing the annual disclosure of crime statistics.**

What does this mean?

This refers to how the crime statistics in the annual security report are prepared. Include a brief description explaining the purpose of the report, who prepares it and how, and from what sources the crime statistics are collected.

- c. A list of titles of each person or organization to whom students and employees should report *Clery Act* crimes for the purpose of making timely warning reports and the annual statistical disclosure.**
- d. Describe institutional policies or procedures for victims or witnesses to report crimes on a voluntary, confidential basis for inclusion in the annual security report.**

What does this mean?

Part c. of this statement asks you to list the titles of each individual or organization your institution has designated for

students and employees to report *Clery Act* crimes. This need not be a list of all your campus security authorities. Although students and employees **may** report crimes to any campus security authority, the people and/or organizations you list in this policy statement are those to whom your institution **would prefer** crimes to be reported. Examples are the campus police department and the dean of students.

Part d. of the statement asks you to disclose whether your institution has policies or procedures allowing voluntary, confidential crime reporting. Some states do not allow this. If your institution does not allow voluntary, confidential reporting, provide a statement about this fact.

2. Provide a statement of **current policies** concerning the following:

- a. **Security of and access to campus facilities, including campus residences; and**
- b. **Security considerations used in the maintenance of campus facilities.**

What does this mean?

Part (a) of this statement addresses the security of campus facilities and access to campus facilities, including campus residences in both instances. If your institution does not have any campus residences, your policy statement should note this. Address such topics as what your institution does to keep its facilities secure, and how individuals gain access or are prevented from gaining access to these facilities. For example, do you issue keycards for student housing facilities? Do you have individuals monitoring access to your campus buildings?

Part (b) of this statement addresses security considerations in maintaining campus facilities. For example, your institution may have someone who regularly checks to make sure pathways are well lit and egress lighting is working in hallways and stairwells.

3. Provide a statement of **current policies concerning campus law enforcement**, including the following:

- a. **The law enforcement authority and jurisdiction of security personnel.**

What does this mean?

Your statement must describe the scope of the enforcement authority and jurisdiction of your school's security personnel. For example, do you have any sworn or commissioned law enforcement personnel? Can any security personnel make arrests? The term "security personnel" encompasses anyone who meets the description in Chapter 5. If your institution does not have any security personnel, you must state this.

- b. **The working relationship of campus security personnel with state and local law enforcement agencies, including whether those security personnel have the authority to make arrests, and any agreements, such as written memoranda of understanding between the institution and such agencies, for the investigation of alleged criminal offenses.**

What does this mean?

Describe the working relationship of your campus security personnel with state law enforcement agencies **and** with local law enforcement agencies. Be specific about whether or not your institution has any written memoranda of understanding (MOU) or any other type of written agreement with any law enforcement agencies for the investigation of alleged criminal offenses. You do not have to include a copy of your MOU in your policy statement; just disclose whether you have one.

- c. Policies which encourage accurate and prompt reporting of all crimes to the campus police and the appropriate police agencies, when the victim of a crime elects to, or is unable to, make such a report.**

What does this mean?

You must have a policy that encourages people to report all crimes in an accurate and timely manner to the campus police, if you have a campus police department, **and** to law enforcement agencies for your institution's jurisdiction. The language in this statement, including the phrase "unable to report," is intended to strike a balance between empowering victims to make the decision about whether and when to report a crime, and encouraging members of the campus community to report crimes of which they are aware. If your institution does not have campus police, you must state this.

- d. A description of procedures, if any, that encourage pastoral counselors and professional counselors, if and when they deem it appropriate, to inform the persons they are counseling of any procedures to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics.**

What does this mean?

Describe any procedures your institution has that encourage both pastoral and professional counselors, at their discretion, to inform those they counsel of procedures for reporting crimes voluntarily and confidentially for inclusion in the institution's annual security report and Web-based report to the Department. This includes verbal or written encouragement. If your institution does not have these procedures, state this.

Note that this policy differs from the policy statement under 1.c. regarding reporting all crimes. That statement does not specifically address pastoral and professional counselors.

4. Provide a **statement that describes the type and frequency of programs designed to inform students and employees about campus security procedures and practices, and to encourage students and employees to be responsible for their own security and the security of others.**

What does this mean?

Your statement should describe both the **type** and the **frequency** of two categories of programs for students and employees: programs dealing with security procedures and practices, and programs encouraging the campus community to look out for themselves and one another. You do not have to list every program, but be sure to address all of the statement's components (i.e., type, frequency, students and employees).

5. Provide a **description of programs designed to inform students and employees about the prevention of crimes.**

What does this mean?

This statement specifically addresses all programs designed to inform students and employees about crime prevention. You must describe the programs, not just list the titles. If there are programs specifically targeted to students and others targeted to employees, state this. If you do not have any programs of this nature, provide a statement disclosing this fact.

6. Provide a **statement of policy concerning the monitoring and recording, through local police agencies, of criminal activity in which students engaged at noncampus locations of student organizations officially recognized by the institution, including student organizations with noncampus housing facilities.**

What does this mean?

This statement addresses whether or not local police monitor and document criminal activity by your students at **noncampus locations of student organizations if your institution is aware of such a practice.** This includes student organizations that have noncampus housing facilities. Note that this concerns only those student organizations that are officially recognized by your institution. If you do not have any

officially recognized student organizations with noncampus locations you must disclose this.

7. Provide a statement of policy regarding the possession, use and sale of alcoholic beverages and enforcement of State underage drinking laws.

What does this mean?

There are two parts to this statement. The first part addresses your policy concerning the possession, use and sale of alcohol. The second part addresses your policy on the enforcement of state laws relating to underage drinking.

8. Provide a statement of policy regarding the possession, use and sale of illegal drugs and enforcement of Federal and State drug laws.

What does this mean?

There are two parts to this statement. The first part addresses your policy concerning the possession, use and sale of illegal drugs. The second part addresses your policy for the enforcement of federal **and** state drug laws.

9. Provide a description of any drug or alcohol abuse education programs as required under Section 120(a) through (d) of the *HEA* (otherwise known as the Drug-Free Schools and Communities Act of 1989). For the purpose of meeting this requirement, an institution may cross-reference the materials the institution uses to comply with Section 120(a) through (d) of the *HEA*.

What does this mean?

To participate in any Title IV federal student financial aid program, an institution must verify that it has a drug and alcohol abuse prevention program available to students and employees. The Department's *Clery Act* regulations ask for a description of these programs and allow you to cross-reference the materials your institution uses to comply with the Drug-Free Schools and Communities Act of 1989. This is the only policy statement in the annual security report for which you can cross-reference materials. The text for Section 120(a)–(d) is in Appendix C of this handbook.

10. Provide a statement that **the institution will, upon written request, disclose to the alleged victim of a crime of violence (as that term is defined in section 16 of title 18, United States Code), or a non-forcible sex offense, the report on the results of any disciplinary proceeding conducted by such institution against a student who is the alleged perpetrator of such crime or offense. If the alleged victim is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim for purposes of this paragraph.**

What does this mean?

This statement addresses disclosure procedures for a student disciplinary proceeding for any **violent crime or non-forcible sex offense (Incest or Statutory Rape)**. You must disclose results upon written request to a victim's next of kin in cases where the crime resulted in the victim's death.

Institutions are required to provide both the accused and the accuser with simultaneous written notification of any result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault or stalking. **In these cases, it is not necessary for a victim to make a written request.**

11. Provide a statement of policy **regarding your institution's emergency response and evacuation procedures.**

This statement of policy is multi-faceted and requires the disclosure of a number of procedures. "Emergency Response and Evacuation Procedures" in Chapter 6 discusses this requirement in detail.

Additional policy statement for institutions with on-campus student housing facilities:

If your institution has any on-campus student housing facilities as described in "Definition of an On-campus Student Housing Facility" in Chapter 2, you must include an additional policy statement in your annual security report that addresses **missing student notification**. This policy statement is explained in detail in Chapter 10. If your institution has multiple campuses, **this policy statement applies only to those campuses that have on-campus student housing facilities.**

*Disciplinary proceeding
results for violent crime or
non-forcible sex offense
citation*

HEOA Sec. 493(a)(1)(A)

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Policies, Procedures and Programs: Dating Violence, Domestic Violence, Sexual Assault and Stalking

CHAPTER 8



As mentioned in Chapter 7, the *Clery Act* requires you to include statements of policy in your annual security report that address your institution's programs to prevent dating violence, domestic violence, sexual assault and stalking, and the procedures your institution will follow when one of these crimes is reported. The regulations include some requirements for these programs but institutions have some discretion in the specifics of their statements and in how the policies and procedures are put into practice. This chapter breaks down the statements' components and indicates which aspects and procedures are required and where you have flexibility. As always, your policy statements must accurately reflect what your institution currently does to prevent dating violence, domestic violence, sexual assault and stalking, and the procedures it follows when one of these crimes is reported. The website www.notalone.gov, which was launched in connection with the White House Task Force to Protect Students from Sexual Assault, includes links to resources that may be helpful to institutions developing or updating policies, programs or procedures.

For purposes of the *Clery Act*, “dating violence,” “domestic violence,” and “stalking” are defined in the Department’s regulations.

Dating violence is defined as *violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition*

- *dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.*
- *dating violence does not include acts covered under the definition of domestic violence.*

Domestic Violence is defined as *a felony or misdemeanor crime of violence committed*

- *by a current or former spouse or intimate partner of the victim.*
- *by a person with whom the victim shares a child in common.*
- *by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner.*
- *by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;*
- *by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*

Stalking is defined as *engaging in a course of conduct directed at a specific person that would cause a reasonable person to*

- *fear for the person's safety or the safety of others; or*
- *suffer substantial emotional distress.*

Sexual Assault is defined as an offense that meets the definition of Rape, Fondling, Incest or Statutory Rape as used in the FBI's UCR program and included in Appendix A of 34 CFR Part 668.

With these definitions in mind, your statement must address your institution's programs to prevent dating violence, domestic violence, sexual assault and stalking, and the procedures your institution will follow when one of these

crimes is reported to your institution, whether the offense occurred on or off campus.

Educational Programs and Campaigns

Your statement **must** include

- a. **a description of the institution's educational programs and campaigns to promote the awareness of dating violence, domestic violence, sexual assault and stalking.**

The statement must include a description of the institution's primary prevention and awareness programs for all incoming students and new employees.

What does this mean?

Your statement must describe the programs you have in place to promote awareness and to educate people about preventing dating violence, domestic violence, sexual assault and stalking. We encourage institutions to reach out to organizations that assist victims of dating violence, domestic violence, sexual assault and stalking, such as local rape crisis centers, local law enforcement officials, social services personnel, and State and territorial coalitions against domestic and sexual violence, when developing these programs.

Programs to prevent dating violence, domestic violence, sexual assault and stalking are defined as *comprehensive, intentional and integrated programming, initiatives, strategies and campaigns intended to end dating violence, domestic violence, sexual assault and stalking that are*

- *culturally relevant,*
- *inclusive of diverse communities and identities,*
- *sustainable,*
- *responsive to community needs,*
- *informed by research or assessed for value, effectiveness or outcome, and*

*Educational programs and
campaigns citation
34 CFR 668.46(j)*

Programs to prevent dating violence, domestic violence, sexual assault and stalking must be directed at all incoming students and new employees.

- *consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.*

The programs you implement at your institution must be tailored to your institution's community and the needs of your students and employees. The programs must be culturally relevant and inclusive of, and responsive to, all parts of your community. The programs must also be informed by research. "Informed by research" includes research conducted according to scientific standards as well as assessments for efficacy carried out by institutions and other organizations. This does not preclude you from using promising practices that have been assessed by members of your institution, or other institutions, for value, effectiveness or outcome but not yet subjected to scientific review.

Programs to prevent dating violence, domestic violence, sexual assault and stalking must include **primary prevention** and **awareness programs**.

- **Primary prevention programs** are defined as *programming, initiatives and strategies intended to stop dating violence, domestic violence, sexual assault and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.* Examples of these programs might include programs that promote good listening and communication skills, moderation in alcohol consumption and common courtesy.
- **Awareness programs** are defined as *community-wide or audience-specific programming, initiatives and strategies that increase audience knowledge, and share information and resources to prevent violence, promote safety and reduce perpetration.*

Programs to prevent dating violence, domestic violence, sexual assault and stalking must be directed at **all incoming students and new employees**. The statute and regulations do not require that all students and employees take or attend the training, but we encourage institutions to mandate training to increase its effectiveness. You are required to make a good faith effort to reach all incoming students and new employees

with this training. This means providing all incoming students and new employees with active notification of the training's availability, and providing the training in a format and timeframe that encourages and allows for maximum participation.

Institutions may choose how to deliver the programming to students and employees; for example, you could use in-person interactive workshops, theater performances, presentations or videos with follow-up discussion, webinars, online videos, online interactive training, etc. You may also use multiple means of delivery for a multi-pronged approach. The means of the training should fit the circumstances of your community. If you have a commuter campus it would make sense to provide online training that can be accessed on a student or employee's own time. In the case of a commuter campus, an in-person training session offered only once per year would most likely not be considered a good faith effort to reach all incoming students and new employees.

You can combine one or more of the required elements (e.g., primary prevention, awareness, bystander intervention and risk reduction) into a single training, as long as the training meets all of the requirements. You are not required to conduct separate trainings on each topic. You are also not prohibited from addressing behaviors or concerns outside of dating violence, domestic violence, sexual assault and stalking in the training. For example, the bystander intervention training principles described below can be extended to other types of behavior.

Your description of the institution's primary prevention and awareness programs for all incoming students and new employees must include

- **a statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault and stalking as those terms are defined for purposes of the *Clery Act*;**

What does this mean?

Your statement must say that your institution prohibits dating violence, domestic violence, sexual assault and stalking, as they are defined for purposes of the *Clery Act*. Definitions of these crimes for *Clery Act* purposes are provided at the beginning of this chapter and discussed further in Chapter 3.

- **the definition of “dating violence,” “domestic violence,” “sexual assault” and “stalking,” as those terms are defined in the applicable jurisdiction;**

What does this mean?

You must provide the definitions of the terms “dating violence,” “domestic violence,” “sexual assault” and “stalking” in your institution’s local jurisdiction. If your local jurisdiction does not define one of these terms, state that there is no definition of the term in your local jurisdiction. These definitions may be different than the definitions used for *Clery Act* purposes. The definitions from local jurisdictions must be provided to the community for educational and awareness purposes; however, **these definitions are not used for the purposes of reporting *Clery Act* statistics.** Use the definitions provided in Chapter 3 for reporting *Clery Act* statistics.

- **the definition of “consent” in reference to sexual activity, in the applicable jurisdiction;**

What does this mean?

Your statement must include the definition of “consent” in reference to sexual activity in your institution’s local jurisdiction. If your local jurisdiction does not define consent, state that there is no definition of consent in your local jurisdiction. If your institution has an institutional definition of consent, you should also state your institution’s definition of consent and the purposes for which that definition is used.

The definitions of consent in your local jurisdiction and for institutional purposes must be provided to the community for educational and awareness purposes. A definition of consent is not needed for the administration and enforcement of the *Clery Act*. For the purposes of *Clery Act* reporting, all sexual assaults that are reported to a campus security authority must be included in an institution’s *Clery Act* statistics and, if reported to the campus police, must be included in the crime log, regardless of the issue of consent. Section 485(f)(1)(F)(i) of the *HEA* requires schools to include in their statistics crimes that are reported to the campus police or non-law enforcement campus safety department.

- **a description of safe and positive options for bystander intervention; and**
- **information on risk reductions.**

What does this mean?

Bystander intervention is defined as *safe and positive options that may be carried out by an individual or individuals to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault or stalking. Bystander intervention includes*

- *recognizing situations of potential harm;*
- *understanding institutional structures and cultural conditions that facilitate violence (this might include fraternity or sports cultures at some institutions);*
- *overcoming barriers to intervening;*
- *identifying safe and effective intervention options; and*
- *taking action to intervene.*

Risk reduction is defined as *options designed to*

- *decrease perpetration and bystander inaction;*
- *increase empowerment for victims in order to promote safety; and*
- *help individuals and communities address conditions that facilitate violence.*

This means that your training to incoming students and new employees must describe positive options for bystander intervention and information on risk reduction; however, it is up to your institution to determine the appropriate strategies to include in your training based on the needs of your community. Information about risk reduction must not be presented in a manner that encourages victim blaming.

Information about risk reduction must not be presented in a manner that encourages victim blaming.

- b. description of the institution’s ongoing prevention and awareness campaigns for students and employees. These campaigns must provide the same information as primary awareness and prevention programs.**

What does this mean?

In addition to the primary prevention and awareness programs provided to incoming students and new employees, you must also provide ongoing prevention and awareness campaigns for all current students and employees. Ongoing prevention and awareness campaigns means programming, initiatives and strategies that are **sustained over time**. The programming, initiatives and strategies must also focus on increasing the understanding of topics relevant to and skills for addressing dating violence, domestic violence, sexual assault and stalking, using a range of strategies with audiences throughout the institution. Your campaign should also promote awareness of the services and programming that your institution has available to address these issues.

Your campaign should use multiple strategies in a coordinated way throughout the year to reach all populations of students and employees at the institution. Campaigns might include but are not limited to:

- communication strategies, such as social media posts, email blasts, notices on bulletin boards, posters, and/or radio and newspaper advertisements;
- programming, such as Take Back the Night events or a Safe Walk service, and the materials used to promote these activities;
- programming coordinated with and delivered to individual groups on campus (e.g., presentations or workshops for individual sports teams, fraternity or sorority houses, or residence halls);
- booths at student fairs or other campus events; and/or
- faculty discussing issues and available services in the classroom, or advertising programs or events.

Your ongoing prevention and awareness campaigns must meet all of the same standards as the primary prevention and

awareness programs provided to incoming students and new employees, as described in section (a.) above.

Procedures Victims Should Follow in the Case of Alleged Dating Violence, Domestic Violence, Sexual Assault or Stalking

Your statement **must** include

- c. **the procedures victims should follow if a crime of dating violence, domestic violence, sexual assault or stalking has occurred, including**
 - **written information about the importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order;**

What does this mean?

This part of your statement addresses what students should do in the case of dating violence, domestic violence, sexual assault or stalking. Institutions must provide written information to victims about the importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or that may be helpful in obtaining a protection order. Although not required, we recommend that institutions provide information about where to obtain forensic examinations, include specific contact information, make clear that completing a forensic examination would not require someone to file a police report, and advise students that having a forensic examination will help preserve evidence in case the victim decides at a later date to file a police report.

- **how and to whom the alleged offense should be reported;**

What does this mean?

“How and to whom the alleged offense should be reported” refers to any person or organization that can assist the victim, such as a rape crisis counselor. Although you must have procedures concerning who should be contacted, it is up

Procedures victims should follow citation

34 CFR 668.46(b)(11)(ii)

to your institution to decide who those people or organizations are. In addition to listing institutional resources, we recommend that you reach out to community organizations that assist victims of dating violence, domestic violence, sexual assault and stalking, such as local rape crisis centers and state and territorial coalitions against domestic and sexual violence, when developing this list. You must include specific contact information for these resources or other information about how victims can report the alleged offense.

- **options about the involvement of law enforcement and campus authorities, including notification of the victim's option to**
 - **notify proper law enforcement authorities, including on-campus and local police;**
 - **be assisted by campus authorities in notifying law enforcement authorities if the victim chooses; and**
 - **decline to notify such authorities;**

What does this mean?

You must let students know about their options regarding the involvement of law enforcement authorities and campus authorities. You must tell students that they have several options, including the option to notify law enforcement authorities about the offense, the option to be assisted by campus authorities in notifying law enforcement if they choose to do so, and the option to decline to notify such authorities. You must provide appropriate and specific contact information for the authorities, for example, your campus police or a local law enforcement agency. Your statement must explain what is involved in making a police report. The statement that your institution will comply with a student's request for assistance in notifying authorities is **mandatory**.

- **where applicable, the rights of victims and the institution’s responsibilities for orders of protection, “no contact” orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court, or by the institution.**

What does this mean?

You must disclose all rights that a victim may have to obtain an order of protection, a “no contact” order, a restraining order or a similar lawful order issued by a criminal, civil or tribal court, or by the institution. You must let students know what legal options are available to them and under what circumstances. You must tell students how to request information about the available options and provide specific contact information. You must also provide instructions for how to file a request for each of the options. Again, include specific contact information. Your statement must also disclose the institution’s responsibilities for honoring such requests and complying with these orders. You must also provide clear information about what the victim should do to enforce an order of protection. If your institution does not issue orders of protection, state that the institution does not issue orders of protection. However, your statement should provide information on other available options in your jurisdiction, such as orders of protection issued by a criminal, civil or tribal court, as well as your institution’s responsibilities for complying with and enforcing those orders.

Procedures institutions
should follow citation
34 CFR 668.46(b)(11)(iii)

Procedures Your Institution Will Follow In the Case of Alleged Dating Violence, Domestic Violence, Sexual Assault or Stalking

Your statement **must** include

- d. **information about how the institution will protect the confidentiality of victims and other necessary parties, including how the institution will**
 - **complete publicly available recordkeeping, including *Clery Act* reporting and disclosures, without inclusion of personally identifying information about the victim; and**
 - **maintain as confidential any accommodations or protective measures provided to the victim, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the accommodations or protective measures.**

What does this mean?

This part of your statement addresses how you will protect a victim's confidentiality, even if the victim does not specifically request confidentiality. First, you must disclose your procedures for ensuring that the victim's personally identifying information will not be included in any publicly available recordkeeping, including *Clery Act* reporting and disclosures such as the annual security report and the daily crime log. Personally identifying information is defined in Section 40002(a) of the *Violence Against Women Act of 1994* as *individually identifying information for or about an individual, including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault or stalking, regardless of whether the information is encoded, encrypted, hashed or otherwise protected, including*

- *a first and last name;*
- *a home or other physical address;*

- *contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number);*
- *a social security number, driver's license number, passport number or student identification number; and*
- *any other information, including date of birth, racial or ethnic background, or religious affiliation that would serve to identify any individual.*

CSA crime reports should include sufficient detail such as dates and locations and, where appropriate, personally identifying information, including name and contact information if available. This is important for law enforcement purposes to ensure that all crimes are counted and to avoid double counting crimes. The *Clery Act* statistics that are included in the Annual Security Report must not include any personally identifying information about the individuals involved in the crimes reflected in the statistics. In addition, no personally identifying information should be disclosed in the Daily Crime Log, as detailed in Chapter 5.

Institutions must protect a victim's confidentiality while also recognizing that, in some cases, an institution may need to disclose some information about a victim to a third party to provide necessary accommodations or protective measures. Your policy should state who is responsible for determining what information about a victim should be disclosed and to whom this information will be disclosed. Your policy should also state how this decision will be made. Institutions may disclose only information that is necessary to provide the accommodations or protective measures in a timely manner. You must carefully consider who may have access to this information to minimize the risk to a victim's confidentiality. We recommend that your policy include informing victims before sharing personally identifying information that the institution believes is necessary to provide an accommodation or protective measure. You should tell the victim which information will be shared, with whom it will be shared and why.

- e. **a statement that the institution will provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid and other services available for victims, both within the institution and in the community.**

What does this mean?

Your statement should identify and provide specific information about appropriate and available services for victims at your institution. Provide information about how a student or employee can access these services or request information. Provide specific contact information. Be sure to include both on- and off-campus services, as applicable. We recommend that institutions reach out to organizations that assist victims of dating violence, domestic violence, sexual assault and stalking, such as local rape crisis centers and state and territorial coalitions against domestic and sexual violence, when developing this list of services. If there **are no on- or off-campus services, you must state this fact in your policy statement.**

As with all information provided in the Annual Security Report, this statement of available services should be updated annually to reflect currently available services.

- f. **a statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation and working situations or protective measures. The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement**

What does this mean?

State that your institution is **obligated** to comply with a student's reasonable request for a living and/or academic situation change following an **alleged** sex offense. Your statement should identify all of the available options. Your statement should also identify how you will determine what

measures to take and who will be responsible for making that decision. Note that this requirement allows your institution flexibility in terms of what is reasonable. Factors that might be considered during this process include, but are not limited to the following: the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).

Protective measures should minimize the burden on the victim. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the victim from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

- g. a clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault or stalking and that**
 - describes each type of disciplinary proceeding used by the institution; the steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding; how to file a disciplinary complaint; and how the institution determines which type of proceeding to use based on the circumstances of an allegation of dating violence, domestic violence, sexual assault or stalking;**

What does this mean?

“Proceeding” is defined as *all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, factfinding investigations, formal or informal meetings, and hearings. Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.* In this statement you must disclose all of your institution’s procedures for campus disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking. For each type of proceeding, list all of the steps involved and the

Protective measures should minimize the burden on the victim.

Procedures for institutional disciplinary action citation
34 CFR 668.46(k)

anticipated timeline for each step, and describe the decision-making process, including who is responsible for making decisions. Describe, in detail, how an individual can file a complaint. Provide contact information for the person or office to which the complaint should be made, the location of any forms required, and the options for filing the complaint (i.e., in-person, electronically, by phone). Also, describe how your institution decides which type of proceeding will be used for which cases and who makes that decision (i.e., do sexual assaults automatically get assigned a formal hearing).

