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## The Clery Act: New Rules for 2010

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### Introduction

Several new provisions were added to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act by the enactment of the [Higher Education Opportunity Act of 2008](#). Among the factors driving these changes were long-standing criticisms of the limited number of campus hate crimes being included in institutions' Annual Campus Security Reports, the recurring issue of college students who become "missing persons", and, of course, the Virginia Tech shootings of April, 2007.

Following the passage of the Higher Education Opportunity Act, the new campus security provisions were among the subjects that were addressed through the process of negotiated rulemaking during the spring of 2009. A [Notice of Proposed Rulemaking](#) was published in the Federal Register on August 21, 2009, in which the proposed changes to the Clery Act were addressed on pp. 42395-42398 and 42437-42442. The [Final Rule](#) implementing the new Clery Act regulations was published in the Federal Register on October 29, 2009 (pp. 55912-55914 and 55943-55947).

### [Relationship to the New Campus Fire Safety Reporting and Disclosure Rules](#)

Unlike the Clery Act campus security and crime statistics provisions, which apply to every institution that participates in federal financial aid programs, the new requirements to publish an Annual Fire Safety Report and to maintain a Fire Log apply only to institutions that maintain on-campus student housing facilities. As a point of clarification, a new definition of the term on-campus student housing facility as being "A dormitory or other residential facility for students that is located on an institution's campus, as defined in § 668.46(a)" has been added to § 668.41. This definition also applies to the new Missing Student Notification Policies and Procedures provisions of the Clery Act (§668.46(h)), which are addressed below.

The requirements for the dissemination of the Annual Fire Safety Report and notice of its availability to prospective students and prospective employees mirror those for the Annual Campus Security Report, and it is possible for an institution to comply by publishing a single, combined, annual report [so long as the title of the document clearly states that it contains both the annual security report and the annual fire safety report]. Should an institution elect to forgo the production of a combined report document, each of the freestanding fire safety and security reports must contain within them information describing how one might directly access the other report.

### [The Missing Student Notification Policy](#)

The HEOA added §668.46(h) which requires institutions that maintain an on-campus student housing facility to establish, for students who reside in such on-campus housing, both a missing student notification policy that allows students to confidentially register a contact person, and procedures by which that contact person would be notified that the student was missing. The definition of on-campus housing facility that was noted previously in regard to campus fire safety reporting applies to this section as well, and the discussion regarding the Final Rule makes clear that it includes any student housing facility that is owned or controlled by the institution, or located on property that is owned or controlled by the institution, and is within the reasonably contiguous geographic area that makes up the "campus" (p. 55912).

The statement of missing student notification policies and procedures, which must be published in the annual security report, must:

- List the titles of persons or organizations to which any individual should report that a student has been missing for 24 hours;
- Require that any missing student report be referred immediately to the campus police or security department, or if there is none, to the local law enforcement agency;
- Contain an option for each student to identify a contact person or persons whom the institution shall notify within 24 hours of the determination [by campus police/security or local law enforcement] that the student is missing;
- Advise students that their contact information will be registered confidentially, will be accessible only to authorized campus officials, and will only be disclosed to law enforcement personnel in furtherance of a missing person investigation;
- Advise students who are under age 18 and not emancipated that the institution must notify a custodial parent or guardian within 24 hours of the determination that the student is missing [in addition to notifying

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any additional contact person designated by the student]; and

- Advise students that the institution will notify the local law enforcement agency within 24 hours of the determination that the student is missing [unless it was that local law enforcement agency which made the missing person determination].

When a student who resides in an on-campus housing facility is determined to have been missing for 24 hours, each institution's procedures must include notification, within 24 hours, of:

- The local law enforcement agency having jurisdiction; and
- The student's contact person, if one has been designated; and
- The custodial parent or guardian of a student who is under age 18 and not emancipated.

The discussion regarding the Final Rule stipulates that while the option to register "confidential" contact information attaches to it a higher level of privacy protection than FERPA would normally apply to other education records, the institution's required policy statement makes it clear that by identifying a contact person, the student has provided permission for that person to be contacted by law enforcement personnel under the circumstances detailed above (p. 55912). The discussion also clarifies that the establishment of maximum 24-hour periods within the missing student policy does not preclude an institution from either making a determination that a student is missing before a full 24 hours have passed or from initiating notification procedures as soon as it determines that the student is missing (p. 55913).

