Ensuring Compliance with VAWA for 2014 ASRs
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October 1st has arrived. As all are no doubt aware, colleges and universities are now required to issue Annual Safety Reports (ASR) to students, employees, and prospective students that attempt to comply in "good faith" with Violence Against Women Act (VAWA). According to the Department of Education (DOE), this means that institutions must include statistics for incidents of domestic violence, dating violence, and stalking in their ASRs that occurred in 2013. While the DOE does not expect a college or university to have recorded statistics for the entire year, it does expect that what is being recorded and subsequently reported in the ASR to be accurate. As institutions double-check their ASRs, here are a few questions and answers to allay any last-minute compliance concerns.

(1) Is there a requirement that the new Clery crimes be reported to the DOE?
Answer: No. The DOE has delayed the reporting of new Clery crimes in the Web-based data collection this year. Notably, the website does not yet include a mechanism for reporting these incidents.

(2) How should an institution define "stalking" in our ASR?
Answer: Tennessee institutions should use the definition of "stalking" in Tenn. Code Ann. (T.C.A) § 39-17-315 because VAWA requires that they incorporate the applicable jurisdiction’s definition of "stalking" in ASRs. Under this Tennessee statute, "stalking" means a:

willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Some confusion has been created by VAWA’s definition of stalking (i.e., "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"). With little to no guidance from the DOE, institutions have resolved this confusion by using the broader VAWA definition in school internal policies and codes of conduct.

(3) How should an institution count stalking when the "course of conduct" occurs on email or text?
Answer: Clery geography will still apply even if the "course of conduct" occurs electronically. Recall that an incident counts if the sender was in Clery geography when sending the communication (e.g., residence hall) or if the recipient was in Clery geography when he/she became aware of it.

(4) Does VAWA define "consent"?
Answer: No - there currently is no definition of consent in VAWA. Institutions should continue to rely on the jurisdictional definition or the institution’s definition (provided the threshold is lower). The definition of "consent" can be found in T.C.A § 39-11-106.
(5) Does an institution need to determine whether there was consent for purposes of counting a sexual assault?

Answer: No. All sex offenses that are reported to a campus security authority must be recorded in an institution’s Clery Act statistics and, if reported to the campus police, must be included in the crime log, regardless of the issue of consent. Even though consent is an element of a Clery offense, for purposes of Clery Act reporting, no determination as to whether that element has been met is required.

(6) What if the incident falls within the definition of dating violence and domestic violence - should it be counted twice?

Answer: No. Institutions should only count the incident once as domestic violence. VAWA specifically excludes from the definition of dating violence those acts covered under the definition of domestic violence.

VAWA’s implementing regulations should be issued later this year so that colleges and universities can fully comply with VAWA. Until such time, member institutions will be well-served to continue recording the new Clery crimes, develop and review prevention and awareness programs, begin modifying procedures in responding to new reports, and assess policies and practices to ensure seamless coordination in investigation, security, reporting and advocacy functions in addressing sexual violence on campus.

If you have additional questions about the ongoing changes to institutional compliance requirements in the wake of the amendments to the Clery Act, please do not hesitate to contact Aron, or any member of Waller.

Waller is pleased to have partnered with TICUA to bring you this series of Legal Notes. If you have questions or suggestions for future topics, please contact Claude Pressnell (pressnell@ticua.org) or Waverly D. Crenshaw, Jr. (waverly.crenshaw@wallerlaw.com).

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