USING THE CLERY ACT TO CREATE A SUSTAINABLE SEXUAL VIOLENCE CONDUCT PROCESS

S. DANIEL CARTER

2020 NASPA STRATEGIES CONFERENCES

LEARNING OBJECTIVES

• Explain which sexual violence institutional conduct cases the VAWA amendments to the Clery Act apply to.
• Explain the specific procedural safeguards for both the “accuser” and “accused” that apply in Clery conduct proceedings.
• Explain how to effectively implement policies that integrate Clery requirements into Title IX and other institutional conduct policies (student code of conduct, faculty handbook, etc…).

CLERY HISTORY

• 1992 – Campus Sexual Assault Victims Bill of Rights
• 2000 – Campus Sex Crimes Prevention Act – Sex Offender Registry
• 2013 – Violence Against Women Reauthorization Act of 2013 Sec. 304 (VAWA)
• Developed parallels to Title IX 2011 Dear Campus Counselor Letter
• Amended & replaced Campus Sexual Assault Victims Bill of Rights
• “Good Faith” effort required 2014, full regulations in effect July 1, 2016
UNC PROGRAM REVIEW'S FINAL PARAGRAPH
AUGUST 23, 2019

Finally, UNC management are strongly advised to take immediate action to ensure that the University is in full compliance with Section 910 of the Violence Against Women
Reauthorization Act of 2013 (VAWA). This includes ensuring that the university has adequate
procedures in place to promptly respond to reports of sexual violence, stalking, dating violence,
domestic violence, and sexual assault. The university should also implement comprehensive
education programs for students, faculty, and staff on sexual assault prevention, response,
and support. The university is required to report on its progress in implementing these
procedures and to submit an annual report to the Department of Education.

SIGNIFICANT CLERY ACT FINES

• $57,317 PER VIOLATION CIVIL PENALTIES
  • ORIGINALY $25,000
  • INCREASED FOR INFLATION ANNUALLY
  • FEDERAL CIVIL PENALTY ADJUSTMENT ACT IMPROVEMENTS ACT OF 2015
  • SIX FIGURE FINES NOW THE NORM

RECORD $4.5 MIL. FINE IN MSU CASE

• RECORD $4.5 MILLION CLERY ACT FINE
  • 1st OF ITS KIND “SETTLEMENT AGREEMENT”
  • TIED TO HEA TITLE IV ELIGIBILITY
  • CLERY COMMITTEE PROFESSIONAL COMMITTEE REQUIRED
  • INSIDE TIPS FOR ALL “CAMPUS SECURITY AUTHORITY”
  • REVIEW ALL PROPERTY
  • ONGOING MONITORING (5 YEARS)
COMPLYING WITH CLERY CAN HELP AVOID ADVERSE COURT RULINGS

DUE PROCESS
PROCEDURAL SAFEGUARDS
JURISDICTION

KEYS TO SUSTAINABILITY

TRANSPARENCY – CLERY DISCLOSURES ARE INCLUSIVE OF & CONSISTENT WITH ALL POLICIES
CLARITY – STUDENTS, PARENTS, & OTHERS CAN READ & EASILY UNDERSTAND YOUR PROCESS
EQUALITY – COMPLAINANT & RESPONDENT MUST BE PROVIDED WITH EQUAL PROCEDURAL SAFEGUARDS

VAWA APPLIES TO

* "PROCEDURES FOR INSTITUTIONAL DISCIPLINARY ACTION IN CASES OF ALLEGED DATING VIOLENCE, DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING" - 34 CFR §668.46 (K)
* STUDENTS, EMPLOYEES, CONTRACTORS, THIRD PARTIES
* "WHETHER THE OFFENSE OCCURRED ON OR OFF CAMPUS" - 34 CFR §668.46 (B)(11)(VII)
* INSTITUTIONS MAY APPLY PROCESS TO BROADER RANGE OF OFFENSES
THE CLERY ACT & TITLE IX

• Complementary & Overlapping, but not interchangeable
• Title IX Civil Rights
• Clery Consumer Information/Criminal Justice
• All Title IX obligations remain
• Final VAWA regulations took effect July 1, 2015
• "When addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX." Office for Civil Rights 2017 Q&A
• Clery Act obligations are in addition to not in place of Title IX & vice versa

COMPLYING WITH THE VAWA AMENDMENTS

• No Time-Sensitive Obligation
• Appropriate Risk Management to Develop a Conduct Program that Works best for your unique campus culture
• Sexual Violence Policy Documents (summaries) must be included in Clery Act Annual Security Report (ASR)
• "Say What You Do and Do What You Say"
• All policies must be coordinated, consistent, & transparent
• Must be "clear" - 34 CFR §668.46 (K)
• Institutional obligation, requires collaboration to coordinate response
• Policy documents must accurately reflect underlying policies & procedures
• Include:
  - Student Code of Conduct
  - Security/Fire Handbook
  - Title IX Policy
  - March 2017

SEXUAL ASSAULT

• 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.