This requirement is not limited to students. If your institution has disciplinary procedures for faculty and staff (e.g., any form of adjudication for a code of conduct ranging from disciplinary action from a supervisor to a formal hearing), you are required to describe them here. If your institution has disciplinary procedures related to incidents other than the *VAWA* crimes listed, you are not required to describe them in this statement but you may include that information. You must follow the procedures described in your statement **regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred** (i.e., on or off your institution's *Clery Act* geography).

- **describes the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault or stalking;**

What does this mean?

Different legal proceedings may have different standards of evidence. The most common standards are “preponderance of the evidence,” “clear and convincing evidence” and “beyond a reasonable doubt.” The *Clery Act* does not require a specific standard of evidence. However, the *Clery Act* does require that each institution choose which standard of evidence they will use in their disciplinary proceedings arising from allegations of dating violence, domestic violence, sexual assault or stalking, and describe that standard in this statement. The institution must use the standard of evidence described in the statement in all such proceedings.

- **lists all the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault or stalking;**

What does this mean?

The *Clery Act* does not specify the sanctions an institution may impose. An institution must determine which sanctions it may impose for each of the *VAWA* offenses and list all of the possible sanctions in this statement. An institution may have different potential sanctions for different crimes. For example, the possible sanctions for an allegation of stalking may be very different from the possible sanctions for an allegation of sexual assault. In this statement, you must list all of the possible sanctions you have identified for each *VAWA* Offense. Be specific. For example, if suspension is a possible sanction, describe the type and length of the suspension, and any requirements that must be met for reinstatement. You are not prohibited from using a sanction not listed in this statement as long as your policy statement is updated to include the sanction for the next published annual security report.

- **describes the range of protective measures that the institution may offer to the victim following an allegation of dating violence, domestic violence, sexual assault or stalking;**

What does this mean?

Institutions are not required to list all examples of acceptable protective measures here but must describe the range of protective measures they may offer. These may include, but are not limited to

- orders of protection, including no-contact orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court, or by the institution;
- transportation assistance or security escorts;
- modifications to academic requirements or class schedules; and/or
- changes in living or working situations.

An institution must determine which sanctions it may impose for each of the *VAWA* offenses and list all of the possible sanctions in this statement.

- **provides that the proceedings will include a prompt, fair and impartial process from the initial investigation to the final result;**

What does this mean?

A prompt, fair and impartial proceeding is defined as a proceeding that is

- *completed within reasonably prompt timeframes designated by the institution's policy, including a process that allows for the extension of timeframes for good cause, with written notice to the accuser and the accused of the delay and the reason for the delay;*
- *conducted in a manner that*
 - *is consistent with the institution's policies and transparent to the accuser and the accused;*
 - *includes timely notice of meetings at which the accuser or accused, or both, may be present; and*
 - *provides timely and equal access to the accuser, the accused and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and*
- *conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.*

Earlier we explained that institutions must describe the steps and timeframes involved in their disciplinary proceedings. This statement requires that those policies be followed and also remain flexible without allowing undue delays. The proceeding must be one that lacks hidden agendas and conditions, makes appropriate information available to each party, and is fair and clear to all parties. Care should be taken to ensure that the official conducting a disciplinary proceeding does not have a conflict of interest or bias either for or against the accuser or the accused.

- **be conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability;**

What does this mean?

The officials who are chosen to conduct proceedings to address allegations of dating violence, domestic violence, sexual assault and stalking must receive training at least once a year. Your statement must describe this training. It is important that this training be updated as necessary to address the latest issues and techniques for conducting proceedings on these topics from beginning to end. Training for these officials should address but not be limited to the following topics:

- relevant evidence and how it should be used during a proceeding;
- proper techniques for questioning witnesses;
- basic procedural rules for conducting a proceeding; and
- avoiding actual and perceived conflicts of interest.

This training may be delivered in person or by electronic means, such as a webinar or video. Since different officials may conduct different parts of the proceedings, it is not necessary for every official to receive every part of the training. For example, if certain officials conduct only the initial investigation, they do not need to receive training on how to conduct a hearing. However, institutions may train all selected officials on all related topics.

The officials who are chosen to conduct proceedings to address allegations of dating violence, domestic violence, sexual assault and stalking must receive training at least once a year.

Institutions are prohibited from limiting the choice of advisor, or an advisor's presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding.

- **provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice;**

What does this mean?

You must state that both the accuser and the accused will be provided with the same opportunities to be accompanied by an advisor of their choice. This requirement is not limited to students. Employees must be provided with the same opportunities. An advisor is *any individual who provides the accuser or accused support, guidance or advice*. Institutions are prohibited from limiting the choice of advisor, or an advisor's presence for either the accuser or the accused, in **any meeting or institutional disciplinary proceeding**. Institutions may form a pool of individuals, including members of the campus community, who may serve as advisors as long as the choice of advisor by the accused or the accuser is not limited to such a pool. The advisor of their choice can be anyone — a friend, parent, professor, attorney or anyone else the accuser or accused would like to have with them. The regulations do not require an advisor to attend disciplinary proceedings in person or even to attend at all, but they merely require that each party have the same opportunity to have an advisor present. Institutions are not required to permit an advisor to attend without the advisee but may find that permitting an advisor to attend alone with the advisee's agreement will make it easier to arrange procedural meetings. Similarly, the regulations do not prohibit the advisor from acting as a proxy for either the accused or the accuser in the interest of protecting the parties' privacy. In such case, the accuser or the accused would need to authorize their advisor to serve as a proxy and consent to any disclosures of their records. Institutions are not required to cancel or delay meetings simply because an advisor could not be present — as long as the institution gave proper notice of the meeting. However, we encourage institutions to consider reasonable requests to reschedule.

- **not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;**

What does this mean?

While institutions may not limit an accused or accuser's choice of advisor, they may restrict the advisor's role, such as prohibiting the advisor from speaking during the proceeding, addressing the disciplinary tribunal or questioning witnesses. Institutions may remove or dismiss advisors who become disruptive or who do not abide by the restrictions on their participation. Institutions should inform all parties of any limitations on the advisor's participation before a proceeding is scheduled so that both parties understand and respect these limitations.

- **require simultaneous notification, in writing, to both the accuser and the accused of**
 - **the result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault or stalking;**
 - **the institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available;**
 - **any change to the result; and**
 - **when such results become final.**

What does this mean?

"Result" is defined as *any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution. The result must include any sanctions imposed by the institution. Notwithstanding section 444 of the General Education*

Provisions Act (20 U.S.C. 1232g), commonly referred to as the Family Educational Rights and Privacy Act (FERPA), the result must also include the rationale for the result and the sanctions.

In explaining the rationale for the result and sanctions, the official or entity must explain how it weighted the evidence and information presented during the proceeding, and explain how the evidence and information support the result and sanctions. You must describe how the institution's standard of evidence was applied. It is not sufficient to say only that the evidence presented either met or did not meet the institution's standard of evidence.

This means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.

- h. a statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options.**

What does this mean?

State that you will provide victims of dating violence, domestic violence, sexual assault or stalking with written documentation of their rights and options. This documentation must be a prepared, standardized and written set of materials including detailed information regarding victims' rights and options. This does not mean that you hand the student a copy of the annual security report or the policy statements contained in the annual security report.

Advising the Campus Community About Sex Offenders

*Sex offender registration
information citation
34 CFR 668.46(b)(12)*

Your institution must provide a statement advising the campus community about where law enforcement agency information provided by a state concerning registered sex offenders may be obtained, such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus or a computer network address.

What does this mean?

Upon release from prison, individuals convicted of sex crimes may be required by law to register with law enforcement agencies (some of these laws are referred to as “Megan’s Laws”). If registered sex offenders are **enrolled at or employed at** a postsecondary institution, the offenders also must provide this information to the state. The state then provides the information to campus police departments or to other law enforcement authorities in the jurisdiction where the institution is located.

Your institution is not required to request this information from the state; rather, the state must provide this information to the campus police department or other law enforcement authorities in your school’s jurisdiction. In turn, **your institution is required to advise the campus community how to access this information.** The law doesn’t, however, require you to disseminate additional information about the offenders. You are responsible for notifying the campus community if there is a change in how the data can be obtained. For example, if you were directing people to a local law enforcement agency for information and the agency tells you that they are now using a website to maintain the data, you must then provide the URL for the site to the campus community.

If the state in which your institution is located does not currently register sex offenders, or does not provide campus police or your local law enforcement agency with this information, include a statement to this effect in your annual security report. However, you would be required to advise the campus community about obtaining registered sex offender information should the state provide it at a future date.

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The Annual Security Report: Publishing Policy Statements and Crime Statistics

CHAPTER 9



You have a lot of information and may be wondering, “Now what do I do with this?” This chapter walks you through the steps necessary to comply with the regulations concerning the publication and distribution of your *Clery Act*-mandated annual security report.

Specifically, you must

- publish the report by the deadline;
- include the required policy statements;
- include three years’ worth of *Clery Act* statistics;
- determine who gets the report;
- distribute the report; and
- retain records associated with the report.

When is the deadline? You must **publish and distribute your annual security report by Oct. 1** each year. This is a firm deadline. There is **no grace period** and there are **no exemptions**. Every eligible postsecondary institution that participates in any Title IV federal student financial assistance program must publish an annual security report.

What should the publication look like? Whether you produce the report as a separate publication or as part of another publication, it must be **contained within a single document**. You cannot publish it in sections or multiple volumes. If you post the report on your institution’s website, clearly identify it as a single, separate part of the site. You may include the report in a publication, such as a campus directory that is given to all students and employees, provided the report appears in its entirety within that publication. You don’t have

*Annual security report
requirement citation*
34 CFR 668.41(e)

You must publish and distribute your annual security report by Oct. 1 each year. This is a firm deadline. There are no grace periods and there are no exemptions.

to provide the report to both students and employees in the same publication, however. If the report is incorporated into a larger publication, the cover must identify the inclusion of the annual security report.

If your institution has **multiple campuses**, remember that *Clery Act* requirements must be met individually for each separate campus. (See “Other On-campus Considerations” in Chapter 2 for more information on separate campuses.) You may publish a single document covering all campuses as long as you clearly identify the policy statements and crime statistics that are associated with each campus.

Presenting Your Policy Statements in the Annual Security Report

As you compile the section on policy statements, keep the focus of the requirement in mind: disclosure of the procedures, practices and programs your institution uses to keep students and employees safe and its facilities secure. Present your statements in an accurate, concise, readable and organized manner.

The required policy statements are discussed in detail in chapters 7 and 8. They may precede or follow the crime statistics in your report.

Presenting General Crime Statistics and Arrest and Disciplinary Referral Statistics

Present all statistics other than those for Hate Crimes and unfounded crimes in a **tabular format**. This means that all Criminal Offenses, *VAWA* Offenses, and arrests and referrals for disciplinary action for Weapons, Drug Abuse and Liquor Law Violations should be presented in a table or tables. Use clear and consistent labeling to make the information presented easy to read. Include caveats as necessary to explain the data in the table. For example, if your institution housed students in an on-campus dormitory for the first time last year, it would be helpful to provide a caveat explaining why crime statistics for the “on-campus student housing facilities” category are included for only the most recent year. If you are including **non-Clery Act statistics** in your annual security report

*Disclosure of policy
statements in annual
security report citation*
34 CFR 668.46(b)(2)–(14)

*Disclosure of crime statistics
in annual security report
citation*
34 CFR 668.46(b)(1)

(i.e., non-*Clery Act* crimes and/or crimes that occurred outside of your *Clery Act* geographic locations), present those statistics in a clearly labeled separate table or in a caveat.

Use the following guidelines when presenting your crime statistics. (See Chapter 3 for crime definitions and information on counting crimes.)

- **Years reported.** Include statistics for the three most recent completed calendar years. Enter statistics for each year separately. For example, for your 2015 report, enter statistics separately for 2012, 2013 and 2014.
- **Geographic category.** Include categories for all required geographic locations (on-campus, public property and noncampus) that pertain to your institution. If your institution has on-campus student housing facilities include that category as well. Remember that statistics for on-campus student housing facilities must be included in the on-campus statistics and also disclosed separately in the on-campus student housing facility category. If your institution does not have any on-campus student housing facilities or any noncampus buildings or property, include a caveat stating this.
- **Crime category.** Include all required crime categories and list each one separately as shown in the sample table on the next page.
- **Categories with no crimes.** Do not leave any cells blank even if you have no crimes to disclose for a particular category. Zero (0) is a statistic; enter a zero whenever there are no reported crimes to disclose in a particular table cell.
- **Required sources.** Include all *Clery Act* crimes reported to campus police or security (if applicable), other campus security authorities and local law enforcement agencies (if the agencies have provided statistics).

A sample table follows; however, there is no prescribed format for how your table or tables should look.

Figure 9. Sample Criminal Offenses Reporting Table

OFFENSE	YEAR	GEOGRAPHIC LOCATION			
		ON-CAMPUS PROPERTY	ON-CAMPUS STUDENT HOUSING FACILITIES	NONCAMPUS PROPERTY	PUBLIC PROPERTY
MURDER / NON-NEGLIGENT MANSLAUGHTER					
MANSLAUGHTER BY NEGLIGENCE					
RAPE					
FONDLING					
INCEST					
STATUTORY RAPE					
ROBBERY					
AGGRAVATED ASSAULT					
BURGLARY					
MOTOR VEHICLE THEFT					
ARSON					

Figure 10. Sample VAWA Offenses Reporting Table

OFFENSE	YEAR	GEOGRAPHIC LOCATION			
		ON-CAMPUS PROPERTY	ON-CAMPUS STUDENT HOUSING FACILITIES	NONCAMPUS PROPERTY	PUBLIC PROPERTY
DOMESTIC VIOLENCE					
DATING VIOLENCE					
STALKING					

Figure 11. Sample Arrests and Disciplinary Referrals Reporting Table

OFFENSE	YEAR	GEOGRAPHIC LOCATION			
		ON-CAMPUS PROPERTY	ON-CAMPUS STUDENT HOUSING FACILITIES	NONCAMPUS PROPERTY	PUBLIC PROPERTY
ARRESTS: WEAPONS: CARRYING, POSSESSING, ETC.					
DISCIPLINARY REFERRALS: WEAPONS: CARRYING, POSSESSING, ETC.					
ARRESTS: DRUG ABUSE VIOLATIONS					
DISCIPLINARY REFERRALS: DRUG ABUSE VIOLATIONS					
ARRESTS: LIQUOR LAW VIOLATIONS					
DISCIPLINARY REFERRALS: LIQUOR LAW VIOLATIONS					

Presenting Hate Crime Statistics in the Annual Security Report

You may present Hate Crime data in either a **tabular format** or in a **narrative or descriptive format**. Either way, use the following bulleted guidelines when presenting the statistics. (See Chapter 3 for information on categorizing and counting Hate Crimes.)

- **Years.** Include statistics for the three most recent calendar years.
- **Geographic category.** Present statistics by geographic location. (For more information on geographic locations, see Chapter 2.)
- **Crime category.** Include all *Clery Act* offenses that are classified as Hate Crimes as well as incidents of Larceny-Theft, Simple Assault, Intimidation and Destruction/Damage/Vandalism of Property that are classified as Hate Crimes. For *Clery Act* reporting purposes, Negligent Manslaughter, arrests and referrals for disciplinary action for Weapons, Carrying, Possessing, Etc., Drug Abuse Violations or Liquor Law Violations are not reported as Hate Crimes. (For more information on crime categories, see Chapter 3.)
- **Bias category.** Include the category of bias for each Hate Crime. (For more information on categories of bias, see “Hate Crimes” in Chapter 3.)

Figure 12. Examples of Descriptive Hate Crime Reporting

Example 1: Hate Crimes

2014: One on-campus Intimidation incident characterized by religious bias.
 2013: One noncampus Robbery characterized by National Origin bias, and one public property Aggravated Assault characterized by Sexual Orientation bias.
 2012: No Hate Crimes reported.

Example 2: Hate Crimes

There were no reported Hate Crimes for the years 2012, 2013 or 2014.

Presenting Statistics for Unfounded Crimes in the Annual Security Report

You may present statistics for unfounded crimes in either a **tabular format**, or in a **narrative or descriptive format**. Either way, include one statistic for each of the three most recent calendar years. For each of the three years, you are required to report the total number of unfounded crimes across all *Clery Act* geographic categories and *Clery Act* crimes. You are not required to break down the number of unfounded crimes by geographic category or type of crime. Do not include unfounded crimes that were originally reported to have occurred outside of your *Clery Act* geography, or unfounded crimes that were not *Clery Act* crimes. (See Chapter 3 for a detailed discussion of Unfounded Crimes.)

Figure 13. Examples of Descriptive Unfounded Crime Reporting

Example 1: Unfounded Crimes

2015: Five unfounded crimes.
2014: Ten unfounded crimes.
2013: Three unfounded crimes.

Example 2: Unfounded Crimes

There were three unfounded crimes in 2013, 10 unfounded crimes in 2014 and five unfounded crimes in 2015.

Distributing the Annual Security Report

Who gets the annual security report? You must distribute the report to all **currently enrolled students** (including those attending less than full-time and those not enrolled in Title IV programs or courses) and all **employees** by Oct. 1 each year. You also must provide the report to any prospective student or prospective employee upon request. A **prospective student** is defined as *an individual who has contacted an eligible institution requesting information about admission to that institution*. A **prospective employee** is defined as *an individual who has contacted an eligible institution requesting information concerning employment with that institution*.

If you have students who are enrolled in your institution but who are currently taking courses at another school or who are not taking courses but are completing thesis or dissertation work, you are still required to provide them with your annual security report.

How should the report be distributed? You must distribute the report to all enrolled students and current employees in one of two ways:

1. Directly by publications and mailings. You may give a copy of your annual security report directly to each individual or by direct mailing the report to each individual through

- the United States Postal Service or any other direct mail service (i.e. Federal Express);
- campus mail;
- e-mail; or
- a combination of these methods.

2. Posting the annual security report on an Internet or intranet website that is reasonably accessible to enrolled students and to current employees.

You may use this method **only** if you distribute an individual notice about the annual security report to each student and employee by Oct. 1. Do not bury the notice in another document where a student or employee may be unlikely to read it. The notice should include

- a statement of the report's availability.
- a list and brief description of the information contained in the report.
- the exact address (URL) of the Internet or intranet website at which the report is posted. This means that you must provide a direct link to the annual security report. It is not acceptable simply to give the URL for the institution's website.

This does not mean that all of your *Clery Act*-related items must be located at this URL. You may provide links from this URL to such items as your crime log, additional annual security reports for your separate campuses, etc.

- a statement that the school will provide a paper copy of the annual security report upon request. This request does not have to be made in writing. You may not charge fees to individuals for copies of the annual security report, nor can you include the annual security report in any publication for which you charge a fee.

Important note for institutions with on-campus student housing facilities:

If your institution has any on-campus student housing facilities you must also publish an annual fire safety report as described in Chapter 14. You may publish both reports together as long as the title of the document clearly states that it contains both the annual security report and the annual fire safety report. If you choose to publish the two reports separately, you must include information in each of the two reports about how to **directly access** the other report. Do not simply state that the other report is available.

Providing the Annual Security Report to Prospective Students and Employees

As stated previously, you must also make the report available to prospective students and employees. Do this by providing prospective students and prospective employees with a notice containing

- a statement of the report's availability;
- a description of its contents; and
- the opportunity to request a copy.

You may provide this notice to prospective students and prospective employees along with other information your institution provides to them. If your institution solicits applications for a faculty or an administrative position through an advertisement, the institution is required to provide a notice of the availability of the annual security report to those

individuals it interviews. However, you are not required to include notification in the job advertisement, nor are you required to notify an individual to whom you simply sent a rejection letter based on his or her unsolicited employment application.

If you choose to provide your annual security report to prospective students and prospective employees by posting the report on an Internet site, the notice provided to each individual must include

- the exact URL for where the report is posted;
- a brief description of the report; and
- a statement that the institution will provide a paper copy of the report upon request.

Note that you may **not** use an intranet site to make disclosures to prospective students and employees.

Correcting the Annual Security Report

If your institution makes corrections to your statistical disclosures or changes its safety and security policies at any time after publishing your annual security report for a particular year (no later than Oct. 1), you must update your annual security report.

If your institution corrects the crime statistics for a previous calendar year, you must correct the statistics in all previous annual security reports that included the statistics. For example, if your institution discovers in December 2015 that the numbers reported for 2013 on-campus disciplinary actions were incorrect, you must correct the 2013 statistics in the 2014 and 2015 annual security reports.

If your institution makes changes to its safety and security policies, you must update the information in your most recent annual security report to reflect your new policies. The statements or descriptions in your annual security report must accurately reflect your institution's current procedures and practices.

When a change is made to the statistics or policies in an annual security report, you should add a note to the annual security report explaining the change. This note should include

what change was made, the date the change was made and the reasons for the change.

Once revised, you must redistribute the annual security report following the notification procedures described in **Distributing the Annual Security Report**. If you post the revised annual security report online, you must distribute a notice about the availability of a revised annual security report to each student and employee.

Retaining Records

Be sure to retain the annual security report and all supporting records used in compiling the report for three years from the latest publication of the report to which they apply. For example, the 2015 annual security report should contain statistics for 2012, 2013 and 2014. The 2012 statistics and supporting records must be kept until Oct. 1, 2018—in effect, seven years.

Records to be kept include, but are not limited to, the following: copies of crime reports; the daily crime logs; records for arrests and referrals for disciplinary action; timely warning and emergency notification reports; documentation, such as letters to and from local police having to do with *Clery Act* compliance; letters to and from campus security authorities; correspondence with us regarding *Clery Act* compliance; and copies of notices to students and employees about the availability of the annual security report. Make sure to date all documentation, and ensure it is easily retrievable. If you scan paper documents for archival purposes, be sure to scan the complete document. We suggest that you have more than one person at your school who knows where the documentation is kept.

Submitting Crime Statistics to the Department

Although you are not required to send us your annual security report, you must submit the crime statistics from the report to the Department via the annual Campus Safety and Security Survey. This Web-based survey is used to collect the statistical data from your annual security report and your annual fire safety report (if your institution has any on-campus student housing facilities). The data are then posted on our public website for use by higher education consumers and the public. The site is located at <http://ope.ed.gov/campussafety>.

Be sure to retain the annual security report and all supporting records used in compiling the report for three years from the latest publication of the report to which they apply—in effect, seven years.

Each year, a few weeks prior to the collection, we send a letter and a registration certificate to your institution's chief executive officer. The letter explains this important *Clery Act* requirement. The certificate contains the following information necessary to access the survey and enter data:

- Institution's User ID—Typically, this ID consists of an uppercase letter plus an eight-digit number. For example: C21370001. We issue a new User ID every year.
- Institution's Password—The password is a combination of nine letters, numbers and symbols. For example: Ab3y22*Z4. We issue a new password every year.
- Survey address—
<https://surveys.ope.ed.gov/campussafety>.
- Campus Safety and Security Help Desk telephone number—(800) 435-5985.
- Campus Safety and Security Help Desk e-mail address—campussafetyhelp@westat.com.
- Data collection dates—Aug. __ to Oct. __ 20__.

Detailed step-by-step screen instructions for the survey are provided in the User's Guide for the Campus Safety and Security Data Collection. The user's guide is located online at <https://surveys.ope.ed.gov/campussafety>.

Note that if **your institution became Title IV eligible after Jan. 31**, your institution is exempt from participating in the Web-based data collection (i.e., the Campus Safety and Security Survey) for the calendar year in which you became eligible. The regulations require you to disclose crime and fire statistics each year for the previous three years.⁵ However, if, for example, your institution became Title IV eligible in July 2014, you would not have collected any *HEA* crime and fire statistics prior to that date. Because the online survey collects statistics for an entire calendar year, your institution would not participate in the survey until you had an entire year of statistics. In this case, you would participate in the 2016 survey for the collection of 2015 statistics.

⁵ Only schools that have on-campus student housing facilities must disclose fire statistics.

This exemption applies *only* to the online data collection. You must still complete an annual security report that includes current policy statements and partial-year crime statistics, provide that report to your students and employees, and make it available to potential students and employees. Partial-year statistics in the annual security report should include all crimes reported between the date the institution became Title IV eligible and the end of the calendar year. If for example, your institution became Title IV eligible in July 2014, you are required to

- publish an annual security report by Oct. 1, 2014, that includes current policies (no crime statistics required);
- publish an annual security report by Oct. 1, 2015, that includes current policies and crimes that were reported between July and December 2014; and
- publish an annual security report by Oct. 1, 2016, that includes current policies, partial-year statistics for 2014, and full calendar-year statistics for 2015.

Institutions or individual campuses that close prior to Oct. 1 are not required to complete the online survey or publish an annual security report for that year.

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Missing Students: The Twenty-four Hour Rule

CHAPTER 10



If your institution has any on-campus student housing facilities, you are required to comply with the Department's missing student notification regulations. (Please see "Definition of an On-campus Student Housing Facility" in Chapter 2.) **The Department's missing student regulations relate only to students who reside in on-campus housing.** They do not address students living in any noncampus student housing your institution owns or controls. If you have **multiple campuses**, you have to comply with these regulations only at those that have on-campus student housing facilities. If your institution has any **foreign campuses** with on-campus student housing facilities, those campuses also must comply with missing student notification regulations. Note that these regulations do not address students who are residing off campus while attending study abroad programs.

