

Brief Analysis of the The Violence Against Women Act (VAWA) and Changes to the Clery Act & Title IX Compliance

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The Senate and House of Representatives have passed an amendment to the Violence Against Women Act (VAWA). The President is expected to sign the legislation.

We have broken up this document into “what we know; what we don’t know,” which is an informal discussion of the law and its impact on colleges and universities, and a second section that catalogs and analyzes each relevant change in the legislation. This guidance includes all information we know to this point and will be supplemented by later guidance.

What we know:

- Section 304 of VAWA includes some changes to the Clery Act and Title IX that will require changes by colleges to maintain compliance.
- The legislation codifies some aspects of the Dear Colleague Letter (DCL), merging them with traditional Clery provisions, but does not codify all aspects of the DCL.
- The Amendments take effect to the Annual Security Report prepared by an institution 1 calendar year after the enactment of the Act.
- The Amendments add “national origin” and “gender identity” to the list of hate crime categories for Clery Act reporting and add three additional crimes as hate crimes: domestic violence, dating violence, and stalking.
- The legislation will require additional education, notice, and campaign work by institutions to notify students and employees about certain dangers as well as their rights.

What we don’t know:

- Whether and how the Department of Education will implement guidance. In the recent past, ED has utilized the Negotiated Rulemaking process to implement regulations on changes to the Higher Education Act. We also don’t know whether the regulatory process will delay implementation of some or all aspects of the legislation. SUNY will actively track the process and issue comments where we believe the regulations can better serve our institutions.
- Where the guidance will come from. The legislation instructs the Department of Education to seek guidance from the Attorney General and the Department of Health and Human Services on some aspects of the legislation. This may extend the amount of time it takes to ascertain guidance and leave institutions unsure of exactly how to comply with the new provisions.

- While the legislation says this will take effect for the ASR issued one calendar year after the legislation passes, the October 2014 ASR includes statistics from all of calendar year 2013, which is the year in which the legislation was passed. However, institutions were not collecting statistics for the first few months of the year. Further, if past practice is a guide, the Department of Education will implement rulemaking, which will include necessary definitions and guidance, that may push out full implementation to later ASRs. In the past, the Department of Education has not audited for errors prior to issuing regulations. We do not know if that practice will continue in this case.
- What the exact guidance on defining dating violence, domestic violence and stalking will include. The definitions as written in the legislation are somewhat vague and open to interpretation. We don't know, for instance, whether the Amendments cover reports of cyber-stalking. Nor do we know how to determine geographic location for certain aspects of stalking and other crimes that are not limited to a specific place. We hope that the Department of Education will, through Regulations and guidance, clarify those definitions somewhat to ensure accurate and uniform reporting across the country. We will continue to track and advise on these definitions.
- What the educational notice and programs will require. The legislation adds a new term "campaign" to the Clery Act/Title IX lexicon where it requires "ongoing prevention and awareness campaigns for students and faculty." Legislative interpretation stands to reason that a "campaign" is more involved than the traditional "notice" required, but it will require Department of Education guidance to know exactly what will be required in such a campaign.

2013 Violence Against Women Act: Sec 304 Campus Sexual Violence, Domestic Violence, Dating Violence, and Stalking Education and Prevention:
Analysis of the Legislative Changes:

I- Annual Security Report crime reporting changes:

- No changes to the reportable Part I crimes.
- For Hate Crimes, categories of prejudice (based on actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability) now also includes **national origin** and **gender identity**.
- Further, in the category of Hate Crimes, new added Hate Crimes are **domestic violence, dating violence, and stalking incidents** that were reported to Campus Security Authorities or local police agencies.

II- Timely Warning Change:

- The legislation makes a change to Timely Warnings in that they must **withhold the names of victims as confidential**. (this should not be a new change to our campuses as we have long anonymized the names of victims of crimes in Timely Warnings recalling

that the purpose of a Timely Warning is to alert the community of a crime or crimes that have occurred and offer the community advice and guidance on protecting itself).