#### Emergency Notification Response and Evacuation Procedures

The HEOA added to §668.46(a) a new definition of Test, "Regularly scheduled drills, exercises, and appropriate follow-through activities, designed for assessment and evaluation of emergency plans and capabilities," and re-titled §668.46(e) Timely warning and emergency notification. There is now a requirement that if there is an immediate threat to the health or safety of students or employees occurring on campus, an institution must follow its emergency notification procedures. Having done so, the requirement to issue a timely warning will have been satisfied, but the institution must provide adequate follow-up information to the community as needed (§668.46(e)(3)).

A new policy statement regarding emergency response and evacuation procedures must be included in the annual security report. Similar to the case of the new Missing Student Notification Policy [and unlike the majority of the other institutional policy disclosures required under the Clery Act], the content has been mandated. Specifically, the statement of policy must include:

- The procedures used to notify the campus community upon confirmation of a significant emergency or dangerous situation on the campus that involves an immediate threat to the health or safety of students or employees;
  - A description of the institution's process used to:
    - o Confirm that there is a significant emergency or dangerous situation on campus;
    - o Determine the appropriate segment(s) of campus to receive a notification;
    - o Determine the content of the notification; and
    - o Initiate the notification system.
- A statement that the institution will, without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system, unless issuing a notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency;
  - A list of the titles of the person(s) or organization(s) responsible for carrying out the actions detailed above;
  - The institution's procedures for disseminating emergency information to the larger community; and
  - The institution's procedures to test the emergency response and evacuation procedures on at least an annual basis, including:
    - o Tests that may be announced or unannounced;
    - o Publicizing its emergency response and evacuation procedures in conjunction with at least on test per calendar year; and
    - o Documenting, for each test, a description of the exercise, the date, time, and whether it was announced or unannounced.

While there is no flexibility in the content of the institutional policy statement regarding emergency response and evacuation procedures, the regulations do not specify the use of any particular mode(s) of communicating with the campus community or the larger community [which, per the commentary on the Proposed Rule, may include parents], nor do the regulations identify any specific manner by which an institution's procedures should be tested (p. 42397). It is also noted in the commentary on the Proposed Rule that there is no intention for the policy disclosures required by this section to include the details of how an institution will respond to any given situation, but it is expected that the diverse needs of all members of the campus community will be considered in the development or revision of any emergency plans.

#### Hate Crime Reporting

The list of hate crimes for which statistics must be disclosed in the annual security report is expanded to include the offenses of larceny-theft, simple assault, intimidation, and destruction/damage/vandalism of property (§668.46(c)(3)). Adding the crimes of intimidation and destruction/damage/vandalism of property to campus hate crime disclosure will significantly increase this subset of the statistics, as those are the categories of hate crimes most frequently [reported by the FBI](#), nationally. This increase in numbers, coupled with the requirement that hate crimes be reported not only by type of offense and geographic area, but also by the nature of the bias involved, will certainly complicate any sort of tabular statistical presentation. The effect of adding the category of simple assault to the list will be inconsequential, however, since the requirement to include statistics for hate crimes arising from any other offenses "involving bodily injury" was previously in effect [and remains so].

The Final Rule also includes definitions of the added hate crime categories [from the FBI's Hate Crime Data Collections Guidelines] and revised definitions [from the Uniform Crime Reporting Handbook] of the Clery-enumerated crimes of Liquor Law Violations, Drug Law Violations and Illegal Weapons Possession, for which campus discipline referral statistics must be disclosed.

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While the policy and statistical disclosure requirements apply to the next annual security report, which must be distributed by October 1, 2010, it is important to recognize that the statistical disclosure standard is the three most recent calendar years. Pursuant to previous regulation, any institution that maintains a campus security department must also maintain a daily log of all crimes reported to that department. Any reports of offenses that fall into the newly required categories of hate crime disclosure should, therefore, have been documented on the daily crime log. Including complete hate crime statistics for all of 2007-2009 in this year's annual campus security report should reasonably be expected to be the norm.

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