

URMIA Government and Regulatory Affairs White Paper

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

May 2017

Andrea Stagg
Deputy General Counsel
Barnard College

Joseph Storch
Associate Counsel
State University of New York

This URMIA white paper is published by the University Risk Management and Insurance Association (URMIA), P.O. Box 1027, Bloomington, IN 47402-1027. URMIA is an incorporated nonprofit professional organization.

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Overview and Brief Description

AUTHORS¹

Andrea Stagg, Deputy General Counsel, Barnard College,² and Joseph Storch, Associate Counsel, State University of New York³

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

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, its Co-Chairs Sally Alexander and Leta Finch and Board Liaison Cheryl Lloyd, 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.

2 Andrea Stagg is deputy general counsel at Barnard College in New York City and has represented both public and private colleges in issues related to campus safety and compliance. 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 Office of General Counsel. Before law school she worked in federal higher education lobbying for Rutgers, the State University of New Jersey.

3 Joseph Storch is an associate counsel at the State University of New York (SUNY) 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 Master of Public Policy from the University at Albany and a law degree from Cornell Law School. He has presented at two URMIA conferences and was awarded NACUA's First Decade Award at its 2015 Annual Conference.

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 cohabit 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

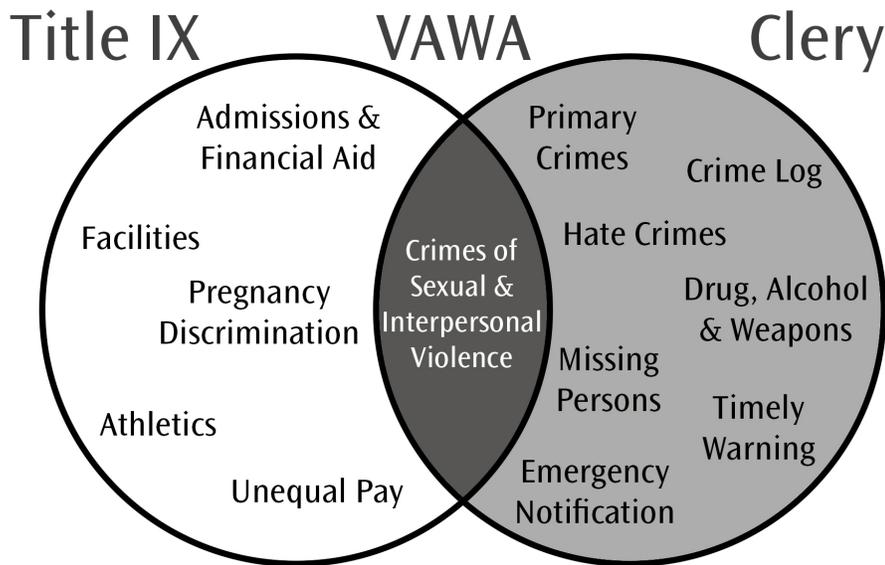


Figure 1: Intersections between Title IX, Clery Act, and Violence Against Women Act

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.

Sources and References

- US Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting, 2016 Edition*, Washington, D.C., 2016, <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.
- Final Regulations to Implement the Clery Act Amendments of the Violence Against Women Act, 79 FR 62751-62790 (Oct. 20, 2014), <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.
- State University of New York, *Policy and Programming Changes Pursuant to the Campus SaVE Provisions of the Violence Against Women Act* (July 2014), <http://system.suny.edu/media/suny/content-assets/documents/generalcounsel/SUNY-VAWA-Guidance-2014.pdf>.
- *Not Alone: Report of the White House Task Force to Protect Students From Sexual Assault* (Apr. 2014), <https://www.justice.gov/ovw/page/file/905942/download>.
- Center for Changing Our Campus Culture, <http://changingourcampus.org>.
- Department of Justice (DOJ), “Resources from the Office on Violence Against Women,” <https://www.justice.gov/ovw>.
- Centers for Disease Control (CDC), “Sexual Violence: Additional Resources,” <http://www.cdc.gov/violenceprevention/sexualviolence/resources.html>.
- Joseph Storch, *Properly Classifying Geographic Locations for Clery Act Annual Security Report Purposes* (May 2013), http://www.higheredcompliance.org/resources/resources/ProperlyClassifyingGeoLocale_CleryAct.pdf.
- Andrea Stagg and Joseph Storch, *Notifications Following Student Conduct Hearings* (2017), <http://www.higheredcompliance.org/resources/VictimNotificationChart%202017.pdf>.
- Andrea Stagg and Joseph Storch, *Crime and Incident Reporting Guidelines for CSAs and Responsible Employees* (April, 2017), <http://www.higheredcompliance.org/resources/Crime%20and%20Incident%20Reporting%20Guidelines%20for%20CSAs%20and%20Responsible%20Employees.pdf>.

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UNIVERSITY RISK MANAGEMENT &
INSURANCE ASSOCIATION

URMIA Home Office
P.O. Box 1027
Bloomington, IN 47402
www.urmia.org