

OCTOBER 2020 RESCISSION OF 2016 CLERY HANDBOOK: WHAT DOES IT MEAN FOR COLLEGES AND UNIVERSITIES?

- The U.S. Department of Education's Federal Student Aid Office has announced that it is rescinding the 2016 Handbook for Campus Safety and Security Reporting and publishing a new Clery-related Appendix of the FSA Handbook.
- This Issue Brief explains some highlights of the changes outlined in the Education Department's announcement, as well as some thoughts on key questions posed by college and university administrators.

Since 1990, The Jeanne Clery Disclosure of Campus Security Policy and Campus Criminal Statistics Act ("Clery Act") has required colleges and universities to publish crime statistics and information about campus safety, and to issue warnings and notifications. For the last four years, Clery Act compliance guidance has been provided to institutions by the U.S. Department of Education ("Department") in the 265-page 2016 [Handbook for Campus Safety and Security Reporting](#) ("Clery Handbook"). However, an October 9 [announcement](#) ("Announcement") by the Department rescinded the Clery Handbook and replaced it with a 13-page document published by the Department's Federal Student Aid Office ("FSA"). This new [Clery-related appendix to the FSA Handbook](#) ("Appendix") will be effective for the 2021 reporting year.

Given the unprecedented challenges posed by the COVID-19 pandemic, and the many other changes and directives by the federal executive branch impacting higher education institutions in recent months, college and university leaders and administrators are undoubtedly asking: What, if anything, should we do differently (1) in the short term and (2) in the longer term? Reasonably prudent answers are that: (1) Nothing more, less, or different needs to be done in the short term unless you wish to consider making changes, and (2) a prudent longer term approach may be to wait to see whether the post-election Department reverts to an approach where sub-regulatory guidance, such as the Clery Handbook, informs substantially the interpretation and enforcement of the law.

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DISCLAIMER

This issue brief does not constitute legal advice. It incorporates and reflects high-level observations based on non-exhaustive research, and does not analyze any specific factual scenarios taking into account potentially relevant details. Institutions should examine issues addressed here based on the context and facts of each situation, institutional policies, geographical and political context, and on their own counsel's interpretation of relevant law. This is a fluid environment and topic, including the potential for changes in current law or current enforcement practices.

THE ANNOUNCEMENT

The Announcement begins by emphasizing that the Clery Handbook effectively created additional requirements for institutions over and above the [Clery Act statute](#) and its regulations at [34 C.F.R. 668.41](#) and [34 C.F.R. 668.46](#): “Despite the fact that the guidance found in the 2016 edition did not have the force of law or regulations, some institutions may have felt pressured to satisfy the non-regulatory or non-statutory based aspects of the guidance, calculating that the financial and reputational consequences of non-compliance were too great.” Citing an [Executive Order](#) issued by President Trump and a U.S. Senate [report](#) criticizing “non-binding” sub-regulatory guidance documents, the Announcement refers to Education Secretary Betsy DeVos’ “commitment to reducing the regulatory burden on institutions,” and describes the rescission of the Clery Handbook and issuance of the dramatically condensed Appendix as part of the Department’s “holistic process of eliminating guidance that extended beyond [the Clery Act’s] statutory and regulatory requirements.”

SIGNIFICANT CHANGES

Clery Geography

The Announcement states that “[w]hile Chapter 2 of the 2016 [Clery Handbook] attempts to clarify some of the details [of the definition of Clery geography], it may have expanded the definition beyond the intent and authority of the legislation and resulted in confusion and unhelpful over-reporting.” The new Appendix says it “applies the specific regulatory requirements and attempts to provide clarity, without additional requirements, to terms defined in 34 CFR 668.46(a).” As an example of this revised approach, the Department will no longer apply the 2016 Clery Handbook’s statement that “it is reasonable to consider locations within one mile of your campus border to be reasonably contiguous with your campus.” The Appendix also eliminates explanations of the definition of “public property” in the 2016 Clery Handbook that the Department viewed as beyond the statutory and regulatory definition.

