

## TOPIC:

### **SAFETY, MISSING STUDENTS AND FIRE REPORTING REQUIREMENTS OF THE HIGHER EDUCATION OPPORTUNITY ACT**

## INTRODUCTION:

The Higher Education Opportunity Act of 2008 [\[1\]](#) and its accompanying regulations [\[2\]](#) establish new requirements for colleges in the areas of personal safety and crime reporting, fire safety and reporting, and missing students. The law and regulations require certain changes to the Annual Security Report [\[3\]](#), as well as the creation or amendment of policies and procedures. In addition, for the first time, colleges must issue an Annual Fire Report. This NACUANOTE will discuss the steps each college or university must take to comply with the statute and regulations which took effect on July 1, 2010.

## DISCUSSION:

### **Changes to the Clery Act**

#### **Hate Crime Reporting [\[4\]](#)**

The HEOA and its accompanying regulations add four new crimes to the annual reporting requirements that must be submitted to the U.S. Department of Education (Department) (usually in or around August or September) and published in the Annual Security Report (ASR). The four new crimes are:

- larceny-theft;
- simple assault;
- intimidation; and
- damage/vandalism of property.

These crimes are only reportable when committed in the context of a hate crime. If they are not committed in the context of a hate crime, they are not reportable. As with other Clery Act reportable crimes, the definitions mirror those in the Federal Bureau of Investigation's Uniform Crime Reporting guidelines. Specific guidance about hate crime reporting may be found in the "Hate Crime Data Collection Guidelines [\[5\]](#)." As before, the regulations require that campuses report all other Clery crimes that occur in the context of hate crimes as well as those hate crimes which result in bodily injury.

Since hate crimes are rare on college campuses when compared to other crimes, the Department has stated that they are the only crimes in the ASR that may be reported either in the traditional tabular format, or in a narrative format [\[6\]](#).

For the four newly reportable hate crimes, the 2010 ASR (to be completed on or before October 1, 2010) need include only those crimes that occur in 2009. The 2011 ASR will report on such hate crimes that occur in 2009 and 2010, and the 2012 ASR will be the first to require the traditional three years of rolling reporting on all hate crimes, including those already required and those newly required.

### **New Security and Emergency Response Policies and Procedures [\[7\]](#)**

The new regulations require that colleges enact and catalog certain policy changes relating to emergency notifications [\[8\]](#) in the 2009 Annual Security Report (ASR) to be issued on or before October 1, 2010. Specifically, colleges must create or update procedures for notifying the campus community in the event of an emergency that presents an immediate threat to health or safety. For those colleges that implemented an emergency notification (text messages, reverse 911, blast e-mails) system in the wake of the April 2008 Virginia Tech shootings, this aspect of the HEOA simply requires that the campuses describe in the ASR the emergency notification policies and procedures that are already in use, provided that such policies and procedures meet the minimum federal requirements laid out below. If campus policies and procedures on emergency notification do not meet the minimum requirements established below, they must be modified to meet those requirements in time for publication in this October's ASR.

Beginning with the 2009 ASR (to be issued on or before October 1, 2010), campuses must include a statement of policy regarding emergency response and evacuation procedures. Such a statement must include:

- the procedures used to immediately notify the campus community of an immediate threat to health or safety when such an emergency is confirmed;
- a description of the process used to:
  - confirm there is an emergency;
  - determine which segments of the campus community must be warned;
  - determine the appropriate content of the warning; and
  - send the notification.
- a statement that such a notice will be sent without delay, unless sending such a message will, in the professional judgment of the responsible campus authorities, compromise the effort to deal with the emergency or rescue a victim;
- a list of the titles of persons or organizations tasked with determining whether an emergency exists and/or sending emergency notifications; and
- the campus procedure for disseminating emergency information to the larger community (e.g., a procedure to notify local media outlets of an emergency and/or update the institution Web site to reflect current status).

