



# NACUA NOTES

National Association of College and University Attorneys June 14, 2019 | Vol. 17 No. 7

---

## **TOPIC:**

**Emergency Notifications and Timely Warnings: Ten Practical Suggestions Informed by Clery Act Enforcement**

## **AUTHORS:**

**Karen Courtheoux and Ben Irwin**[\[1\]](#)

## **INTRODUCTION:**

Among the many types of communications that an institution of higher education[\[2\]](#) must disseminate to its campus community, two in particular require dissemination in a manner that is deliberate, thorough, and prompt: emergency notifications and timely warnings. These communications, both required under the Clery Act,[\[3\]](#) reflect a vexing combination of apparent institutional discretion on the front end and stringent enforcement by the United States Department of Education (the “Department”) on the back end. Even our campus communities are frequent critics of our emergency notification and timely warning decisions—too many communications and their messages become diluted or obscured; too few and the institution is perceived as failing to prioritize campus safety. Between this rock and hard place, however, is the core purpose of these communications: sharing information in a manner that allows campus community members to better protect themselves from threats to their health and safety. With this NACUANOTE, we seek to clarify the decision-making process for issuing emergency notifications and timely warnings and to identify Department enforcement patterns that will help institutions develop effective policies and then, in moments of urgency, follow them.

## DISCUSSION:

We begin by defining key terms, proceed to compare and contrast timely warnings and emergency notifications, and then explore the practical application and enforcement of the rules regarding timely warnings and emergency notifications.

### I. Definitions of Key Terms

Below are summary definitions of key terms.

*Annual Security Report (ASR)*: A report that an institution must prepare each year, containing, among other things, crime statistics, policy statements, and other information related to campus safety and security.[\[4\]](#)

*Campus Security Authority (CSA)*: Under the Clery Act, this is any person who – regardless of whether they are employed by the institution – falls into any of four categories:

(1) the institution's campus police or security department;

(2) other individuals with responsibilities for campus security but who do not constitute a campus police or security department, such as an individual who is responsible for monitoring entrance into institutional property;

(3) institutional officials[\[5\]](#) with significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings; and

(4) any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.[\[6\]](#)

*Clery Act Crime*: Any crime that must be counted and disclosed pursuant to the Clery Act.[\[7\]](#)

*Clery Act Geography*: Any physical location that is (1) on campus; (2) on public property within or immediately adjacent to the campus; or (3) in or on noncampus buildings or property that an institution owns or controls.[\[8\]](#)

*Emergency Notification*: A campus alert that an institution must disseminate immediately upon confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.[\[9\]](#)

*Timely Warning*: A campus alert that an institution must disseminate as soon as pertinent information is available about a reported Clery Act Crime within the institution's Clery Act Geography that represents an ongoing threat to the safety of students or employees.[\[10\]](#)

### II. Timely Warnings

The mandate that institutions must issue timely warnings is set forth in the Clery Act regulations, which provide, in relevant part:

An institution must, in a manner that is timely and that withholds as confidential the names and other identifying information of victims . . . and that will aid in the

prevention of similar crimes, report to the campus community on [certain] crimes.[\[11\]](#)

The crimes that must be reported through a timely warning consist of all Clery Act Crimes that occur within an institution's Clery Act Geography that are both: (i) reported to Campus Security Authorities or local police agencies; and (ii) considered by the institution to represent a serious or continuing threat to students and employees.[\[12\]](#)

The content of a timely warning is not specified in the Clery Act regulations, but institutions are responsible for providing information that will aid in the prevention of similar crimes, including by helping members of the campus community protect themselves. Accordingly, a timely warning should include the date, time, location, and nature of the crime reported and any other information known about the ongoing threat. It is not sufficient to advise the campus community to "be careful" or to avoid certain practices or places.[\[13\]](#) The following is an example of an appropriately specific timely warning:

WARNING: Armed Robbery outside of Smith Hall reported at 9:32 p.m. Perpetrator described as a tall male in a red hooded sweatshirt. Last seen running to the north across Ash Street. This is an active situation. Please be alert if you are in the area.

