

July 21, 2014

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U.S. Department of Education
1990 K Street NW, Room 8055
Washington, DC 20006-8502

**Re: Violence Against Women Act
Docket ID ED-2013-OPE-0124**

Dear Secretary Duncan:

The American Council on Education (“ACE”)¹ appreciates the opportunity to submit these comments to the U.S. Department of Education (“ED” or the “Department”) in response to the June 20, 2014 notice of proposed rulemaking (“NPRM”) regarding proposed regulations to implement changes made to section 485(f) of the Higher Education Act, otherwise known as the Jeanne Clery Disclosure of Campus Crime Statistics Act (“Clery Act”), by the Violence Against Women Reauthorization Act of 2013 (“VAWA”). ACE and its members are steadfast in our commitment to keep college and university campuses safe by preventing sexual assault and responding to instances of sexual assault through actions that support survivors and hold offenders accountable. We appreciate the negotiated rulemaking committee’s efforts “to develop inclusive, effective, and fair regulations that protect the rights of all students” and “to craft regulatory language that takes into account the unique needs of diverse communities and individuals”.² We applaud the negotiators’ commitment to the challenging task at hand and thank them for the hard work undertaken in order to achieve consensus regarding the proposed regulations. In light of that consensus,³ we focus our comments on a few matters regarding which ED specifically requested input and a limited set of matters with respect to which we anticipate confusion by our members which could hamper effective implementation.

I. Recording reports of stalking - 34 C.F.R. § 668.46(c)(6)

In the NPRM, the Department invited comments on several issues related to the reporting of stalking. First, the Department requested feedback about how to decide when one incident of stalking has ended and another has begun.⁴ Under the proposed regulations, a stalking course of conduct would be recorded as a new crime for Clery Act statistical reports after an “official

¹ ACE represents the presidents of U.S. accredited, degree-granting institutions, which include two- and four-year colleges, private and public universities, and nonprofit and for-profit entities. ACE has more than 1,800 member institutions.

² 79 Fed. Reg. 35,418, 35,422 (June 20, 2014).

³ Id. at 35,421.

⁴ Id. at 35,438.

intervention,” defined broadly to include formal and informal interventions initiated by institutional officials or a court. ACE agrees that counting a report of stalking as a separate crime after a specific period of time has elapsed (based on invocation of either a set “bright line” standard, or a more flexible “significant amount of time” standard) would be arbitrary, and we support generally the approach in the proposed regulations. We note that it may be difficult for an institution to know when “official intervention” has occurred when such intervention does not involve the institution (i.e., the issuance of a no-contact order, restraining order, or “warning by . . . a court”⁵). ACE suggests that proposed 34 C.F.R. § 668.46(c)(6) be amended to state that issuance of a no-contact order, restraining order, or warning by a court is an “official intervention” only when the institution has actual knowledge that such “official intervention” has occurred.

Second, the Department requested comment on the issue of how to count stalking that crosses calendar years.⁶ Under the proposed regulations, stalking would be counted only in the first calendar year in which it is reported, unless it continues into a new calendar year, in which case the institution would record the stalking in both calendar years. The NPRM notes that some negotiators argued that reporting a crime of stalking in only one year “could artificially deflate the number of reported crimes.”⁷ That argument, however, assumes its own conclusion—that a course of behavior constituting stalking is by definition more than one crime simply because it spans across the arbitrary time limit of the end of a calendar year. In other words, the NPRM approach could just as easily be described as artificially inflating the number of reported crimes. ACE respectfully suggests that if ED seeks to count a crime of stalking that continues into a subsequent calendar year as a crime in the subsequent year, ED provide that the institution should indicate, for each calendar year, how many incidents of stalking are newly-reported in that calendar year and how many are continuations from the previous calendar year. Such an approach would satisfy the purpose of the disclosures required by the Clery Act—to help “prospective and current students and their families, staff, and the public . . . to assess an institution’s security policies and the level and *nature of* crimes on its campus.”⁸ Students and the public would receive more accurate information if they could tell the difference between new incidents of stalking and stalking that continued from one calendar year into another.