Further, each ASR must include the college's procedure to test such an emergency response and evacuation system at least once per year including:

- performing tests that are announced or unannounced;
- publicizing the emergency response and evacuation procedures in connection with at least one test per year; and
- keeping certain records for each emergency response and evacuation test including:
  - a description of the test;
  - the date and time of the test; and
  - whether the test was announced or unannounced.

## **Distinction Between Timely Warnings and Emergency Notifications [\[9\]](#)**

For many years, federal law has required that colleges issue “timely warnings” of potential dangers to the campus community. While such warnings must be “timely,” they need not be *immediate*, and can await the result of investigations into the danger. In the wake of the tragic shootings at Virginia Tech and Northern Illinois, colleges across the country developed emergency notification systems that could quickly notify all or selected members of the campus community of immediate dangers including active shooters, fires, or severe and dangerous weather.

A question arose, however, as to whether a campus must issue a “timely warning” regarding a danger if it recently issued an “emergency notification” [\[10\]](#) regarding the same danger. The new regulations clarify that a college that follows its procedures on emergency notification, which should be issued in the case of an immediate threat to health or safety, need not issue a timely warning for the same danger. The college must, however, still provide its community with any appropriate follow-up information regarding the circumstances.

## **Statement Concerning Law Enforcement [\[11\]](#)**

The ASR’s previously required “statement of current policies concerning law enforcement” [\[12\]](#) must now include a few additional elements, specifically: i) a statement of whether campus security personnel has law enforcement authority; ii) a description of campus security’s “working relationship” with state and local law enforcement agencies, including whether any written agreements exist with such agencies for the investigation of alleged criminal offenses; and iii) a policy statement encouraging accurate and prompt reporting of all crimes to campus security and the appropriate law enforcement agencies.

## **Missing Student Procedure [\[13\]](#)**

The HEOA and its accompanying regulations require that colleges take certain actions regarding on-campus residential students [\[14\]](#) who are reported missing for more than 24 hours.

The HEOA introduces two procedural requirements. First, colleges must provide all on-campus resident students with the opportunity to confidentially register the names and contact information of individuals whom the campus should contact if the student is reported to be missing for longer than 24 hours. Representatives of residence life and housing, the registrar, campus police/security and student affairs should coordinate this process to provide a user-friendly method for registering such information for students, as well as a method by which student affairs and campus police/security may quickly access such information if a student is reported missing.

Second, colleges must include in the ASR a statement of the institution’s missing student policies and procedures, including: i) a list of titles of persons or organizations who may be contacted to report a student as missing for more than 24 hours; and ii) a requirement that any such missing student report be immediately referred to campus police/security (or local law enforcement if the institution does not have campus police/security). Although the persons designated to receive initial reports regarding missing students may be determined by each college, it would be wise to consider limiting this list to those offices trained in missing person response and available 24 hours per day (usually campus police/security and perhaps residence hall directors). By limiting the list in this way, such important information can be quickly funneled to campus or local police departments that are staffed 24 hours per day and trained to investigate missing person reports. The statement must also describe the opportunity (see above) for students to designate a person to be contacted, and must advise students that this information will be maintained confidentially and will not be disclosed except in furtherance of a missing person investigation [\[15\]](#).

In addition, the HEOA mandates that designated campus officials take certain actions within 24 hours of receiving a report (from anyone, student or otherwise) that an on-campus residential student has been missing for at least 24 hours, including:

- making contact with the person or persons designated by the student [\[16\]](#);
- contacting the custodial parent or guardian of any unemancipated student under eighteen years of age; and
- contacting the local law enforcement agency that has jurisdiction in the area.

A description of these procedures must also be included in the ASR statement of policy.

The Department has stated that campus police departments may conduct a brief investigation of the missing person report prior to contacting local law enforcement and the parents or confidential contacts of the missing student [\[17\]](#). The notification requirements do not preclude such a brief investigation, which may include phone calls to the student and friends of the student, a review of the student's Facebook or other social networking account, a visit to the student's residence and friends of the student, and other investigative techniques as determined by the police and student affairs professionals on the campus. If the brief investigation results in locating the student, then the campus should not needlessly contact the confidential contact or parents of such a student or the local law enforcement agency. This brief investigation does not, however, extend the 24 hour clock.