When issuing timely warnings, institutions must protect the confidentiality of crime victims.[\[14\]](#) However, "in appropriate circumstances," a timely warning may include personally identifiable information ("PII") that is otherwise protected from disclosure under the Family Educational Rights and Privacy Act ("FERPA"). Including PII may be permissible based on the health and safety emergency exception to FERPA's general rule against disclosure without prior consent.[\[15\]](#) This exception requires the institution, taking into account the totality of the circumstances, to determine that there is an articulable and significant threat necessitating the disclosure of PII in order to protect the health or safety of a student or other individuals.[\[16\]](#)

The institution must choose a method for disseminating the timely warning in a manner that is likely to reach the entire campus community. This method(s) should be reflected in the institution's required Clery policy and often includes email, text message, and warnings posted around campus.[\[17\]](#) The method or methods of communication that the institution will employ should be specified in the appropriate campus safety policies.[\[18\]](#)

Although there is no private right of action for a failure to issue a timely warning, the Department enforces the timely warning requirement through its program review and audit functions. Institutions that are found to have failed to issue a sufficient timely warning may be subject to additional reporting or monitoring as well as monetary fines, usually in the tens of thousands of dollars. Enforcement of the timely warning requirement has increased over the last three years, and potential penalties have also increased.[\[19\]](#) There is no indication that this trend is likely to stop or reverse in the foreseeable future.[\[20\]](#)

### **III. Emergency Notifications**

The emergency notification requirement, which was added through a 2008 amendment to the Clery Act, was prompted by the 2007 mass shooting at Virginia Tech. Every institution must immediately notify the campus community upon confirmation of a "significant emergency" or "dangerous situation" occurring on campus that involves an immediate threat to the health or safety of students or employees.[\[21\]](#) It is not necessary that the emergency must have been reported to a CSA or local police agency; any qualifying emergency may warrant an emergency

notification. Institutions are to withhold emergency notifications only if a notification would compromise efforts either to help or protect a victim or to address the emergency.<sup>[22]</sup> For example, it may compromise response efforts if a shooter has reason to believe he has escaped when in fact law enforcement personnel have him surrounded and are about to initiate a plan to apprehend the individual. Of course, depending on the facts, a carefully worded notification (that warns the campus community but avoids tipping off the shooter) may be more prudent than no notification at all.

As with timely warnings, the Department enforces the emergency notification requirement through its program review and audit functions. Institutions that are found to have failed to issue a sufficient emergency notification may be subject to additional reporting or monitoring as well as monetary fines. For example, the Department assessed a portion of a Clery fine to an institution for failing to issue an emergency notification after senior officials learned that criminal charges for various sex offenses were being brought against a former employee who continued to have significant and regular presence on campus after his retirement.<sup>[23]</sup>

#### IV. Timely Warnings vs. Emergency Notifications

Both of these communications – frequently referred to by the Department as “campus alerts” – are required to be issued where warranted in order to allow members of the campus community to better protect themselves from threats to their health and safety. The scope and use of timely warnings and emergency notifications, however, are materially different. The table below sets forth some of the most critical differences.

##### A. Distinctions Between Timely Warnings and Emergency Notifications<sup>[24]</sup>

	<b>Timely Warning</b>	<b>Emergency Notification</b>
<b>Scope</b>	Only required in the event of a Clery Act Crime.	In the event of any significant emergency or dangerous situation, which may include (but are not limited to) Clery Act Crimes.
<b>When Issued</b>	As soon as pertinent information is available about a reported Clery Act Crime within an institution’s Clery Act Geography that represents an ongoing threat to the safety of students or employees.	Immediately upon the confirmation of a significant emergency or dangerous situation occurring on campus and involving an immediate threat to the health or safety of students or employees.
<b>Geographic Scope</b>	Anywhere within an institution’s Clery Act Geography.	On an institution’s campus only.
<b>Department’s Examples of Appropriate Use</b>	Rash of burglaries or motor vehicle thefts; multiple instances of date rape drugs being used; sexual assault or robbery where perpetrator is unknown/not immediately apprehended.	Outbreak of serious illness; approaching significant weather event; bomb threat.

