American Council on Education
Leadership and Advocacy

New Requirements Imposed by the Violence Against Women Reauthorization Act

The Violence Against Women Reauthorization Act ("VAWA"), which President Obama signed into law on March 7, imposes new obligations on colleges and universities under its Campus Sexual Violence Act ("SaVE Act") provision, Section 304. Those obligations—which to some extent refine and clarify, and to some extent change, existing legal requirements and government agency enforcement statements—likely will require revision of institutional policy and practice. Counsel should be consulted on this complex, sensitive area of institutional law compliance.

Under VAWA, colleges and universities are required to:

- Report domestic violence, dating violence, and stalking, beyond crime categories the Clery Act already mandates;
- Adopt certain student discipline procedures, such as for notifying purported victims of their rights; and
- Adopt certain institutional policies to address and prevent campus sexual violence, such as to train in particular respects pertinent institutional personnel.

The interplay of VAWA and other pronouncements—notably the April 4, 2011 Dear Colleague Letter under Title IX issued by the Office for Civil Rights of the Department of Education ("ED") ("OCR Guidance Letter") and prevailing institutional policy—warrants legal risk management judgment by institutional counsel and compliance officers, and implicates a range of management steps. Here we identify some key points.

I. New Reporting Requirements

VAWA's SaVE Act provision imposes new reporting requirements:

A. The Clery Act requires annual reporting of statistics for various criminal offenses, including forcible and non-forcible sex offenses and aggravated assault. VAWA's SaVE Act provision adds domestic violence, dating violence, and stalking to the categories that, if the incident was reported to a campus security authority or local police agency, must be reported under Clery. Parsed for clarity, these offenses are defined:

1. "Domestic violence" includes asserted violent misdemeanor and felony offenses committed by the victim's current or former spouse, current or former cohabitant, person similarly situated under domestic or family violence law, or anyone else protected under domestic or family violence law.

This memorandum was prepared by the Washington, DC law firm Hogan Lovells US LLP.

2. "Dating violence" means violence by a person who has been in a romantic or intimate relationship with the victim. Whether there was such relationship will be gauged by its length, type, and frequency of interaction.

3. "Stalking" means a course of conduct directed at a specific person that would cause a reasonable person to fear for her, his, or others' safety, or to suffer substantial emotional distress.

B. The provision adds "national origin" and "gender identity" to the hate crime categories, involving intentional selection of a victim based on actual or perceived characteristics that must be reported under the Clery Act.

C. The provision requires, with respect to the "timely reports" the Clery Act mandates for crimes considered a threat to other students and employees, that victims' names be withheld.

D. The Campus SaVE Act takes effect with respect to the Annual Security Report that must be issued by each institution no later than October 1, 2014. Final regulations to implement statutory changes to VAWA will not be effective until after ED completes the rulemaking process. Until regulations are issued, ED expects institutions to "to make a good faith effort to comply" with the requirements. For more information, see ED's electronic announcement May 29, 2013, on this issue.

II. New Student Discipline Requirements

A. Current requirements in the Clery Act are that institutions inform students of procedures victims should follow, such as preservation of evidence and to whom offenses should be reported. VAWA adds that institutional policy must also include information on:

1. Victims' option to, or not to, notify and seek assistance from law enforcement and campus authorities.

2. Victims' rights and institutional responsibilities regarding judicial no-contact, restraining, and protective orders.

B. VAWA prescribes standards for investigation and conduct of student discipline proceedings in domestic violence, dating violence, sexual assault, and stalking cases.

1. Institutional policy must include a "statement of the standard of evidence" used. Unlike some earlier drafts of the legislation, VAWA does not prescribe the evidentiary standard. The OCR Guidance Letter, at page 11, directs a standard of "preponderance of the evidence." That letter, although not positive law, authoritatively represents OCR enforcement policy. Whether OCR's position would withstand judicial review is an open question.

2. Institutional officials who conduct the proceeding must be trained on how to investigate and conduct hearings in a manner that "protects the safety of victims" and "promotes accountability."

3. Institutional policy must identify "sanctions or protective measures" the institution may impose following a final determination of rape, acquaintance rape, domestic violence, dating violence, sexual assault or stalking.

4. "[T]he accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice...."

5. Accuser and accused must be notified "simultaneously" and "in writing" of: the outcome of the proceeding; appeal procedures; any change to the result before it becomes final; and when the result becomes final. The OCR Guidance Letter, at page 13, merely "recommends" that the parties be provided the determination "concurrently."

6. Institutional policy must address how victims' confidentiality will be protected, including record-keeping that excludes personally-identifiable information on victims. OCR's Guidance Letter, at page 5, encourages institutions to be cognizant of victims' confidentiality, but does not mandate that institutional policy address it.

III. New Requirements to Educate Students and Employees on Sexual Violence

Under VAWA, new students and new employees must be offered "primary prevention and awareness programs" that promote awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking. The OCR Guidance Letter, at pages 15-16, "recommends" that institutions implement preventive education programs; VAWA is more prescriptive in its requirements.

The training programs must include:

A. A statement that the institution prohibits those offenses.

B. The definition of those offenses in the applicable jurisdiction.

C. The definition of consent, with reference to sexual offenses, in the applicable jurisdiction.

D. "Safe and positive" options for bystander intervention an individual may take to "prevent harm or intervene" in risky situations.

E. Recognition of signs of abusive behavior and how to avoid potential attacks.

F. Ongoing prevention and awareness campaigns for students and faculty on all of the above.

Conclusion

VAWA's ramifications include that institutions will need to review and modify policies and procedures for handling asserted sexual offenses, and train carefully personnel responsible in this area. This memo primarily addresses VAWA. Requirements under the OCR Guidance Letter, the Clery Act, Title IX, Title VII, State employment laws, local human rights ordinances, or the sundry apposite regulations and agency pronouncements are also relevant and should be reviewed. College and university counsel expert on those and on faculty, student, and staff rights under institutional handbooks, manuals, and other policies should be consulted. In light of acute sensitivities on campus in this sphere, and by parents of students involved in these situations, and the common prospect of related civil and criminal litigation as well as often extensive publicity, university leadership should give close reading and attention to VAWA and its requirements.