Source: Appendix A to Subpart D of 34 CFR 668.
VAWA OFFENSES

• 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.

• DOMESTIC VIOLENCE.—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 SHARED A CHILD IN COMMON;
  • (C) BY A PERSON WHO IS COHABITATING WITH, OR HAS COHABITED WITH, THE VICTIM AS A SPOUSE OR INTIMATE PARTNER;
  • (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.

• SOURCE: 34 CFR 668.46(A)

• STALKING.—ENGAGING IN A COURSE OF CONDUCT DIRECTED AT A SPECIFIC PERSON THAT WOULD CAUSE A REASONABLE PERSON TO—
  • (A) FEAR FOR THE PERSON'S SAFETY OR THE SAFETY OF OTHERS; OR
  • (B) SUFFER SUBSTANTIAL EMOTIONAL DISTRESS.

• SOURCE: 34 CFR 668.46(A)

• PLEASE CONSULT “THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING” FOR ADDITIONAL INFORMATION ABOUT THESE DEFINITIONS, INCLUDING COLLECTING, CLASSIFYING, AND COUNTING FOR SEPARATE CRIME STATISTICAL REPORTING.

• UNIFORM FEDERAL DEFINITIONS MUST BE USED FOR CONDUCT PROCEEDINGS NOT STATE OR LOCAL LAW

CONDUCT DISCLOSURES

• ALL POSSIBLE SANCTIONS

• RANGE OF PROTECTIVE MEASURES

• ALL OFFICIALS MUST RECEIVE ANNUAL TRAINING
  • TRAINING SPECIFIC TO INSTITUTIONAL POLICY & THEIR ROLE IN IT (NOT JUST INVESTIGATORS, HEARING PANELS)
STANDARD OF EVIDENCE

• ASR MUST DESCRIBE "THE STANDARD OF EVIDENCE THAT WILL BE USED DURING ANY INSTITUTIONAL DISCIPLINARY PROCEEDING" - 34 CFR §668.46 (K)(1)(II)

• INSTITUTIONAL OBLIGATION TO PROVE RESPONSIBILITY BY THIS STANDARD

PROCEDURAL SAFEGUARDS APPLY EQUALLY TO BOTH "ACCUSER" & "ACCUSED"/COMPLAINANT & RESPONDENT

• ENUMERATED PROCEDURAL SAFEGUARDS APPLY EQUALLY TO BOTH "THE ACCUSER AND THE ACCUSED" - 34 CFR §668.46 (K)(2)(II)
  - NEED NOT BE STUDENT OR EMPLOYEE, CLERY DISTINGUISHES RIGHTS WHICH APPLY ONLY TO STUDENTS AND EMPLOYEES WHEN THEY REPORT CONDUCT PROCEEDINGS

• INSTITUTIONS MUST APPLY "A PROMPT, FAIR, AND IMPARTIAL PROCESS FROM THE INITIAL INVESTIGATION TO THE FINAL RESULT" - 34 CFR §668.46 (K)(2)(I)
  - AS DEFINED BY MEETING CLERY STANDARDS

HAVING OTHERS PRESENT

• INSTITUTIONS MUST "PROVIDE THE ACCUSER AND THE ACCUSED WITH THE SAME OPPORTUNITIES TO HAVE OTHERS PRESENT DURING ANY INSTITUTIONAL DISCIPLINARY PROCEEDING" - 34 CFR §668.46 (K)(2)(II)
  - ADVISOR OF CHOICE
  - WITNESSES
  - PARENTS
  - OTHER SUPPORT PERSON OR PEOPLE
  - MUST ALLOW AT LEAST ONE ADVISOR, MAY LIMIT NUMBER BEYOND THAT
ADVISOR OF CHOICE

• An institution may not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding.” 34 CFR §668.46 (K)(2)(IV)

• Attorney, parent, affiliated, unaffiliated, law enforcement, witness

• “Advisor means any individual who provides the accuser or accused support, guidance, or advice.” 34 CFR §668.46 (K)(3)(II)

• “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.”

• “Potted Plant Rule”

CLERY PROCEEDINGS

• “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.”

• Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.

• 34 CFR §668.46 (K)(3)(III)

ASR MUST DISCLOSE:

• “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”

• “How the institution determines which type of proceeding to use”

• 34 CFR §668.46 (K)(3)(I)

• “The institution’s procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available.” 34 CFR §668.46 (K)(2)(V)(B)
PROMPT PROCEEDINGS

  • MUST BE A SPECIFIED TIMEFRAME (60 DAYS, 90 DAYS, ETC…), SUBJECT TO REASONABleness STANDAARD

CONSISTENT & TRANSPARENT

• “CONSISTENT WITH THE INSTITUTION’S POLICIES AND TRANSPARENT TO THE ACCUSER AND ACCUSED” 34 CFR §668.46 (K)(3)(I)(B)(1)
  • NO SURPRISES
  • DON’T DEVIATE FROM UNDERLYING POLICIES OR WHAT HAS BEEN PROMISED TO PARTIES
  • ENSURE CONSISTENCY WITH ASR & VARIOUS INSTITUTIONAL CODES
  • IF THERE ARE CHANGES (WHICH SHOULD BE RARE), FOR ANY REASON (DISABILITY, LITIGATION, ETC…), ENSURE PARTIES CLEARLY UNDERSTAND THEM AND WHY THEY ARE BEING MADE

TIMELY NOTICE

• PROVIDE “TIMELY NOTICE OF MEETINGS AT WHICH THE ACCUSER OR ACCUSED, OR BOTH, MAY BE PRESENT” 34 CFR §668.46 (K)(3)(I)(B)(3)
  • IF PROCEEDINGS ARE RE-OPENED, BOTH PARTIES MUST BE NOTIFIED
  • NO UNILATERAL ACTION IS PERMITTED
ACCESS TO INFORMATION

• "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." - 34 CFR §668.46 (K)(3)(I)(B)(3)
• ONLY INSTANCE WHERE "ACCUSER," "ACCUSED," AND "OFFICIALS" ARE ALL MENTIONED, INTENDED TO ENSURE ALL PARTIES INCLUDING HEARING OFFICERS/PANEL MEMBERS/APPEAL OFFICERS HAVE EQUAL ACCESS TO EVIDENCE (INCLUDATORY/EXCLUDATORY)
• INSTITUTION SHOULD GATHER ALL PERTINENT EVIDENCE

IMPARTIAL

• PROCEEDINGS MUST BE "CONDUCTED BY OFFICIALS WHO DO NOT HAVE A CONFLICT OF INTEREST OR Bias FOR OR AGAINST THE ACCUSER OR THE ACCUSED." - 34 CFR §668.46 (K)(3)(I)(C)
• PARTIES MUST HAVE EFFECTIVE OPPORTUNITY TO KNOW WHO OFFICIALS ARE, AND OBJECT TO POTENTIAL CONFLICTS OF INTEREST OR Bias
• Bias IS WIDELY RANGING AND NOT LIMITED TO SEX DISCRIMINATION

NOTICE OF RESULTS

• POLICY MUST "REQUIRE SIMULTANEOUS NOTIFICATION, IN WRITING, TO BOTH THE ACCUSER AND THE ACCUSED, OF:"
  • "THE RESULT OF ANY INSTITUTIONAL DISCIPLINARY PROCEEDING"
  • "ANY CHANGE TO THE RESULT, AND"
  • "WHEN SUCH RESULTS BECOME FINAL" - 34 CFR §668.46 (K)(2)(V)
NOTICE OF RESULTS

"RESULT MEANS ANY INITIAL, INTERIM, AND FINAL DECISION BY ANY OFFICIAL OR ENTITY AUTHORIZED TO RESOLVE DISCIPLINARY MATTERS WITHIN THE INSTITUTION."-34 CFR §668.46 (K)(3)(IV) [EMPHASIS ADDED]

- SANCTIONS IMPOSED (INCLUDING DURATION)
- RATIONALE – RESULT & SANCTIONS (FOR PURPOSES OF ASSESSING APPEAL, BUT REQUIRED WHETHER OR NOT AN APPEAL IS OFFERED)
- COMPLIANCE DOES NOT VIOLATE FERPA

RATIONALE

"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."

THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, 2016 EDITION, PAGE B-22

S. DANIEL CARTER
SAFETY ADVISORS FOR EDUCATIONAL CAMPUSES, LLC
P.O. BOX 2019, THOMSON, GA 30824
202-684-6471
S.DANIEL.CARTER@SAFECAMPUSES.BIZ