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## **NACCOP Issues List Relative to the Clery Act and Specifically the Subregulatory Guidance from the Handbook for Campus Safety and Security Reporting – (2016 Edition)**

### **Overview:**

The National Association of Clery Compliance Officers and Professionals (NACCOP) is a professional association for Clery Compliance Officers and Professionals to collaborate with each other, share resources and best practices, and participate in professional development opportunities to support colleges and universities in their efforts to comply with the Clery Act. NACCOP is a young, but growing association with more than 700 members and represents hundreds of colleges and universities from all over the United States. Our constituents include campus law enforcement and security directors, chiefs, and professionals; Clery Compliance Officers; Title IX Officers; Student Conduct and Student Affairs professionals; Human Resources professionals; and a variety of other Higher Education administrators focused on compliance related issues. NACCOP partners with other Higher Education Associations to provide training and education to the members of both associations, thereby expanding its reach and influence. NACCOP developed a Clery Compliance Officer certification program in 2016, and 9 members of the first cohort have already been certified through the association. NACCOP has also been proactively engaging Congressional leaders relative to membership issues and concerns pertaining to regulatory oversight and enforcement. In recent months, NACCOP met with the professional staffs of the below committees in response to increased conversations and energy around the reauthorization of the Higher Education Act (HEA):

- Senate Committee on Health, Education, Labor & Pensions (HELP Committee) – professional staff of Sen. Alexander, Sen. Murray, and Sen. Casey
- House Committee on Education and the Workforce – professional staff of Rep. Foxx
- Senate Committee on the Judiciary – professional staff of Sen. Grassley

NACCOP appreciates this opportunity to provide input to the Department of Education (ED) regarding regulations that may be appropriate for repeal, replacement, or modification through the “Enforcing the Regulatory Reform Agenda,” in accordance with Executive Order 13777. These comments are focused on The Jeanne **Clery** Disclosure of Campus Security Policy and Campus Crime Statistics **Act** or **Clery Act**; 20 U.S.C. § 1092(f), with implementing regulations in the



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U.S. Code of Federal Regulations at 34 C.F.R. 668.46 and ED's subregulatory guidance as outlined within 'The Handbook for Campus Safety and Security Reporting, 2016 Edition.'

It is NACCOP's understanding that ED's review and consideration of regulations for repeal, replacement or modification may also be based on recommendations from a 2015 report produced by a congressional task force on federal regulation in higher education. This 2015 report titled, "Recalibrating Regulation of Colleges and Universities" (Congressional Task Force, "Recalibrating Regulation of Colleges and Universities", <https://www.luminafoundation.org/resources/recalibrating-regulation-of-colleges-and-universities>), addresses the complexity, increasing cost and arduous nature of ED regulations on IHEs, including some associated specifically with Clery Act compliance. The Executive Director of NACCOP, Dolores Stafford, actively participated in those task force meetings and contributed to the Clery Act section of that report.

Current regulatory oversight and sub-regulatory guidance seems to have strayed from the spirit of the original law as essentially intended by congress when the Clery Act was passed in 1990. The 2016 Handbook for Campus Safety and Security Reporting provides many examples of this. There is a clear need to assess and reduce the regulatory burden, but not to eliminate the Clery Act's important disclosure requirements that have helped inform consumers about campus safety. NACCOP's goal is to have ED reform and streamline guidance versus eliminate important and substantive requirements of the Clery Act's open disclosure and transparency requirements. NACCOP believes strongly that the Clery Act has certainly professionalized campus security and police departments and it has undoubtedly contributed to safer campuses and more informed students.

#### **Top Level Issues:**

1. **Administrative Capacity** – unintended consequences that have no basis in the law – creates excessive administrative burden on IHEs to comply. Reduces their capacity to maintain compliance.
  - a. Example of Excessive Burden: (As outlined in the 2016 Handbook for Campus Safety and Security Reporting on page 9-10): "If your institution corrects crime statistics for a previous calendar year, you must correct the statistics in all previous annual security reports that included the statistics. For example, if your institution discovers in December 2015 that the numbers reported for 2013 on-campus disciplinary actions were incorrect, you must correct the 2013 statistics in the 2014 and 2015 annual security reports." – Revising and distributing "old" Annual Security and/or Fire Safety Reports is not beneficial to the campus communities and can only serve to confuse the students and employees. Those



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reports are typically archived after the newest report has been released and have historically not been provided to students and employees once they are no longer active. NACCOP does not believe that this exercise of revising and distributing old reports is useful and institutions should only be required to update the current Annual Security and Fire Safety Report, when errors or omissions are identified to reduce the administrative burden that serves no useful purpose.