*Missing student notification
policy disclosure citation
34 CFR 668.46(b)(14)*

**The Department's
missing student
regulations relate
only to students
who reside in on-
campus housing.**

Your institution must

- issue a policy statement that addresses missing student notification for students residing in on-campus student housing; and
- include procedures that your institution will follow if any of those students is determined to be missing for 24 hours.

The essence of the requirement is that if a student who lives in on-campus student housing is determined to have been missing for 24 hours, you have only 24 hours after receiving this information in which to initiate specific notification procedures. **This requirement does not preclude your institution from making a determination that a student is missing before the student has been missing for a full 24 hours, or from initiating notification procedures as soon as it determines that the student is missing.** In other words, you **must** initiate *HEA*-related procedures if a student has been determined to be missing for 24 hours; however, you **may** act sooner.

*Requirements for missing
student notification policy
statement citation*
34 CFR 668.46(h)

Include your policy and procedures statement in your institution's annual security report. You can include it with your institution's other campus security policy statements, in any order that you choose. Make sure that you clearly state that this policy focuses only on students residing in on-campus student housing. If your institution has a policy that applies to all missing students regardless of whether they live on campus or off campus, you may issue a single missing student policy statement providing it fully and clearly addresses each of the required *HEA* components for students living in on-campus housing.

Policy Statement

Your missing student policy statement must

- 1. indicate a list of titles of the persons or organizations to which students, employees or other individuals should report that a student has been missing for 24 hours;**

What does this mean?

You must provide a list of individuals or organizations that people should contact if they have reason to believe a student who lives in on-campus student housing has been missing from campus for 24 hours. Use complete titles, such as "dean of housing" rather than "the dean," and "City of Rockville Police Department" rather than "the police." Include contact information for each listing.

- 2. require that any missing student report must be referred immediately to the institution's police or campus security department, or, in the absence of an institutional police or campus security department, to the local law enforcement agency that has jurisdiction in the area;**

What does this mean?

This component addresses what your institution is obligated to do when a missing student report is received from anyone, even individuals not affiliated with your school.

If your institution has a campus police or security department, your policy must state that anyone receiving a

missing student report should **immediately** bring it to that department's attention. If your institution does not have a campus police or security department, the report should **immediately** be brought to the attention of the local law enforcement agency that has jurisdiction in your area. Include contact information for that agency. (For help in determining the law enforcement agency or agencies that have jurisdiction in your area, see "How Do You Obtain Statistics From Local Law Enforcement?" in Chapter 4.) Every report must be forwarded to the appropriate entity regardless of how long the student is believed to have been missing.

3. **contain an option for each student to identify a contact person or persons whom the institution shall notify within 24 hours of the determination that the student is missing, if the student has been determined missing by the institutional police or campus security department, or the local law enforcement agency;**

What does this mean?

This component addresses your institution's obligation to advise every student who lives in on-campus student housing, **regardless of age**, that he or she may register one or more individuals to be a contact **strictly for missing persons purposes**. The contact person can be anyone. You must give students this option even if they have already identified a general emergency contact. A student may identify the same individual for both purposes, but your institution may not assume that a general emergency contact is also the missing person contact. Offer students this option annually regardless of whether they chose to register a contact the previous year. If any students move into on-campus student housing mid-year, you must give them the option to name a contact person as well. Include in your policy statement information about how a student can register a contact or contacts.

To protect confidentiality, general emergency contact information and missing student contact information must be kept separate, even if the student has registered the same person for both purposes.

4. **advise students that their contact information will be registered confidentially, that this information will be accessible only to authorized campus officials, and that it may not be disclosed, except to law enforcement personnel in furtherance of a missing person investigation;**

What does this mean?

This component addresses how a student's contact person information will be maintained and who is allowed access to it. Inform students that the information will be kept confidential. To protect confidentiality, general emergency contact information and missing student contact information must be kept separate, even if the student has registered the same person for both purposes. Because the *HEA* requires the information to be kept confidential, student's contact information has greater privacy protections than the *Family Educational Rights and Privacy Act (FERPA)* provides.

State that contact information may be accessed only by authorized campus officials. Although your policy statement does not have to contain the names or titles of the authorized officials, you should document this information for your records. Those officials may disclose the contact information **only** to law enforcement officials and **only** for the purpose of a missing student investigation. In issuing this policy statement, you are letting students know that if they register a contact person, they are, in effect, also providing permission for law enforcement personnel to contact the identified individual for the purpose of a missing student investigation.

5. **advise students that if they are under 18 years of age and not emancipated, the institution must notify a custodial parent or guardian within 24 hours of the determination that the student is missing, in addition to notifying any additional contact person designated by the student;**

What does this mean?

This part of your statement addresses students who are under the age of 18 and are not emancipated, that is, not legally independent of their parents. State that if it has been determined that such a student has been missing for 24 hours, the institution will notify both the student's custodial parent or

guardian and the student's contact person, if he or she has registered one, that the student is missing.

6. **advise students that the institution will notify the local law enforcement agency within 24 hours of the determination that the student is missing, unless the local law enforcement agency was the entity that made the determination that the student is missing.**

What does this mean?

Include a statement that once a determination has been made that a student living in on-campus student housing is missing, your institution will notify local law enforcement of the situation within 24 hours. The **only exception** is when it was the law enforcement agency that made the determination. This statement addresses **any** missing student who lives in on-campus student housing regardless of age or status, and regardless of whether he or she registered a confidential contact person.

Procedures

Your institution's missing student notification procedures **must** go into effect within 24 hours of the determination that a student who lives in on-campus student housing has been missing for 24 hours. Again, this doesn't preclude initiating notification procedures as soon as your institution determines that a student is missing.

Your policy statement must include the procedures that will be followed in the case of a missing student report. In addition to any other steps your institution might take, you must include the following:

1. **If the student has designated a contact person, notifying that contact person within 24 hours that the student is missing.**

What does this mean?

State that if a student has registered a contact person, the institution will notify him or her no later than 24 hours after it's been officially determined that the student is missing. This does not have to be an in-person contact. If a student identifies

Your institution's missing student notification procedures must go into effect within 24 hours of the determination that a student who lives in on-campus student housing has been missing for 24 hours.

multiple contacts, they can be contacted in an order determined by the institution. If a student registers multiple contact persons and the first person contacted confirms that the student is not missing, the institution must contact each additional contact person in turn, unless the student in question is contacted by the institution or contacts the institution. If your institution is unsuccessful in contacting the named individual or individuals, document your attempts.

The official determination that the student is missing can be made **at any time** by the campus police or security department (if the campus has one) or by the local law enforcement agency that has jurisdiction where the campus is located. For example, suppose a student goes to your campus security office at 10 a.m. on a Monday and reports that a student living in her dorm left the campus at 9 p.m. Sunday and didn't return for her Monday 8 a.m. class. The student has been missing for 11 hours. Campus security investigates and comes to the conclusion at 11:15 a.m. that the student is missing. If the missing student has identified a confidential contact, campus security has 24 hours (i.e., until 11:15 a.m. Tuesday) to notify that contact person.

2. If the student is under 18 years of age and is not emancipated, notifying the student's custodial parent or guardian and any other designated contact person within 24 hours that the student is missing.

What does this mean?

These procedures address students under 18 who are not legally independent of their parents. If it's determined that such a student has been missing for 24 hours, the institution has only 24 hours in which to contact (in no required order)

- the custodial parent or guardian; and
- The confidential contact person, if the student has identified one.

These regulations do not preclude the institution from contacting the student's contact person or the custodial parent or guardian immediately upon determination that the student is missing.

3. **Regardless of whether the student has identified a contact person, is above the age of 18 or is an emancipated minor, informing the local law enforcement agency that has jurisdiction in the area within 24 hours that the student is missing.**

What does this mean?

You must state that your institution will notify the local law enforcement agency when **any** student who lives in on-campus student housing has been determined to be missing for 24 hours. You must do this even if your school has a campus police or security department.

Note that this procedure differs from no. 2 under the Policy Statement section, which requires missing student **reports** to be forwarded to a local law enforcement agency if your school does not have a campus police or security department. Procedure no. 3 directly above, requires your institution to forward the information that a student has been **determined** to be missing.

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Fire Safety Disclosures: Requirements and Definition Of a Fire

CHAPTER 11



The *HEA* fire safety regulations **apply only to institutions with on-campus student housing facilities and focus exclusively on those facilities.** (See “Definition of an On-campus Student Housing Facility” in Chapter 2.) The regulations do not apply to other buildings on your campus or to any noncampus student housing facilities your institution might own or control. If you have **multiple campuses**, you must comply with the regulations only at those that have on-campus student housing facilities. If your institution has any **foreign campuses** with on-campus student housing facilities, you must comply with the *HEA* fire safety regulations at those campuses.

An institution with on-campus student housing facilities is required to

- maintain a **log** of all reported fires that occur in those on-campus student housing facilities;
- publish an annual **fire safety report** that contains fire safety policies and fire statistics for each of those facilities; and
- submit the **fire statistics** from the fire safety report annually to the Department.

The fire log is discussed in Chapter 12, fire statistics are discussed in Chapter 13 and the annual fire safety report is discussed in Chapter 14. First, though, to comply fully and accurately with the requirements found in those chapters, you need to understand how to define a fire for the purposes of the *HEA*.

Definition of a Fire

For the purposes of fire safety reporting, a “**fire**” is defined as *any instance of open flame or other burning in a*

*Institutional fire safety
regulations citation*
34 CFR 668.49

Fire log requirement citation
34 CFR 668.49(d)

*Annual fire safety report
citation*
34 CFR 668.49(b)

*Fire statistics disclosure
requirement citation*
34 CFR 668.49(c)

place not intended to contain the burning or in an uncontrolled manner.

This definition contains two descriptions of fire. The first is “any instance of open flame or other burning in a place not intended to contain the burning.” Some examples are

- trash-can fire
- oven or microwave fire
- burning oven mitt on a stove
- grease fire on a stovetop
- flame coming from electric extension cord
- burning wall hanging or poster
- fire in an overheated bathroom vent fan
- couch that is burning without any flame evident

The second type of fire is “any instance of open flame or other burning **in an uncontrolled manner**.” Some examples are

- chimney fire
- gas stove fire
- fuel burner or boiler fire

Include

- all fires that meet the definition regardless of
 - size
 - cause
 - whether the fire results in injury, death or property damage
 - your institution’s fire safety policies. Even if your institution prohibits the burning of candles in dorms, a lit candle doesn’t meet the definition of a fire. If drapes catch on fire due

to brushing against a lit candle, the burning drapes meet the definition.

- fires on the roof or the outside walls of a building even if the fire doesn't reach the inside
- an incident where there is evidence that there **was** burning, for example, a singed electrical cord
- fires in parking facilities and dining halls that are **physically attached to and accessed directly from**, on-campus student housing facilities. "Accessed directly from" means that an individual can enter the parking area or dining hall directly from the housing area without leaving the building. Note that if there is a vehicle fire (i.e., a fire that is confined to a vehicle) in a student housing facility parking garage, this is not a student housing facility fire. However, if there is a fire in the garage that spreads to a vehicle, or if a vehicle fire spreads to the garage, this is a student housing facility fire.
- fires reported to any official at your institution (e.g., to a residence life officer), not just campus fire authorities or campus security authorities.

Do not include

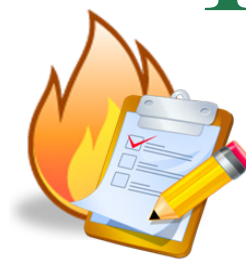
- sparks or smoke where there is no open flame or other burning
- such incidents as burnt microwave popcorn that trigger fire alarms or smoke detectors but where there are no open flames or other burning
- **attempted** Arson in cases where there is no open flame or burning. (Attempted Arson must be included along with statistics for completed Arson in your *Clery Act* crime statistics, however. See "Types of Criminal Offenses," no. 7 in Chapter 3 for more information about Arson.)
- fires in parking facilities and dining halls that are **not physically attached to and accessed directly from** on-campus student housing facilities, even if the facilities are reserved for the use of residents in those housing facilities

- incidents that violate your institution's fire safety policies but that do not meet the definition of a fire. For example, if your institution prohibits fires in fireplaces in on-campus student housing and a student lights a fire in the fireplace, this is not a reportable fire under the *HEA*. However, if the fire began burning in an uncontrollable manner and ignited the chimney or flue, that would be a reportable fire.

The Fire Log:

Recording Fires in On-campus Student Housing Facilities

CHAPTER 12



Your institution must maintain a written, easily understood fire log that records, by the date reported, **any fire that occurs in an on-campus student housing facility**. You are not required to record fires that occur anywhere else on your campus in this log. Nor are you required to record fires that occur in any noncampus student housing that your school might own or control. You may, however, include other fires in the log for your institution's internal record keeping and for making the information available to the public.

You may maintain the log in a hard copy or in an electronic format. Either format must be accessible to the campus community on-site. This means that if you have separate campuses that have on-campus student housing facilities, a fire log must be available at, or accessible from, each campus. Information from the log should be used in calculating the statistics to include in the annual fire safety report and the fire statistics submitted to the Department. These statistics must also be disclosed to your students and employees, and prospective students and employees.

What Are Reported Fires?

Reported fires include fires that were already extinguished as well as those discovered while still burning. They include emergency situations involving fires that necessitated a call to 911 for fire department assistance, as well as minor fires, such as a small trash can fire that was easily extinguished without assistance. Fires can be reported by anyone, regardless of the individual's association with your institution.

Unlike *Clery Act* crime reporting, in which a crime is "reported" when it is brought to the attention of a campus security authority or a local law enforcement agency, there are no such restrictions with fire reporting. Any student housing fire that is reported to any official at your institution must be documented in your fire log. An **official** is *any person who has*

Fire log citation
34 CFR 668.49(d)

Reported fires include fires that were already extinguished as well as those discovered while still burning.

Any student housing fire that is reported to any official at your institution must be documented in your fire log.

the authority and the duty to take action or respond to particular issues on behalf of the institution. To help ensure that fire reports get entered into your fire log, your institution must have and disclose a policy and procedures informing students and employees of the individuals or organizations to whom fires should be reported. (More about this in Chapter 14.)

Figure 14. Examples of Reported Fires

Scenario 1: A student calls a resident assistant from his cell phone to report a small fire in a dorm laundry room. When the RA gets to the laundry room there is no evidence or indication of a fire. He asks the student who made the report where the fire was and the student tells him that a paper had been set on fire on the bulletin board by someone on his way out of the room. The student extinguished the burning paper immediately and then called the RA. The RA must document the report and forward it to the office maintaining the log for entry in the fire log.

Scenario 2: A maintenance worker is repairing a kitchen sink at a Greek house on campus. He notices that the stove is scorched and asks a couple of students what happened. They tell him that several months ago they had a fire while making dinner. The maintenance worker asks the students if they reported the fire and they tell him that they didn't because they were able to extinguish it themselves. The maintenance worker forwards the report to the office maintaining the log for entry into the fire log.

Scenario 3: The city of College Park's fire department responds to an active fire alarm set off by a smoke detector in a student dormitory on campus. Fire personnel investigate but do not find evidence of a fire. The fire department determines that workmen using power tools to repair a bathroom fan set off the smoke detector. They call the school's security department to report their findings. The security department documents the report in the department's incident log but does not enter it into the fire log.

Scenario 4: The fire department responds to a fire in the dumpster next to an on-campus residence hall. Although not required to enter this fire in the fire log because it occurred **outside of** an on-campus student housing facility, the school decides to enter the fire in the log for internal record-keeping purposes. (The school should **not** include this fire in its on-campus student housing facility fire statistics discussed in Chapter 13.)

Creating a Fire Log

Required Fire Log Elements

The law allows flexibility in how you design your fire log but you must include certain elements. For each fire, the log must include

- the date the fire was reported;
- the nature of the fire;
- the date and time of the fire; and
- the general location of the fire.

You may include other data elements or columns in your log for internal record-keeping purposes, but this additional information is not required by the *HEA*. You also may include entries for fires other than those in on-campus student housing facilities, but you are not required to do so. If you record such fires, do not include statistics for them in your *HEA*-mandated annual fire safety report unless they are presented in a separate table or in a caveat.

The Date the Fire Was Reported

Use the date that the fire was initially reported. For example, if the fire was reported to a campus dean on a Friday and the dean reported it the following Monday to the office maintaining the log, Friday's date would be entered in the log. Enter the date the fire was reported **regardless** of how much time has passed since the fire occurred.

Enter the date the fire was reported regardless of how much time has passed since the fire occurred.

The Nature of the Fire

For this category you may simply use the causes listed under "Cause of Fire" in Chapter 13, or you may elaborate on them. Whatever you choose to do, enter a description that allows the reader to know what type of fire occurred. For example, instead of "accidental" or "Arson," enter "room fire caused by electrical malfunction" or "bulletin board intentionally set on fire." Use descriptions that anyone reading the log can understand. Don't use codes, acronyms or abbreviations.

The Date and Time of the Fire

Enter the date the fire occurred **and** the time it started. If you do not know the time the fire started, enter the time it was first noticed. If this information is not available, enter an approximation or a range, or enter “unknown.”

The General Location of the Fire

Enter the location of the fire but do not provide personally identifying information. For example, enter “Fourth Floor, North Campus Hall” rather than “Room 404, North Campus Hall.”

Figure 15. Sample Fire Log With Required Elements

Fire Log March 2015

Date reported	Case Number	Nature of fire	Date and Time of Fire	Location
03/12/2015	2015F-1200	Cigarette thrown in trash can	03/11/2015 Approx. 5:30 p.m.	North Campus Hall lounge
03/25/2015	2015F-1201	Flyer set on fire	03/25/2015 Btw. 2 and 6 a.m.	Third-floor hall in Theta Chi house

Maintaining the Fire Log

Your institution must make an entry or an addition to an entry to the log within two business days of receiving the information. A business day is any day Monday through Friday, except for days when the institution is closed. If you have an electronic log, and you experience a software or computer problem, use a hard copy log as a temporary replacement. Make the fire log for the most recent 60-day period open to public inspection, upon request, during normal business hours. Make any portion of the log older than 60 days available within two business days of a request for public inspection. Anyone may have access to the log, whether or not they are associated with your institution. This includes the media.

Provide students and employees with a description of the log, noting its location and availability. Your institution may decide who or what department is responsible for maintaining the log and where it should be kept if it's a hard copy log. Keep your archived fire logs for three years following the publication of the last annual fire safety report to which it applies (in effect, seven years; see page 9-11).

Combining Your Fire Log With Your Daily Crime Log

If your institution has a campus police or security department and is required to maintain a daily crime log for *Clery Act* reporting (see Chapter 5), you may use that same log for your fire log. Label it in a manner that lets people know that it is both a crime log and a fire log. Make sure that it contains the required elements for both logs. You also may keep separate crime and fire logs.

Note that if you have separate logs, they should differ as follows in terms of reporting fires: The **fire log** must record all reported fires, including Arson, in on-campus student housing facilities. The **crime log** records all Arsons and attempted Arsons reported to a CSA that occur on campus (including student housing facilities), on public property, in noncampus buildings or property or within the patrol jurisdiction of that department.

Reporting to the Campus Community

The law states that an institution must make an annual report to the campus community on the fires recorded in the fire log. This requirement may be satisfied by the annual fire safety report. This report is described in detail in Chapter 14.

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Fire Statistics:

Classifying and Counting Fires in On-campus Student Housing Facilities

CHAPTER 13



In addition to the disclosure of your institution's fire safety-related policies and procedures, your annual fire safety report must contain **statistics for reported fires in on-campus student housing facilities**. This chapter discusses in detail the various categories of required statistics.

You must collect and include statistics for **each** on-campus student housing facility **separately** for the three most recent calendar years (i.e., Jan. 1 through Dec. 31) for which data are available. You may treat a group of attached buildings, such as a row of townhouses, as a single student housing facility if they share a name and have the same fire safety policies and systems. All other student housing facilities must be reported separately.

If there were no reported fires in **any** of your on-campus student housing facilities in the three most recent calendar years, you may simply list the name and address of each facility in your annual fire safety report and state that there were no reported fires in the facilities for the reporting years. You must, however, enter 0 for each on-campus student housing facility in your Web-based survey.

Required Fire Statistics

Identify each facility by name and street address, and for each facility include

1. the number of fires and the cause of each fire

A **fire**, for the purposes of the *HEA*, is *any instance of open flame or other burning in a place not intended to contain the burning or in an uncontrolled manner*.

(For more information about what is and isn't a fire, please see Chapter 11.)

*Fire statistics disclosure
citation*
34 CFR 668.49(c)

“Cause of fire” is defined as *the factor or factors that give rise to a fire. The causal factor may be, but is not limited to, the result of an intentional or unintentional action, mechanical failure, or act of nature.*

Use the following guide, Classifications of Fire and Examples, to help identify the cause of a fire.

Figure 16. Classifications of Fire and Examples

Unintentional Fire. (A fire that does not involve an intentional human act to ignite or spread fire into an area where the fire should not be.)

Cause	Example
Cooking	Grease fire on stove top or in oven or microwave
Smoking Materials	Discarded lit cigarette butt
Open flames	Candles
Electrical	Electrical arcing, overheated electrical motor
Heating equipment	Heating stoves, space heaters, fireplaces, furnaces, water heaters
Hazardous products	Spontaneous combustion; chemical reaction
Machinery/Industrial	Heat from friction, (e.g., fan belts); cutting and welding
Natural	Fires that result from a natural phenomenon, such as lightning, tornadoes and earthquakes
Other	Fireworks (including sparklers), paper caps, party poppers, and firecrackers; sunlight (usually magnified through glass or a bottle); fires that start in a building that is not an on-campus student housing facility and spread to an on-campus student housing facility

Intentional Fire. (A fire that is ignited, or that results from a deliberate action, in circumstances where the person knows there should not be a fire.)

Example: Fire in a dorm restroom has been investigated by fire authorities and determined to be Arson. Perpetrator used matches to ignite paper towels.

NOTE: Provide a description of all intentional fires. (For more information on intentional fires, see “Arson” in Chapter 3.)

Undetermined Fire. (A fire in which the cause cannot be determined.)

Example: Investigators cannot determine whether a couch was smoldering because someone accidentally dropped a lighted cigarette behind a cushion, or because someone intentionally set it on fire.

2. the number of persons who received fire-related injuries that resulted in treatment at a medical facility, including at an on-campus health center

A “**fire-related injury**” is defined as *any instance in which a person is injured as a result of a fire, including an injury sustained from a natural or accidental cause, while involved in fire control, attempting rescue, or escaping from the dangers of the fire. The term “person” may include students, employees, visitors, firefighters or any other individuals.*

Include

- individuals who are transported to a medical facility (even if they refuse treatment at the facility);
- individuals who are treated at a temporary medical facility that is set up at the fire site; and
- individuals who are treated in an ambulance.

Do not include

- individuals who appear to be injured but refuse to be treated or transferred to a medical facility; and
- individuals more than one time for a single fire. If an individual is treated at a medical facility, and is later transferred to a different medical facility, count this as one person with fire-related injuries.

3. the number of deaths related to a fire

A “**fire-related death**” is defined as *any instance in which a person*

- (1) *is killed as a result of a fire, including death resulting from a natural or accidental cause while involved in fire control, attempting rescue, or escaping from the dangers of a fire; or*
- (2) *dies within one year of injuries sustained as a result of the fire.*

Examples of natural causes of fire-related death:

- Lung damage due to smoke inhalation
- Heart problems due to stress or exertion

Examples of accidental causes of fire-related death:

- Getting struck by a falling object
- Getting burned by fallen wires
- Being killed by jumping out of a window

Disclose the number of fire-related deaths for **each** fire. Although the regulations don't require your school to track every individual who has a fire-related injury for the purpose of documenting fire-related deaths, you must make a reasonable effort to ascertain the number of deaths that occur in a one-year period following a fire. A reasonable effort includes

- tracking individuals who are hospitalized a few miles from your school;
- tracking individuals who are still in contact with the school following the fire; and
- documenting deaths that you learn of from other individuals or the media.

4. the value of property damage caused by a fire

“Value of property damage” is defined as *the estimated value of the loss of the structure and contents, in terms of the cost of replacement in like kind and quantity. This estimate should include contents damaged by fire, and related damages caused by smoke, water, and overhaul; however, it does not include indirect loss, such as business interruption.*

Disclose the value of property damage for **each** fire. Include the value of all property damage, even to property not owned or controlled by your institution. (If you want to make an **additional** disclosure to separate out institutional property damage and damage to the personal property of others, you may do so.) Your estimate for structural damage should be based on replacement value, not market value. Make sure to include the value of property destroyed during overhaul.

Overhaul is *the practice of searching a fire scene to detect*

hidden fires or sparks which may rekindle, and to note the possible point of origin and cause of ignition.

Do not include any indirect losses. In addition to business interruption, indirect losses include the cost of emergency housing, personnel costs associated with subsequent cleanup and restoration, and lost tuition.

If you use estimates for property damage rather than actual amounts, use the ranges listed in the following chart to report the value of property damage:

Figure 17. Value Ranges for Estimated Property Damage Due to Fire	
\$0 – 99	\$50,000 – 99,999
\$100 – 999	\$100,000 – 249,999
\$1,000 – 9,999	\$250,000 – 499,999
\$10,000 – 24,999	\$500,000 – 999,999
\$25,000 – 49,999	>\$1,000,000

How to Determine the Value of Property Damage

Property damage can be determined by the property owner or an insurance adjuster. If there is no property damage—for example a brief fire in a trash can that only destroyed discarded cigarette butts—indicate that the damage was in the \$0–\$99 range.

