

## Violence Against Women Act Negotiated Rulemaking Committee

### Issue Paper #3

**Issue:** Legal processes in cases involving sex offenses and related incidents

**Statutory Cites:** §485(f)(8)(A) and (B) of the HEA, as amended by §304 of the Violence Against Women Reauthorization Act of 2013

**Regulatory Cites:** 34 CFR §668.46

#### **Statutory Changes:**

VAWA made changes to provisions of the Clery Act that establish procedural rules for institutions to follow in campus disciplinary actions involving alleged sex offenses. Under current regulations, institutions must develop and distribute policies for cases involving sex offenses that include a clear statement that: the accuser and the accused are entitled to the same opportunities to have others present during the disciplinary proceeding; both the accused and the accuser must be informed of the outcome of the institutional disciplinary proceeding (the outcome means the institution's final determination and any sanction imposed against the accused); and the sanctions the institution may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape or other forcible or nonforcible sex offenses. In enforcing these requirements under current regulations, the Department reviews not only whether the institution made the required disclosure but also whether the policy accurately reflects the institution's practices.

VAWA modified these requirements and added additional requirements for the development of institutional policies for cases involving sex offenses and the information that institutions must provide to their students regarding procedures involving sex offenses including:

1. The procedures the institution will follow when an incident of domestic violence, dating violence, sexual assault or stalking is reported, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from the report.
2. Possible sanctions or protective measures the institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault or stalking.
3. Procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking, including information in writing about—
  - a. the importance of preserving evidence;
  - b. to whom the alleged offense should be reported;

- c. options regarding law enforcement and campus authorities, including notification of the victim's option to notify proper law enforcement authorities (both on-campus and local police), be assisted by campus authorities in notifying law enforcement authorities if the victim chooses and to decline to notify such law enforcement authorities; and
  - d. where applicable, the rights of victims and the institution's responsibilities regarding orders of protection, no contact orders, restraining or similar orders issued by a court.
4. Procedures for institutional disciplinary actions in cases of alleged domestic violence, dating violence, sexual assault or stalking, including a clear statement that–
- a. the proceedings shall provide a prompt, fair and impartial investigation and resolution;
  - b. the proceedings shall be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;
  - c. the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice; and
  - d. both the accuser and the accused shall be simultaneously informed in writing of: the outcome of any campus disciplinary proceeding arising from an allegation of domestic violence, dating violence, sexual assault or stalking; the institution's procedures for the accused and the victim to appeal the results of any such proceeding; of any change to the results that occurs prior to the time the results become final; and when such results become final.

#### Summary of Issues:

1. The amendments to the Clery Act in this area refer to “victims” rather than “students.” Should institutions be required to provide the opportunities and information required by the Clery Act to non-student victims?
2. The amendments provide that the accuser and the accused have the same opportunities to have representatives present during a disciplinary proceeding. If, under state law or the institution's policies, the accused has a right to have an attorney, does the same rule apply to the accuser? Does the right to have a representative present mean that the representative must be allowed to fully participate in the proceeding? Is the representative able to examine witnesses?

3. The amendments require that the proceedings provide a “prompt, fair and impartial investigation and resolution.” Should the regulations include requirements for how an institution meets these requirements? Does the promptness requirement in Section 485(f)(8)(B)(iv)(I)(aa) of the HEA that applies to “resolution” also apply to the “final determination” as described in Section 485(f)(8)(B)(ii) of the HEA, or do the terms “resolution” and “final determination” have different meanings?
4. Officials who conduct disciplinary proceedings must receive annual training. Should there be any standards for this training?
5. The amendments require that the accuser and accused be informed “simultaneously” and “in writing” of the outcome of a proceeding, appeals procedure, change to a result before it is final, or when the result becomes final. What do the terms “simultaneously” and “in writing” mean (e.g., is email notification sufficient or is a formal written notice required)?
6. The amendments require that the accuser and accused be informed of the institution’s procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding. Does this mean that institutions are required to have an appeals process for institutional disciplinary proceedings, or are they just required to have equal notice and treatment if the institution has such a process?
7. The Department has previously informed institutions that they cannot require victims to sign a “gag” order as a condition to receive notice of the final determination. Does this interpretation need to be reflected in the regulations?
8. The Clery Act and the amendments require that the accuser and accused be informed of the outcome of a proceeding. Under the Clery Act regulations, outcome means the institution’s final determination and any sanctions imposed against the accused. Should the term “outcome” be defined to include the rationale for the determination?