<b>To Whom Issued</b>	All students and employees.	Any segment of the campus population determined to be at risk.
<b>Purpose</b>	To allow students and employees to protect themselves against a serious or continuing criminal threat; to aid in the prevention of similar crimes.	To allow members of the campus community to protect themselves against an imminent threat to their health or safety.

**B. Common Principles**

Although, as noted in the table above, there are clear differences between emergency notifications and timely warnings, the Department applies certain principles to both types of alerts.

**1. Follow Your Policy**

Institutions must maintain written policies and procedures governing their deployment of both emergency notifications and timely warnings and must include these policies and procedures in their ASRs. These policies must meet all of the requirements set forth in the Clery Act regulations, but institutional policies may be broader or more exacting than those required by the regulations. To the extent that an institution’s policy is broader than the regulations require, the Department will measure the institution’s conduct against its own policies.<sup>[25]</sup>

For example, the Department cited one institution for failing to adhere to its own policy and procedures for issuing timely warnings. Although the Clery Act does not require institutions to issue timely warnings for offenses that occur outside of their Clery Act Geography, that institution’s policy stated that it would issue a timely warning for otherwise eligible threats arising “either on or off campus.”<sup>[26]</sup> According to the Department, in response to this finding, the institution argued that “it should not need to follow its own timely warning policy as it is broader than the Federal requirement.”<sup>[27]</sup> The Department rejected this argument.

Note, especially, that the Department has stated that nothing prohibits institutions from issuing campus alerts where they are not required by federal law.<sup>[28]</sup> On the contrary, to the extent that an institution’s policy indicates that it will issue campus alerts under circumstances other than those covered by the emergency notification and timely warning requirements, the institution must follow its policy and issue those supplementary campus alerts. The Department has given no reason to believe that supplementary alerts represent any additional compliance risk for the institution, as long as they are issued consistently with the institution’s policy.<sup>[29]</sup> Too many supplementary alerts, however, can desensitize community members and dilute the urgency of the alerts’ messages.

**2. Act Reasonably Based on What You Know**

The Clery Act requires institutions to strike a balance between issuing an alert as quickly as possible and providing sufficiently detailed information to reduce the risk of similar crimes and/or to enable people to better protect themselves.<sup>[30]</sup> Institutional decision-makers may take comfort knowing that their decisions in this regard will be evaluated based not on all the

information that eventually becomes available, but rather on the information available at the time of the decision. Their job is to act reasonably based on that information.

This approach by the Department does not, however, permit institutions to adopt the least serious or threatening interpretation of the known facts and act accordingly. One institution, upon the prompt reporting of the shooting murder and attempted murder of two students in a residence hall, did not issue a timely warning for two hours following that incident.<sup>[31]</sup> In defense of the delay, the institution argued that the information available at the time suggested that the incident might represent targeted domestic violence and therefore did not present a threat warranting a campus-wide alert. The Department rejected this interpretation of the information known to the institution. Based primarily on the facts that two students had been shot, that the shooter's identity was unknown, and that the shooter had not been located or apprehended, the Department determined that it was not reasonable for the institution to have acted on its preliminary belief about the limited nature of the threat. Although the institution argued that it was being subjected to the cruelty of hindsight, the Department advised that the plain evidence available at the time of the incident was sufficient to trigger the timely warning requirement.

### **3. Make Decisions on a Case-by-Case Basis**

The Department expects institutions to consider each campus alert on a case-by-case basis. What is considered "timely" with respect to a given offense or emergency may not be "timely" with respect to the next one. Your institution can apply the knowledge and experience it has gained over time in assessing whether to issue a campus alert, but it should not rely too heavily only on what has worked before.