Fires in On-campus Student Housing Facilities That Are Physically Attached to Facilities Not Owned or Controlled by the Institution

Perhaps you have a student housing facility located on the edge of your campus that is attached along one wall to a privately owned establishment, such as a restaurant. A fire that originates in the restaurant kitchen spreads to the student housing facility. Include this as a student housing fire. It is irrelevant whether the building had separate access for the student housing facility and the restaurant, or a single point of access. However, count injuries, damages, etc. only for the student housing facility, not for the restaurant.

Remember, you must identify each on-campus student housing facility and enter the number of reported fires at each facility.

A Note About Arson

As described in the Arson classification section in Chapter 3, the *Clery Act* requires your institution to disclose statistics for fires that are investigated and determined to meet the FBI's UCR definition of Arson. The Arson can occur anywhere within the institution's *Clery Act* geography: on campus (including in on-campus student housing facilities), in or on noncampus buildings or property, and public property. If your institution has a campus police or security department you also must record Arsons that are reported to that department in your daily crime log if the Arson occurs on your *Clery Act* geography or within the department's patrol jurisdiction. This means that an Arson that occurs in an on-campus student housing facility must be disclosed in your annual fire safety report, your fire log, your annual security report and your crime log (if you are required to keep a crime log).

Remember, you must identify each on-campus student housing facility and enter the number of reported fires at each facility. Then, for each fire, enter the cause of the fire, the number of persons who received fire-related injuries that resulted in treatment at a medical facility, the number of deaths related to that fire and the value of property damage related to that fire. If there were no reported fires at a facility, state this, or enter a 0; do not omit the facility from your disclosures.

Figure 18. Sample Fire Statistics Reporting Table for the Annual Fire Safety Report

Statistics and Related Information Regarding Fires in Residential Facilities for 2014						
Residential Facilities	Total Fires in Each Building	Fire Number	Cause of Fire	Number of Injuries That Required Treatment at a Medical Facility	Number of Deaths Related to Fire	Value of Property Damage Caused by Fire ¹
Parker 195 7th St.	2	1	Unintentional/Stove fire	1	0	187.25
		2	Unintentional/Stove fire	0	0	665.23
Hacket 210 7th St.	0	0	N/A	N/A	N/A	N/A
Cooper 24 8th St.	1	1	Unintentional/Fire in oven	0	0	0.00
Tyler 49 8th St.	0	0	N/A	N/A	N/A	N/A
Carter 206 9th St.	0	0	N/A	N/A	N/A	N/A
Becket 209 9th St.	0	0	N/A	N/A	N/A	N/A
Denali 490 9th St.	0	0	N/A	N/A	N/A	N/A
Eisner 495 9th St.	0	0	N/A	N/A	N/A	N/A
Grant 491 9th St.	2	1	Unintentional/Fire in basement trash chute	0	0	5,895.00

¹ Values are in dollars.

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The Annual Fire Safety Report: Publishing Policy Statements and Fire Statistics

CHAPTER 14



An institution that maintains any on-campus student housing facilities must publish an annual fire safety report by Oct. 1. This is a firm deadline; there is **no grace period** and there are **no exemptions**. The purpose of this report is to disclose fire safety policies and procedures related to your **on-campus student housing** and to disclose statistics for fires that occurred in those facilities.

You may publish your annual fire safety report together with your *Clery Act*-required annual security report as long as the title of the document clearly states that it contains both reports. There is no prescribed order for the reports. If you choose to publish the reports together one year and separately the next year, you may. If you choose to publish the reports separately, you must include information in each report about how to **directly access** the other report. This means that you can't simply say that the other report is available; you must describe how an individual can obtain that report. The publication requirements for the fire safety report are the same as those for the annual security report and are found in Chapter 9. Remember that if you have a **foreign campus** with on-campus student housing facilities, an annual fire safety report must also be published for that campus.

The law doesn't require your institution to adopt particular policies, procedures, programs or practices with respect to fire safety; the law prescribes how your institution collects, reports and disseminates the required information. The report must disclose your **current** policies, procedures, practices and rules. Descriptions of what your institution does regarding fire safety must be accurate and clear. For example, anyone reading your procedures for student housing evacuation in the case of a fire should be able to understand exactly what those procedures are, and the order in which they should be

*Annual fire safety report
citation*
34 CFR 668.49(b)

**The publication
requirements for
the fire safety
report are the
same as those for
the annual
security report
and are found in
Chapter 9.**

followed. Your institution must adhere to the policies and procedures it discloses.

If your institution does not have any fire safety experts on site, we suggest that you contact local experts, such as the fire marshal, fire chief, fire investigator or other local fire authorities for assistance in developing appropriate policies and procedures.

Components of the Fire Safety Report

At a minimum, the fire safety report must contain the components that are listed below. There is no prescribed order. All of the components pertain to on-campus student housing facilities, not the campus as a whole.

1. Description of each on-campus student housing facility fire safety system.

A “**fire safety system**” is defined as *any mechanism or system related to the detection of a fire, the warning resulting from a fire, or the control of a fire. This may include sprinkler systems or other fire extinguishing systems, fire detection devices, stand-alone smoke alarms, devices that alert one to the presence of a fire, such as horns, bells, or strobe lights; smoke-control and reduction mechanisms; and fire doors and walls that reduce the spread of a fire.*

What does this mean?

Your statement should describe the fire safety system in **each** of your on-campus student housing facilities. It isn’t enough to provide a general description of fire safety systems used in your facilities. A reader should be able to look for a specific facility and read a description for that facility.

If you are not sure whether a specific mechanism or system is part of a fire safety system, ask yourself if the mechanism or system is related to the

- **detection** of a fire,
- **warning** resulting from a fire, or
- **control** of a fire.

For example, your institution might have egress lighting in the dormitories. Although egress lighting can be an element of a campus safety system, it is not part of a fire safety system because it is not used to detect, warn of or control a fire.

The elements included in the definition of a fire safety system are examples. The fire safety system or systems you describe may differ.

You have flexibility in how your institution addresses this requirement. The goal is to ensure that, at a minimum, students and families have enough information to understand what type of fire safety system is used in each on-campus student housing facility. For example, you may create a table that lists each student residential facility by name and has columns for checking whether a facility has any or all of the various systems and mechanisms identified, such as smoke alarms, fire doors, sprinkler systems, etc. If you use terms such as “full” or “partial” to describe a fire suppression system, explain what is meant by “full” or “partial.”

The regulations don’t require your institution to provide specific detailed information on your fire safety system or other systems, such as maintenance or inspection schedules. However, you may provide this or other pertinent information as you choose.

Note that although you must disclose fire statistics for the previous three calendar years, your description of each on-campus student housing facility fire safety system must reflect the system that is currently in place.

Figure 19. Sample Description of On-campus Student Housing Facility Fire Safety Systems

Fire Safety Systems in Residential Facilities

Facility	Fire Alarm Monitoring Done On-Site (by UPD)	Partial *1 Sprinkler System	Full *2 Sprinkler System	Smoke Detection	Fire Extinguisher Devices	Evacuation Plans & Placards	Number of Evacuation (Fire) Drills Each Calendar Year
Hacket 210 7th St.	X	X		X	X	X	2
Cooper 24 8 th St	X		X	X	X	X	4
Carter 206 9th St.	X	X		X	X	X	4
Becket 209 9th St.	X		X	X	X	X	2
Denali 490 9th St.	X		X	X	X	X	2
Eisner 495 9th St.	X		X	X	X	X	2
Grant 491 9th St.	X		X	X	X	X	2
Parker 195 7 th St	X	X		X	X	X	2

2. Number of fire drills held during the previous calendar year.

What does this mean?

A “**fire drill**” is defined as *a supervised practice of a mandatory evacuation of a building for a fire*. Disclose the number of fire drills held during the previous calendar year for each on-campus student housing facility. If no fire drills were held for a facility during this time period, you must indicate this. The requirement for a fire drill cannot be met by a false alarm that leads to the evacuation of a building, even if the evacuation is supervised. A drill involves planning, supervision and evaluation.

3. Policies or rules on portable electrical appliances, smoking and open flames in a student housing facility.

What does this mean?

Disclose all of your institution’s policies or rules on portable electrical appliances, smoking and open flames in your on-campus student housing facilities. It’s not adequate to state that you have such policies or rules; you must disclose the specifics and you must address all three categories: portable electrical appliances, smoking and open flames. If some rules apply to certain facilities only, state this.

4. Procedures for student housing evacuation in the case of a fire.

What does this mean?

Disclose your institution’s procedures for evacuating a student housing facility in the case of a fire. If specific exits should be used or relocation procedures should be followed, state this. If the procedures differ by student housing facility, your statement must describe the specific procedures for each facility.

5. Policies regarding fire safety education and training programs provided to the students and employees. In these policies, the institution must describe the procedures that students and employees should follow in the case of a fire.

What does this mean?

Disclose all of your institution's policies related to fire safety education programs and fire safety training programs associated with on-campus student housing facilities. Include in-person and online programs, as applicable. Describe all procedures that students should follow in the case of a fire, as well as all procedures that employees should follow in the case of a fire. The policy statement must cover all employees involved in student housing and areas related to student housing, for example, residential life staff, student affairs staff, student personnel services staff, residence hall directors, residential education staff and summer housing staff. If any of your student housing facilities has an attached parking garage or dining hall (as described in the bullets under the "Definition of a Fire" section in Chapter 11), include employees associated with those areas. You may include other employees as well.

6. For purposes of including a fire in the statistics in the annual fire safety report, a list of the titles of each person or organization to which students and employees should report that a fire occurred.

What does this mean?

This is a list of the titles of the people or organizations that should be told after the fact that a fire occurred. It is not a list of whom to notify that there is a fire emergency. That information should be included in "the procedures that students and employees should follow in the case of a fire," as described in component no. 5 above.

7. Plans for future improvements in fire safety, if determined necessary by the institution.

What does this mean?

Your plan can be limited to "Our institution is going to do the following ..." or can include "If we obtain funding we'd like to do the following ..." We suggest that you include information that tells the reader why the improvements are necessary. Do not simply state that the institution has plans for

future improvements without indicating what those improvements will be. You may, but are not required to, include a time line.

If you determine that future improvements in fire safety are not necessary, state this.

8. Fire statistics.

Your annual fire safety report must include statistics for reported fires in on-campus student housing facilities. This requirement is discussed in detail in Chapter 13.

In addition to including fire statistics in your annual fire safety report, your institution is required to **submit the statistics from that report to the Department**. The mechanism for doing this is the annual online Campus Safety and Security Survey that takes place in the fall. A registration packet with survey information, a password and a user ID are sent to the chief executive officer of your institution several weeks prior to the start of the data collection.

Specific screen-by-screen instructions for completing the survey and submitting it to the Department are included in the user's guide for the survey, which can be found at <https://surveys.ope.ed.gov/campussafety>. You can get additional help with the survey by phone at 800-435-5985 or by e-mail at campussafetyhelp@westat.com. Your institution's fire statistics will subsequently be migrated to the Department's public dissemination site at: <http://ope.ed.gov/campussafety> where any interested person can view them. The public site also can be used to generate reports using aggregated data from all of the schools that submit *HEA*-related crime and fire statistics. You can find more information about the annual data collection in Chapter 9.

Appendix A

Links to the *Higher Education Act of 1965* Safety- and Security-related Laws and Regulations

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Links to the *Higher Education Act of 1965* Safety- and Security-related Laws and Regulations

***Federal Register*, Nov. 1, 1999 (Vol. 64, No. 210),**

Student Assistance General Provision; Final Rule.

34 CFR 668.41, Reporting and Disclosure of Information

34 CFR 668.46, Institutional Security Policies and Crime Statistics

<http://www.ed.gov/legislation/FedRegister/finrule/1999-4/110199d.html>

***Federal Register*, Oct. 31, 2002 (Vol. 67, No. 211),**

Student Assistance General Provision; Final Rule.

34 CFR 668.46, Institutional Security Policies and Crime Statistics

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=02-27599-filed

***Federal Register*, Oct. 29, 2009 (Vol. 74, No. 208),**

General and Non-Loan Programmatic Issues; Final Rule.

34 CFR 668.41, Reporting and Disclosure of Information

34 CFR 668.46, Institutional Security Policies and Crime Statistics

34 CFR 668.49, Institutional Fire Safety Policies and Fire Statistics

<http://edocket.access.gpo.gov/2009/E9-25373.htm>

***Higher Education Opportunity Act*, Aug. 14, 2008.**

Program Participation Agreement Requirements

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ315.110

***Federal Register*, Oct. 20, 2014 (Vol. 79, No. 202),**

Violence Against Women Act; Final Rule.

34 CFR 668.46, Institutional Security Policies and Crime Statistics

<http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/html/2014-24284.htm>

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Appendix B

Sample Letter to a Local Law Enforcement Agency to Request Crime Statistics

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Sample Letter to a Local Law Enforcement Agency to Request Crime Statistics

Jan. 21, 2016

(Name)
Research Analyst
Metropolitan Police Department
300 Indiana Ave. NW, Suite 5126
Washington, DC 20001

Dear (Name),

Under the federal *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)*, postsecondary schools are required to disclose statistics for certain crimes that occurred on campus and on public property within and immediately adjacent to school-owned buildings and property. In the statistics we are required to include crimes that were reported to our department as well as crimes reported to local and state law enforcement agencies.

I am requesting that your department provide me with **crime statistics for 2015** for the following offenses that occurred on our campus or on public property within and immediately adjacent to our property:

- Murder/Non-negligent Manslaughter
- Manslaughter by Negligence
- Rape
- Fondling
- Incest
- Statutory Rape
- Robbery
- Burglary
- Aggravated Assault
- Motor Vehicle Theft
- Arson

Please specify if any of the above-listed offenses were categorized as Hate Crimes. In addition, please include statistics for any incidents of Larceny-Theft, Simple Assault, Intimidation, or Destruction/Damage/Vandalism of Property that were classified as Hate Crimes. I also need the category of bias for each Hate Crime according to the eight categories for which we are required to report: Race, Religion, Sexual Orientation, Gender, Gender Identity, Disability, Ethnicity, and National Origin.

Please include statistics for **arrests** only for the following Uniform Crime Reporting (UCR) categories:

- Liquor Law Violations
- Drug Abuse Violations
- Weapons: Carrying, Possessing, Etc.

Please include **separate** statistics for all incidents of Domestic Violence, Dating Violence, and Stalking. For *Clery Act* reporting, we are required to use the following definitions for these terms:

Domestic Violence: The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

Dating Violence: The term “dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

- (i) The length of the relationship.
- (ii) The type of relationship.
- (iii) The frequency of interaction between the persons involved in the relationship.

Stalking: The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—(A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

I am requesting the required statistics for the following areas that are considered to be “on campus”:

- 1900–2200 blocks of Pennsylvania Ave.
- 2300 block of K St.
- 2000-2300 blocks of I St.
- 2000-2300 blocks of H St.
- 2000-2300 blocks of G St.
- 1900-2200 blocks of F St.

I also need crime statistics for the following specific addresses:

1129 New Hampshire Ave.
2400 Virginia Ave.
2601 Virginia Ave.
1776 G St.
2011 I St.
2020 K St.
2021 K St.

I would appreciate it if you would forward this information to me as soon as you get an opportunity. We are in the process of publishing our annual report, and we will need to include these statistics in the final draft.

In addition, if a serious crime that may cause an ongoing threat to our campus community is reported to your department, we would appreciate it if you would notify our University Police Department immediately. The institution has a legal responsibility to notify the campus community in a timely manner about any crimes on and immediately around the campus that pose an ongoing threat to the community.

Thank you for your attention to this matter.

Sincerely,

(Name)
Chief of University Police
(Phone Number)

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Appendix C

Checklist for Campus Safety and Security Compliance

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Checklist for the Various Components of Campus Safety and Security Compliance

This list is designed to help you determine if you are meeting the various components of campus safety and security compliance. It is not a substitute for reading this handbook, as it provides only a brief description of the activities to be undertaken by an institution. Remember, if your institution has any separate campuses (see bullet no. 6 under “Other On-campus Considerations” in Chapter 2), the requirements must be met for each one individually.

I. Geography (Chapter 2) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	
Date information was last updated	

Your institution must disclose statistics for *Clery Act* crimes that occur on campus, in or on noncampus buildings or property and on public property.

Do you have an up-to-date list of the buildings and properties that your institution owns or controls and addresses for those buildings/properties? ☐

Have you identified the appropriate geographic categories to which the buildings and property belong? ☐

Have you identified public property that is within your campus or immediately adjacent to and accessible from your campus? ☐

II. Crime Statistics (Chapter 3) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	

Your institution must collect statistics for reported crimes on your *Clery* geography. You must disclose the statistics in your annual security report and provide the statistics to the Department through the annual Web-based data collection.

Do you have all records associated with your institution’s statistics? ☐

III. Campus Security Authorities (Chapter 4) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

In addition to any campus police or security personnel, your institution must identify other individuals or offices with significant responsibility for student and campus activities. Alleged crimes reported *to* these campus security authorities are then reported *by* these campus security authorities to someone designated by the institution to collect such reports, such as the campus police or security department.

Have you identified all of your institution's campus security authorities? ☐

Have you provided your campus security authorities with the information and materials they need to document reported crimes? ☐

Do you have a procedure in place for collecting and reviewing crime reports from your campus security authorities? ☐

IV. Statistics From Local Law Enforcement Agencies (Chapter 4) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution must make a good-faith effort to collect crime statistics for all *Clery Act* crimes committed in applicable geographic locations from all law enforcement agencies with jurisdiction for your institution.

Have you made a good-faith effort to obtain the crime statistics from all of the law enforcement agencies with jurisdiction for your *Clery* geography? ☐

Have you requested statistics for *all* of your *Clery* geography? ☐

Have you documented your institution's efforts to obtain the statistics and, if applicable, documented any nonresponse on behalf of an agency (or agencies)? ☐

V. The Daily Crime Log (Chapter 5) Mandatory for all institutions with a campus police or security department.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution must record all alleged criminal incidents, including non-*Clery Act* crimes, reported to the campus police or security department regardless of how much time has passed since the alleged incident occurred. Crimes are recorded in the crime log by the date they are reported. The log must be available for review by the public.

Do you have a hard copy or electronic crime log that includes information on all reported crimes, including

the nature of the crime? ☐

the date and time the crime occurred? ☐

the general location of the crime? ☐

the disposition of the complaint, if known? ☐

If you maintain an electronic log, do you have a back-up log in case there are technical problems accessing the log? ☐

Do you have more than one person trained to maintain the log? ☐

Do you notify the public how they can review the log? ☐

VI. Emergency Response and Evacuation Procedures (Chapter 6) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution must immediately notify the campus community (or a segment or segments of the campus community) upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.

Does your institution have written emergency response and evacuation procedures that include the following?

The procedures the institution will use to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus?..... ☐

A description of the process the institution will use to

- a) confirm that there is a significant emergency or dangerous situation as described above? ☐
- b) determine the appropriate segment or segments of the campus community to receive a notification? ☐
- c) determine the content of the notification? ☐
- d) initiate the notification system? ☐

A statement that the institution will, without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system, unless issuing a notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to or otherwise mitigate the emergency?..... ☐

A list of the titles of the person or persons or organization or organizations responsible for carrying out the actions described in (a) through (d) above?..... ☐

The institution's procedures for disseminating emergency information to the larger community?..... ☐

The institution's procedures to test the emergency response and evacuation procedures on at least an annual basis, including

tests that may be announced or unannounced? ☐

publicizing its emergency response and evacuation procedures in conjunction with at least one test per calendar year? ☐

documenting, for each test, a description of the exercise, the date and time and whether it was announced or unannounced? ☐

Has your institution communicated with local police requesting their cooperation in informing the institution about situations reported to them that may warrant an emergency response? ☐

VII. Timely Warnings (Chapter 6) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution must alert the campus community regarding any *Clery Act* crime that is reported to campus security authorities or local police agencies and is considered to represent a serious or continuing threat to students and employees.

Does your institution have a written timely warning policy? ☐

Does your institution have an individual or office responsible for issuing timely warnings? ☐

Does your institution have one or more methods of disseminating timely warnings? ☐

Has your institution communicated with local police requesting their cooperation in informing the institution about crimes reported to them that may warrant timely warnings? ☐

VIII. Annual Security Report (Chapters 7–9) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution is required to publish and distribute an annual security report by Oct. 1 to all enrolled students and all employees. You must provide notice of the availability of the report to all prospective students and employees. The report must contain crime statistics and various policy statements. The statements must accurately reflect how your institution's policies are currently implemented.

Policy statements

Does your annual security report have statements addressing the following?

Current campus policies regarding procedures for students and others to report criminal actions or other emergencies occurring on campus? Does this statement include your institution's policies concerning its response to these reports, and does it specifically address the following areas?

Policies for making timely warning reports to members of the campus community regarding the occurrence of *Clery Act* crimes? ☐

Policies for preparing the annual disclosure of crime statistics? ☐

- A list of titles of each person or organization to whom students and employees should report criminal offenses described in the law for the purpose of making timely warning reports and the annual statistical disclosure? This statement also must disclose the institution's policies or procedures for victims or witnesses to report crimes on a voluntary, confidential basis for inclusion in the annual security report..... ☐
- Current policies concerning the following:
- Security of and access to campus facilities, including campus residences? ☐
 - Security considerations used in the maintenance of campus facilities? ☐
- Current policies concerning campus law enforcement, including the following:
- The law enforcement authority and jurisdiction of campus security personnel? ☐
 - The working relationship of campus security personnel with state and local law enforcement agencies, including whether the institution has agreements with such agencies, such as written memoranda of understanding, for the investigation of alleged criminal offenses?..... ☐
 - Policies that encourage accurate and prompt reporting of all crimes to the campus police and the appropriate law enforcement agencies?..... ☐
 - A description of procedures, if any, that encourage pastoral counselors and professional counselors, if and when they deem it appropriate, to inform the persons they are counseling of any procedures to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics?..... ☐
 - A description of the type and frequency of programs designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others? ☐
 - A description of programs designed to inform students and employees about the prevention of crimes?..... ☐
 - A policy concerning the monitoring and recording, through local police agencies, of criminal activity in which students engaged at off-campus locations of student organizations officially recognized by the institution, including student organizations with off-campus housing facilities? ☐
 - A policy regarding the possession, use and sale of alcoholic beverages and enforcement of state underage drinking laws? ☐
 - A policy regarding the possession, use and sale of illegal drugs and enforcement of federal and state drug laws? ☐

A description of any drug or alcohol abuse education programs as required under Section 120(a) through (d) of the *HEA*. For the purpose of meeting this requirement, an institution may cross-reference the materials it uses to comply with Section 120(a) through (d) of the *HEA*? ☐

A statement that the institution will, upon written request, disclose to the alleged victim of a crime of violence (as that term is defined in Section 16 of Title 18, United States Code), or a non-forcible sex offense, the report on the results of any disciplinary proceeding conducted by such institution against a student who is the alleged perpetrator of such crime or offense? If the alleged victim is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim for purposes of this paragraph.. ☐

A statement regarding your institution's emergency response and evacuation procedures? (See this checklist's no. VI for details.) ☐

A statement regarding your missing student notification procedures? (See this checklist's no. X for details.) ☐

Does your annual security report have a statement addressing your institution's program to prevent dating violence, domestic violence, sexual assault and stalking? Does your statement specifically include the following?

A description of educational programs and campaigns to promote the awareness of dating violence, domestic violence, sexual assault and stalking, including the following?

A description of the primary prevention and awareness programs for all incoming students and new employees? ☐

A statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault and stalking as those terms are defined for purposes of the *Clery Act*? ☐

The definition of "dating violence," "domestic violence," "sexual assault" and "stalking" as those terms are defined in the applicable jurisdiction? ☐

The definition of "consent" in reference to sexual activity in the applicable jurisdiction? ☐

A description of safe and positive options for bystander intervention? ☐

Information on risk reductions? ☐

A description of the ongoing prevention and awareness campaigns for students and employees that provide the same information as above? ☐

Procedures students should follow in the case of alleged dating violence, domestic violence, sexual assault, or stalking, including:

Written information about the importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order? ☐

How and to whom the alleged offense should be reported? ☐

- Options about the involvement of law enforcement authorities and campus authorities, including notification of the victim's option to
- Notify proper law enforcement authorities, including on-campus and local police? ☐
 - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses? ☐
 - Decline to notify such authorities? ☐
- Where applicable, the rights of victims and the institution's responsibilities for orders of protection, "no contact" orders, restraining orders or similar lawful orders issued by a criminal, civil or tribal court, or by the institution? ☐
- Procedures your institution will follow in the case of alleged dating violence, domestic violence, sexual assault, or stalking, including the following?
- Information about how the institution will protect the confidentiality of victims and other necessary parties? Does your statement specifically address how your institution will do the following?
- Complete publicly available recordkeeping, including *Clery Act* reporting and disclosures, without inclusion of personally identifying information about the victim? ☐
 - Maintain as confidential any accommodations or protective measures provided to the victim, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the accommodations or protective measures? ☐
- A statement that the institution will provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid and other services available for victims, both within the institution and in the community? ☐
- A statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation and working situations or protective measures? The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement. ☐
- A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault or stalking and that includes the following?

