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On October 20, 2014, the Department of Education published final regulations to implement the statutory changes to the Clery Act resulting from the passage of the Violence Against Women Reauthorization Act of 2013. This whitepaper will highlight key takeaways gleaned from comparing the draft regulations published on June 20, 2014 in the Federal Register and the final regulations published on October 20, 2014. An exhaustive explanation of all changes to the Clery Act brought about by the Violence Against Women Reauthorization Act of 2013 is beyond the scope of this paper.



As a leader at the forefront to enhance security at the nation's higher education facilities, universities, STANLEY Security understands the importance of educating school administrators and policy-makers on the intricacies of compliance. For years, STANLEY has developed highly intuitive technologies and integrated security solutions to promote on-campus safety, but has acted as an advocate for the importance of compliance-driven decisions.

STANLEY continues this progressive, comprehensive approach to higher education security by partnering with the National Association of Clergy and Security Associates and the National Association of Clergy Officers and Professionals (NACCOP). STANLEY combines its expertise with that of Dolores Stafford, a national expert on the Clery Act and premier consultant in both the law enforcement and security industries. Over the years, to establish a culture of safety, knowledge sharing amongst campus advisors and administrators, STANLEY has endeavored to secure campus environments nationwide.

BACKGROUND

President Barack Obama signed the Violence Against Women Reauthorization Act of 2013 (VAWA) into law on March 7, 2013. Section 304 of VAWA amended section 485(f) of the Higher Education Act, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (a.k.a. the Clery Act). In addition to enacting clarifying and technical revisions to the Clery Act, VAWA significantly expanded crime reporting requirements to include incidents of Dating Violence, Domestic Violence, and Stalking (DVDVS). VAWA also enhanced the policies, procedures and programs institutions must include related to these incidents. The statutory provisions took effect March 7, 2014 and institutions were required to make a good faith effort to comply with the new crime reporting and policy statement requirements in the Annual Security Report published on or before October 1, 2014.

On April 16, 2014 the Department of Education published a notice in the Federal Register announcing its intent to establish a negotiated rulemaking committee to develop draft regulations. Following four public hearings at which commentary was received from various stakeholders, the Department solicited nominations for non-Federal negotiators.

Fifteen negotiators (one Federal, 14 non-Federal) were appointed and met during three separate sessions during the first quarter of 2014. After the negotiators reached consensus on a draft, the Department of Education published draft regulations for public comment on June 20, 2014 in a Notice of Proposed Rulemaking (NPRM). During the month in which it solicited public comment, the Department received approximately 2,200 comments on the proposed regulations in addition to approximately 3,600 signatures supporting comments submitted by the American Association of University Women. Final regulations were published in the Federal Register on October 20, 2014.

FINAL REGULATIONS WERE
PUBLISHED IN THE FEDERAL
REGISTER ON OCTOBER 20, 2014



JUL
2015

Date final regulations become effective, which means that all policies, procedures, and programs addressed must be in full compliance prior to the next annual security report on or before October 1, 2015.

OCT
2018

Date of first annual security report for which institutions must publish three years' worth of crime statistics (including DVDVS) in conformance with the final regulations.

OCT
2015

We recommend institutions begin using the updated regulations now in reporting 2013 and new 2014 crime statistics.

IMPLEMENTATION OF CHANGES

The final regulations are effective July 1, 2015, which means that all policies, procedures and programs addressed by the regulations must be in full compliance prior to publication of the next annual security report on or before October 1, 2015. Institutions were already expected to make a “good faith” effort to provide accurate and complete statistics in the annual security report published on or before October 1, 2014. Institutions were also required to meet the statutory requirements of VAWA pertaining to any policies, procedures and practices by this time. The department asserted that institutions have at least seven months until the effective date of the final regulations to update policies, procedures and practices which, in the department’s view, is “sufficient time for institutions to come into compliance.”¹ Institutions would be wise to immediately develop and implement plans for reviewing their policies, procedures and programs to ensure they meet the July 1, 2015 deadline. As policies are being developed and/or updated, institutions should take notice of the department’s reminder in the federal register to notify students and employees whenever “an institution changes its policies during the year.”²

With respect to crime statistics, institutions will not have to report statistics for DVDVS using the definitions and criteria contained in the final regulations until calendar year 2015. This means that the first annual security report for which institutions must publish three years’ worth of crime statistics in conformance with final regulations will be the annual security report due October 1, 2018 (which will disclose statistics for calendar years 2015, 2016 & 2017).

