Violence Against Women Act Negotiated Rulemaking Committee

Issue Paper #1

Issue: Definitions and Key Terms

Statutory Cites: §485(f) of the HEA, as amended by §304 of the Violence Against Women Reauthorization Act of 2013

Regulatory Cites: 34 CFR §668.41, §668.46, and Appendix A to Subpart D of Part 668

Summary Question(s): What definitions should we establish for the new terms in the statute?

Summary of Issue:

Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA) (Pub. Law 113-4) amended §485(f) of the Higher Education Act of 1965 (HEA), as amended, otherwise known as the Clery Act. VAWA added several new terms to the Clery Act that are not currently defined in regulation.

New Crime Categories

Beginning with the Annual Security Report that must be distributed and made available to students, employees, prospective students, and prospective employees by October 1, 2014, each institution must include statistics on the number of incidents of domestic violence, dating violence, and stalking that were reported to campus security authorities or local police agencies. Institutions must also report these statistics to the U. S. Department of Education (Department) each fall. Section 485(f)(6)(A) specifies that, for the purposes of the Clery Act, these terms have the same meaning as in section 40002(a) of the Violence Against Women Act of 1994.

1. Section 40002(a) defines "domestic violence" as a "felony or misdemeanor crime 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 [under VAWA], 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."

There are some challenges in applying this definition in the higher education context. The definition relies in part on the laws of local jurisdictions, which will present challenges in trying to provide comparable data for institutions. The reliance on the laws of local jurisdictions will also create issues for institutions with campuses in different jurisdictions. Additionally, institutions often provide a variety of housing arrangements for students, for example, housing for married couples, housing for unmarried couples, housing for families, housing for friends, etc. Does the existing definition make it clear as to which incidents involving roommates should be included in an institution's statistics?

2. Section 40002(a) defines "dating violence" to mean "violence committed by a person—

    - who is or has been in a social relationship of a romantic or intimate nature with the victim; and
    - where the existence of such a relationship shall be determined based on a consideration of the following factors:
        - the length of the relationship;
        - the type of relationship; and
        - the frequency of interaction between the persons involved in the relationship."

    Does the definition make it clear as to which incidents should be included in an institution's statistics? Do institutions have an affirmative duty to investigate whether an alleged offender and the victim were in a relationship that met this definition?

3. Section 40002(a) defines "stalking" to mean "engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

    - fear for his or her safety or the safety of others; or
    - suffer substantial emotional distress."

    This definition presents several challenges. First, is the distinction between "stalking" and "intimidation" sufficiently clear? Institutions currently must include incidents of intimidation that are determined to be hate crimes in their Annual Security Report and in the statistics that they report to the Department. "Intimidation" is defined as "to unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack." This definition appears to be similar to the definition of stalking. How can the two categories best be distinguished?

    Second, how can this definition most effectively be implemented in the context of the Clery Act and in an electronic environment? The Clery Act requires institutions to report

crimes in three different geographic categories: an institution's campus, its noncampus buildings or property, and its public property (see 34 CFR 668.46(a)). These areas are sometimes referred to as an institution's "Clery geography." Stalking, however, may occur in a digital environment (cyberstalking), where either or both parties involved may not be located physically within the institution's Clery geography. This poses challenges in determining whether an incident must be reported and, if reported, within which Clery geography category. Page 58 of the Department's Handbook for Campus Safety and Security Reporting instructs institutions to report instances of cyber-intimidation where a victim is threatened via computer while on the institution's Clery geography. In implementing the provisions related to stalking, should the Department continue to apply this guidance, which may not include all instances of cyberstalking or cyber-intimidation, or should we take a different approach?

Third, institutions must include reported Clery Act crimes in their statistics, regardless of how they learned that the crime took place. The definition of stalking refers to whether a "reasonable person" would fear for his or her safety or suffer substantial emotional distress. This definition would seem to include situations in which the victim does not believe that he or she is the victim of stalking and the victim is not the person who reported the stalking. Should the definition of "stalking" be modified to make it clear that it includes cases where an individual does not characterize the behavior as stalking?

Sex Offenses and Sexual Assault

Under the Clery Act, institutions have had to disclose the number of "sex offenses, forcible and nonforcible" in their Annual Security Reports and report those statistics to the Department. Since first implementing the Clery Act, the Department has used the definition of "sex offenses" from the FBI's National Incident-Based Reporting System (NIBRS) edition of the Uniform Crime Reporting (UCR) Handbook as the basis for these crime statistics. In the last few years, the FBI has made several changes to its definitions of sex offenses to remove references to "forcible" sex offenses and to bring them more in line with the NIBRS definitions. VAWA did not reflect these changes to the FBI's crime reporting system. Instead, for purposes of the Clery Act, the list of criminal offenses to be reported and disclosed continues to refer to "sex offenses – forcible and nonforcible." At the same time, VAWA added section 485(f)(6)(A)(v) specifying that the term "sexual assault" means "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI)."

Additionally, under the Clery Act, institutions have long had to include a policy statement in their Annual Security Reports regarding their programs to prevent sex offenses on campuses, their procedures once a sex offense has occurred, information about their institutional disciplinary proceedings in cases of a sex offense, and other relevant information. While it did not change the reference to the term "sex offenses" for the purposes of crime statistics, VAWA's

amendments to the Clery Act replaced references to terms like "sex offenses," "campus sexual assault," and "criminal sexual assault" in the requirements for an institution's policy statement with references to "domestic violence, dating violence, sexual assault, and stalking."

This raises several questions. How should we harmonize the changes to the Clery Act with the changes that FBI has made to its definitions? Should we continue to use the NIBRS definitions? Additionally, how should we harmonize the use of two terms – "sex offenses" and "sexual assault," which appear to have essentially the same meaning?

Policies to Prevent Domestic Violence, Dating Violence, Sexual Assault, and Stalking

Prior to the enactment of VAWA, section 485(f)(8)(B) of the HEA required institutions to describe their education programs to promote the awareness of rape, acquaintance rape, and other sex offenses as part of their policy statement about programs to prevent sex offenses, but it did not detail specifically what those programs had to include. VAWA amended the Clery Act to make this section much more prescriptive. Specifically, the Clery Act now requires institutions to include in their education programs "primary prevention and awareness programs" for all incoming students and new employees," as well as "ongoing prevention and awareness campaigns" for students and faculty. Both of these efforts must provide the same information (outlined in the statute) to the participants.

These requirements raise several questions. First, given the similarities in the requirements, how should we give meaning to the different names for these two efforts? Second, what do terms used in the statute like "ongoing," "campaign," "awareness programming," "primary prevention," and "bystander intervention" mean? How often must ongoing activities take place? What is a campaign? Second, how do we reconcile differences in the audiences that must be included? Specifically, the "primary prevention and awareness programs" must be provided to *incoming students* and *new employees*, while the "ongoing prevention and awareness campaigns" are required to include [all] students and *faculty*. Should institutions be required to engage non-faculty employees in their ongoing prevention and awareness campaigns? Finally, to what extent are institutions expected to track participation in these efforts?