In other words, if on Monday at 1:00 p.m. a designated campus missing persons reporting official receives a report (from anyone) that a residential student has been missing since Sunday at 1:00 p.m., between the time of the report and Tuesday at 1:00 p.m., the campus must notify the student's designated contact person (if any), notify the student's parent or guardian if the student is an unemancipated minor (whether they have designated a contact person or not) and notify the local law enforcement agency. Within that time, the police (likely in conjunction with student affairs) may conduct the brief investigation described above.

As a practical matter, it is recommended that each institution establish a policy/procedure containing all the elements required to be in the ASR. A copy of the policy/procedure should be provided to students living in on-campus housing facilities either at matriculation or as part of the housing check-in process, at which point they should also be given an opportunity to designate a missing person contact (a simple form will suffice). Ideally, the designation should be made electronically and in a way that integrates with the campus file system (e.g. Banner or People Soft), so that it is easily available to police and student affairs staff in the event of a missing persons report. The policy/procedure should then be included as required in the ASR.

While the law and regulations only mandate missing persons' policies for on-campus residential students, colleges may make the programmatic decision of extending this missing person policy to all students or all campus community members. Additional potential liability incurred (if any) may be matched or outweighed by the potential to save or assist others in the campus community.

## **Fire Safety Reporting [\[18\]](#)**

For the first time, the HEOA and its accompanying regulations require that campuses report on-campus housing facility fire and related incidents in a manner that is similar to crime and incident reporting in the Clery Annual Security Report. The statute and regulations require that the new report:

- describe each on-campus student housing facility;
- report the number of fire drills conducted during the reporting year;
- list the campus policies or rules on portable electronic appliances, smoking, and open flames in a student housing facility;
- list the campus procedures for evacuating student housing in the event of a fire;
- list the policies regarding fire safety education and training programs provided to the student and employees (including the procedures that students and employees should follow in the case of a fire);
- list the titles of each person or organization to which students and employees should report that a fire occurred; and
- list plans for future improvements in fire safety, if any.

As with the missing persons policy [\[19\]](#), it would be wise to consider limiting this list to those offices trained in fire response and available 24 hours per day (usually campus police/security and 911). By limiting reporting in this manner, campuses can ensure that fires are properly handled and are consistently counted in the Annual Fire Report.

Colleges must report only those fires that occur within an on-campus student housing facility, not fires that occur anywhere else on campus [\[20\]](#). Colleges may not simply report all fires that occur anywhere on campus. The most important parameter of this reporting is accuracy, and over-reporting is as incorrect as under-reporting.

The regulations define fire as “[a]ny instance of open flame or other burning in a place not intended to contain the burning or in an uncontrolled manner.” While seemingly straightforward, this definition can lead to some close cases, such as candles or incense (not a reportable fire, unless the fire spreads to other material) or burned microwave popcorn (not a reportable fire, unless the microwave begins to melt or burn). A fire in a candle or incense is not a reportable fire even if possession of candles or incense violates college or housing policy. A violation of college policy does not, by itself, lead to a reportable fire. For a fire to be reportable, it must meet the federal definition [\[21\]](#).

Colleges must report on the number of fires (if any) that occur in the residence halls, the number of injuries [\[22\]](#) and deaths from such fires (including someone who dies within a year from injuries sustained in a campus fire) [\[23\]](#), and the value of fire-related property damage. The Fire Report will ultimately need to include statistics for the three most recent calendar years for which data are available, but that requirement will be phased in. The 2010 Fire Report (to be completed on or before October 1, 2010) need include only those fires that occurred in 2009. The 2011 Fire Report will include information regarding 2009 and 2010 fires, and the 2012 Fire Report will be the first to require the three years of rolling reporting.