Although ED will not require institutions to publish 2014 crime statistics in accordance with the final regulations, we encourage institutions to do so in the Annual Security Report that must be published by October 1, 2015

¹ Violence Against Women Act; Final Rule, 79 Fed. Reg. 62752 (October 20, 2014), p. 62754

² 79 Fed. Reg. 62752 (October 20, 2014), p. 62754

A REVISED HANDBOOK IS COMING

The final regulations affirm that the Department intends to publish a revised edition of the Handbook for Campus Safety and Security Reporting (hereafter, “the Handbook”). No formal process or timeline for revising the Handbook is outlined in the Federal Register, but we can expect the Department to address, at a minimum, the following, which are explicitly mentioned in the Federal Register as areas in which the Department intends to provide further guidance in the Handbook:

- The reporting of crimes on a voluntary, confidential basis for inclusion in the crime statistics and the implications of doing so under Title IX of the Education Amendments of 1972;
- Classification of crimes using applicable Uniform Crime Reporting (UCR) guidelines;
- Additional examples of locations that are part of a school’s Clery geography, including how to determine a school’s “public property”; and
- What constitutes “simultaneous notification” to both the accuser and the accused following institutional disciplinary proceedings arising from an allegation of domestic violence, dating violence, sexual assault or stalking (DVDVSAS).

We should anticipate the Department will provide additional guidance regarding the issue of unfounding reported crimes given the new reporting requirement, discussed below. It is also reasonable to expect the Department to provide additional insights into the various requirements of VAWA, including guidance pertaining to the classification of dating violence, domestic violence and stalking offenses as well as the institution’s programs to prevent DVDVSAS and institutional disciplinary actions pertaining to DVDVSAS.



WHAT HASN'T CHANGED SINCE THE **NPRM**

The final regulations responded to comments the Department received which it determined to be substantive, rather than technical or clarifying, in nature. The Department's response included responding to comments and suggestions which the Department ultimately rejected for reasons it explained in the Federal Register. A noteworthy example involves the Department's position on omitting a definition of "consent" from both the draft and final regulations. As the Department notes,

for purposes of Clery Act reporting, all sex offenses that are reported to a campus security authority... must be included in an institution's Clery Act statistics. Thus, while the definition of the sex offenses... include lack of consent as an element of the offense, for purposes of Clery Act reporting, no determination as to whether that element has been met is required.³

In essence, the Department said out loud that institutions should include in their statistics any sex offense reported to a campus security authority, and that institutions need not (and should not) attempt to determine whether there was an absence of consent before disclosing the offense in its annual crime statistics. We do not interpret this to mean that an institution cannot subsequently "unfound" a reported sex offense, but rather to reinforce that an institution should accept any crime report of a sex offense that is not clearly rumor or hearsay.

The Department also maintained its position on allowing both the accuser and accused the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice. The Department rejected the summary disqualification of certain parties from being advisors, such as immigration agents or attorneys, but maintained the autonomy of institutions to fashion restrictions on participation so long as these restrictions apply equally to both parties. The Department also affirmed that institutions may remove advisors who are disruptive or fail to abide by restrictions placed on them by the institution. The Department further noted that institutions are not required to delay or cancel a meeting due to the inability of an advisor to attend the meeting so long as "timely notice" of the meeting has been provided in accordance with §668.46(k)(3)(i)(B)(2). These clarifications provide an important framework for institutions to consider as they refine their disciplinary proceedings for students, faculty and employees involved in DV/DVSA cases.

With respect to reporting incidents of dating violence, the Department stuck to its original position to exclude emotional and psychological abuse from the definition of dating violence. The Department acknowledged that inclusion of emotional and psychological abuse within the construct of dating violence "would pose significant challenges in terms of compliance and enforcement of these provisions."⁴ The department also rejected calls to provide definitions of "students" and "employees" as the Department was satisfied that the statute already requires institutions to determine who its students and employees are for the purposes of distributing its Annual Security Report.

³ 79 Fed. Reg. 62752 (October 20, 2014), p. 62756

⁴ 79 Fed. Reg. 62752 (October 20, 2014), p. 62757

TERMINOLOGY

The department chose to keep the original definitions of most defined terms originally published in the NPRM, including “Clery geography;” “Federal Bureau of Investigation’s Uniform Crime Reporting Program [FBI’s UCR Program];” “Hate crime;” “Hierarchy Rule;” “Programs to prevent dating violence, domestic violence, sexual assault, and stalking;” “awareness programs;” “bystander intervention;” “ongoing prevention and awareness campaigns;” “primary prevention programs;” “risk reduction;” “advisor;” and “result.” The Department also retained the definitions pertaining to the required crime categories of “dating violence;” “domestic violence;” “sexual assault;” and “stalking.” As part of the definition of stalking, the definitions of “course of conduct;” “reasonable person;” and “substantial emotional distress” also remained intact from their original appearance in the NPRM.