For example, the Department found that an institution's campus alert was not "timely" when it was issued two hours after a crime was first reported. In response, the institution argued that its campus alert was timely in light of certain statistics, which purportedly showed that other institutions issued most campus alerts after more than two hours.<sup>[32]</sup> The Department found this argument unpersuasive, largely because the question of whether a campus alert is "timely" depends on how effectively the campus alert allowed the institution's students and employees to protect themselves from harm.<sup>[33]</sup>

## **V. Ten Practical Suggestions**

Much more could be said about the Clery Act requirements and the manner in which the Department has interpreted them. The following practical tips are intended to help institutions to translate those requirements and interpretations into workable practices.

### **1. Educate Students and Employees about Timely Warnings and Emergency Notifications**

The Clery Act does not require institutions to provide educational programming to the general campus community related to campus alerts. Institutions should consider offering it anyway, however, in order to provide context to students and employees and to empower them to respond quickly and effectively in the event that they receive a timely warning or an emergency notification. There are opportunities for this type of educational programming at new student and new hire orientations, as well as in conjunction with any safety-related drills on campus.<sup>[34]</sup>

## **2. Train Campus Security Authorities and Clarify Communication Channels**

It is critical that institutions ensure that Campus Security Authorities understand their obligations upon receiving a report of a possible crime, even though a very broad set of individuals—sometimes including students—can be considered to be Campus Security Authorities. Institutions should consider designating central points of contact (i.e., leaders within the public safety department or an appropriate dean) that CSAs from all areas of the institution can recognize and know how to contact. Institutions might also provide CSAs with reporting guidelines, forms, and other reference documents and worksheets for their use. In addition, institutions should convey to CSAs the importance of reporting immediately to facilitate a prompt timely warning assessment.

The Department cited one institution for noncompliance with the timely warning requirement in part on the basis that there was no evidence that the institution's residential college staff received any specific training on the Clery Act to properly prepare them for required actions.<sup>[35]</sup> According to the Department, this lack of training resulted in the institution failing to issue timely warnings regarding certain incidents that represented a threat to the campus community. More specifically, the heads of the residential colleges limited the distribution of warnings and did not prepare or disseminate alerts in a manner that gave clear and timely notice of the threats.<sup>[36]</sup>

## **3. Designate Appropriate Decision-Makers**

The Department acknowledges that different institutions might adopt a variety of approaches to *who* will determine when a campus alert should issue.<sup>[37]</sup> With respect to emergency notifications, institutions are obligated to provide a list of their decision-makers in their ASRs.<sup>[38]</sup> With respect to timely warnings, the Department suggests that institutions specify in their policy statements the individual or office responsible for issuing the timely warning.<sup>[39]</sup> These decision-makers should receive appropriate training on the Clery Act's requirements with respect to campus alerts.

## **4. Facilitate Prompt and Accurate Decision-Making**

Each institution's Clery Act policies should be clear and easy to apply. They should also guide and reflect the actual, Clery-compliant practices at each institution. The Department evaluates an institution's policies and procedures not only against the explicit requirements of the Clery Act, but also against the institution's actual decision-making practices.

To determine whether to issue an emergency notification, the decision-makers should consider whether the emergency is currently occurring or imminently threatening the campus; if so, then an emergency notification is likely warranted. In addition, the Department has offered a fairly broad list of qualifying emergencies.<sup>[40]</sup> These are: an approaching forest fire; a fire currently raging in an institution's building; an outbreak of meningitis, norovirus, or other serious illness; an approaching tornado, hurricane, or other extreme weather conditions; an earthquake; a gas leak; a terrorist incident; an armed intruder; a bomb threat; civil unrest or rioting; an explosion; and a nearby chemical or hazardous waste spill.<sup>[41]</sup> Institutions should consider the degree to which the emergency at hand resembles those examples.