- Describes each type of disciplinary proceeding used by the institution; the steps, anticipated timelines and decision-making process for each type of disciplinary proceeding; how to file a disciplinary complaint; and how the institution determines which type of proceeding to use based on the circumstances of an allegation of dating violence, domestic violence, sexual assault or stalking? ☐
- Describes the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault or stalking? ☐
- Lists all the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault or stalking? ☐
- Describes the range of protective measures that the institution may offer to the victim following an allegation of dating violence, domestic violence, sexual assault or stalking? ☐
- Provides that the proceeding will accomplish the following?
- Include a prompt, fair and impartial process from the initial investigation to the final result? ☐
- Be conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability? ☐
- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice? ☐
- Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding? ☐
- Require simultaneous notification, in writing, to both the accuser and the accused of the following?
- The result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault or stalking? ☐
- The institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available? ☐
- Any change to the result? ☐
- When such results become final? ☐

A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options?

☐

Have you provided a statement advising the campus community where law enforcement agency information provided by a state concerning registered sex offenders may be obtained, such as the law enforcement agency with jurisdiction for the campus or a computer network address?

☐

Crime statistics

Does your annual security report contain statistics reported by year and geographic location for the following crimes?

Offenses

Murder and Non-negligent Manslaughter?
 Manslaughter by Negligence?
 Rape?
 Fondling?
 Incest?
 Statutory Rape?
 Robbery?
 Aggravated Assault?
 Burglary?
 Motor Vehicle Theft?
 Arson?

☐
☐
☐
☐
☐
☐
☐
☐
☐
☐
☐

Hate Crimes

Murder and Non-negligent Manslaughter?
 Rape?
 Fondling?
 Incest?
 Statutory Rape?
 Robbery?
 Aggravated Assault?
 Burglary?
 Motor Vehicle Theft?
 Arson?
 Larceny-Theft?
 Simple Assault?
 Intimidation?
 Destruction/Damage/Vandalism of Property?

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VAWA Offenses

Domestic Violence?
 Dating Violence?
 Stalking?

☐
☐
☐

Arrests and referrals for disciplinary action

Weapons: Carrying, Possessing, Etc.? ☐

Drug Abuse Violations? ☐

Liquor Law Violations? ☐

IX. Report to the Department via the Web-based Data Collection (Chapter 9) Mandatory for all institutions.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution is required to submit the crime statistics from the annual security report to the Department via an annual Web-based data collection. If your institution has one or more on-campus student housing facilities, you must submit the fire statistics from the annual fire safety report as well.

Have you completed the Web-based data collection? ☐

X. Missing Student Notification Procedures (Chapter 10) Mandatory for all institutions with on-campus student housing facilities.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

If a student who lives in on-campus student housing is determined to have been missing for 24 hours, you have only 24 hours after receiving the report in which to initiate specific notification procedures. You must include your missing student notification policy and procedures in your annual security report.

Does your policy statement do the following?

Indicate a list of titles of the persons or organizations to which students, employees or other individuals should report that a student has been missing for 24 hours? ☐

Require that any missing student report must be referred immediately to the institution's police or campus security department, or, in the absence of an institutional police or campus security department, to the local law enforcement agency that has jurisdiction in the area? ☐

Contain an option for each student to identify a contact person or persons whom the institution shall notify within 24 hours of the determination that the student is missing, if the student has been determined missing by the institutional police or campus security department, or the local law enforcement agency? ☐

Advise students that their contact information will be registered confidentially, that this information will be accessible only to authorized campus officials and that it may not be disclosed, except to law enforcement personnel in furtherance of a missing person investigation? ☐

Advise students that if they are under 18 years of age and not emancipated, the institution must notify a custodial parent or guardian within 24 hours of the determination that the student is missing, in addition to notifying any additional contact person designated by the student? ☐

Advise students that the institution will notify the local law enforcement agency within 24 hours of the determination that the student is missing, unless the local law enforcement agency was the entity that made the determination that the student is missing? ☐

Do your procedures include the following?

If the student has designated a contact person, notifying that contact person within 24 hours that the student is missing? ☐

If the student is under 18 years of age and is not emancipated, notifying the student's custodial parent or guardian and any other designated contact person within 24 hours that the student is missing? ☐

Regardless of whether the student has identified a contact person, is above the age of 18, or is an emancipated minor, informing the local law enforcement agency that has jurisdiction in the area within 24 hours that the student is missing? ☐

XI. Fire safety log (Chapter 12) Mandatory for all institutions with on-campus student housing facilities.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution must maintain a written, easily understood fire log that records, by the date reported, any fire that occurs in an on-campus student housing facility. Fires are recorded by the date they are reported.

Do you have a hard copy or electronic fire log that includes the following?

the date the fire was reported? ☐
the nature of the fire? ☐
the date and time of the fire? ☐
the general location of the fire? ☐

Do you notify the public how they can review the log? ☐

XII. Fire Safety Statistics (Chapter 13) Mandatory for all institutions with on-campus student housing facilities.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution must collect statistics for reported fires in on-campus student housing facilities. You must disclose the statistics in your annual fire safety report and provide the statistics to the Department through the annual Web-based data collection.

Do you have statistics for each on-campus student housing facility for the following?

- the number of fires and the cause of each fire? ☐
- the number of persons with fire-related injuries for each fire? ☐
- the number of fire-related deaths for each fire? ☐
- the value of property damage caused by each fire? ☐

XIII. Annual Fire Safety Report (Chapter 14) Mandatory for all institutions with on-campus student housing facilities.

Office/Individual responsible	
Location where documentation is kept	
Date policy and procedure were last updated	

Your institution is required to publish and distribute an annual fire safety report by Oct. 1 to all enrolled students and all employees. You must provide notice of the availability of the report to all prospective students and employees. The report must contain fire statistics and various policy statements. The statements must accurately reflect how the policies are currently implemented by your institution.

Policy statements

Does your annual fire safety report have statements addressing the following?

- A description of each on-campus student housing facility fire safety system? ... ☐
- The number of fire drills held during the previous calendar year? ☐
- Policies or rules on portable electrical appliances, smoking and open flames in a student housing facility? ☐
- Procedures for student housing evacuation in the case of a fire? ☐
- Policies regarding fire safety education and training programs provided to the students and employees? In these policies, the institution must describe the procedures that students and employees should follow in the case of a fire. ☐
- For purposes of including a fire in the statistics in the annual fire safety report, a list of the titles of each person or organization to which students and employees should report that a fire occurred? ☐
- Plans for future improvements in fire safety, if determined necessary by the institution? ☐

Fire statistics

- Does your annual fire safety report contain the required fire statistics? ☐

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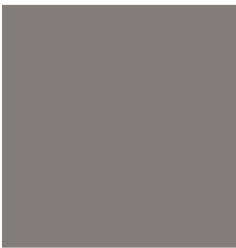
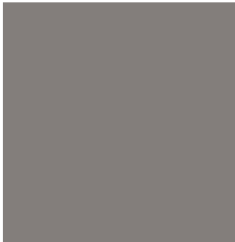
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Complying with Education Law Article 129-B New York State Education

I- Introduction:

This guidance document is joint guidance of the State Education Department and the New York State Office of Campus Safety. It is intended to assist colleges and universities in complying with Education Law Article 129-B, as added by Chapter 76 of the Laws of 2015, relating to the establishment of sexual assault, dating violence, domestic violence and stalking prevention and response policies and procedures. Article 129-B includes §§ 6439-6449 of the Education Law.

II- History of the Legislation:

Governor Andrew Cuomo introduced comprehensive sexual assault prevention legislation as part of the 2015 Executive Budget. Final legislation was passed unanimously in the Senate (S.5965, sponsored by Senator LaValle) and 138-4 in the Assembly (A.8244, sponsored by Assemblymember Glick) on June 17, 2015. On July 7, 2015, Governor Cuomo signed the bill into law as Chapter 76 of the Laws of 2015.

Article 129-B (except for the provisions regarding Climate Surveys [Education Law §6445] and Reporting Aggregate Data to the Department [Education Law §6449]) became effective October 5, 2015. The Climate Survey and Aggregate Data sections take effect in July 2016 with the provisions applying for the 2016-2017 academic year.

III- Rulemaking:

The State Education Department (SED) is required by Education Law §6449(4) to adopt regulations by July 2017 relating to the reporting of aggregate data, in consultation with representatives of SUNY, CUNY, and the private and independent colleges.

IV- Compliance:

Each institution is required by Education Law §6440(1) to adopt written rules implementing this article by amending its code of conduct or other comparable policies. A copy of these rules and policies must be filed with SED on or before July 1, 2016. Updated policies must be filed at least every 10 years, except that the second filing shall coincide with the required filing of a certificate of compliance under Article 129-A of the Education Law, and continue on the same cycle thereafter.

Institutions must also file a certificate of compliance with the provisions of this article with SED on July 1, 2016. If an institution fails to file a certificate of compliance on or before September 1, 2016, and annually thereafter, the institution will be ineligible for any State aid or assistance until the certificate is filed.

SED will conduct random audits, at any time after September 1, 2016 to ensure compliance with the provisions of this article.

V- Provisions and Guidance:

For ease of reference, the following sections appear in the order of the provisions in the legislation. *Text from the legislation is in italics*, and guidance is in regular text.

Where the legislation places text in quotes, it must be adopted using that language. Other than quoted passages, the legislation requires conceptual elements, but does not require any specific word or sentence. Institutions that use slightly different words for covered concepts with the same substantive meaning may use the term consistent with their other policies, even in quoted sentences. For instance, if an institution refers to permanent removal of a student as “dismissal,” in current policies or guidance, it need not change that to “expulsion” to comply with the legislative requirement of a transcript notation for cases of expulsion but can say “dismissed” in the notation instead.

The law requires that each concept be included in policy, but does not require that the elements be in any specific order. While a college may have a single policy incorporating all elements within the code of conduct, it may also take each paragraph and incorporate it into the section of the code of conduct where it is most relevant, so students do not have to hunt around in different sections and cross-compare in order to make sense of the policies. Or, an institution may have both, provided that they are consistent.

Definitions (Section 6439):

As used in this article, the following terms have the following meanings:

1. “Institution” shall mean any college or university chartered by the regents or incorporated by special act of the legislature that maintains a campus in New York.

The legislation defines institution to mean any college or university chartered by the Regents or incorporated by special act of the legislature that maintains a campus. This is precisely the same definition as in Education Law 129-A, and any institutions that have traditionally been covered by that law are also covered by 129-B.

2. *“Title IX Coordinator” shall mean the Title IX Coordinator and/or his or her designee or designees.*

This is important for those requirements the legislation assigns to the Title IX Coordinator. Institutions may allow a Title IX Coordinator to delegate those roles to other individuals. Note that such designee is not required by the law to be denoted a “Deputy Title IX Coordinator” and there is no requirement that all obligations be designated to the same person or group of people. Institutions should use good faith to designate personnel best able to complete the requirements. This is consistent with current federal law and guidance on the role of the Title IX Coordinator.

3. *“Bystander” shall mean a person who observes a crime, impending crime, conflict, potentially violent or violent behavior, or conduct that is in violation of rules or policies of an institution.*

Under the definitions in the statute, a bystander is an individual who witnesses or learns of violence or impending violence, but is not directly impacted as a victim or survivor of this violence. They do not have equivalent rights under federal or state law as a “reporting individual” (victim) who is directly impacted by the violence.

A bystander does not become a “reporting individual” when they bring forth a report. They remain a bystander.

4. *“Code of conduct” shall mean the written policies adopted by an institution governing student behavior, rights, and responsibilities while such student is matriculated in the institution.*

Code of conduct is intended to reference the document or documents that an institution uses to govern student behavior. This does not require that each institution use the name “Code of Conduct.” Some institutions refer to this as an “Honor Code” or “Judicial Code” or a number of other names. Whatever name is used by the institution, where the legislation uses code of conduct, it is referencing that document.

Note that the definition of Code of Conduct in 129-B may differ from the definition of Code of Conduct in 129-A.

5. *“Confidentiality” may be offered by an individual who is not required by law to report known incidents of sexual assault or other crimes to institution officials, in a manner consistent with state and federal law, including but not limited to 20 U.S.C. 1092(f) and 20 U.S.C. 1681(a). Licensed mental health counselors, medical providers and pastoral counselors are examples of institution employees who may offer confidentiality.*

6. *“Privacy” may be offered by an individual when such individual is unable to offer confidentiality under the law but shall still not disclose information learned from a reporting individual or bystander to a crime or incident more than necessary to comply with this and other applicable laws, including informing appropriate institution officials. Institutions may substitute another relevant term having the same meaning, as appropriate to the policies of the institution.*

Confidentiality is a defined term under the statute, and the obligation to keep information in confidence is inherent for certain professionals on campus, such as health care providers, licensed social workers, licensed psychologists and pastoral and professional counselors (including licensed mental health counselors). Many off-campus resources such as rape crisis centers are also confidential, and with the exception of certain child abuse and imminent threats, individuals working in such organizations have no obligation to report information back to the reporting individual’s campus.

Most employees at an institution are required to report known incidents of sexual assault, or other crimes, so they are not confidential resources. Still, most college employees can offer “privacy.” Privacy is the default. It means that an employee may have to share information pursuant to federal or state law or college policy with certain other college employees, but they will not share the private information beyond what is required or needed to comply with law and policy, and will otherwise limit redisclosure as much as possible. They may not however, offer true confidentiality. Each institution should determine which employees may offer true confidentiality as opposed to privacy.

7. *“Accused” shall mean a person accused of a violation who has not yet entered an institution’s judicial or conduct process.*

8. *“Respondent” shall mean a person accused of a violation who has entered an institution’s judicial or conduct process.*

9. *“Reporting individual” shall encompass the terms victim, survivor, complainant, claimant, witness with victim status, and any other term used by an institution to reference an individual who brings forth a report of a violation.*

Institutions may use different words to describe the various roles in the campus conduct or complaint process. These definitions are included to ensure an understanding of the stated rights for the parties that are provided within the legislation. The legislation does not require that each college use this nomenclature, it merely states that, whatever the institution calls the people who meet these definitions, these are the rights and responsibilities that apply to those individuals. The term reporting individual is limited in the statute to those directly impacted by the violation

as victims. A bystander to a violation, or a third party who reports information about a violation that they have learned from a victim, is not themselves a reporting individual.

10. “Sexual activity” shall have the same meaning as “sexual act” and “sexual contact” as provided in 18 U.S.C. 2246(2) and 18 U.S.C. 2246(3).

In order to determine when affirmative consent is required prior to sexual activity, this legislation first defines “sexual activity.” Rather than developing a new definition, the legislation refers to a current definition used by the federal government. 18 U.S.C. 2246(2)-(3) states that:

“(2) the term “sexual act” means—

- A. contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
- B. contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- C. the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- D. the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”

Individuals must obtain affirmative consent prior to engaging in any of the activity referenced above.

11. “Domestic violence”, “dating violence”, “stalking” and “sexual assault” shall be defined by each institution in its code of conduct in a manner consistent with applicable federal definitions.

To assist colleges in preventing and responding to domestic violence, dating violence, sexual assault and stalking, the legislation makes reference to the Clery Act¹ provisions of the Higher

¹ All references to the Clery Act in this guidance reflect the law as most recently amended by the 2013 Reauthorization of the Violence Against Women Act.

Education Act, as amended by the Violence Against Women Act. The relevant definitions appear at pages 62784 and 62789-62790 of the Violence Against Women Act Final Rule, 34 C.F.R. § 668.46, available at <http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

General Provisions (Section 6440):

1. Every institution shall:

a. adopt written rules implementing this article by amending its code of conduct or other comparable policies;

b. annually file with the department on or before the first day of July, beginning in two thousand sixteen, a certificate of compliance with the provisions of this article; and

SED will prepare and distribute a certificate for this purpose, similar to the form provided by SED under Article 129-A.

c. file a copy of all written rules and policies adopted as required in this article with the department on or before the first day of July, two thousand sixteen, and once every ten years thereafter, except that the second filing shall coincide with the required filing under article one hundred twenty-nine-A of this chapter, and continue on the same cycle thereafter.

These provisions are meant to be aligned with the requirements of 129-A. The change to coordinate the second filing with the 129-A filing was made to cut down on the burden for institutions, rather than having institutions file forms in separate decennial cycles. SED will develop a process for institutions to submit copies of their written rules and policies to SED electronically.

2. All institutional services and protections afforded to reporting individuals under this article shall be available to all students and applicable to conduct that has a reasonable connection to that institution. When such conduct involves students or employees from two or more institutions, such institutions may work collaboratively to address the conduct provided that such collaboration complies with the Family Educational Rights and Privacy Act codified at 20 U.S.C. 1232g; 34 C.F.R. Part 99.

Education Law 129-B is not limited by the geographic reporting categories of the Clery Act. The rights and responsibilities of the law apply based on identity of the reporting individual and/or accused/respondent, not based on the geographic location of the violation.

FERPA has waiver provisions that allow institutions to share the records of students participating in joint programs, and, in certain cases, allow record sharing with third parties. This legislation encourages such sharing, within the bounds of federal and state law, to assist each institution with its compliance with this law, as well as relevant federal laws including Title IX and the Clery Act.

3. If an institution fails to file a certificate of compliance on or before September first beginning in two thousand sixteen, such institution shall be ineligible to receive state aid or assistance until it files such a certificate. The department shall conduct audits of institutions by random selection, at any time after September first, two thousand sixteen, to ensure compliance with the provisions of this article, and shall post information and statistics regarding compliance with this article on the department's website.

This section describes audits by SED and potential penalties for non-compliance. As stated later in the description of subdivision 9, there shall be no new private right of action.

4. A copy of such rules and policies shall be provided by each institution to all students enrolled in said institution using a method and manner appropriate to its institutional culture. Each institution shall also post such rules and policies on its website in an easily accessible manner to the public.

Institutions must provide a copy of the rules and policies required by the legislation to each student “using a method and manner appropriate to its institutional culture.” This provides significant flexibility to institutions who should use good faith to provide these policies in a manner aimed to educate, not to check a compliance box. The policies can be compiled together or placed in the appropriate sections of the code of conduct and must be available on the institution's website.

5. The protections in this article apply regardless of race, color, national origin, religion, creed, age, disability, sex, gender identity or expression, sexual orientation, familial status, pregnancy, predisposing genetic characteristics, military status, domestic violence victim status, or criminal conviction.

The law is clear that membership in any protected class does not reduce one's protections under this law. These categories are intended to match current federal and New York State discrimination law protected categories.

6. The provisions of this article shall apply regardless of whether the violation occurs on campus, off campus, or while studying abroad.

Education Law 129-B is not limited in any way by the geographic reporting categories of the Clery Act. The rights and responsibilities of Article 129-B law apply based on identity of the reporting individual and/or accused/respondent, not based on the geographic location of the violation.

7. Institutions shall, where appropriate, utilize applicable state and federal law, regulations, and guidance in writing the policies required pursuant to this article.

A list of resources at the end of this guidance document may assist institutions in drafting policies.²

8. Nothing in this article shall be construed to limit in any way the provisions of the penal law that apply to the criminal action analogous to the student conduct code violations referenced herein. Action pursued through the criminal justice process shall be governed by the penal law and the criminal procedure law.

This subdivision is to make clear that 129-B is distinct from criminal justice process, and vice versa. The processes have different purposes and use different standards and methods.

A team of attorneys from public and private colleges developed a resource to assist colleges in complying with the requirement to educate reporting individuals about the differences in the criminal and conduct process. The resource may be accessed in Word or PDF format at this site: <http://system.suny.edu/sexual-violence-prevention-workgroup/College-and-Criminal-Resource/>³

9. Nothing in this article shall be construed to create a new private right of action for any person.

This is the equivalent to a provision in the Clery Act.

10. Nothing in this article shall be construed to prevent an institution from continuing an investigation when required by law to continue such investigation.

This paragraph is in place to acknowledge the separate and independent responsibility of colleges and universities to investigate violations when required by law, regardless of whether a

² Please note that the list resources attached to this document have not been reviewed and/or endorsed by SED and are provided solely as resources developed by other attorneys and/or institutions to assist higher education institutions in developing their own policies and procedures to comply with this new law.

³ Please note that the list resources attached to this document have not been reviewed and/or endorsed by SED and are provided solely as resources developed by other attorneys and/or institutions to assist higher education institutions in developing their own policies and procedures to comply with this new law.

reporting individual or any other witness chooses to participate in the institution's process and regardless of a decision within the criminal justice process whether or not to proceed investigate.

Affirmative Consent to Sexual Activity (Section 6441):

1. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: "Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression."

2. Each institution's code of conduct shall reflect the following principles as guidance for the institution's community:

a. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.

b. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.

c. Consent may be initially given but withdrawn at any time.

d. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.

e. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.

f. When consent is withdrawn or can no longer be given, sexual activity must stop.

The provisions in the first paragraph must be included verbatim in each code of conduct. The provisions in the second paragraph must be included conceptually in each code of conduct, but they do not have to be included verbatim (institutions may include them verbatim).

Consent must be knowing, voluntary and mutual.

Voluntary consent means that consent under coercion such as a threat of violence is not consent. Mutual means that all parties must consent.

There is no requirement under the definition of consent that there be “verbal” consent or a specific statement of yes. To require a verbal statement would be to exclude hearing and speaking impaired students from consenting to sexual activity. Consent can be given through words or actions so long as the word or action is clear regarding willingness to engage in the sexual activity. The legislation says that silence “in and of itself” is not consent; a reporting individual failing to say no or actively resist is not a defense to a charge of sexual activity without consent. Please be advised that this is a departure from New York State Penal Law relating to criminal charges.

It is common for individuals to engage in multiple sexual acts or sexual contacts during a brief time period (See §6430(10) above for definitions of activity included in sexual act and sexual contact). Whether through words or actions that clearly display consent, each party must affirmatively consent to participating in each sexual act or sexual contact. Consenting to one type of sexual act or contact is not blanket consent to any and all types of sexual contacts. Mutual consent is required for each and may be withdrawn at any time by either party. When consent is withdrawn, the activity must stop. The phrase “[w]hen consent...can no longer be given” refers to a party to a sexual act or sexual contact who initially consents to the activity but during the course of the activity falls asleep or otherwise becomes unconscious or incapacitated. At that point, the other party must stop the sexual activity or contact, and stopping at the point that consent is withdrawn or can no longer be given, can be asserted as a defense to a charge of sexual activity or contact without consent.

Pursuant to paragraph (2)(b), being intoxicated is not a license to engage in sexual activity with another person without their consent. Students who are charged in student judicial or conduct process with initiating sexual activity or contact without the consent of another party cannot use as a defense that they themselves were under the influence of drugs and/or alcohol at the time they committed the violation.

Individuals who are incapacitated cannot consent to sexual activity or contact. Incapacitation is to be determined by a student conduct or investigation process based on available evidence, acknowledging that in almost no cases will scientific evidence of alcohol or drug level (such as a breathalyzer taken at the time of the assault) be available. There is no single standard or number of drinks that leads to incapacitation. This level varies for different people, and may depend in part on their age, gender, height, weight, metabolism and whether and how much they have recently eaten. This provision does not mean that individuals cannot affirmatively consent to

sexual activity or contact when they have been drinking or using drugs. Such individuals may still affirmatively consent through words or actions that clearly indicate interest in engaging in the activity.

Someone who is unconscious, asleep, or involuntarily restrained cannot consent to sexual activity.

Minors who cannot consent under New York's laws covering age of consent are considered incapacitated for purposes of §6441(2)(d) (See New York Penal Law Article 130 et seq.).

Whether all parties consented to sexual activity or contact is to be determined through the student conduct or grievance process. Per Section 6444(5)(c)(ii) below, respondents have a "right to a presumption that the respondent is 'not responsible' until a finding of responsibility is made pursuant to the provisions of this article." This means that the burden of showing that a student had sexual activity or contact with another without affirmative consent as defined here is on the institution, not on the respondent to prove a negative. Note that the burden is on the institution to develop these facts, not on the reporting individual, who may participate at the level to which he or she is comfortable. Through the process, appropriate officials may listen to witnesses and review available evidence to make a determination, to the best of their ability, whether it is more likely than not that a policy violation occurred.

Policy for Alcohol and/or Drug Use Amnesty (Section 6442):

1. Every institution shall adopt and implement the following policy as part of its code of conduct: "The health and safety of every student at the [Institution] is of utmost importance. [Institution] recognizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time that violence, including but not limited to domestic violence, dating violence, stalking, or sexual assault occurs may be hesitant to report such incidents due to fear of potential consequences for their own conduct. [Institution] strongly encourages students to report domestic violence, dating violence, stalking, or sexual assault to institution officials. A bystander acting in good faith or a reporting individual acting in good faith that discloses any incident of domestic violence, dating violence, stalking, or sexual assault to [Institution's] officials or law enforcement will not be subject to [Institution's] code of conduct action for violations of alcohol and/or drug use policies occurring at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault."

2. Nothing in this section shall be construed to limit an institution's ability to provide amnesty in additional circumstances.

The legislation contains provisions that provide amnesty to students reporting incidents under this Article from internal institutional violations for drug or alcohol use. This subdivision does not require amnesty for drug dealers or those who use drugs or alcohol as a weapon or to facilitate assault. It covers personal drug use and possession whether intentional or accidental.