III- Annual Security Report crime definition changes:

- **New Definitions**: dating violence, domestic violence, and stalking as defined in other areas of the law (copied below):
 - **Dating violence**

The term “dating violence” means violence committed by a person—
(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
(i) The length of the relationship.
(ii) The type of relationship.
(iii) The frequency of interaction between the persons involved in the relationship.
 - **Domestic violence**

The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
 - **Stalking**

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
(A) fear for his or her safety or the safety of others; or
(B) suffer substantial emotional distress
 - **Sexual assault**

Offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

IV- Changes to Policy Statements of the ASR:

- The legislation adds domestic violence, dating violence, and stalking to “sexual assault programs” that will be included in the policy statement developed and distributed as part of the report.
- Institutions must have a statement about the procedures to be used not only with “sex offenses” (old language), but incidents of “domestic violence, dating violence, sexual assault, or stalking” have been reported.

- The ASR must include “a statement of the standard of evidence that will be used” during any conduct proceeding. *Note that it does **not** require a particular standard, only that the institution must be transparent about the standard you are using. The DCL advises using preponderance of the evidence, so clearly state that in the institution’s policy.*
- Policy Statements on Education Programs:
 - The legislations adds domestic violence, dating violence, sexual assault, and stalking to “rape, acquaintance rape” for education/awareness programs addressed in the policy.
There is a new subsection under that: Education programs shall include “primary prevention and awareness programs for all incoming students and new employees,” which shall include:
 - a statement that the institution prohibits domestic violence, dating violence, sexual assault, and stalking;
 - the definition of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction;
 - the definition of consent, in reference to sexual activity, in the applicable jurisdiction;
 - safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual;
 - information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and
 - ongoing prevention and awareness campaigns for students and faculty on all of the above.
- Addressing new sections that codify the Department of Education’s Dear Colleague Letter, the policy statements of the ASR shall also include:
 - possible sanctions and protective measures following a final determination regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking;
 - Procedures victims should follow if a sex, offense, DV, dating violence, SA, or stalking has occurred, including the following information provided in **writing**:
 - The importance of preserving evidence for proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protection order;
 - To whom the offense should be reported;
 - Options regarding reporting, including law enforcement and campus authorities options to:
 - Notify victim of the option to notify on-campus and local police;
 - assist the victim if they choose in notifying law enforcement; and
 - give the victim the right to decline to notify such authorities.
 - Rights of victims and institutional responsibilities on orders of protection, no contact orders, restraining orders, or similar lawful orders issued by criminal, civil, or tribal courts.

- Procedures for institutional disciplinary action in cases of domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that:
 - Proceedings will provide a prompt, fair, and impartial investigation and resolution; and be conducted by officials who receive annual training on issues related to DV, dating violence, SA, and stalking, and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.
 - The accuser and accused are entitled to the same opportunities to have a support person/advisor of their choice at any proceeding or related meeting.
 - The accuser and accused must be simultaneously informed in writing of:
 - the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.
 - The institution's procedures for appealing the results of the proceeding.
 - Any change to the results that occurs prior to the time that such results become final.
 - When such results become final.
- Information about how confidentiality of victims will be protected, including how publicly-available recordkeeping will be accomplished without including identifying information about the victim, to the extent possibly by law
- Written notification of students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community.
- Written notification to victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if requested by victim and if reasonable available, regardless of whether victim chooses to report the crime to campus police or local law enforcement.
- Further, a student or employee who reports to an institution of higher education that s/he has been a victim of domestic violence, dating violence, sexual assault, or stalking, whether it occurred on or off-campus, shall be provided with a written explanation of his or her rights and options, as described above.

V- Retaliation:

- There shall be no retaliation against anyone who exercises rights under the Clery Act and Title IX (such retaliation is already prohibited).