To determine whether to issue a timely warning, institutions should undertake a multifaceted review of the available facts. Department guidance states that an institution's decision should take into account: (1) the nature of the crime; (2) the continuing danger to the campus community; and (3) the possible risk of compromising law enforcement efforts.<sup>[42]</sup> Related or additional considerations might include, but are not limited to, inquiries into the number of

suspects and whether their identities are known to the victim or to the institution; the criminal or disciplinary history of any suspects; whether the suspects have been apprehended or arrested and, if not, whether their whereabouts are known; whether the institution has received similar reports, and, if so, how similar and how close in time. The institution must reasonably determine the likelihood that the reported offense was targeted or unique or, otherwise, is likely to be repeated.

Institutions should consider creating and consistently using a worksheet or other document to ensure that decision-makers take into account all relevant considerations and to memorialize the deliberate consideration given, regardless of the ultimate decision. Many institutions already have and use such documents and many public safety consultants offer them.

## **5. Empower Your Decision-Makers**

A report necessitating a timely warning might happen in the middle of the night or while an institution is on a weeks-long break between academic terms. To issue an effective timely warning (and to comply with the Clery Act), institutions might need to issue the alert before they are able to assemble their leadership group in a conference room. In evaluating institutions' compliance with the emergency notification and timely warning requirements for reasonableness under the known circumstances, the Department has rejected the unavailability of particular institutional leaders as an excuse for delay.<sup>[43]</sup> Make sure that your decision-making team is on-call, nimble, and includes a member of the institution's public safety department. Then give that team the means to issue a timely warning without further approval.

In 2015, the Department found an institution in violation of the Clery Act for failure to issue a timely warning where the institution had not issued a timely warning of a sexual assault offense until two days after the offense occurred.<sup>[44]</sup> The institution represented that the risk to students and employees was mitigated by the fact that the campus was "essentially closed" during the intervening days. For that reason, the institution stated, it did not make the decision to issue a timely warning until students and employees returned to campus two days after the offense. The Department rejected this excuse, partially based on the institution's admission that the institution's Safety and Security Office (SSO) "did not have the requisite authority or systems access to actually issue warnings;" rather, timely warnings could be sent only after the campus facilities director sent the warning to the Media Relations Office for dissemination. Following the Program Review, the institution revised its procedures to allow SSO supervisors to issue timely warnings.

## **6. Facilitate Swift and Effective Execution**

The process for discussing and deciding whether to issue a campus alert should be structured to avoid gaps and delays. The process should build in back-ups in case a particular campus leader is unavailable. It should also include contingency plans in case the decision-makers are not able to meet but must make a timely decision.

One way to potentially facilitate swift execution is to create template notices in advance for common situations resulting in campus alerts and, if possible, to pre-populate them into your alert system. Language may need to be adjusted prior to sending a particular alert, but having templates as a starting point will help avoid having to "recreate the wheel" each time a warning is necessary.

## **7. Prepare Multiple Means of Communication and Select Deliberately Among Them**

An institution might use any means or combination of means to communicate with its students and employees, including but not limited to email, text messages, paper fliers, its public website, automated phone calls, campus safety apps, and campus loudspeakers. With respect to emergency notifications, the Department encourages institutions to use overlapping means of communication in case of failure or malfunction.<sup>[45]</sup> The same reasoning applies in the timely warning context as well, and multiple methods of communication also provide opportunities to ensure the alerts are accessible to those with disabilities. Finally, in order to ensure alerts sent to personal devices of students and employees reach their audience, consider requesting updated emergency contact information on a regular basis, such as the beginning of each academic year or term.

Using ineffective means to disseminate campus alerts can lead to liability. For example, the Department found that one institution had violated the Clery Act in part because it had issued timely warnings in a manner that was both ineffective and inconsistent, often consisting only of posting paper notices within a particular building or in and around a few buildings.<sup>[46]</sup> The Department opined that, because of the large size of the institution, the posting of paper notices could never reasonably be an adequate means of communicating information about dangerous threats to the entire campus community.