2. **Revised definition of “reasonably contiguous” and addition of a new one-mile guideline (2016 Handbook for Campus Safety and Security Reporting; pp. 2-3 to 2-4)** - This is concerning from the practitioner’s perspective. Previously, no distance or range was offered to operationalize “reasonably contiguous” and the definition included two factors: integral part of the IHE’s main or core campus and covered by the same security policies. Now any property within one mile that is considered to be an integral part of the IHE’s main or core campus is “reasonably contiguous.” This has the potential to significantly broaden an institution’s “Clery map.” Institutional non-campus locations that are owned or controlled, as well as any Separate Campus locations that are within one-mile of the core campus, may convert to On-campus. This would also mean that any public property within or immediately adjacent to and accessible from each of those off-campus buildings would now be reportable as well. These locations are not typically considered or treated as part of the campus for any other purpose. To provide an example from Washington, DC, if the George Washington University (at 2000 Pennsylvania Ave) leased a building where they held continuing education classes in Dupont Circle (1 Dupont Circle), that would be .9 miles away and they would be required to consider that building to be an on-campus location, and would be obligated to report crime statistics for the public property (sidewalks, streets, etc.) surrounding the building as “public property” in the statistical disclosures. The problem with this is that no one at GW, including the students, believes that the Dupont Circle area is part of the “campus” for any purpose. The one-mile expansion is arbitrary, at best and would create an unreasonable expansion of what should be considered part of a campus. Prior to the new rule, GW would have been required to capture crime statistics for the building in this example and would have reported it as a Noncampus property.
  - a. NACCOP believes, based on previous conversations with ED, that this expansion of geography was unintentional and ED’s true intent was to ensure IHEs Fire Safety Protocols, Statistics, and Policies were applied to any Non-campus residential facilities in the same fashion they are for On-campus residential facilities. A more narrowly tailored approach to achieving this goal would be to state that the fire safety regulations apply not only to on campus student housing facilities, but also to any owned or controlled locations within one mile of the campus border that house students.



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- b. This revised definition requires IHEs to reevaluate their Clery geography and further extend their outreach to local law enforcement (LLE) agencies with jurisdiction over this Clery geography to request statistics from LLE (especially as it relates to the expansion of their public property reporting category) that LLE don't always have or can't always calculate to the level of detail we would typically request. In the Dupont Circle example, GW would have to request crime data for Dupont circle immediately adjacent to One Dupont Circle and for the section of P Street immediately adjacent to the same address. It is not likely that the Metropolitan Police Department could provide crime statistics with that level of specificity. Thus, for most campuses, this is an exercise in futility.

NACCOP believes that the original goal (as was described to us by an official from ED) could be accomplished by simply adding language to the Fire Safety section of it's Handbook to direct institutions to provide fire safety information and gather fire statistics for any Noncampus residential facilities.

- 3. **Short-Stay "Away" Trips and Repeated Use of Location (2016 Handbook for Campus Safety and Security Reporting; pp 2-25 to 2-26)** – Repeated use includes IHE sponsored overnight trips every year and the students stay at the same hotel each year - this would require the IHE to include portions of the hotel in their non-campus geography. The definition of frequently used by students for short-stay away trips now has a bright-line standard of either repeated use or "more than one night" (we applaud ED for providing a bright line standard, rather than providing guidance to individual institutions on what constitutes "frequently used by students"). This now means that all locations used by students for more than one night during domestic and international trips that are used to support educational purposes must be accounted for under the Clery Act as Noncampus locations. Institutions are required to write to the local law enforcement agency to request crime statistics for the spaces they are using in a building and the common spaces leading to those spaces being used. Field trips, overnight school-sponsored trips to see a play, etc. would not be included if they are not staying in a location for more than one night, as they don't meet the "frequently-used-by-students" criterion (although if the same location were used by students the preceding year, the location would now be reportable under the "repeated use" standard also identified in the 2016 Handbook).

- a. Non-campus considerations, crime reporting, and complexity of tracking statistics. This requirement places a significant burden on IHEs and provides little, if any useful information to consumers about



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crimes on campus. The example of chasing down possible crime statistics from law enforcement within the jurisdiction of a hotel that is temporarily visited by the baseball team for more than one night during spring-break training is a very real exercise being completed by many IHEs for purposes of complying with this requirement.

NACCOP believes that the current definition of frequently used by students, i.e. more than one night, does not actually depict what should be construed as “frequent” use. A standard of 10 days or 14 days seems much more reasonable and would then only require institutions to gather and report crime statistics for locations that are actually under a substantial level of use. The repeated use standard should be adjusted to repeated use for a multiple number of days. If a facility is used once a year, for one day and again, for one day the following year, does that meet the spirit of the concept of being frequently used by the institution? Probably not. It is important to note that the concept of “frequently used by students” is not defined in the regulations, only in the Handbook for Campus Safety and Security Reporting.