Helpfully, the Appendix addresses issues identified in the Senate report referenced above regarding institution-sponsored stay-away trips and similar practical mandates previously placed upon institutions with trips to international destinations that required the collection of crime statistics from foreign law enforcement agencies.

Clery Crimes

The new Appendix deletes all definitions for Clery crimes from Chapter 3 of the 2016 Clery Handbook and replaces them with references to the precise regulatory-defined sources, on the rationale that the “explanations, summaries, and examples provided [in the 2016 Clery Handbook] may have, at times, created misperceptions and confusion for institutions attempting to properly interpret and apply the definitions.”

Campus Security Authorities

The Announcement states that the “Appendix will strictly adhere to the definition of campus security authority (CSA) and will respect institutions’ discretion in their reasonable determinations of who constitutes a CSA.” According to the Department, this approach appropriately reverses the Clery Handbook’s 2016 expansion of “the definition of a CSA to include individuals on campus that should likely not be designated so under a strict interpretation of the regulatory framework” because the Clery Handbook’s “expansive view of the phrase ‘significant responsibility for student and campus activities . . . captured groups of individuals who did not have ‘significant responsibility.’”

APPLICATION

The Announcement has prospective application. It states that while “this rescission will inform the Department’s views moving forward, the rescission will not retroactively apply to previous Department determinations regarding Clery Act violations, fines, enforcement actions, or any other related actions by the Department.” Therefore, the Clery Handbook “will be archived on the Department’s website” and “where appropriately applied to prior calendar years,

will continue to be referenced in program review reports, final program review determinations, and final audit determinations.”

The Announcement notes in closing that “[n]one of the changes in the Appendix impact the July 10, 2020 temporary extension (to December 31, 2020) that the Department provided, regarding Clery reporting due to COVID-19.”

SO WHAT DOES IT MEAN FOR YOUR CAMPUS?

Short-Term Ramifications

In the short term, this Announcement need not mean any more than you want it to. For college and university administrators whose first reaction to the Announcement was frustration, concern, and maybe even mild panic about having to deal with yet another change in Department of Education guidance, the news is neither urgent nor dire. The rescission of the Clery Handbook should have no effect on the substance of this year’s annual security report (ASR), or on an institution’s classification and reporting of statistics from prior years based in good faith on the Clery Handbook’s definitions, examples and guidance. Therefore, attention to the Announcement and what it means for an institution may be deferred to next year.

That said, many colleges and universities likely prepared their soon-to-be-published ASRs using a process steeped rather thoroughly in Clery compliance culture, and may view the elimination of the Clery Handbook’s “one mile guideline,” its examples of regulatory definitions, and its expansive, non-deferential view of the CSA definition as a welcome opportunity to make changes. Administrators at these schools may choose to use the wrap up of their 2020 ASRs as an opportunity to turn to considering how such changes should affect their Clery compliance reporting efforts in 2021 and beyond, if the Appendix is not complemented or replaced by some other sub-regulatory guidance.

Long-Term Ramifications

The longer term ramifications of the Announcement will likely depend on the approach taken by the Department post-election. As noted above, its rationale for the rescission of the Clery Handbook is grounded in the Trump administration’s antipathy toward sub-regulatory guidance issued by the Obama administration, as well as the related Executive Order referenced above. A new administration may have a different view about the value of sub-regulatory guidance in general, and regarding concepts outlined in the Clery Handbook in particular. In that context, institutions would be prudent to maintain a steady course and wait to see whether much of the guidance found in the Clery Handbook is reinstated through guidance, regulatory or statutory changes.

On the other hand, a continuing Trump administration for the next four years will most surely mean that institutions will need to focus closely on Clery Act statutory and regulatory language, because the Appendix does not contain all the necessary compliance information for informed Clery compliance, and institutions no longer will be able to rely on the expansive Clery Handbook.

CONCLUSION

For many institutions, it will be sensible to calendar for early 2021 a robust assessment of the direction in which Clery Act guidance and enforcement is likely to go, and to decide at that time what changes, if any, ought to be made to institutional processes and reporting. Until then, completing this year’s ASR may be done without distraction by the Announcement. Most importantly, of course, college and university administrators should continue the practical, crucial work they perform to promote safety and security for their campus communities.