Third, ED invited public comment on whether applying the existing Clery Act geography requirements to incidents of stalking through electronic means would adequately capture stalking that occurs at institutions.⁹ Under the approach put forth in the NPRM, an institution would be required to record each report of stalking as occurring in the first Clery Act location in which either the perpetrator engaged in the stalking course of conduct, or the victim first became aware of the stalking. ACE acknowledges that this approach may not capture all incidents of stalking that adversely affect members of the college or university community. For example, if a stalker engages in electronic stalking behavior exclusively outside of Clery Act geography, and the victim first becomes aware of the stalking while outside Clery Act geography, no crime would be reported for purposes of the Clery Act. However, we note that other crimes that occur beyond the boundaries of an institution’s Clery Act geography (e.g., an act of domestic violence that occurs in a residence

⁵ Id. at 35,457.

⁶ Id.

⁷ Id.

⁸ Id. at 35,449 to 35,450 (emphasis added).

⁹ Id. at 35,438.

outside of an institution's Clery Act geography) are similarly excluded from an institution's reporting obligations under the Clery Act. In other words, the geography-based framework of the Clery Act is focused on whether crimes occurred in particular geographical places, not on whether crimes occurred that have affected members of the college or university community. As such, ACE believes that the NPRM sets forth a paradigm for recording stalking that is consistent with other parts of the Clery Act, and for that reason we believe the approach is appropriate. We further note that simply because an institution is not required to report for purposes of the Clery Act an incident that occurs beyond its Clery Act geography does not mean that an institution is prevented from taking action to address the incident through, for example, its internal student disciplinary process.

II. Identifying the relationship between perpetrator and victim - 34 C.F.R. § 668.46(c)(6)

The Department specifically invited comment on whether the approach in the NPRM for reporting and disclosing Clery Act crimes should be modified to require institutions to identify the relationship between the perpetrator and the victim.¹⁰ ED has stated that reporting and disclosing such "critical information . . . would be helpful for prevention and research purposes."¹¹ As the primary purpose of the Clery Act is to provide students and their families, staff, and the public with useful information, rather than to collect data for research purposes, the focus of the regulations should be to provide those constituencies with clear, easy-to-understand information. ACE respectfully submits that required reporting of this additional information may result in institutional disclosure categories that are fractured or vague to the point of being confusing. At a minimum, requiring institutions to identify the relationship between the perpetrator and the victim for some or all Clery Act crimes would necessitate the consistent application of a pre-defined set of terms to identify categories of relationships (e.g., "intimate partner," "roommate," "acquaintance"). Such terms have not been subject to discussion and negotiation. Therefore, we submit that at this time ED should not require institutions to identify the relationship between the perpetrator and the victim for purposes of reporting and disclosing any Clery Act crime. We note that institutions continue to have the option "to provide more detailed information as part of the annual security report . . . if they choose", including information provided in narrative or descriptive format rather than a tabular format.¹² Such additional information may identify the relationship between the perpetrator and the victim. Institutions that choose to provide such information should be encouraged to be clear about how they have defined the relationship between the parties.

III. Calculating costs and benefits

In the NPRM, ED noted that "[i]nstitutions would largely bear the costs of these proposed regulations, which would fall into two categories: Paperwork costs of complying with the regulations, and other compliance costs that institutions may incur as they attempt to improve security on campus."¹³ With regard to the second category of costs, the Department acknowledged that "the costs of any changes institutions would make in response to the proposed regulations could vary significantly", and "the Department has not attempted to quantify additional costs associated with"

¹⁰ Id. at 35,435.

¹¹ Id.

¹² Id.