Colleges must report identical statistics in their Annual Fire Report and to the Department of Education (in a Web site-based reporting system that will likely mirror the current system utilized for campus crime statistics reporting).

Colleges must also maintain a written, easily understood fire log that records, by the date that the fire was reported (which may differ from the date in which the fire actually occurred), any reportable fire. The log must include the nature, date, time, and general location of each fire and the entry must be made within 2 business days after receipt of the relevant information. The portion of the log covering the most recent sixty (60) day period must be open to public inspection during normal business hours. Portions of the log older than sixty (60) days must be made available to the public within two (2) business days of receiving an inspection request. Public colleges and universities subject to state freedom of information laws may have additional obligations on disclosure.

## Publishing the Annual Safety and Fire Reports

Department of Education regulations and commentary recommend that both the Clery Annual Safety Report and the Annual Fire Report be distributed to the campus community in a single document. A college may distribute the reports in separate documents provided that each document references the existence of the other document and provides information on how one can locate and access the other document.

These ASR and Annual Fire Reports may be sent to the campus community by means of postal mail, a postcard with a printed link to the report(s) on the Internet, or by an e-mail with a direct link to the report(s). Practically, most campuses today send e-mails to all members of the campus community. This e-mail should cover the report(s) alone, and should not place the report(s) within a laundry list of other information. The link should be a “high-level” link (as a rule of thumb, if the link is so long that a reasonable person would never type it in to a browser if found on a piece of paper, then it probably does not meet federal requirements). Finally, colleges should also make the report(s) available to prospective faculty and staff (including a statement of the availability of the report(s), a description of the contents of the report(s), and an opportunity to request a copy of the report(s)). In addition, campuses should place links to the report(s) on the Admissions and Human Resources Web pages.

## CONCLUSION:

Federal law and regulation require several changes in the areas of safety and fire reporting. In the near future, the Department will be updating the Handbook for Campus Crime Reporting [\[24\]](#) to reflect the changes to crime, safety and fire reporting described above.

Colleges will need to establish or amend policies and procedures to ensure that the information described above is collected and included in the 2009 ASR and Annual Fire Report, which campuses must issue before October 1, 2010.

## FOOTNOTES:

**FN1.** See Public Law 110-315 (8/14/08).

**FN2.** See Department of Education General and Non-Loan Programmatic Issues; [Proposed Rule, 74 Fed. Reg. 42380](#) (Aug. 21, 2009) (to be codified at 34 CFR Parts 600, 668, 675 et al.). See *also* Department of Education General and Non-Loan Programmatic Issues; [Final Rule, 74 Fed. Reg. 55902, 55926](#) (Oct. 29, 2009) (to be codified at 34 CFR Parts 600, 668, 675 et al.).

**FN3.** For the purposes of this NACUA Note, the year of the Annual Security Report or Annual Fire Report is the year in which the report is issued. For instance, the 2010 Annual Security Report will be issued on or before October 1, 2010 and will include (with some exceptions detailed elsewhere in this memo) statistics for the 2009, 2008, and 2007 calendar years.

**FN4.** See 34 CFR § 668.46 (c)(3).

**FN5.** See [HATE CRIME DATA COLLECTION GUIDELINES](#).

**FN6.** See [THE HANDBOOK FOR CAMPUS CRIME REPORTING](#), p. 84.

**FN7.** See 34 CFR § 668.46 (g).

**FN8.** For information on the distinction between emergency notifications and timely warnings, please see ["Distinction Between Timely Warnings and Emergency Notifications"](#) of this Note below.

**FN9.** See 34 CFR § 668.46 (e). It should be noted that the timely warning requirement under Clery was limited to warnings about Clery crimes. See [THE HANDBOOK FOR CAMPUS CRIME REPORTING](#), p. 4. The emergency notification requirement is a broader requirement related to all emergencies, not just Clery reportable crimes. See Department of Education General and Non-Loan Programmatic Issues; [Proposed Rule, 74 Fed. Reg. 42380, 42396](#) (Aug. 21, 2009) (to be codified at 34 CFR Parts 600, 668, 675 et al.).