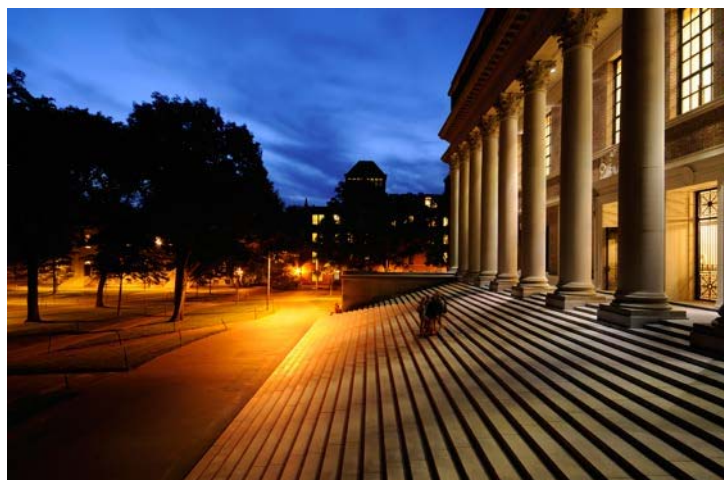
While these definitions did not change in the final regulations, they highlight broader regulatory changes worthy of mention. Institutions have already been required to apply the Hierarchy Rule from the FBI’s UCR program whenever multiple offenses occur during the same incident. The final regulations, consistent with the NPRM, create a new exception to the Hierarchy Rule that requires institutions to report a sex offense and a murder whenever these offenses occur during the same incident. Under the prior application of the Hierarchy Rule, institutions would have only reported a murder.

“Sexual Assault” is defined in the regulations 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 this subpart.” The Department acknowledges in the regulations that the FBI’s UCR program (specifically the Summary Reporting System, or SRS) has modernized the definition of rape and now encompasses all offenses which previously met the National Incident-Based Reporting System (NIBRS) categories of rape, sodomy and sexual assault with an object. The new SRS definition of rape will guide reporting of these offenses for Clery Act purposes. The NIBRS definitions of fondling, incest and statutory rape will continue to guide classification of those sex offenses). Consistent with these

changes, references to “forcible” or “non-forcible” sex offenses have been removed from the regulations.

The Department also updated the regulations to make reference to revised FBI UCR Program manuals:⁵

- The FBI’s “Summary Reporting System User Manual” [SRS User Manual] should be used to count all of the Primary crimes enumerated in the regulations (except fondling, incest and statutory rape). The SRS User Manual was published in June 2013 and replaced the 2004 edition of the “Uniform Crime Reporting Handbook” that is currently referenced in the Handbook for Campus Safety & Security Reporting;
- The definitions of fondling (formerly labeled “forcible fondling”), incest and statutory rape are excerpted from the “National Incident-Based Reporting System (NIBRS) User Manual,” which was published by the FBI in January 2013. The 2013 NIBRS User Manual replaces the “National Incident-Based Reporting System Volume 1: Data Collection Guidelines” originally published in August 2000 and is referenced in the current Handbook; and
- The Department incorporated the “Hate Crime Data Collection Guidelines and Training Manual” into the regulations for compiling hate crime statistics for larceny-theft (except motor vehicle theft), simple assault, intimidation, and destruction/damage/vandalism of property. The “Hate Crime Data Collection Guidelines and Training Manual” was published by the FBI in December 2012 and replaces the “Uniform Crime Reporting Hate Crime Data Collection Guidelines” and “Training Guide for Hate Crime Data Collection” which are referenced in the Handbook.



⁵ These revised manuals are available under the “Resources” tab on the D. Stafford & Associates website at www.dstaffordandassociates.com.



The Department modified the definition of only one term in response to comments received following publication of the NPRM. One commenter expressed concern regarding how the proposed definition of “proceeding” could inadvertently result in the disclosure of interim or protective measures provided to a victim if the term “proceeding” included informal meetings between institutional officials and a victim, as originally proposed. In response, the Department updated the regulation to state “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.” This addition helps preserve the confidentiality of victims and the accommodations or protective measures they are provided by institutional officials following a report of DVDVSAS.

