

## Violence Against Women Act Negotiated Rulemaking Committee

### Issue Paper #5

**Issue:** Technical Changes

**Statutory Cites:** §485(f) of the HEA, as amended by §488 of the HEOA and §304 of the Violence Against Women Reauthorization Act

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

**Summary Question(s):** What technical changes are necessary to update the Clery Act regulations and reporting system?

#### **Summary of Issues:**

There are several technical changes that need to be made to the Department's Clery Act regulations. These changes will incorporate self-implementing statutory provisions, correct outdated references, and reflect changes in related statutes and rules.

#### Memorandum of Understanding

Prior to the passage of the Higher Education Opportunity Act of 2008 (HEOA), institutions were required to include in their Annual Security Report a statement of current policies concerning campus law enforcement, including the "enforcement authority of security personnel, including their working relationship with State and local police agencies." This requirement is reflected in 34 CFR §668.46(b)(4)(i). The HEOA amended §485(f)(1)(C) of the HEA to explicitly require institutions to include in this policy statement information about any agreements, such as written memoranda of understanding, that they hold with State and local law enforcement agencies with respect to the investigation of alleged criminal offenses. The regulations at 34 CFR §668.46(b)(4) need to be revised to reflect this change.

#### Anti-Retaliation Clause

The HEOA added §485(f)(17) to the Clery Act specifying that "nothing in this subsection shall be construed to permit an institution, or an officer, employee, or agent of an institution, participating in any program [under Title IV of the HEA] to retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual with respect to the implementation of any provision in this subsection." The regulations need to be revised to reflect this important principle.

### Bias Categories for Hate Crimes

Prior to the enactment of VAWA, the Clery Act regulations and reporting system required the collection of hate crime statistics by actual or perceived race, gender, religion, sexual orientation, ethnicity/national origin, and disability. Various statutory changes and administrative efforts in the last few years affect these categories. Specifically--

- VAWA added “gender identity” and “national origin” to the list of possible categories of bias for the purpose of hate crime statistics.
- The President signed the National Defense Authorization Act for Fiscal Year 2010 on October 28<sup>th</sup>, 2009. Division E of this act, otherwise known as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, amended section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994, as amended, to add “gender identity” to the list of possible categories of bias.
- The FBI has modified its hate crime data collection categories within the Uniform Crime Reporting System to include actual or perceived race, religion, disability, sexual orientation, ethnicity, gender, and gender identity.

We need to reflect these changes in the Clery Act regulations and reporting system.

### Sex Offenses

For the purposes of the Clery Act, the Department has historically drawn on the sex offenses definitions in the FBI’s National Incident-Based Reporting System Edition of the Uniform Crime Reporting Program. The FBI recently revised these sex offenses definitions. Accordingly, we need to update Appendix A to Subpart D of Part 668 to reflect these changes.

The table below summarizes the relevant changes:

<u>Term</u>	<u>Definition</u>
Sex Offenses	Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
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.
Sodomy	Oral or anal sexual intercourse with another person, 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 or physical incapacity.
Sexual Assault with an Object	The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, 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 or physical incapacity.
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.

Sex Offender Registry Reference

The current reference in 34 CFR §668.46(b)(12) to section 170101(j) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(j)), concerning registered sex offenders, is out of date. We need to update this reference to refer to 42 USC 16921.