4. **Expansion of Campus Security Authorities (CSAs) – (2016 Handbook for Campus Safety and Security Reporting; pp. 4-2 to 4-4) –** The new handbook expanded the CSA category and included in its examples of individuals who generally meet the criteria for being a CSA positions that had previously been thought of as either confidential, privileged or outside the scope of an “official of an institution who has significant responsibility for student and campus activities...” (p. 4-2). Recent helpdesk guidance seems to also be expanding the definition of a “student”, although this term has never truly been originally defined by ED.
  - a. Directors of Counseling, Ombudspersons, and Victim Advocates have long considered their positions and responsibilities to be confidential or in some cases privileged. Including them as examples of CSAs in the most recent Handbook created much consternation among these professionals and IHEs. The International Ombudsman Association, for example, has always asserted that including Ombudspersons as CSAs would conflict with their basic duties of responsibilities. The Association wrote a letter to the Secretary of Education in protest explaining how this decision conflicted with their primary role. ED has responded to inquiries and criticism over this “expansion” by stating that since all CSAs are required to do is report crimes minus personal identifying information (PII) to the reporting structure of their institution for statistical disclosure in an IHEs Annual Security Report (ASR), that requirement alone



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would not jeopardize victim confidentiality. On page 4-8 of the Handbook it states;

“In most cases it is possible for a CSA to fulfill his or her responsibilities while still maintaining victim confidentiality. CSA reports are used by the institution to compile statistics for Clery Act reporting and to help determine if there is a serious or continuing threat to the safety of the campus community that would require an alert. However, those responsibilities **can usually be met** without disclosing personal identifying information.”

**Can usually be met** means that PII may need to be disclosed in order to properly assess a crime for timely warning notification purposes. Additionally, PII may be necessary as part of the IHEs audit process to ensure a crime statistic is not inadvertently double counted. This seems to clearly conflict with EDs statement that a CSA can maintain victim confidentiality. These conflicting statements have caused great frustration, strain and concern for practitioners who need to work with these entities to ensure crime reporting.

5. **Timely Warnings about Threats to Campuses – (2016 Handbook for Campus Safety and Security Reporting; pp. 6-12 to 6-15) -** IHEs should be given the authority to use their own judgment when assessing Clery Act crimes for the potential of a serious or continuing threat. Second guessing the experts on the ground well after an incident has happened does nothing but create additional angst among practitioners as they decide when, how and to whom to distribute warnings. The often-unfair criticism after the fact and fear of an ED audit, subsequent fine and bad publicity changes the process from one of an evaluation of an incident that may pose a real (serious or ongoing) threat to others to an exercise of sending out a notice almost instantaneously for all crimes to avoid external scrutiny. ED should allow IHEs the flexibility and judgment to make these decisions based on the expertise of their campus law enforcement and security agencies, knowledge of their campus environments, constituencies, and the context of the situation. Except in cases of obvious negligence or an intentional attempt to conceal or disguise information, these decisions should be left to the expert practitioners in the field using their best judgment based on the known incident specifics at the time. Good faith efforts by IHEs to appropriately inform their campus communities about potential threats should be acknowledged by ED.

**Expansion of Timely Warning Notification Protocols as Part of EDs Program Review of Penn State University:**





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- a. Timely warnings are not limited to Clery Act crimes occurring in an IHE's Clery Geography that pose an ongoing threat to students and employees. The requirement extends to the entire campus community, including invitees and guests.
    - i. *Institutions...must issue timely warnings anytime a Clery-reportable crime is reported to a CSA or the police that may pose an ongoing threat to students, employees, or other members of the campus community, including guests such as campers or persons attending concerts or sporting events. (FPRD, p. 26).*

Institutions often don't have the contact information for guests of concerts, sporting events, etc. or for campers (many of the campers are children and don't have phones while they are on campus, thus they would never be in a position to receive a notice, even if the institution had some level of contact information for some of the guests, such as campers). This language seems like an expansion of the original intent of warning students and employees of a crime that poses a serious or continuing threat.

- 6. **Technical Support and Assistance** - Increase and improve Clery Act technical assistance by ensuring more consistency in application and messaging. Regulations should state expressly that if an institution relies upon guidance received by the Campus Safety and Security Helpdesk, they should not be the subject of any adverse administrative action by the U.S. Department of Education if the Department subsequently conducts a program review and determines that adhering to Help Desk guidance did not fully comply with the requirements of the law.

NACCOP representatives would be pleased to discuss these and other issues with representatives from ED in a more direct and personal way should we receive an invitation to do so.

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