## **8. Provide Sufficient Information**

The campus alert must provide the information necessary to allow students and employees to determine how they might protect themselves from the crime or emergency described. The Department has faulted institutions that failed to provide, at a minimum, the location, time, and type of crime, where this information was known. One institution issued campus alerts, but their content was sometimes so vague that they failed to provide actual notice of the dangerous condition. In other instances, that institution included details in its campus alerts that were inaccurate with respect to material facts, such as the date or the place of the reported crime.<sup>[47]</sup>

## **9. Document Your Process**

The Department has consistently emphasized that institutions should analyze on a case-by-case basis the question of whether a campus alert should be issued in a particular situation. Except in the most egregious cases, an institution can avoid enforcement penalties by showing that it followed its policy in considering whether to issue a campus alert. Institutions do well to keep notes and minutes from their meetings and conversations related to any question of whether to issue a campus alert. An institution significantly increases the odds that the Department will find that it complied with the Clery Act where it can substantiate (i) the fact that it considered issuing a campus alert; and (ii) the reasons for its decision about whether to issue a campus alert, even if the Department disagrees in substance with the decision.<sup>[48]</sup>

The Department has frequently imposed liability on institutions that could not make these showings. For example, the Department found that one institution had violated the Clery Act by failing to issue a timely warning, even though it believed that a sexual assault had occurred.<sup>[49]</sup> Institutional officials argued that, at the time, the institution reasonably believed that there was no continuing threat to students, even though the alleged perpetrator remained on campus. The Department found liability, however, in part because the institution “did not present any evidence to indicate that the [institution] collected or evaluated any information for the purpose of determining if a timely warning was warranted.”<sup>[50]</sup> The Department took a position with

another institution based on similar reasoning with respect to a report of a sexual assault by multiple assailants but later settled the matter after further examination of the institution's records, which appears to have led the Department to deem reasonable the institution's disagreement with its findings.[\[51\]](#)

Based on the Department's previous determinations, institutions can infer that the Department expects them to quickly gather and analyze as much relevant information as possible. This type of information might include: the relationship between the alleged perpetrator and the victim, if any; the last known location of the alleged perpetrator; whether the alleged perpetrator might have been carrying a weapon; and a physical description of the alleged perpetrator. Institutions may demonstrate that they gathered and analyzed this type of information by keeping a log of their efforts or memorializing any discussion of that information among decision-makers.

The Department sustained findings against another institution based in part on the fact that the University had provided "no information indicating that a timely warning was considered" in two sexual assault cases.[\[52\]](#) Moreover, the University provided no information to substantiate that it had followed its policy of convening a response team each time a forcible sex offense occurred within the University's Clery Act Geography to determine whether a timely warning was warranted by each incident.[\[53\]](#)

## **10. Review the Big Picture**

Institutions should consider all instances in which they issue campus alerts to determine whether their practices are adequate with respect to timely warnings and emergency notifications. In institutions' efforts to comply with the Clery Act, their decisions with respect to issuing campus alerts should also be internally consistent and should avoid conspicuous omissions. In addition, institutions should ensure consistency between these policies and their crisis response plans, reconciling conflicts as necessary.

One institution had sent campus alerts regarding past-due parking fines, abandoned bicycles, and campus road or lot closures, but had failed to issue any timely warnings from 2009 through 2012, despite receiving reports of at least 10 Clery Act Crimes as to which the Department determined that a timely warning was warranted.[\[54\]](#) In sustaining several Clery Act violations by the institution, the Department noted not only the gap of several years when no timely warnings were issued, but also the disproportionality of that omission compared with the relative non-urgency of the warnings actually issued.