The point of this subdivision is to remove the fear of those who have, legally or illegally, been using or in the presence of drugs or alcohol at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault, that the college would take conduct action related to the use of drugs or alcohol rather than action on the sexual or interpersonal violence

Note that this provision only covers the student disciplinary process. The legislation does not cover the criminal justice process (but see New York State Good Samaritan Law, Penal Law §220.78), does not cover areas outside of conduct, and does not apply to employees of the institution. Note that many higher education institutions operate clinical or residency placements where the prohibition on drug and alcohol use in the workplace is governed by federal or state law or regulation, national standards or accreditation requirements. For example, if a student reports being sexually assaulted in a hospital residency placement while under the influence of prescription drugs stolen from the hospital pharmacy, this section would not prevent the student from being removed from the placement or from having restrictions placed on participation in the placement. The student would have amnesty from student judicial or conduct charges for that prescription drug use.

This section does not limit a college from seeking assistance for a student who is struggling with drug or alcohol addiction or is otherwise in danger provided that the assistance is not disciplinary in nature.

“Occurring at or near the time of the commission” is not defined in the law, and should be implemented reasonably and in good faith by institutions.

Students’ Bill of Rights (Section 6443):

Every institution shall adopt and implement the following “Students’ Bill of Rights” as part of its code of conduct which shall be distributed annually to students, made available on each institution’s website, posted in campus residence halls and campus centers, and shall include links or information to file a report and seek a response, pursuant to section sixty-four hundred forty-four of this article, and the options for confidential disclosure pursuant to section sixty-four hundred forty-six of this article: “All students have the right to: 1. Make a report to local law enforcement and/or state police; 2. Have disclosures of domestic violence, dating violence, stalking, and sexual assault treated seriously; 3. Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal

justice process free from pressure by the institution; 4. Participate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard; 5. Be treated with dignity and to receive from the institution courteous, fair, and respectful health care and counseling services, where available; 6. Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations; 7. Describe the incident to as few institution representatives as practicable and not be required to unnecessarily repeat a description of the incident; 8. Be protected from retaliation by the institution, any student, the accused and/or the respondent, and/or their friends, family and acquaintances within the jurisdiction of the institution; 9. Access to at least one level of appeal of a determination; 10. Be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process; and 11. Exercise civil rights and practice of religion without interference by the investigative, criminal justice, or judicial or conduct process of the institution.”

The student bill of rights is intended to be a brief but overarching document to set the expectations for students. Specific requirements appear in the sections below. This section is aimed at educating students as to their rights under this legislation. The law requires that the bill of rights be widely distributed but gives options to institutions as to how to distribute it in a way that maximizes dissemination to as many students as possible. While all concepts must be included, institutions may present them in a different order, split or re-combine them (such as in training documents or social media) and make minor, non-substantive changes for readability, understandability or consistency. Posted documents should include URL links, shortened URL's, QR codes, or other methods of informing students of the availability and location of other relevant policies required by the law.

Subdivisions 1 and 2 speak for themselves.

For Subdivision 3, the Clery Act, 20 U.S.C § 1092(f)(8) (B)(iii)(III)(aa)-(cc), requires institutions to provide students with three options:

- “(aa) notify proper law enforcement authorities, including on-campus and local police;
- (bb) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
- (cc) decline to notify such authorities.”

This subdivision of the Bill of Rights means that institutions must be neutral in providing these options and neither encourage or discourage students from choosing a specific option. While institutions should advise potential reporting individuals about the pros and cons of specific options, reporting individuals should control their own decision-making.

Subdivision 4 is consistent with the Clery Act and is further expanded upon in Section 6444.

Subdivision 5 is consistent with federal law and requires institutions to provide reporting individuals access to medical and counseling resources, where available. While encouraged, there is no requirement to create resources not currently available. Resources may also be available in the community or through statewide or national organizations.

Subdivision 6 relates to the investigative process involving student reporting individuals. A number of reporting individuals have historically reported that, upon reporting sexual or interpersonal violence, the first responder questions them about their dress, actions, or fault in the incident. This is not appropriate. Consistent with best practices adopted by national law enforcement organizations and practiced by many in higher education, those working with reporting individuals should use trauma-informed questioning tactics which stick to the violative behavior, and do not question whether a reporting individual is partly at fault due to their decisions about dress, attendance, or use of alcohol or drugs. This does not mean, however, that an institution is prohibited from investigating significant inconsistencies that could be evidence of a false or partially false report. Institutions must take the approach of accepting complaints from reporting individuals and treating those individuals with respect and dignity. Officials trained in the neurobiology of trauma will understand that slight deviations in recounting a situation are typical, but a full and fair investigation includes exploring inconsistencies. This is consistent with Section 6444(5)(c)(ii) regarding burden of proof requirements that provide the right to have a “*complaint investigated and adjudicated in an impartial, timely, and thorough manner by individuals who receive annual training in conducting investigations of sexual violence, the effects of trauma, impartiality,*” and guarantees the rights of a respondent, “*including the right to a presumption that the respondent is “not responsible” until a finding of responsibility is made pursuant to the provisions of this article and the institution’s policies and procedures.*” While institutions must not sanction and assign responsibility without establishing the elements of a violation, so too, they should approach reporting individuals in a fair and open way, informed by the effects of trauma on reporters.

Subdivision 7 is an important provision to protect students from having to unnecessarily repeat their description of what occurred such that eventually, exhausted, they withdraw from the process. The subdivision says “as few as practicable” not “as few as possible.” This means that an institution may still have a student repeat a story for legitimate reasons, which may include repeated stories prior to student conduct charges, a Title IX investigation, interviews with law enforcement, etc. An example where a student should not be asked to repeat a description would occur where a student reports to a Title IX Coordinator that they were assaulted by a student who lives across the hall from their residence hall room and is in their biology lab. In such a case, the reporting individual should not have to repeat the entire description to the hall director, residence

life leadership, their biology professor and/or the academic affairs office. Rather, the Title IX Coordinator should be empowered to contact each required office/individual on the reporting individual's behalf, to arrange for the appropriate accommodations.

Subdivision 8 is a brief description of the retaliation provisions required by the Clery Act and referenced by the Office for Civil Rights in Dear Colleague letters. While an institution cannot prevent all retaliation, it should prohibit retaliation and act within its abilities to take action, where retaliation is found to have occurred by someone within the institution's jurisdiction.

Subdivision 9 is further expanded upon in Section 6444.

Subdivision 10 allows a student to be accompanied by an advisor of choice to assist and advise the reporting individual, consistent with the Clery Act, and is further expanded upon in Section 6444.

Sentence 11 is intended to educate students that an institution shall not make them choose between their religion and participating in the process. For instance, an institution shall not tell an Orthodox Jewish student that the hearing will be held on Friday at 7:00 p.m. or tell a Muslim student that the only time the Title IX Coordinator can meet with them is just before sunset during Ramadan (when they have been fasting all day). Additionally, institutions will not force students to undergo medical procedures that they say are forbidden by their religion. Institutions will work with participants to ensure they do not have to choose between participating in the process and practicing their religion.

Response to Reports (Section 6444):

1. Every institution shall ensure that reporting individuals are advised of their right to:

a. Notify university police or campus security, local law enforcement, and/or state police;

All reporting individuals have these rights. Institutions shall provide these rights consistent with the provisions of the Clery Act, 20 U.S.C. 1092 (f)(8)(B)(iii)(III)(aa)-(cc) that require institutions to provide students with three options:

- “(aa) notify proper law enforcement authorities, including on-campus and local police;
- (bb) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
- (cc) decline to notify such authorities.”

Institutions that do not have an on campus security option and/or a local law enforcement option shall only include available options; providing a blank space for a resource that does not exist at the school may be confusing to a reader. New York State Police have statewide jurisdiction and are always an option within the State of New York. The State Police have created a special unit dedicated to college and university sexual and interpersonal violence prevention and response.

b. Have emergency access to a Title IX Coordinator or other appropriate official trained in interviewing victims of sexual assault who shall be available upon the first instance of disclosure by a reporting individual to provide information regarding options to proceed, and, where applicable, the importance of preserving evidence and obtaining a sexual assault forensic examination as soon as possible, and detailing that the criminal justice process utilizes different standards of proof and evidence and that any questions about whether a specific incident violated the penal law should be addressed to law enforcement or to the district attorney. Such official shall also explain whether he or she is authorized to offer the reporting individual confidentiality or privacy, and shall inform the reporting individual of other reporting options;

The definition of Title IX Coordinator in this legislation includes the coordinator and his/her designee. Further, the legislation further provides that emergency access can be provided by a Title IX Coordinator or “other appropriate “official” instead of “institution official” since the person who may provide such service does not need to be an official of the institution and may instead be an official of an off campus resource. The law requires that institutions must, at all times, provide emergency access to a Title IX Coordinator (which includes the Coordinator’s designee) or other appropriate official trained in interviewing victims of sexual assault. The law does not contemplate that the college or university must have a contact person or office on site that is available 24/7. Nor does the law require that the emergency access must be provided at all times by an official or employee of the institution. The statute allows institutions to designate appropriate officials at off campus resources for emergency access (see Toolkit information below). Institutions should designate the best person(s) and/or office(s) to provide the information and ensure that policies and procedures make it simple for reporting individuals to connect to the appropriate person.

Institutions may provide information about preserving evidence, sexual assault forensic examinations and the differences between the conduct and criminal justice processes either live or via a website. However, an institution that complies by placing this information on a website shall only be considered to be in compliance if the institution uses good faith to train appropriate officials who are likely to receive a report of sexual or interpersonal violence on the following items: the existence of the website, how to use it to find information, how to access it when approached by a reporting individual, and whether that person is an official who can offer confidentiality or privacy. Further, the website should be easily accessible using a short URL (a rule of thumb for memorability of a URL is to have no more than two “.” or “/” in the name, for

instance “response.campus.edu” or “campus.edu/safety”) or be accessible as a mobile phone application that is free and easily accessed by students. While each institution should determine for itself who qualifies as officials likely to receive a report, some examples include, but are not limited to:

- Title IX Coordinator.
- University Police or Campus Security.
- Student Affairs professionals.
- Resident Assistants and Hall Directors.
- Coaches, trainers and athletic staff.
- Club and organization advisors.
- Counseling professionals and advocates.
- Individuals designated as Campus Security Authorities for Clery Act compliance purposes.
- Individuals designated as Responsible Employees for Title IX compliance purposes.

To assist institutions in developing such resources, including access to a list of available state and community organizations that may serve as options for emergency access officials, the State University of New York prepared a Toolkit to develop a website similar to the SUNY SAVR (Sexual Assault and Violence Response) Resource.

A team of attorneys from public and private colleges developed a resource to assist colleges in complying with the requirement of educating about the different standards of proof and evidence. The resource may be accessed as a Word or PDF at this site: <http://system.suny.edu/sexual-violence-prevention-workgroup/College-and-Criminal-Resource/>.

When the statute references “different standards of proof and evidence” it is speaking primarily to the difference between the criminal requirement of proof beyond a reasonable doubt compared to the standard of preponderance of the evidence commonly utilized in student conduct proceedings, as well as the stringent laws applied in criminal court regarding submission and admissibility of evidence as compared to the college conduct process which is not governed by formal rules of evidence.

c. Disclose confidentially the incident to institution representatives, who may offer confidentiality pursuant to applicable laws and can assist in obtaining services for reporting individuals;

d. Disclose confidentially the incident and obtain services from the state or local government;

e. Disclose the incident to institution representatives who can offer privacy or confidentiality, as appropriate, and can assist in obtaining resources for reporting individuals;

f. File a report of sexual assault, domestic violence, dating violence, and/or stalking and the right to consult the Title IX Coordinator and other appropriate institution representatives for information and assistance. Reports shall be investigated in accordance with institution policy and a reporting individual's identity shall remain private at all times if said reporting individual wishes to maintain privacy;

g. Disclose, if the accused is an employee of the institution, the incident to the institution's human resources authority or the right to request that a confidential or private employee assist in reporting to the appropriate human resources authority;

The above paragraphs are a list of options a reporting individual has in reporting the violation. They are not mutually exclusive. A reporting individual may use any or none of these options.

Institutions should only list resources that are actually available to the institution's students.

h. Receive assistance from appropriate institution representatives in initiating legal proceedings in family court or civil court; and

Institutions have flexibility in complying with this provision. Large institutions may have personnel on campus who can assist with understanding the initial requirements to bring a case in family or civil court, while other institutions may refer reporting individuals to legal aid or community resources (institutions may access a list and/or map of legal aid resources in New York State by visiting <http://www.suny.edu/violence-response/>, clicking on "Off Campus Resources" and then sorting for "Legal Resources"). This provision does not require institutions to bring actions on behalf of reporting individuals, provide or pay for attorneys, or provide direct support. The provision merely requires that institutions serve as a resource to students in "initiating" these proceedings. That may include information sheets, links to appropriate resources or assistance from personnel in the institution or outside personnel.

i. Withdraw a complaint or involvement from the institution process at any time.

A reporting individual may withdraw a complaint or report from the institution at any time, and should not be penalized. The institution may, consistent with other provisions of this law as well as federal law, still have obligations to investigate and/or take actions. Pursuant to this law, reporting individuals may participate as much or as little as they wish.

2. Every institution shall ensure that, at a minimum, at the first instance of disclosure by a reporting individual to an institution representative, the following information shall be presented

to the reporting individual: “You have the right to make a report to university police or campus security, local law enforcement, and/or state police or choose not to report; to report the incident to your institution; to be protected by the institution from retaliation for reporting an incident; and to receive assistance and resources from your institution.”

Institution representative includes employees likely to receive such a report, who may be student employees. Institutions may not limit this coverage to a single employee, but should act in good faith to provide the information to employees likely to receive such a report or otherwise comply as addressed in the guidance below.

While each institution should determine for itself who qualifies as officials likely to receive a report, some examples include, but are not limited to:

- Title IX Coordinator.
- University Police or Campus Security.
- Student Affairs professionals.
- Resident Assistants and Hall Directors.
- Coaches, trainers and athletic staff.
- Club and organization advisors.
- Counseling professionals and advocates.
- Individuals designated as Campus Security Authorities for Clery Act compliance purposes.
- Individuals designated as Responsible Employees for Title IX compliance purposes.

The important point in this paragraph is for employees to provide this information to students at the first instance of disclosure.

Employees may be instructed to carry this paragraph with them for easy access. Alternatively, institutions may allow employees to access this paragraph via a website, when needed, to then provide or read the information to the reporting individual. However, an institution that complies by placing this information on a website shall only be considered to be in compliance if the institution uses good faith to train appropriate officials who are likely to receive a report of sexual or interpersonal violence on the following items: the existence of the website, how to use it to find this paragraph and other pertinent information on the website, and how to access the paragraph when approached by a reporting individual. Please refer to the guidance under Section 6444(1)(b) above for more information on how to comply by posting this information on a website.

3. Every institution shall ensure that reporting individuals have information about resources, including intervention, mental health counseling, and medical services, which shall include

information on whether such resources are available at no cost or for a fee. Every institution shall also provide information on sexually transmitted infections, sexual assault forensic examinations, and resources available through the New York state office of victim services, established pursuant to section six hundred twenty-two of the executive law.

Sample language that can serve as a fill-in-the-blank template for institutions can be found in the State University of New York Sexual Violence Response Policy, which is consistent with this section of the law. The language is available for use by public and private institutions. Additional guidance for crime victims may be found at the Office of Victim Services website:

<https://ovs.ny.gov/>.

4. Every institution shall ensure that individuals are provided the following protections and accommodations:

a. When the accused or respondent is a student, to have the institution issue a “no contact order” consistent with institution policies and procedures, whereby continued intentional contact with the reporting individual would be a violation of institution policy subject to additional conduct charges; if the accused or respondent and a reporting individual observe each other in a public place, it shall be the responsibility of the accused or respondent to leave the area immediately and without directly contacting the reporting individual. Both the accused or respondent and the reporting individual shall, upon request and consistent with institution policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of a no contact order, including potential modification, and shall be allowed to submit evidence in support of his or her request. Institutions may establish an appropriate schedule for the accused and respondents to access applicable institution buildings and property at a time when such buildings and property are not being accessed by the reporting individual;

No contact orders are institutional documents that do not have the legal effect of orders of protection, which are obtained through a court. Although this is the generally accepted term, institutions may refer to such a document by another name, and the provisions in the legislation would apply to such a document.

The law requires that institutions be clear that the responsibility to stay away falls upon the person subject to the no contact order (“covered person”), not the protected individual. A covered person may be a respondent or accused or a third party who is the subject of a no contact order. In certain cases, a reporting individual under this law may be a covered person under a no contact order. If the covered person and protected person are in the same place accidentally, it is incumbent upon the covered person to remove themselves in a reasonable time and manner. They need not run or make a scene out of leaving, but they should leave the location. In

exceptionally rare cases where a protected individual is actively seeking to be in the same place as the covered person, this does not mean that an institution must sanction the covered person or is prohibited from taking other reasonable action to address the situation, consistent with its policies and procedures. The definition of a public place is to be interpreted by institutions using reason and good faith. Some institutions may assist students in compliance by setting up a schedule of attendance in certain locations such as academic buildings, libraries, athletics or fitness facilities and dining halls, but there is no requirement that institutions develop such a schedule.

Both the accused or respondent and the reporting individual shall, upon request and consistent with institution policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of a no contact order, including potential modification, and shall be allowed to submit evidence in support of his or her request.

As has been generally accepted practice in higher education, covered and protected individuals under no contact orders may request a review of the need for, and terms of, such orders by the institution and may submit information as to their reasoning for requesting a change. Such review shall be prompt, but promptness is determined by the institution in view of the circumstances of the case, personnel availability, complexity of the request, and evidence/information submitted favoring or arguing against a modification. There is no requirement in this provision for a full, in person hearing to review the order.

b. To be assisted by the institution's police or security forces, if applicable, or other officials in obtaining an order of protection or, if outside of New York state, an equivalent protective or restraining order;

This section reflects the current state of the law and is intended for completeness and student education. Institutions with sworn law enforcement could directly assist in obtaining such an order, or do so in concert with municipal law enforcement, as the situation merits.

Section 2265 of the Violence Against Women Act requires that each state give full faith and credit to orders of protection issued by other states, Indian Tribes, and territories.

18 U.S.C. 2265(a): Full Faith and Credit-

Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.

This means that institutions shall treat the process and award of an out-of-state court document equivalent to a New York State Order of Protection.

c. To receive a copy of the order of protection or equivalent when received by an institution and have an opportunity to meet or speak with an institution representative, or other appropriate individual, who can explain the order and answer questions about it, including information from the order about the accused's responsibility to stay away from the protected person or persons;

The intention of this provision is to assist both covered and protected students with understanding a document that may appear complicated or otherwise difficult to understand. If, due to some circumstance, the reporting individual or respondent does not have a copy of the order, they can receive that copy from an institution representative if the institution has a copy.

This requirement may be met by an institution representative or other appropriate official. This means that an institution that lacks on campus resources to assist in this matter may work with a local resource or a neighboring institution where such a resource is available. Local resources may include law enforcement, legal aid organizations, rape crisis centers, and domestic violence prevention organizations (this is not a comprehensive list). Institutions may access a list and/or map of state and local resources in New York State by visiting <http://www.suny.edu/violence-response/> and clicking on “Off Campus Resources” or “View NYS Resources”).

The law requires that institutions be clear that the responsibility to stay away falls upon the covered person, not the protected individual. In the exceptionally rare case that a protected individual is actively seeking to be in the same place as the covered person, this does not mean that an institution must sanction the covered person or is prohibited from taking reasonable action to address the situation, consistent with its policies and procedures.

d. To an explanation of the consequences for violating these orders, including but not limited to arrest, additional conduct charges, and interim suspension;

Institutions may wish to call on available law enforcement, whether on-campus or off, to assist in developing language on specific consequences. Note that either a covered or protected person may request assistance and an explanation.

e. To receive assistance from university police or campus security in effecting an arrest when an individual violates an order of protection or, if university police or campus security does not possess arresting powers, then to call on and assist local law enforcement in effecting an arrest for violating such an order, provided that nothing in this article shall limit current law enforcement jurisdiction and procedures;

As with many provisions of the law, this section does not change the current requirements for arrests for violations of such orders, but instead the law is aimed at educating students about their rights under Orders of Protection.

Each institution should post information about personnel, likely in University Police, Campus Safety, or Student Affairs, who can assist a student in understanding an Order of Protection, and a clear method for contacting that office. To comply with the Clery Act requirement of even-handedness, such explanations should be available both to students who are protected by Orders of Protection and to those who are subject to Orders of Protection.

The language about not limiting current law enforcement jurisdiction is intended to make clear that 129-B does not change current law enforcement jurisdiction.

f. When the accused or respondent is a student determined to present a continuing threat to the health and safety of the community, to subject the accused or respondent to interim suspension pending the outcome of a judicial or conduct process consistent with this article and the institution's policies and procedures. Both the accused or respondent and the reporting individual shall, upon request and consistent with the institution's policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of an interim suspension, including potential modification, and shall be allowed to submit evidence in support of his or her request;

Institutions should use good faith and best practices to determine when a person presents a continuing threat to the health and safety of the community. Interim suspensions should be reasonable and tailored to balance the ability of the accused/respondent to complete their studies with the safety of both the reporting individual and/or the institution community at large. This section largely reflects longstanding best practices of public and private institutions.

As has been the generally accepted practice in higher education, covered individuals under suspension may request a review of the need for or terms of such orders by the institution and may submit information as to their reasoning for requesting a change. Institutions must have a procedure by which the accused/respondent or reporting individual can request a review. The review must be prompt. Promptness is determined by the institution in view of the circumstances of the case, personnel availability, complexity of the request, and evidence/information submitted favoring or arguing against a modification of suspension. This provision does not specify that a hearing must be held to determine the request to modify the order, but rather the institution must conduct some review, and it may be short of a hearing. To be consistent with federal law and guidance and the need for equal opportunity, institutions should notify the other party of the request for modification and the decision of whether to modify or not.

g. When the accused is not a student but is a member of the institution's community and presents a continuing threat to the health and safety of the community, to subject the accused to interim measures in accordance with applicable collective bargaining agreements, employee handbooks, and rules and policies of the institution;

This provision is a parallel to the provision above that applies to non-student members of an institution community. Consistent with the law collective bargaining agreements, and institution policy, institutions may remove a non-student from the institution community when the person is accused of a violation and presents a danger. Nothing in the law changes collective bargaining agreements or requires changes to other policies.

Individuals who are neither students, nor employees, but are members of the institution community who present a continuing threat, as determined by the institution, would also be subject to interim measures, consistent with institution policy. An example is a persona non grata letter notifying an individual that they are not allowed on institution property and entering property may subject them to arrest or trespassing charges (consistent with applicable law, institutional policy, and due process requirements, where applicable).

h. To obtain reasonable and available interim measures and accommodations that effect a change in academic, housing, employment, transportation or other applicable arrangements in order to help ensure safety, prevent retaliation and avoid an ongoing hostile environment, consistent with the institution's policies and procedures. Both the accused or respondent and the reporting individual shall, upon request and consistent with the institution's policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of any such interim measure and accommodation that directly affects him or her, and shall be allowed to submit evidence in support of his or her request.

This provision should be interpreted in a manner consistent with federal law including but not limited to the Clery Act, and Office for Civil Rights interpretations of Title IX and the Americans with Disabilities Act. Institutions must, under those and this law, provide reasonable accommodations. Reasonability is to be determined on a case-by-case basis and using the standards established in law and by the institution. Not all accommodations must be granted. Institutions should analyze each request to determine if it could improve safety, prevent retaliation, and/or avoid an ongoing hostile environment, and the law is clear that such analysis should be consistent with institutional policy and procedure.

In the event that an accommodation or interim measure (including but not limited to campus or residence hall suspension) granted to or against one party impacts another party (parties in this case being the reporting individual[s] and accused or respondent[s]), both the directly impacted party and the secondarily impacted party may request a review of the terms or totality of the

accommodation and/or measure by the institution and may submit information as to their reasoning for requesting a change. Such review shall be prompt, but promptness is determined by the institution in view of the circumstances of the case, personnel availability, complexity of the request, and evidence/information submitted favoring or arguing against a modification. There is no requirement in this provision for a full, in person hearing on the request to modify the order.

5. Every institution shall ensure that every student be afforded the following rights:

In general, these rights apply to all students. Some rights by their nature may be more applicable to reporting individuals or accused/respondents.

a. The right to request that student conduct charges be filed against the accused in proceedings governed by this article and the procedures established by the institution's rules.

The law gives students the right to *request* that charges be brought but leaves the decision of whether to actually file charges with the institution. Institutions can initiate charges or choose not to initiate them when evidence does or does not merit doing so, in conformity with this law and the institution's code of conduct and other institution policies. The statutory word "charges" should be read to cover other equivalent terms, including those used to reference information brought through the investigative process, even if a school does not use the specific term "charge" within their process.

b. The right to a process in all student judicial or conduct cases, where a student is accused of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, that includes, at a minimum: (i) notice to a respondent describing the date, time, location and factual allegations concerning the violation, a reference to the specific code of conduct provisions alleged to have been violated, and possible sanctions; (ii) an opportunity to offer evidence during an investigation, and to present evidence and testimony at a hearing, where appropriate, and have access to a full and fair record of any such hearing, which shall be preserved and maintained for at least five years from such a hearing and may include a transcript, recording or other appropriate record; and (iii) access to at least one level of appeal of a determination before a panel, which may include one or more students, that is fair and impartial and does not include individuals with a conflict of interest. In order to effectuate an appeal, a respondent and reporting individual in such cases shall receive written notice of the findings of fact, the decision and the sanction, if any, as well as the rationale for the decision and sanction. In such cases, any rights provided to a reporting individual must be similarly provided to a respondent and any rights provided to a respondent must be similarly provided to a reporting individual.