**FN10.** See ["New Security and Emergency Response Policies and Procedures"](#) of this Note above.

**FN11.** See 20 USC § 2092 (f)(1)(C).

**FN12.** See 34 CFR § 668.46 (b)(4).

**FN13.** See 34 CFR § 668.46 (h).

**FN14.** The Department of Education uses the following definition for on-campus student housing facility: any student housing facility that is owned or controlled by the institution, or is located on property that is owned or controlled by the institution, and is within the reasonably contiguous geographic area that makes up the campus.

**FN15.** Nothing in the regulations would lead to the conclusion that this requirement is satisfied by currently collected emergency contact data. It would seem that, under the regulations, campuses may collect this specific information during their regular request for emergency contact information, but should specify that the student should provide a confidential contact for this specific purpose. The format could be a simple question asking the on-campus residential student to list the name and contact information for a person or persons whom the institution should contact in the event the student is reported missing for more than twenty four hours. Such a request for contact information is sure to meet the requirements of the statute and regulation.

**FN16.** The Department of Education views the provision of such confidential contact information as an implicit waiver of FERPA for the specific purpose of law enforcement personnel contacting the listed confidential contact under these specific circumstances.

**FN17.** See Department of Education Final Rule, *supra* Note 2.

**FN18.** See 34 CFR § 668.49.

**FN19.** See ["Missing Student Procedure"](#) of this Note above.

**FN20.** The Department of Education uses the following definition for on-campus student housing facility: any student housing facility that is owned or controlled by the institution, or is located on property that is owned or controlled by the institution, and is within the reasonably contiguous geographic area that makes up the campus.

**FN21.** The Proposed Regulations, *supra*, Note 2, issued by the Department of Education on August 21, 2009 discuss the definition of fire in a passage that is worthy of review:

“The committee discussed the definition of fire at length. Generally, the negotiators agreed that the critical elements of a reportable fire are that it occurs in a place not intended to contain the fire or involves any burning that is not under control. For instance, under these proposed regulations, a fire in a trash can would count as a fire for reporting purposes, even if the fire was still under control, because a trash can is not intended to contain a fire. A lit candle, by contrast, while possibly against the institution’s policies for candles in dorms, would not generally be considered a reportable fire, as it is in a place intended to contain the fire and is under control. However, if the flame from a lit candle were to spread and become uncontrolled, it would be considered a reportable fire. The definition of fire is also intended to capture situations in which there is burning (not necessarily an open flame) that might easily become a fire, such as a smoldering couch. Burning or other flames can easily become a fire, at great risk to students and other individuals.”

**FN22.** Here campuses should report the number of persons injured, not the total number of injuries. If one person experiences more than one injury, the Annual Report should list one injury.

**FN23.** The Department of Education acknowledges that a campus may have a difficult time tracking an individual who separates from the college but requires that in cases of injury from fire that may lead to death, that the campus make a reasonable effort to ascertain whether an individual’s death within a year is related to injuries sustained in a fire within a residence hall. The Department cites an example where a college would be required to track the status of a student convalescing in a hospital within a few miles of the campus, but would not be required to track the status of a student who separates from the college and travels to another country.

**FN24.** [THE HANDBOOK FOR CAMPUS CRIME REPORTING.](#)

## **AUTHOR:**

[Joseph Storch, Associate Counsel, State University of New York](#)

## **RESOURCES:**

### **NACUA Resources:**

- [NACUA Clery Act Resources Page](#)

### **Additional Resources:**

- [Department of Education Handbook for Campus Crime Reporting](#)
- [Security on Campus Statutory and Regulatory Redlining](#)
- [The American Council on Education’s Analysis of the HEOA Statute](#)
- [NAICU HEA 101 Quick Guide: Campus Crime Reporting](#)
- [NAICU HEA 101 Quick Guide: Missing Person Procedures](#)
- [NAICU HEA 101 Quick Guide: Fire Safety](#)

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