¹³ Id. at 35,449.

awareness and prevention programs or changes to disciplinary proceedings.¹⁴ The Department requested comments related to the estimated burden stemming from the proposed regulations.¹⁵

ACE supports ED's efforts to improve crime reporting and to better inform students, families, and employees about campus safety and related procedures. We also respectfully submit that the cost of complying with the proposed regulations may be quite significant, especially for smaller institutions that do not have existing staff members with the expertise or workload capacity to review and revise institutional policies or to conduct the required training. For example, the cost of revising a single institutional policy or code of conduct has been estimated at \$3,500 – 12,500.¹⁶ The cost of conducting live, in-person awareness and prevention programs may also be significant; although ED has endorsed the electronic delivery of such programs,¹⁷ which may be less costly, many institutions may believe that in-person programs are more effective. We encourage the Department to recognize that Clery Act compliance costs are significant and to work with the higher education community to consider comprehensively the compliance costs associated with Higher Education Act requirements and possible approaches to minimize those costs.

IV. Request for regulatory clarification - 34 C.F.R. § 668.46(c)

The proposed regulations establish as Clery Act “crimes” instances of dating violence and stalking, two offenses that may not be categorized as crimes in some jurisdictions. Thus, the proposed regulations would require an institution to report non-criminal offenses as crimes for purposes of Clery Act disclosures. To do so with regard to such offenses that occur in or on a noncampus building or property or on public property, an institution would be required to gather and review individual reports from municipal police authorities and determine whether the offenses described in the reports constitute Clery Act “crimes”, even if they do not constitute criminal offenses in the jurisdiction. For example, an institution may be required to review all incidents of threatening conduct, simple assault, and several other criminal-code categories to determine whether the reported conduct, although not a crime in the relevant jurisdiction, meets the definition of a Clery Act “crime”. This collection and review of police records would require significant cooperation by municipal police authorities and would be burdensome for institutional officials tasked with reviewing such reports and reclassifying offenses for Clery Act purposes. We request that ED clarify that colleges and universities are not required to gather reports from municipal police authorities for purposes of determining whether such reports describe Clery Act “crimes” of which the institution was otherwise unaware. In other words, with respect to offenses reported to municipal police authorities, institutions should be required to report only those offenses that are crimes in the relevant jurisdiction and crimes for Clery Act purposes.

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Id.

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Id.

¹⁶

See, e.g., The National Center for Higher Education Risk Management, Off-Site Consultation, <http://www.nchem.org/services/consultation/off-site-services/>.

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79 Fed. Reg. at 35,441 to 35,442.

V. Right of accuser and accused to be accompanied by an advisor of his or her choice - 34 C.F.R. § 668.46(k)(2)(iii)

The proposed regulations require that the accuser and the accused be entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied by an advisor of his or her choice to any related meeting or proceeding. Although the proposed regulations would allow institutions to establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties, it is likely that in some circumstances, either the accuser or the accused will have the resources to hire sophisticated legal counsel while the other party does not. The mere presence of legal counsel during disciplinary proceedings may create an actual or perceived advantage for that party, insofar as such presence of the counsel may intimidate the other party or members of the hearing panel. While ACE recognizes that the statutory language was intended to allow the accuser and the accused to have an advisor of his or her choice, ACE encourages ED to consider ways to minimize the likelihood that a party or institutional official will be intimidated or otherwise prevented from participating fully in all aspects of a proceeding.

Apart from this rulemaking process, ACE understands that ED has undertaken to provide in future documents and publications further clarification and guidance around the issue of consent.¹⁸ ACE further understands that ED may include in a best practices document or a revised version of the Clery Handbook training standards for use with officials who conduct disciplinary proceedings.¹⁹ In acknowledgement that the negotiating rulemaking committee agreed that those matters should not be addressed in regulation, if and when ED addresses them, it should address them through guidance that is not binding on institutions.

Thank you for your consideration of these comments. We take seriously our responsibility to care for all of our students, to protect them from sexual assault, and when sexual assault occurs, to provide accountability to students and the broader public. ACE and its member institutions recognize the importance of transparency and accountability related to crime on campus, and we look forward to working with the Department to ensure that the disclosures required by the Clery Act, as amended by VAWA, are clear and useful to students and the public. If you have any questions or would like to discuss these comments further, please do not hesitate to contact me.

Sincerely,



Ada Meloy
General Counsel

¹⁸ Id. at 35,423 to 35,424.

¹⁹ Id. at 35,446.