Using the Clery Act to Create a Sustainable Sexual Violence Conduct Process

Identifying Common Gaps in VAWA Compliance

S. Daniel Carter

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In 2013 the federal government enacted the “Violence Against Women Reauthorization Act of 2013” (VAWA) which updated the 1992 “Campus Sexual Assault Victims’ Bill of Rights” portion of the Jeanne Clery Act (Clery Act). In addition to providing expanded reporting and prevention requirements, the intent was to help facilitate the creation of sustainable disciplinary proceedings that are fair to all parties in “cases of alleged dating violence, domestic violence, sexual assault, or stalking”.

In reviewing these policies it is important to note that they are separate and distinct from Title IX of the Education Amendments Act of 1972 (Title IX). As noted by the U.S. District Court for the District of Columbia in 2015 the VAWA amendments “had no effect on Title IX.” (Doe v. U.S. Dept. of Health and Human Services, 85 F. Supp. 3d 1, 5 (2015)). Further, the U.S. Department of Education's Office for Civil Rights (OCR) stated in their 2017 Title IX Q&A that “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.” Where there is overlap institutions must meet their obligations under both laws.

Despite the U.S. Department of Education (ED) issuing implementing regulations for the VAWA amendments that took effect July 1, 2015 we have continued to identify common gaps in implementation. This “Quick Briefing” is the first in a series intended to help institutions identify and bridge those gaps to better comply with the Clery Act. The five issues addressed here – scope of proceedings, annual training requirements, designated and prompt timeframes, access to information, and providing the results to complainants and respondents – are among the most important and common where we’ve regularly identified gaps.

There are as many solutions to these challenges as there are institutions of higher education. Each campus community has a unique culture and regulatory framework – whether it be large or small, public or private, residential or commuter. This review reflects merely the beginning of the process.

Next steps include reviewing the implementing regulations (many of which are cited here) and looking to ED’s *The Handbook for Campus Safety and Security Reporting, 2016 Edition*. Our multidisciplinary team of experts at SAFE Campuses, LLC is also available to help answer your questions.

**Scope of Proceedings**

The Clery Act requires that institutions adopt one or more policies that address disciplinary action comprehensively from an initial report to any final action taken. The Act affords institutions wide latitude to select the form or forms of proceedings they will use, but everything must be consistent with Clery requirements and transparent to the campus community.

ED, in implementing regulations at 34 CFR §668.46 (b)(11)(vi), requires that institutions include in their Clery Act annual security report (ASR) “An explanation of the procedures for institutional disciplinary action”. Proper implementation of this requires that all policies which may be used (note use of plural “procedures” in the regulations), such as distinct procedures
for students, faculty, and staff or in different graduate schools, be summarized in the ASR, and that all phases of each process must meet Clery requirements.

The Act uses the term “proceeding” to encompass each process and defines it broadly. ED, at 34 CFR §668.46 (k)(3)(iii), says “Proceeding means 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.”

This covers everything from the initial report to investigation to any form of “adjudication” as well as any final resolution including extraordinary steps that may be taken in response to external oversight or legal action. The activity need not be in person. The only exception is that proceeding “does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.”

A singular disclosure, therefore, which we frequently see, is only appropriate if an institution actually has a universal policy that is used in all cases. The disclosures should not merely state an institution will do something, but should state how it will be done so the campus community will know what to expect.

### Annual Training

The issues faced by institutional officials in these cases are often highly complex and can raise challenging questions. For this reason the Clery Act requires that the officials charged with handling them receive training that is both specific to these types of offenses and in our view in order to be effective their own institution’s particular process.

ED, at 34 CFR §668.46 (k)(2)(ii), requires that all proceedings “Be conducted by officials who, at a minimum, receive annual training” on the Clery covered offenses “and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability”. Because Clery defines “proceedings” expansively this means that any official with responsibilities at any stage – from receiving a disciplinary report to deciding an appeal – must be trained, at a minimum on their role in the process, at least every 12 months.

The express references to investigations and hearings, in recognition that those are among the most challenging aspects of proceedings, are proceeded by an “and” therefore training is not exclusive to those two components. We, however, frequently see policies that only specify training for investigations and or hearings.