This section should not be read to extend to private colleges the Constitutional due process requirements that apply to public colleges. It establishes minimum requirements for cases of sexual and interpersonal violence covered by 129-B, but institutions may offer more rights and requirements and may offer such rights and requirements for other violations that are outside the scope of this law.

Consistent with the regulations implementing the Clery Act, 34 C.F.R. §668.46(k)(2)(v), institutions should simultaneously provide both reporting individuals and respondents with notice or notices that include the date, time, location and factual allegations that have been reported, as well as a reference to the specific code provisions reported to have been violated and their associated sanctions. This list should be specific enough to allow a reasonable person to present a defense, pursuant to institutional policy, but need not be so long and detailed that it negatively impacts the student conduct process. The section is consistent with the notice requirements of the Clery Act. Nothing in the paragraph prohibits an institution from holding students accountable for violations that are not referenced in the initial charge letter but are learned about from evidence, testimony, or admission at a hearing or during the investigatory process, consistent with institution policies and due process, where applicable.

Students should receive the notice required by this paragraph, however, and, consistent with the Clery Act, there is no requirement that all provisions of notice be provided within the same notification, or in the first communication to the student. An institution may provide the information required in this paragraph via a number of separate communications, however each communication must be provided to the reporting individual and respondent simultaneously. Institutions may choose to provide limited information initially for policy reasons, and then supplement that information with additional notice(s) as information becomes available or as the institution is able to gauge other factors, such as the respondent's availability and understanding of the charges. The law does not prescribe a medium for providing notice and institutions may use all or some combination of written notice, electronic notice, or oral notice, provided that if an institution uses oral notice, it shall document the date, time, and attendees at any meeting at which oral notice is provided and shall obtain from the student an acknowledgment that such notice was provided.

The "reference to the specific code violation" means that institutions may provide a link or referral to a location in the code that includes relevant page numbers or section numbers, and need not copy and paste the applicable paragraphs (which may be lengthy) into the charging letter or document. Institutions may only make such a reference if their code of conduct is available publicly or on the internet. Recall that the Clery Act requires that institutions publish a list of the available sanctions for violations of institution policy related to sexual assault, domestic violence, dating violence and stalking (institutions must, per the regulations, publish all possible sanctions and not just a range of sanctions). Therefore the requirement in 129-B simply

mandates a reference to these sanction lists which must already be created pursuant to federal law.

Reporting individuals and respondents should be afforded the opportunity to offer evidence during the process. Evidence is not defined in the law and should be defined reasonably by an institution. Institutions are not required by this law to offer hearings, and may use alternative methods, such as the investigatory model, as allowed under the institution's policies and applicable law. The paragraph does not require that evidence be offered during a hearing or that evidence be offered in the presence of other parties or witnesses.

The law does not specify the type of record or manner of access to the record that must be maintained. It can be a recording, notes, a transcript or any other reasonable type of record. There is no requirement in the law that an institution prepare a transcript on demand. Further, the legislation only requires "access" to the record. This means that for most institutions, they are required to continue their practice of giving participants reasonable access during business hours and are specifically not required to provide participants with copies of the record. Institutions may choose to allow licensed court reporters to make transcripts of a hearing or proceeding, at the expense of the participant in the hearing that requests such a transcript, as allowed by the institution's code of conduct. Note that if one participant creates such a recording, the fair treatment provision of the law may require the institution to provide that transcript to the other participant(s) upon request or as a matter of course, as determined by institution policy. Recordings must be maintained for at least five years although institutions may choose to retain them for longer.

Appeals must be considered by a panel—not one person. The panel may include one or more students, but does not have to include students. The law does not specify whether the decision of the panel must be unanimous or may be a majority vote of panelists, and that decision is left to the institution. Further, the law does not state who must, may, or may not be a member of the panel. Individuals who made the initial decision should not be a part of the panel considering an appeal.

The law is to be read as consistent with the Clery Act, Title IX, and other applicable laws; it requires equal access to appeals and requires that the institution provide the parties with simultaneous notice about the outcome. The outcome includes the underlying decision, sanction, and rationales for decision and sanction. Also, institutions must provide notice to the respondent and the reporting individual of both the initial outcome and any change in the outcome due to appeal. If there is no appeal, institutions must provide notice to the parties when the outcome becomes final because the time for an appeal has expired.

c. Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, the right:

In general, these rights apply to all students. Some rights by their nature may be more applicable to reporting individuals or accused/respondents.

i. For the respondent, accused, and reporting individual to be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process. Rules for participation of such advisor shall be established in the code of conduct.

This paragraph parallels the requirements of the Clery Act and requires that institutions allow students to choose an advisor of choice to accompany the student to any hearing or meeting related to the conduct process. Institutions have the discretion to allow more than one advisor, although the law requires that they are permitted at least one. Institutions may, but are not required to, offer a particular advisor at the cost of the school or to pay for an advisor. The advisor is truly of choice; it may be a faculty member, family member, attorney or otherwise. Unless an institution makes an affirmative decision as a matter of policy to reimburse the student for engaging an advisor, any costs associated with the advisor would be at the expense of the student. An institution may provide a list or panel of employees available to offer advice, but may not limit a student to members of such a list or panel.

The requirement is that a student be allowed to have such an advisor accompany them. There is no provision of the law that requires an institution to allow such an advisor to participate in the meetings or hearings, such as making opening or closing statements or questioning witnesses. While an institution may allow such participation, it may also restrict such advisors from speaking at the meeting or hearing. Institutions must allow advisors to reasonably provide assistance and advice to their student principal during the course of such a proceeding, which may be accomplished by allowing for passing of notes, non-verbal cues, or a reasonable number of breaks or recesses. Institutions are not required to allow for attempts to go around these provisions, such as by having attorneys write every word that their student principal reads verbatim, while waiting for the attorney to then finish the next sentence of the script. Institutions may place reasonable restrictions on such actions. Advisors who violate institution policies may be removed from a hearing or meeting. Institutions are not required by this law to recess the hearing or allow the student to replace the banned advisor with a new advisor. Nothing in the law requires an institution to limit its capacity to conduct its judicial or conduct process due to scheduling or other delays (whether genuine or tactical) by an advisor of choice. Institutions may place reasonable restrictions on participation of advisors, such as by having a policy allowing any party to request a five business day delay to allow for the scheduling conflicts of their

advisor of choice, and institutions are not required to comply with the busy schedule of advisors of choice who may declare themselves unavailable for days, weeks or months. This provision is to be read in concert with provisions requiring a timely process (such as the Office for Civil Rights Title IX guidance that requires a process lasting approximately 60 days).

ii. To a prompt response to any complaint and to have the complaint investigated and adjudicated in an impartial, timely, and thorough manner by individuals who receive annual training in conducting investigations of sexual violence, the effects of trauma, impartiality, the rights of the respondent, including the right to a presumption that the respondent is “not responsible” until a finding of responsibility is made pursuant to the provisions of this article and the institution’s policies and procedures, and other issues including, but not limited to domestic violence, dating violence, stalking or sexual assault.

Prompt is not defined in the law and is to be determined on a case-by-case basis, consistent with institution policy and procedures. Institutions should use good faith to conduct investigations and proceedings in a prompt but meaningful way. Consistent with the requirements of the Clery Act, individuals who conduct investigations, hearing and appeals should have annual training in conducting these investigations, the impact of trauma on reporting such violations, the importance of impartiality in these proceedings, and the rights of the respondent (rights of reporting individuals are established here and elsewhere in the law). The provisions of this subparagraph regarding training of those conducting investigations and adjudications are consistent with the requirements of the Clery Act, and are included here for education purposes.

A key provision in this subparagraph is a presumption that one should not be determined in advance to have violated a rule and then required to “prove a negative.” To borrow a phrase from the criminal justice process, one is “innocent until proven guilty.” This law, consistent with that principle, emphasizes that a respondent is presumed to be “not responsible” until the institution has established evidence, testimony or information that would allow the decision maker to find the respondent responsible pursuant to the institution code of conduct and this law. Note that the burden is on the institution to develop these facts, not on the reporting individual, who may participate at the level to which he or she is comfortable. Through the process, appropriate officials may listen to witnesses and review available evidence to make a determination, to the best of their ability, whether it is more likely than not that a policy violation occurred. For example, an institution cannot begin a process with the presumption that a respondent engaged in sex without consent, and then begin to gather evidence wherein the respondent would have to prove there was consent. The institution should gather evidence to determine whether a violation occurred and the burden of such a finding is on the institution.

Institutions should read this provision consistent with a requirement in this same section to have training in, among other things, trauma-informed interviewing and investigations, which lead

with an initial obligation to treat a reporting individual's allegations with respect and seriousness. Institutions are not conducting criminal trials, but are expected to follow their policies and procedures as well as this and other laws to determine the facts, including whether an institution policy was violated, and then determine whether sanctions or other actions are necessary.

iii. To an investigation and process that is fair, impartial and provides a meaningful opportunity to be heard, and that is not conducted by individuals with a conflict of interest.

A conflict of interest is to be interpreted consistent with the provisions in the Clery Act and would cover an investigator or adjudicator who is a family member or close friend or advisor of a party, or who has similar conflicts. Institutions need not entertain claims of conflict of interest that merely stem from the involvement of an investigator or adjudicator who is the same gender, race, etc. of a party.

iv. To have the institution's judicial or conduct process run concurrently with a criminal justice investigation and proceeding, except for temporary delays as requested by external municipal entities while law enforcement gathers evidence. Temporary delays should not last more than ten days except when law enforcement specifically requests and justifies a longer delay.

Institutions maintain a responsibility under this law and federal law to investigate and take action in cases of sexual assault, domestic violence, dating violence, and stalking. This obligation is completely separate from a law enforcement duty to investigate whether a person within their jurisdiction violated applicable law and whether or not such a violation merits charges or prosecution. The Clery Act requires that institutions offer reporting individuals the opportunity to report to the college, law enforcement, or not at all. The college's sexual assault policy/procedures and criminal justice process are separate and distinct processes and one does not overcome the other.

This independence requires that institutions not be barred from conducting their disciplinary process due to the proceedings of the criminal justice system, except when temporary delays are requested by law enforcement with proper jurisdiction. Such delays should not be longer than 10 days except where specifically requested and justified by law enforcement. The determination of whether such delays are justified is in the discretion of the institution.

An example of a delay would occur when law enforcement seeks to elicit a confession using a wiretap of a witness or the reporting individual during one or more conversations with the accused. If law enforcement informs the institution that notifying the accused of an investigation or that they will become a respondent in a student conduct process may hamper their ability to obtain useful information from a wiretap, an institution may view this as justification for a temporary delay. Still, such a delay should only be temporary and not open-ended.

Generalized delays due to scheduling, workload, priority of investigation compared to other open cases, are insufficient to meet the requirements of this law that institutions independently investigate and act when receiving these reports, without being impacted in that responsibility by the parallel (but different) requirements and/or actions of law enforcement.

The institution should determine, consistent with its policies and using good faith, who the appropriate institution official is to field requests for a delay, however, the individual assigned should be at a sufficiently high level of authority tasked with important policy decisions. In cases that impact Title IX, the Title IX Coordinator should, if not the decision maker, at a minimum be involved in the decision of whether to delay the institution process.

v. To review and present available evidence in the case file, or otherwise in the possession or control of the institution, and relevant to the conduct case, consistent with institution policies and procedures.

This provision ensures that respondents and reporting individuals will have reasonable access to evidence in the case file that may be used in a hearing or investigation and/or may exonerate or show responsibility in the case, regardless of whether that evidence is held in a file denoted “case file” or held in a parallel file maintained by the institution, to the extent that is applicable. Institutions may still place reasonable restrictions on access to evidence, such as time, place and manner restrictions, heightened restriction for sensitive information that is not directly relevant to the questions raised in the investigation or hearing, and a limit on students or their advisors of choice engaging in “fishing expeditions” of all records maintained by a college that in any way cover any of the parties. This provision is not a generalized discovery mandate. It allows access to evidence directly relevant to the specific case, as reasonably determined by the institution, but the law does not require any type of pre-hearing discovery. The right in the law is to review and present evidence. There is no requirement that parties or their advisors of choice be provided with a copy of the evidence in question.

vi. To exclude their own prior sexual history with persons other than the other party in the judicial or conduct process or their own mental health diagnosis and/or treatment from admittance in the institution disciplinary stage that determines responsibility. Past findings of domestic violence, dating violence, stalking, or sexual assault may be admissible in the disciplinary stage that determines sanction.

Consistent with due process and/or fundamental fairness (as applicable), this is a right that belongs to the individual and applies equally to respondents and reporting individuals. While a party participating in a conduct proceeding may, if allowed under the policies and procedures of the institution, present evidence of their *own* past sexual history with persons other than the other

party and/or evidence of mental health diagnosis and treatment (or have the institution present such evidence on their behalf), they may likewise prohibit the *other* party from seeking to present testimony or other evidence of the same.

The limit does not cover evidence of prior sexual history with the other party in the judicial or conduct action that is relevant to a charge or defense. For instance, if student Respondent A wants to testify about why A believed that Reporting Individual B was affirmatively consenting to sexual activity, A may testify about past sexual acts between B and A, indicia of consent in those acts (such as certain words or actions said or used in the past between participants to indicate consent which were or were not said or used in this particular sexual contact), and why A believed that consent was also given in the case under consideration. However, A may not introduce directly or seek to have Witness C testify about a past sexual act between Reporting Individual B and Witness C as evidence of same. Reporting Individual B may prohibit such testimony.

Further, if a reporting individual engaged in sexual activity with more than one partner in a short time period (as reasonably determined by the institution) and the institution alleges that the reporting individual sustained injuries during non-consensual sexual activity with the respondent, the fact of consensual or non-consensual sexual activity with the unrelated individual may be admitted for the limited purpose of addressing how injuries were sustained. Such evidence may not be used to show a pattern of engaging in sexual activity by the reporting individual or to allege that if the reporting individual consented to activity with the unrelated individual, ipso facto she or he was consenting to sexual activity with respondent.

The same concepts apply to past mental health diagnosis or treatment and cover both respondents and reporting individuals. A student may testify or offer evidence on their own past mental health diagnosis or treatment but may limit the other party from offering such evidence.

Evidence of past findings of domestic violence, dating violence, stalking, or sexual assault may be admitted but only in the penalty phase of the proceeding. Past findings are not relevant to answering the question of whether there was a violation in this specific instance, and could be found to be prejudicial and to inappropriately shift the burden of proof from the institution to the respondent (See Section 6444(5)(c)(ii) regarding burden of proof requirements). If respondent is found responsible in that part of the proceeding, the subparagraph allows for admittance of evidence about the respondent's past findings of criminal or conduct violations in these areas to assist a decision-maker in determining an appropriate sanction. Past findings are to be interpreted by the institution using good faith and may be limited to past findings made by the institution or may include past findings made by other institutions, the criminal or civil court system, etc.

vii. To receive written or electronic notice, provided in advance pursuant to the college or university policy and reasonable under the circumstances, of any meeting they are required to or are eligible to attend, of the specific rule, rules or laws alleged to have been violated and in what manner, and the sanction or sanctions that may be imposed on the respondent based upon the outcome of the judicial or conduct process, at which time the designated hearing or investigatory officer or panel shall provide a written statement detailing the factual findings supporting the determination and the rationale for the sanction imposed.

This should be read in a manner consistent with the requirements of the regulations implementing the Clery Act, 34 C.F.R. §668.46(k). All requirements are subject to good faith application and to an institution's policies. The requirement to provide notice of meetings to which a person is required or eligible to attend is specific to that specific person and notice need not be provided to all parties unless *that* party is required or eligible to attend *this* meeting. For instance, in the case of an accusation of stalking, the institution need not notify the accused of a meeting for which the reporting individual is required or eligible to attend unless the accused is also required or eligible to attend that specific meeting

viii. To make an impact statement during the point of the proceeding where the decision maker is deliberating on appropriate sanctions.

This should be read in a manner consistent with the requirements of the Clery Act. Institutions may use different terms to describe the impact statement, and this provision would apply regardless of chosen term. Institutions may place reasonable restrictions on provision of such a statement, such as length.

ix. To simultaneous (among the parties) written or electronic notification of the outcome of a judicial or conduct process, including the sanction or sanctions.

This should be read in a manner consistent with the requirements of the Clery Act, 20 U.S.C §1092(f)(8)(iv)(III)(a) and 34 C.F.R. §668.46(k)(2)(v). There is no requirement in law that notice be provided using paper mail. Institutions may determine the best way of providing such notice in a manner reasonably calculated to be informative and simultaneous (in some cases, paper mail may be the best option). Oral notice does not meet the requirements of this section.

x. To be informed of the sanction or sanctions that may be imposed on the respondent based upon the outcome of the judicial or conduct process and the rationale for the actual sanction imposed.

This provision should be read in a manner consistent with the requirements of the Clery Act regulations, 34 C.F.R. §668.46(k). The Clery Act requires that institutions publish a list of the available sanctions for violations of institution policy related to sexual assault, domestic

violence, dating violence and stalking (institutions must, per the regulations, publish all possible sanctions and not just a range of sanctions). Therefore the requirement in the law simply mandates providing information about these sanction lists which must be created pursuant to federal law.

xi. To choose whether to disclose or discuss the outcome of a conduct or judicial process.

Institutions may not require that students sign a non-disclosure agreement prior to learning the results of a conduct process in which they participated as a reporting individual or respondent. This is consistent with the Family Educational Rights and Privacy Act (FERPA) (see page 14 of the April 2011 Office for Civil Rights “Dear Colleague Letter,” <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>). This applies to respondents and reporting individuals. Respondents and reporting individuals are not themselves barred by FERPA from sharing this information. Note, however, that this does not allow students to unreasonably share private information in a manner intended to harm or embarrass another individual, or in a manner that would recklessly do so regardless of intention. Such sharing may be retaliation which can result in separate charges under the code of conduct.

xii. To have all information obtained during the course of the conduct or judicial process be protected from public release until the appeals panel makes a final determination unless otherwise required by law.

This section is consistent with the Family Educational Rights and Privacy Act (FERPA). Institutions may not share the information obtained during the course of the disciplinary process until final determination, unless compelled to do so, such as by receipt of a lawfully issued subpoena. Institutions may still share information about the proceeding with “school officials” with a “legitimate educational interest” consistent with FERPA. More information on the requirements of the various federal laws in this area can be found in the chart “Notifications Following Student Conduct Hearings.”

6. For crimes of violence, including, but not limited to sexual violence, defined as crimes that meet the reporting requirements pursuant to the federal Clery Act established in 20 U.S.C. 1092(f)(1)(F)(i)(I)-(VIII), institutions shall make a notation on the transcript of students found responsible after a conduct process that they were “suspended after a finding of responsibility for a code of conduct violation” or “expelled after a finding of responsibility for a code of conduct violation.” For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they “withdrew with conduct charges pending.” Each institution shall publish a policy on transcript notations and appeals seeking removal of a transcript notation for a suspension, provided that such notation shall not be removed prior to

one year after conclusion of the suspension, while notations for expulsion shall not be removed. If a finding of responsibility is vacated for any reason, any such transcript notation shall be removed.

This provision requires all institutions to place notations on transcripts of students when two factors are met:

- The student is found responsible, after a process (or takes responsibility) for a code of conduct violation that is equivalent to the definitions for Clery Act Part I Primary Crimes; and
- The student is expelled, suspended, and/or withdraws with conduct charges pending.

Institutions may (but are not required to) place notations on transcripts for other violations, but must at a minimum place notations when the two factors above are met.

The specific language of the transcript notation is established in Education Law §6444(6). The required notation is general to a violation of the code of conduct and does not list the specific violations for which a student is found responsible. Notations must appear on the actual transcript, and may not be issued on a separate, detachable paper.

Education Law §6444(6) uses the definitions of the Clery Act solely for the purpose of identifying relevant code of conduct violations that must be noted on a student's transcript. Violations do not have to be Clery Act reportable in order for a transcript notation to be issued. Section 6440(6) states that the law "shall apply regardless of whether the violation occurs on campus, off campus, or while studying abroad" so actual Clery Act reportability of an incident is not relevant to the question of whether a transcript notation of a violation must be utilized. All students who take responsibility or are found responsible after a code of conduct process for a code of conduct violation whose definition is equivalent to a Clery Part I Primary Crime, or who withdraw with conduct charges pending, must have such a notation on their transcript regardless of where or when the violation occurred.

Violations equivalent to crimes of violence, as defined in the Clery Act (as updated by the Violence Against Women Act Final Regulations) Part I crimes, as set forth in 34 C.F.R. §668.46(c), that require a transcript notation under §6444(6) are: murder; manslaughter; rape, fondling, incest and statutory rape; robbery; aggravated assault; burglary; motor vehicle theft; and arson. Institutions may, but are not required to, include transcript notations for additional violations. The relevant definitions defined in accordance with the Federal Bureau of Investigation's Uniform Crime Reporting and set forth as Appendix A to Subpart D of Part 668, the Final Regulations to implement the Violence Against Women Act Amendments to the Clery Act in the Federal Register, Vol. 79, No. 202, October 20, 2014 at pages 62,789-62,790 are:

- **Criminal Homicide—Manslaughter by Negligence:** The killing of another person through gross negligence.
- **Criminal Homicide—Murder and Nonnegligent Manslaughter:** The willful (nonnegligent) killing of one human being by another.
- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.
- **Robbery:** The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.
- **Aggravated Assault:** An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)
- **Burglary:** The unlawful entry of a structure to commit a felony or a theft. For reporting purposes this definition includes: unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts to commit any of the aforementioned.
- **Motor Vehicle Theft:** The theft or attempted theft of a motor vehicle.
- **Arson:** Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Note that these definitions are not completely consistent with New York State Penal Law. The law does not forbid institutions from admitting a transfer student with a transcript notation, nor does it forbid employers from employing a person with a transcript notation. In general, colleges can develop policies that govern how admissions staff will weigh a notation and whether or if they will require additional information from the applicant. Additionally, licensure organizations may develop policies that allow them to request additional information when an

applicant presents a transcript with a notation, but the law does not mandate such policies, nor does it forbid licenses for individuals with a transcript notation.

If a court of competent jurisdiction vacates a finding of responsibility for a violation of college policy, the legislation requires that vacating an underlying finding also vacates the transcript notation memorializing that finding. This provision applies to vacating of the finding by an external entity, and is separate from the policy on transcript notations and appeals in this section that governs the process internal to the institution for removing or modifying a notation.

Institutions may, but are not required to, establish a policy for appealing a notation of suspension, including standards for lifting a notation and who such an appeal should be addressed to, provided that such notation may not be lifted until one year after the suspension ends. A notation for expulsion may not be removed via an appeal to the institution.

7. Institutions that lack appropriate on-campus resources or services shall, to the extent practicable, enter into memoranda of understanding, agreements or collaborative partnerships with existing community-based organizations, including rape-crisis centers and domestic violence shelters and assistance organizations, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, which may also include resources and services for the respondent.

This provision encourages such memoranda of understanding “to the extent practicable” and does not require such an agreement or demand any specific provisions be in such an agreement.

The State University of New York, Department of Health, and New York State Coalition Against Sexual Assault developed a model agreement that can be implemented by private and public colleges and their community partners.

Nothing in this law requires or obligates institutions to pay a community organization or provider a fee or other consideration in exchange for signing a memorandum of understanding.

8. Institutions shall, to the extent practicable, ensure that students have access to a sexual assault forensic examination by employing the use of a sexual assault nurse examiner in their campus health center or entering into memoranda of understanding or agreements with at least one local health care facility to provide such a service.

Local health care facilities that provide sexual assault nurse examination services are required by law (including the Violence Against Women Act, codified at 42 U.S.C.A. § 3796gg-4; and N.Y. Exec. L. § 631(13)) to provide these examinations to college students and are barred from charging for the specific cost of the exam. The intent is for institutions to work collaboratively

with community partners and health care providers to provide the best service to victims and survivors of violence, and to that end, institutions and local health care facilities are strongly encouraged to develop partnerships that go beyond the minimum required by law. To the extent additional agreements are reached, they can be memorialized in a memorandum of understanding. Nothing in this law requires or obligates institutions to pay a community organization or health care provider a fee or other consideration in exchange for signing a memorandum of understanding.

9. Nothing in this article shall be deemed to diminish the rights of any member of the institution's community under any applicable collective bargaining agreement.

Certain rights and responsibilities of this law may be in conflict with provisions of applicable collective bargaining agreements. While institutions may wish to bargain for changes to those provisions, this law does not interfere with or abrogate existing collective bargaining agreements.

Campus Climate Assessments (Section 6445):

1. Every institution shall conduct, no less than every other year, a campus climate assessment to ascertain general awareness and knowledge of the provisions of this article, including student experience with and knowledge of reporting and college adjudicatory processes, which shall be developed using standard and commonly recognized research methods.

2. The assessment shall include questions covering, but not be limited to, the following:

a. the Title IX Coordinator's role;

b. campus policies and procedures addressing sexual assault;

c. how and where to report domestic violence, dating violence, stalking or sexual assault as a victim, survivor or witness;

d. the availability of resources on and off campus, such as counseling, health and academic assistance;

e. the prevalence of victimization and perpetration of domestic violence, dating violence, stalking, or sexual assault on and off campus during a set time period;

f. bystander attitudes and behavior;

g. whether reporting individuals disclosed to the institution and/or law enforcement, experiences with reporting and institution processes, and reasons why they did or did not report;

h. the general awareness of the difference, if any, between the institution's policies and the penal law; and

i. general awareness of the definition of affirmative consent.