## **CONCLUSION:**

Developing and maintaining an effective system for issuing timely warnings and emergency notifications requires preparation, training, and deliberate, thoughtful execution. With diligent planning and careful attention, however, it is possible to provide timely information to our campus communities in a way that maximizes their opportunity to protect themselves from harm. In doing so, our institutions can comply with both the letter and the spirit of the Clery Act.

## RESOURCES:

[Sample Timely Warning Policy](#), Husch Blackwell LLP.

U.S. DEP'T OF EDUC., [THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING](#) ("Handbook") (2016 ed.).

[EDUCAUSE RESOURCE PAGE ON EMERGENCY NOTIFICATIONS](#) (last visited March 6, 2019).

[NACUA RESOURCE PAGE ON THE CLERY ACT \(last visited June 12, 2019\)](#).

Joseph Storch, [The Clery Act and Overseas/Distance Study: New Developments and Compliance Guidance, 2016 Edition](#), NACUANOTES, Vol. 15, Iss. 1 (Sept. 26, 2016).

U.S. DEP'T OF EDUC. OFFICE OF FEDERAL STUDENT AID, CLERY ACT REPORTS ([searchable database](#) of Clery Compliance Reviews) (last visited Feb. 20, 2019).

## END NOTES:

[1] [Karen Courtheoux](#), an Associate at Husch Blackwell LLP, advises higher education clients in the areas of faculty, student, and employment matters, litigation, investigations, and governance questions. [Ben Irwin](#), Senior Counsel at Husch Blackwell LLP, concentrates his practice on compliance issues, particularly related to the Clery Act and Title IX.

[2] All public and private postsecondary institutions that participate in any Title IV funding program must comply with the Clery Act, unless those institutions are distance education-only or foreign institutions (though foreign campuses of U.S. institutions are not exempt). See U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING ("Handbook"), 1-2 to 1-4 (2016 ed.).

[3] For purposes of this NACUANOTE, we adopt the shortened version of the statute's full name, which is Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2018). The Clery Act amended the Higher Education Act of 1965.

[4] 34 C.F.R. § 668.46(b) (2014).

[5] An "official" is defined as any person who has the authority and the duty to take action or respond to particular issues on behalf of the University. 34 C.F.R. 668.46(a) (2014).

[6] 34 C.F.R. § 668.46(a) (2014); Handbook, 4-2.

[7] 34 C.F.R. § 668.46(c) (2014); Handbook, 3-3.

[8] 34 C.F.R. § 668.46(a) (2014); Handbook, 2-1.

[9] 34 C.F.R. § 668.46(e)(3) and (g) (2014); Handbook, 6-2.

[10] 34 C.F.R. § 668.46(e)(1)-(2) (2014); Handbook, 6-12.

[11] 34 C.F.R. § 668.46(e) (2014).

[12] See Handbook, 6-12.

[13] See Handbook, 6-15.

[14] See 34 C.F.R. § 668.46(e) (2014).

[15] See 34 C.F.R. §§ 99.31(a)(10) (2011) and 99.36 (2008); Handbook, 6-15. There is limited precedent addressing an institution's potential liability for defamation with respect to campus alerts. In a leading case, the court applied Rhode Island law, which affords an alleged defamer a qualified privilege against liability if it "reasonably believed that it had a legal duty to publish the allegedly-defamatory statement." *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25 (1st Cir. 2007) (cited in *Emery v. Talladega Coll.*, 688 F. App'x 727, 730, n.2 (11th Cir. 2017)). The *Havlik* court held that the university defendant had a reasonable belief that it was required, under the Clery Act, to publish the allegedly defamatory campus alert and therefore affirmed summary judgment in favor of the university. See *id.*

[16] In practice, it is difficult to envision a scenario in which it would be necessary for an institution to include a victim's name in a particular alert, but it is possible that identification of the victim may be inevitable in some situations based on the circumstances (i.e., nature and location of the crime) leading to the alert.

[17] See Handbook, 6-15.