Finally, although not a term defined explicitly in the regulations, the final regulations (consistent with the NPRM) incorporate by reference the definition of “personally identifying information” (PII) from section 40002(a)(20) of the Violence Against Women Act of 1994. This phrase is contained within the requirement that institutions provide a statement of policy in the Annual Security Report pertaining to the procedures the institution will follow when DVDVSAS is reported. Specifically, institutions must disclose how they will protect the confidentiality of victims and other necessary parties, including how the institution will fulfill annual and ongoing disclosures required by the Clery Act, without inclusion of PII. The definition of PII provided in section 40002(a)(20) of the Violence Against Women Act of 1994 is as follows:

“...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:

1. A first and last name;
2. A home or other physical address;
3. Contact information (including a postal, e-mail, or Internet protocol address, or telephone or facsimile number);
4. A social security number, driver license number, passport number, or student identification number; and
5. Any other information, including date of birth, racial or ethnic background, or religious affiliation, that would serve to identify any individual.”⁶

SUBSTANTIVE DEVELOPMENTS

Perhaps the most substantive changes from the NPRM deal with the issues of counting stalking offenses and “unfounding” crime reports.

With respect to stalking, the Department decided to drop the proposed standard of counting as a new and distinct incident of stalking any behaviors that occur subsequent to an “official intervention” by a school or court. The Department recognized the inherent difficulty of tracking stalking incidents when institutions may not always be aware of interventions by courts. Further, the Department recognized the arbitrary nature of attempting to differentiate among courses of conduct involving the same perpetrator and victim in light of stalking patterns and dynamics.

In omitting this standard, the Department opted to clarify (but not substantively change) its originally proposed language requiring institutions to report incidents of stalking in each and every year in which the stalking course of conduct occurs. This language reaffirms that if a course of conduct continues across calendar years, the stalking offenses must be recorded in each calendar year in which they are reported to a campus security authority (provided the courses of conduct occurred within the institution’s Clery geography). The Department rejected the notion that an institution’s computer servers or networks should factor into the determination of whether the incident occurred within the institution’s Clery geography and opted to report offenses based on the first (physical)

location within the institution’s Clery geography in which either the perpetrator engaged in the stalking course of conduct or the victim first became aware of the stalking.

Although the original NPRM included language affirming that all crimes reported to campus security authorities must be disclosed in the annual crime statistics, the Department enhanced this language by adding a new requirement for institutions to report the number of incidents sworn or commissioned law enforcement personnel have determined through investigation to be “unfounded.” In adding this requirement, institutions will be required to report, in the Annual Security Report and to the Department via the Campus Safety and Security data collection website, the number of incidents the institution withheld (or subsequently removed) from the annual crime statistics. In the Department’s discussion of these requirements, they acknowledged “we are concerned that some institutions may be inappropriately unfounding crime reports and omitting them from their statistics”⁷ though the foundation for this concern was not identified in the Department’s explanation. The Department took care to note that institutions should be maintaining documentation of any crime reports they unfound as “the Department can and does request such documentation when evaluating compliance with Federal law.”⁸



⁷ 79 Fed. Reg. 62752 (October 20, 2014), p. 62765

⁸ 79 Fed. Reg. 62752 (October 20, 2014), p. 62765

CAMPUS SECURITY

NEXT STEPS IN COMPLIANCE

College and university personnel are encouraged to familiarize themselves with these and other issues addressed by the final regulations well in advance of the July 1, 2015 implementation deadline. Although the Department projects adhering to new requirements will only require an additional burden of 10.75 hours per institution, these estimates are clearly unrealistic and do not adequately account for all of the time institutions will spend on meeting new compliance requirements. In spite of such modest burden projections, the Department conceded the following: “we expect this additional workload would result in costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities.”⁹

Institutions, and the personnel involved in Clery compliance efforts, need not shoulder these burdens alone. The National Association of Clery Compliance Officers and Professionals (NACCOP) provides a professional association for Clery Compliance Officers and Professionals to collaborate with each other,

share resources and best practices, and participate in professional development opportunities to support colleges and universities in their efforts to comply with the Clery Act. For more information about the resources available to NACCOP members, or to join NACCOP, visit www.naccop.org. A track-changed version of the regulations previously in effect (following amendments to Clery by the Higher Education Opportunity Act of 2008) is available for download for NACCOP members from this website to more clearly explain what language and requirements have changed with the passing of VAWA. Additionally, the D. Stafford and Associates Clery Act Compliance Training Academy (formerly the Advanced Clery Act Class that has been expanded to 5 days) will cover all of the requirements of the Clery Act, including those addressed by the final regulations in significant detail. To learn more about offerings of the Academy in 2015, visit www.dstaffordandassociates.com/training.

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