3. Every institution shall take steps to ensure that answers to such assessments remain anonymous and that no individual is identified. Institutions shall publish results of the surveys on their website provided that no personally identifiable information or information which can reasonably lead a reader to identify an individual shall be shared.

4. Information discovered or produced as a result of complying with this section shall not be subject to discovery or admitted into evidence in any federal or state court proceeding or considered for other purposes in any action for damages brought by a private party against an institution, unless, in the discretion of the court, any such information is deemed to be material to the underlying claim or defense.

Every institution must conduct a climate survey to assess, at minimum, the topics raised in the legislation. This provision becomes effective in July 2016, meaning that the survey can be completed in the 2016-2017 year to be compliant. A college may also conduct the survey in 2015-2016 but the law allows the survey to be conducted as late as spring 2017. After that, the survey must occur at least every other year. There are no specific questions required by the law, and the law gives institutions flexibility in determining the best questions and language to use. The legislation neither limits the survey to students nor requires that institutions survey faculty and staff in addition to students. Further, the law neither requires that the survey be given to all nor limits the survey to representative samples. These decisions are to be made by each institution.

Several private colleges and the State University of New York have developed climate surveys that other institutions may choose to adopt or adapt for their purposes. Institutions may contact such institutions directly to ask about using questions and methods.

Climate surveys must be reviewed by the appropriate committees (institutional review boards) as they involve human subjects (*see generally* <http://www.hhs.gov/ohrp/>).

As with all other aspects of the law, institutions are given flexibility to conduct this survey in a way that best serves students and in consideration of the campus culture and policies.

Care must be taken to ensure that data is protected and that individuals responding cannot be identified when data is published on the web. There are no specific requirements for what information must be published, but institutions should review the top level survey result publications of other institutions that have completed climate surveys so as to ascertain best practices.

To encourage institutions to properly conduct climate surveys and encourage participation in the survey, the law creates a presumption that data and information from a climate survey is not admissible in a federal or state court proceeding unless the court, in its discretion, determines that the information is material to the underlying claim or defense. The phrase *material* makes this a higher bar than the standard legal threshold for admissibility of evidence, which is *relevance*.

The White House Task Force has developed useful guidance on developing and conducting a climate survey: <https://www.notalone.gov/assets/ovw-climate-survey.pdf>; <http://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>.

Options for Confidential Disclosure (Section 6446):

1. In accordance with this article, every institution shall ensure that reporting individuals have the following:

This section applies to reporting individuals, and ensures that reporting individuals and potential reporting individuals are provided with clear and plain language regarding their options to report confidentially and/or privately, as those terms are defined in the law. The State University of New York has developed a policy relating to confidential disclosure.

a. Information regarding privileged and confidential resources they may contact regarding domestic violence, dating violence, stalking or sexual assault;

Privileged and confidential are defined in Section 6439(5)&(6).

b. Information about counselors and advocates they may contact regarding domestic violence, dating violence, stalking, or sexual assault;

These can include on campus resources and off campus resources. This section is consistent with the Office for Civil Rights April 2011 Dear Colleague Letter and April 2014 Dear Colleague Letter/Questions and Answers regarding “nonprofessional counselors and advocates” (this is an OCR term consistent with this law’s term “counselors and advocates”).

c. A plain language explanation of confidentiality which shall, at a minimum, include the following provision: “Even [Institution] offices and employees who cannot guarantee confidentiality will maintain your privacy to the greatest extent possible. The information you provide to a nonconfidential resource will be relayed only as necessary for the Title IX Coordinator to investigate and/or seek a resolution.”;

This language must be included verbatim. It is intended to provide students with uniform guidance about confidentiality, regardless of where they attend college in New York State. Privacy is the default setting for institution personnel. Only a few personnel at any institution have the ability to offer true confidentiality under the law. This statement informs students that the confidential resources listed by the institution provide confidentiality, but other employees who offer privacy will not make their reported information public; they will treat it with respect and only share it as necessary to comply with law and/or institution policy.

d. Information about how the institution shall weigh a request for confidentiality and respond to such a request. Such information shall, at a minimum, include that if a reporting individual discloses an incident to an institution employee who is responsible for responding to or reporting domestic violence, dating violence, stalking, or sexual assault but wishes to maintain confidentiality or does not consent to the institution’s request to initiate an investigation, the Title IX Coordinator must weigh the request against the institution’s obligation to provide a safe, non-discriminatory environment for all members of its community. The institution shall assist with academic, housing, transportation, employment, and other reasonable and available accommodations regardless of reporting choices;

The confidentiality referenced here is slightly different from the confidentiality referenced elsewhere in the law. Confidentiality as referenced here is intended to correspond to the confidentiality of whether to go forward with an investigation as described in Office for Civil Rights guidance interpreting Title IX. The reference to confidentiality should be read as a shorthand for the statement in paragraph (4) of this section describing information for students who are “[d]eclining to consent to an investigation.” The Office for Civil Rights’ analysis of Title IX, as stated in their April 2011 Dear Colleague Letter and April 2014 Dear Colleague Letter/Questions and Answers would require that Title IX Coordinators analyze each case where a reporting individual requests that an institution not go forward to determine whether the institution should or must go forward with an investigation and/or process anyway, even without the participation (or with the active opposition) of the reporting individual. The factors to be used by the Title IX Coordinator appear in paragraph 4 of this section below.

The final sentence of the paragraph is intended to educate students that their rights to interim measures and accommodations referenced in Section 6444(4)(h) apply regardless of whether they decide to formally report and/or to participate in the investigation or conduct process.

Reporting individuals may obtain all resources outlined in the law even if they decline to participate in an investigation or process or actively oppose the institution proceeding in its process.

e. Information about public awareness and advocacy events, including guarantees that if an individual discloses information through a public awareness event such as candlelight vigils, protests, or other public event, the institution is not obligated to begin an investigation based on such information. The institution may use the information provided at such an event to inform its efforts for additional education and prevention efforts;

This paragraph is intended to notify potential reporting individuals that, in accord with the Office for Civil Rights' analysis of Title IX, as stated in their April 2014 Dear Colleague Letter/Questions and Answers (modifying understanding of the April 2011 Dear Colleague Letter) institutions need not conduct a Title IX review of specific reports made at public events, including events like "Take Back the Night," "Paint the Campus Teal," "Walk a Mile" and other similar events. A Title IX Coordinator, consistent with this law, can use information learned at public events for training and prevention work, but may respect the desire of individuals to outcry at these events and not, in doing so, be required to undergo the institution's formal or informal process. A best practice would be to have an event leader state this clearly at the beginning of an outcry or open-microphone portion of such an event, and also list resources where a potential reporting individual could go to disclose confidentially and/or privately. Recall that the definition of Title IX Coordinator in this law also includes designees.

f. Information about existing and available methods to anonymously disclose including, but not limited to information on relevant confidential hotlines provided by New York state agencies and not-for-profit entities;

A curated list of New York State and national resources that is kept up-to-date may be found at the State University of New York Sexual Assault and Violence Response (SAVR) resource, by clicking on the blue tab named "View NYS Resources." A database of all resources is available on the SAVR site's toolkit:

https://docs.google.com/document/d/1E3ZZqQ03ah3RV_qhrUrdv3TNh5cNSQiq9N8BB21Ij-Y/pub. Institutions may freely copy some or all of the resources available there to their institution web site or resource.

g. Information regarding institutional crime reporting including, but not limited to: reports of certain crimes occurring in specific geographic locations that shall be included in the institution's annual security report pursuant to the Clery Act, 20 U.S.C. 1092(f), in an anonymized manner that identifies neither the specifics of the crime nor the identity of the reporting individual; that the institution is obligated to issue timely warnings of crimes

enumerated in the Clery Act occurring within relevant geography that represent a serious or continuing threat to students and employees, except in those circumstances where issuing such a warning may compromise current law enforcement efforts or when the warning itself could potentially identify the reporting individual; that a reporting individual shall not be identified in a timely warning; that the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, allows institutions to share information with parents when i. there is a health or safety emergency, or ii. when the student is a dependent on either parent's prior year federal income tax return; and that generally, the institution shall not share information about a report of domestic violence, dating violence, stalking, or sexual assault with parents without the permission of the reporting individual.

This paragraph is a statement of the current requirements of the Clery Act and the Family Educational Rights and Privacy Act (FERPA). The paragraph does not change anything in law but is an educational piece for students to include such information alongside other relevant policy information.

2. The institution may take proactive steps, such as training or awareness efforts, to combat domestic violence, dating violence, stalking or sexual assault in a general way that does not identify those who disclose or the information disclosed.

This provision speaks for itself.

3. If the institution determines that an investigation is required, it shall notify the reporting individuals and take immediate action as necessary to protect and assist them.

This provision speaks for itself.

4. The institution should seek consent from reporting individuals prior to conducting an investigation. Declining to consent to an investigation shall be honored unless the institution determines in good faith that failure to investigate does not adequately mitigate a potential risk of harm to the reporting individual or other members of the community. Honoring such a request may limit the institution's ability to meaningfully investigate and pursue conduct action against an accused individual. Factors used to determine whether to honor such a request include, but are not limited to:

a. Whether the accused has a history of violent behavior or is a repeat offender;

b. Whether the incident represents escalation in unlawful conduct on behalf of the accused from previously noted behavior;

- c. The increased risk that the accused will commit additional acts of violence;*
- d. Whether the accused used a weapon or force;*
- e. Whether the reporting individual is a minor; and*
- f. Whether the institution possesses other means to obtain evidence such as security footage, and whether available information reveals a pattern of perpetration at a given location or by a particular group.*

This paragraph adds details to the balance considered by the Title IX Coordinator in (1)(d) of this section. In general, consistent with the Clery Act and the Office for Civil Rights' interpretations of Title IX, institutions should respect the request of a reporting individual to withdraw his or her complaint and to have the institution not investigate and/or take any action. However, consistent with the aforementioned federal laws, this law requires that the Title IX Coordinator or designee analyze the factors established in (4)(a)-(f) of this section to determine whether not going forward with the institution's process would fail to adequately mitigate a potential risk of harm to the reporting individual and/or other members of the community. The law does not draw bright lines or tell institutions how to weigh these factors. Rather, the law gives broad discretion to institutions, expected to act in good faith to develop policies, procedures and protocols to properly weigh the risks to the reporting individual and other members of the institution community against the wishes of the reporting individual not to have the institution move forward.

Student Onboarding and Ongoing Education (Section 6447):

1. Every institution shall adopt a comprehensive student onboarding and ongoing education campaign to educate members of the institution's community about domestic violence, dating violence, stalking, and sexual assault, in compliance with applicable federal laws, including the Clery Act as amended by the Violence Against Women Act reauthorization of 2013, 20 U.S.C. 1092(f).

Education Law 129-B codifies some of the education and training requirements of the Clery Act, 20 U.S.C. 1092(f)(8)(B) and 34 C.F.R. §658.46 (j) as amended by the Violence Against Women Act relating to primary and ongoing prevention and awareness programs while providing plain language and consistent requirements for colleges to implement those federal requirements and, in certain limited areas that are specifically delineated, going beyond the federal law. This section should be read to be consistent with the Clery Act except in the specific cases where the law goes beyond those requirements.

The law does not prescribe any specific method for educating students, and each institution should use good faith to develop programs that best meet the needs of students and educate them about these important issues.

Except as specifically required in paragraph 6 regarding student leaders and athletes, the obligation of each institution is to *offer* training in a meaningful way to students (including but not limited to entering students). With the exception of paragraph 6 covering athletes and student leaders, there is no requirement that students complete the training, and no requirement that students sign-in to a training session, or that institutions create an audit trail to show 100 percent attendance at a training or among students. There is no requirement that institutions discipline or sanction students who choose not to attend one or more offered trainings, nor are institutions required to prevent students choosing not to attend from registering for classes, graduating, etc.

While software or digital training may be *part* of a regime for training and education (and may be the only option for institutions that primarily offer classes in a distributed or online manner), for traditional brick and mortar campuses, institutions should not simply use a software package and require students to log in and prove attendance. Studies and experience show that they will not learn best this way and that they will come to resent the training.

Instead, institutions should be creative with training that is meaningful to students and that offers students different options over the course of their time on campus to learn about these issues from both the prevention and response angles. The legislation encourages institutions to work together and with statewide and local organizations to develop and offer interesting and useful trainings. Institutions may also see strong results by calling on students, faculty, staff and community members to assist in developing tailored programming.

2. Included in this campaign shall be a requirement that all new first-year and transfer students shall, during the course of their onboarding to their respective institution, receive training on the following topics, using a method and manner appropriate to the institutional culture of each institution:

Summer orientations are packed full of content and at a certain point, additional training comes with diminishing returns. Traditionally, as a best practice and pursuant to the requirements of Education Law §6432, institutions offer training in sexual assault prevention during new student orientation. The changed requirement of “onboarding” is intended to be reflective of a regime of training that is not limited to a single session on a single orientation day. Rather, each institution, consistent with its best practices and culture, should develop a series of programs over the course of the new student experience.

- a. The institution prohibits sexual and interpersonal violence and will offer resources to any victims and survivors of such violence while taking administrative and conduct action regarding any accused individual within the jurisdiction of the institution;*
- b. Relevant definitions including, but not limited to, the definitions of sexual assault, domestic violence, dating violence, stalking, confidentiality, privacy, and consent;*
- c. Policies apply equally to all students regardless of sexual orientation, gender identity, or gender expression;*
- d. The role of the Title IX Coordinator, university police or campus security, and other relevant offices that address domestic violence, dating violence, stalking, and sexual assault prevention and response;*
- e. Awareness of violence, its impact on victims and survivors and their friends and family, and its long-term impact;*
- f. Bystander intervention and the importance of taking action to prevent violence when one can safely do so;*
- g. Risk assessment and reduction including, but not limited to, steps that potential victims, perpetrators, and bystanders can take to lower the incidence of violations, which may contain information about the dangers of drug and alcohol use, including underage drinking and binge drinking, involuntary consumption of incapacitating drugs and the danger of mislabeled drugs and alcohol, the importance of communication with trusted friends and family whether on campus or off campus, and the availability of institution officials who can answer general or specific questions about risk reduction; and*
- h. Consequences and sanctions for individuals who commit these crimes and code of conduct violations.*

At a minimum, the onboarding programming should cover the topics listed here, again in a method and manner appropriate to the institution. Not every topic needs to be covered in every session, and institutions can determine which areas to go can determine which areas to emphasize, but over the course of the programming all topics should be covered. Again, while institutions must offer this programming to students, the law does not require that students attend. The impetus is to develop creative trainings that engage students, rather than rote trainings that comply, but that bore students.

3. Every institution shall train all new students, whether first-year or transfer, undergraduate, graduate, or professional.

New students are required to be trained regardless of whether it is their first day as an undergraduate or they are in graduate or professional school, and this provision should be read consistently with the Clery Act and the paragraphs above.

4. Every institution shall use multiple methods to educate students about violence prevention and shall share information on domestic violence, dating violence, stalking and sexual assault prevention with parents of enrolling students.

The law discourages institutions from simply sending students to a website or a software program and relying entirely on that. Rather, with the exception of institutions that can only rely on software or web programming due to their nature as an online or distance only institution, institutions should use several methods, consistent with best practices, to best educate students.

Institutions shall also share information on sexual and interpersonal violence with parents of students. There are several ways to comply with this. One is to provide information directly to parents, either by mail or to parents attending programming. Many institutions, especially graduate and professional schools, do not collect contact information for parents.

Acknowledging this, another method to comply with this provision would be to post information on a web page directed specifically at parents, that can be found on the institution website in an appropriate place or places, that can be found via a search of the website, and that is available generally with information for parents customized to the specific institution.

5. Every institution shall offer to all students general and specific training in domestic violence, dating violence, stalking and sexual assault prevention and shall conduct a campaign that complies with the Violence Against Women Act, 20 U.S.C. 1092(f), to educate the student population. They shall, as appropriate, provide or expand specific training to include groups such as international students, students that are also employees, leaders and officers of registered or recognized student organizations, and online and distance education students. They shall also provide specific training to members of groups that the institution identifies as high-risk populations.

This provision is separate from and in addition to paragraph 2 of this section. Institutions must offer training to new students during the onboarding period and engage in a campaign over the course of each academic year that offers different training and education options.

As stated above under paragraph 1, this paragraph should be read in a manner consistent with the Clery Act. A campaign of programming shall be offered to all students that wish to participate.

Institutions should make programming available at different times and in different formats to encourage participation.

Beyond this, institutions should use good faith to determine whether specific groups of students could benefit from more specific or tailored training. There is no requirement that each group receive individualized training, but institutions should determine whether there is additional tailored training that, if offered to specific groups, could assist in prevention and response. The legislation lists examples of groups such as international students, students who are also employees, student leaders and online students. That is not an exclusive list, but are examples to help institutions identify student groups that may benefit from additional, tailored training. Institutions should tailor training to their student population.

Each institution should also use good faith efforts to determine whether specific groups of students are in high risk populations who could benefit from more specific or tailored training. Institutions determine who these populations are and an institution can determine whether it wishes to provide training for populations who are at high risk for victimization, perpetration, being a bystander to violence, or a combination of these groups. In different years, population changes may lead to different determinations of membership in high risk populations. Again, the idea is for institutions to consider going beyond generalized training equally applicable to all to specialized training that could lessen violence when directed at a specific population.

6. Every institution shall require that each student leader and officer of student organizations recognized by or registered with the institution, as well as those seeking recognition by the institution, complete training on domestic violence, dating violence, stalking, or sexual assault prevention prior to receiving recognition or registration, and each institution shall require that each student athlete complete training on domestic violence, dating violence, stalking, or sexual assault prevention prior to participating in intercollegiate athletic competition.

This paragraph is the only provision of this onboarding section of the law that goes beyond the requirements of the Clery Act. While the above paragraphs require institutions to *offer* training and a campaign of education generally, this provision requires *completion* of training by student leaders (including athletes and club/organization officers and leaders) in an effort to change the culture in schools.

Institutions have significant flexibility in how to offer these required trainings. The legislation uses the disjunctive “or” in requiring training on domestic violence, dating violence, stalking, **or** sexual assault prevention, giving institutions flexibility to have broad or tailored programming that covers one topic in detail or several topics. Institutions may conduct a single training or a series of trainings for all athletes or student leaders or they may allow such students to show that they have attended one of many trainings offered by the institution over the course of the

semester. Institutions should endeavor to accomplish this in good faith. The training requirement is not measured by the *organization* or *team* being trained once, but by each *officer*, *leader*, or *athlete* completing the training her or himself to qualify for their position as athlete or club/organization leader. The legislation does not denote which individuals are considered “leaders” and “officers” and leaves it to the institution. While many student organizations have a president, vice president, treasurer, and secretary, other organizations have chancellors, directors, captains, or other titles. Each institution can use good faith to determine for its own organizations who the appropriate individuals are to receive the training. Other institutions may comply by requiring each organization to show that its leaders have been trained, for instance, by requiring each organization to list in its registration/recognition application four leaders (as determined by the organization) who have completed training. Completing one such training is the minimum required by the law but institutions may require or encourage attendance at multiple trainings by covered students.

As stated several times, the legislation is tailored to encourage institutions to use good faith to educate covered students in useful ways using best practices. Institutions may make small, reasonable adjustments and be in compliance. For instance, if a major training is scheduled for September 15, allowing fall sport athletes to begin competition with the understanding that they would be trained within their first month of play, or allowing student organization leaders to begin their “back to school” programming understanding that they would be imminently attending a training during the fall semester should be seen as compliant with the law, provided that the institution uses good faith to ensure such covered students do obtain the training.

This training must be offered in addition to the training offered as onboarding to incoming students.

7. Every institution must regularly assess programs and policies established pursuant to this article to determine effectiveness and relevance for students.

The law does not specify the method for such assessment, but institutions should seek to determine whether their methods of education reflect best practices and current thinking. Assessment may include review of internal programs and procedures, review of external programs and procedure conducted at other institutions, and/or review of resources prepared by government agencies and not-for-profit entities.

No program is effective indefinitely and this requirement will remind institutions to keep current on best practices so as to educate and train students with maximum effectiveness.

Privacy in Legal Challenges (Section 6448):

Pursuant to subdivision (i) of rule three thousand sixteen of the civil practice law and rules, in any proceeding brought against an institution which seeks to vacate or modify a finding that a student was responsible for violating an institution's rules regarding a violation covered by this article, the name and identifying biographical information of any student shall be presumptively confidential and shall not be included in the pleadings and other papers from such proceeding absent a waiver or cause shown as determined by the court. Such witnesses shall be identified only as numbered witnesses. If such a name or identifying biographical information appears in a pleading or paper filed in such a proceeding, the court, absent such a waiver or cause shown, shall direct the clerk of the court to redact such name and identifying biographical information and so advise the parties.

There have been reports of some attorneys seeking to shame reporting individuals by exposing their status as a victim or survivor of sexual or interpersonal violence by naming them in a complaint against the college or university that took action under the student conduct code. There is no legal or procedural gain from naming reporting individuals, but it has a significant negative impact on the willingness of victims to come forward and report. There is no diminution in the rights and options available to respondent students challenging student conduct findings that comes through calling reporting individuals and other student witnesses Witness 1, Witness 2, etc. This provision does not prevent the respondent (plaintiff or complainant in such a case) from naming himself or herself, or naming any student witnesses who waive their right to confidentiality. Further, this provision does not apply to non-student witnesses including, but not limited to, faculty and staff, law enforcement, and witnesses testifying in a professional capacity.

Reporting Aggregate Data to the Department (Section 6449):

1. Institutions shall annually report to the department the following information about reports of domestic violence, dating violence, stalking and sexual assault:

a. The number of such incidents that were reported to the Title IX Coordinator.

b. Of those incidents in paragraph a of this subdivision, the number of reporting individuals who sought the institution's judicial or conduct process.

c. Of those reporting individuals in paragraph b of this subdivision, the number of cases processed through the institution's judicial or conduct process.

d. Of those cases in paragraph c of this subdivision, the number of respondents who were found responsible through the institution's judicial or conduct process.

e. Of those cases in paragraph c of this subdivision, the number of respondents who were found not responsible through the institution's judicial or conduct process.

f. A description of the final sanctions imposed by the institution for each incident for which a respondent was found responsible, as provided in paragraph d of this subdivision, through the institution's judicial or conduct process.

g. The number of cases in the institution's judicial or conduct process that were closed prior to a final determination after the respondent withdrew from the institution and declined to complete the disciplinary process.

h. The number of cases in the institution's judicial or conduct process that were closed because the complaint was withdrawn by the reporting individual prior to a final determination.

2. The department shall create a reporting mechanism for institutions to efficiently and uniformly provide the information outlined in subdivision one of this section.

3. The department shall not release the information, as provided for in this section, if it would compromise the confidentiality of reporting individuals or any other party in the best judgment of the department.

4. Within one year of the effective date of this article, the department shall issue regulations in consultation with representatives from the state university of New York, city university of New York, and private and independent colleges and universities, and within two years of the effective date of this article the department shall issue a report to the governor, the temporary president of the senate, the speaker of the assembly and the chairs of the higher education committees in each house regarding the data collected pursuant to this section.

SED shall conduct a rulemaking process, with sufficient notice and comment, and provide further guidance on complying with the provisions of this section.

Additional Provisions:

The legislation establishes a special unit within the State Police to assist in complying with this law including providing forensic support services to University Police, Campus Safety and local law enforcement and providing training to college campuses, and appropriates \$4.5 million dollars to the State Police. Another \$4.5 million dollars is appropriated through the Office of Victim Services and Department of Health towards prevention, education and victim services of rape crisis centers. Finally, \$1 million dollars is appropriated to colleges and universities for training and other expenses related to successful implementation of this legislation.

VI- Further Resources:

- Governor's Office Program Page: <https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses>
- New York Article 129-B Legislation: <http://www.nysenate.gov/legislation/bills/2015/S5965>
- Signed Legislation Press Release: <https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university>
- Distinctions Between Penal Law and Discipline: <http://system.suny.edu/sexual-violence-prevention-workgroup/College-and-Criminal-Resource/>
- New York State Department of Health Rape Crisis and Sexual Violence Prevention Program: https://www.health.ny.gov/prevention/sexual_violence/
- New York State Office for the Prevention of Domestic Violence: <http://www.opdv.ny.gov/>
- New York State Coalition Against Sexual Assault: <http://nyscasa.org/>
- New York State Coalition Against Domestic Violence: <http://www.nyscadv.org/>
- New York City Alliance Against Sexual Assault: <http://www.svfreenyc.org/>
- Violence Against Women Act Final Regulations: <https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act>
- Guidance for Complying with the Violence Against Women Act: <http://system.suny.edu/media/suny/content-assets/documents/generalcounsel/SUNY-VAWA-Guidance-2014.pdf>
- Federal Department of Education Office for Civil Rights Title IX Guidance: <http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX>

SED provides links to these external resources throughout this document but does not control these resources. Such links are not an endorsement of any content not created by SED. SED welcomes additional resources developed by institutions, state agencies and community organizations to aid in compliance with this law.