While the regulations are silent on what form the training must take it must be Clery specific, and in order to be effective it needs to incorporate each institution’s specific process for things like conducting investigations and hearings, whether they be factfinding or appellate.

The training must specifically address the Clery offenses, which may for example include matters outside Title IX, so general Title IX or disciplinary training won’t be sufficient. Due to the significant variation in investigation and hearing standards effectively implementing them is
dependent upon understanding an institution’s specific process so that the official understands their role and each step they must take.

**Designated & Prompt Timeframes**

While the Clery Act doesn’t establish fixed timeframes for disciplinary proceedings it does require that institutions do so, and that they be prompt. ED requires, per 34 CFR §668.46 (k)(1)(i), the inclusion of “anticipated timelines” in each policy and in the ASR. Further, at 34 CFR §668.46 (k)(3)(i)(A), they require that proceedings be “Completed within reasonably prompt timeframes designated by an institution’s policy”. Recognizing that meeting these deadlines may not always be possible, institutions must also include “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”.

Merely stating that proceedings will be resolved “within reasonably prompt timeframes”, a common statement, is insufficient, institutions must state a set period of time – days, weeks, or months, etc… - and stick to it. At a minimum institutions need to establish a set timeframe between the initial report and conclusion of a disciplinary process. Set timeframes for each stage of the process – such as the factfinding investigation, conducting a hearing, and considering appeals – offer even greater clarity.

ED then evaluates these timeframes using a reasonableness standard. While we’re not yet aware that they’ve reached findings in any reviews, it is likely that going beyond a period of several months would face significant scrutiny. The extension provision exists to address more complex cases and or instances where there are delays beyond the control of the institution, but should only be used when absolutely necessary.

**Access to Information**

One of the Clery Act’s most essential and core values is transparency. This is reflected in publicly disclosing information about disciplinary proceedings, and also in requiring that not only the complainant and respondent have access to information to be used in any proceeding, but also any appropriate official involved. This is intended to ensure not only that both parties have the same information as each other but also as officials, and to ensure that officials at each stage of the process are privy to all applicable information. We’ve observed a number of significant gaps in both providing this access as well as not including officials.

ED, at 34 CFR §668.46 (k)(3)(i)(B)(3), requires that institutions provide “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”. While all other procedural safeguards are limited to the complainant and respondent this one notably expressly also includes “appropriate officials”. In order to meet this requirement both the complainant and respondent as well as all officials responsible for each particular stage of the process must be afforded access to the exact same information at that stage of the process.
This means that if an institution will be using any information – testimony, documentation, electronic records such as video recordings, etc… – or an official has made use of information (including information provided by either party or other officials) then it must make it available to the complainant, respondent, and any official for the stage of the proceeding they are responsible for. If different officials, for example, are responsible for follow-up aspects of the proceedings such as sanctioning or appeals they must be provided with all information necessary to carry out their responsibilities.

Results & Rationale

One of the original 1992 requirements was unconditionally providing both the complainant and respondent with the results of disciplinary proceedings. The 2013 amendments and implementing regulations expanded this requirement to among other things require both “simultaneous notification, in writing” and inclusion of the “rationale” for the results.

ED, at 34 CFR §668.46 (k)(3)(iv), defines result as “any initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution.” Additionally, “the result must also include the rationale for the result and the sanctions.”

While one of the reasons for including the “rationale” in results was to enable the parties to make informed decisions about appeals, the regulations provide a single definition of “result” at all stages of the proceedings, and it includes the “rationale” with no distinction for what stage of the proceedings it is for. The “rationale” must also be included in the results at institutions which don’t offer an appeal.

Helping the parties understand the findings in what is often a complex and confusing process for them is also an invaluable benefit of including this information and ample justification on its own. It should explain how specific evidence was considered in light of the institution’s policies, and weighted in reaching decisions relative to both responsibility and when applicable sanctions imposed.

This paper does not provide legal advice and does not create an attorney-client relationship. If you need legal advice, please contact an attorney directly.