[18] See *id.*

[19] In 2017, possible fines for Clery Act violations were raised from \$35,000 to \$54,789 per violation. These fines are now subject to an automatic annual adjustment and, as of February 2019, institutions can be fined \$57,317 per violation for Clery Act noncompliance. See Final Rule, 84 C.F.R. 971.

[20] Note that the Department has significant discretion to determine the number and severity of any Clery Act violations and the amount of an institution's total penalty. The Department often connects failures to comply with the timely warning requirement with other Clery Act compliance deficiencies, such as the failure to obtain crime reports from CSAs (or to have clear structures for CSA reporting) or the failure of institutions to properly classify crimes. Accordingly, based on publicly available information, it is difficult to predict or generalize about how the Department will calculate penalties in any given case.

[21] 34 C.F.R. 668.46(e)(3) and (g) (2014); Handbook, 6-3.

[22] Handbook, 6-7 to 6-8.

[23] See U.S. Dep't of Educ. [Fine Action Letter](#) to [Pennsylvania State University](#) (November 3, 2016).

[24] See *generally* Handbook, 6-16 (providing information sorting out the differences between emergency notification and timely warnings).

[25] See Handbook, 6-3 and 6-13.

[26] See Final Program Review Determination, [Occidental College](#), 21 (Aug. 11, 2017).

[27] *Id.* at 24.

[28] See Handbook, 6-13.

[29] See Handbook, 6-3 (acknowledging that an institution might choose to alert the campus community in certain situations that would not necessitate an emergency notification under the Clery Act).

[30] See Allison Newhart, et al., "[Interplay and Intersection: Understanding and Navigating the Key Similarities and Differences Between Title IX and Clery Act](#)," 12-13 (NACUA Annual Conference 2017).

[31] See Final Program Review Determination, [Virginia Polytechnic Institute & State University](#) (Dec. 9, 2010).

[32] *Id.* at 18.

[33] See *id.*

[34] The Clery Act requires that institutions perform certain such drills annually. See Handbook, 6-9.

[35] See Final Program Review Determination, [Yale University](#), 7 (May 23, 2011).

[36] See *id.*

[37] See Handbook, 6-6.

[38] See Handbook, 6-8.

[39] See Handbook, 7-3.

[40] See Handbook, 6-2 to 6-3.

[41] *Id.*

[42] See Handbook, 6-13 to 6-14.

[43] See, e.g., Final Program Review Determination, [Montgomery College](#) (August 3, 2015) (stating that Montgomery College management conceded that its Safety and Security Office did not have the requisite authority or systems to issue warnings).

[44] *Id.*

[45] Handbook, 6-4.

[46] See Final Program Review Determination, [Pennsylvania State University](#) (November 3, 2016).

[47] Occidental College, *supra* note 26, at 20.

[48] See *generally* Final Program Review Determination, [University of Montana](#) (December 5, 2017) (determining that the University of Montana's corrective action plan "appears to meet minimum requirements," making several findings regarding the University's failure to comply with the Clery Act that did not result in financial liabilities, accepting the University's response, and closing the review).

[49] See Final Program Review Determination, [Wesley College](#) (April 26, 2010).

[50] *Id.* at 6.

[51] See Final Program Review Determination, [Liberty University](#) (March 23, 2010).

[52] University of Montana, *supra* note 48, at 8.

[53] See *id.*

[54] See *id.*

### **NACUANOTES Copyright Notice and Disclaimer**

Copyright 2019 by Karen Courtheoux and Ben Irwin. NACUA members may reproduce and distribute copies of NACUANOTES to other members in their offices, in their law firms, or at the institutions of higher education they represent if they provide appropriate attribution, including any credits, acknowledgments, copyright notice, or other such information contained in the NACUANOTE.

Disclaimer: This NACUANOTE expresses the viewpoints of the authors and is not approved or endorsed by NACUA. This NACUANOTE should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.