

I N S I D E T H E M I N D S

Emerging Issues in College and University Campus Security

*Leading Lawyers and Administrators on the
Threats Confronting Our Campuses and the Laws
That Protect Students, Staff, and Communities*



ASPATORE

©2015 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.legalsolutions.thomsonreuters.com

Addressing Intimate Partner
Violence and Stalking on
Campus: Going Beyond Legal
Compliance to Enhance
Campus Safety

Jeffrey J. Nolan

Director and Shareholder

Dinse Knapp & McAndrew PC



ASPATORE

Introduction

As higher education professionals and their legal counsel are well aware, the last few years have seen many changes in the law and guidance applicable to sexual violence, intimate partner violence, and stalking issues on college and university campuses. The media, activists, compliance professionals, and governmental entities have focused heavily on student-on-student sexual violence-related issues, but the Violence Against Women Reauthorization Act amendments to the Clery Act¹ also impose extensive requirements as to how institutions of higher education must respond to reports of intimate partner violence and stalking made by students and employees, and how they must educate their communities about those forms of misconduct. Institutions must focus on these requirements as well.

First, this chapter outlines applicable legal requirements and the rationale therefor, and comments and provides guidance on those requirements. Second, the chapter goes beyond a discussion of basic compliance to explain how colleges and universities can use campus threat assessment and management techniques to enhance the safety of intimate partner violence and stalking victims, and the campus community as a whole.

The VAWA Amendments to the Clery Act

The Tangled Web of Overlapping Legal Requirements and Enforcement Schemes

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), portions of which amended the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act.² The VAWA Amendments to the Clery Act cover domestic violence, dating violence, and stalking cases in addition to sexual assault cases. The law went into effect on March 7, 2014. The Clery Act applies to institutions that receive federal funds (for example, because their students participate in federal financial aid programs). Among other things, the Clery Act requires that covered institutions collect and publish campus crime statistics, and publish numerous policy statements in an Annual Security Report (ASR).

¹ Clery Act, 20 U.S.C.A. § 1092(f).

² Campus Security and Campus Crime Statistics Act, 20 U.S.C.A. § 1092(f) (2014) (Clery Act).

The Clery Act has long required the adoption of sexual assault policies with certain features, but the breadth and detail of these requirements was expanded significantly by the VAWA Amendments. The Violence Against Women Act as passed originally in 1994 was designed to improve the response of the criminal justice system to crimes against women.³

The VAWA Amendments apply many of the principles and definitions of the Violence Against Women Act of 1994⁴ to the college and university context, by adding detailed requirements regarding how institutions should address domestic violence and dating violence (intimate partner violence or IPV) and stalking on campus.⁵

Demonstrating the partial interrelationship between enforcement regimes in the sex discrimination/sexual violence and IPV/stalking contexts, the VAWA Amendments to the Clery Act also codify some, but not all, of the procedural requirements and preferences stated in the United States Department of Education's Office of Civil Rights' (OCR) Dear Colleague Letter on Sexual Violence (*2011 DCL*). OCR is charged with enforcing Title IX of the Education Amendments of 1972 (Title IX). Title IX prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance,⁶ but does not deal directly with IPV or stalking issues. While highly persuasive, OCR

³ According to the White House, VAWA as passed in 1994 reformed the ways in which the criminal justice system responded to crimes against women by “strengthening federal penalties for repeat sex offenders and creating a federal ‘rape shield law;’” providing that victims will not be required “to bear the expense of their own rape exams or for service of a protection order;” “requiring that a victim’s protection order will be recognized and enforced in all state, tribal, and territorial jurisdictions within the United States;” “increasing rates of prosecution, conviction, and sentencing of offenders by helping communities develop dedicated law enforcement and prosecution units and domestic violence dockets;” and “ensuring that police respond to crisis calls and judges understand the realities of domestic and sexual violence by training law enforcement officers, prosecutors, victim advocates and judges.” See “Factsheet: The Violence Against Women Act”, available at: https://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf.

⁴ 42 U.S.C.A. §§ 13925 et seq. (2014).

⁵ See generally 20 U.S.C.A. § 1092(f).

⁶ The pertinent portion of Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” 20 U.S.C.A §§ 1681 et seq. OCR has also issued regulations to implement Title IX. See 34 C.F.R. Pt. 106.

“Dear Colleague” letters do not have the same weight as statutes,⁷ but as codified in the VAWA Amendments, these procedural features are now

⁷ The *2011 DCL*, see <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, focuses on student-on-student sexual violence. While the *2011 DCL* does not technically have the force of law, the reality of OCR’s enforcement process, which can involve threats to terminate federal funding if voluntary compliance agreements are not reached, strongly encourages colleges and universities to follow OCR’s guidance regarding how sexual violence-related issues should be handled in the student-on-student context. The nineteen-page *2011 DCL* contains numerous pronouncements regarding OCR’s view of what it means for institutions to avoid discrimination on the basis of sex when handling student-on-student sexual assault cases. The letter starts by emphasizing that sexual harassment of students is a form of sex discrimination, and that sexual violence (defined to include “rape, sexual assault, sexual battery, and sexual coercion”) is a form of sexual harassment. Thus, the letter is framed as supplementing OCR’s *Revised Sexual Harassment Guidance* issued in 2001, see <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

The *2011 DCL* outlined many new procedural requirements and preferences. For example, while OCR has for some time advised that an alleged victim of sexual harassment should not have to work out the problem directly with the alleged harasser, and that the alleged victim must be notified of the right to end an informal process and proceed with a formal complaint, the *2011 DCL* declared that “in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.” The *2011 DCL* also emphasized that institutions should discontinue the relatively common practice of delaying or suspending internal disciplinary proceedings while a criminal investigation and/or prosecution is pending. OCR emphasized in this context that institutions should only delay their internal fact-finding for the short period that it would “typically” take for law enforcement officials to conduct their initial evidence gathering. The *2011 DCL* also emphasizes that a “preponderance of the evidence” (that is, more likely than not) standard of proof must be used in internal disciplinary proceedings. OCR rejected the higher “clear and convincing evidence” standard used by some institutions as being inconsistent with how other civil rights issues are adjudicated in a non-criminal, civil context. The *2011 DCL* further requires that both parties to a sexual violence case receive equal procedural opportunities to, for example, review all of the evidence, attend all meetings and hearings on an equal basis, have the same rights to have an advisor present, and have an equal right to appeal a disciplinary decision.

Finally on the procedural front, the *2011 DCL* outlined detailed rules regarding the information that complainants should receive regarding the outcome of a disciplinary process that complainants are entitled to receive. The letter noted that while the Family Education Rights and Privacy Act (FERPA) restricts an institution’s ability to share detailed information from a respondent’s education and disciplinary records with a complainant (particularly in sexual harassment cases that do not involve sexual violence), institutions can and should share information about responsibility and sanctions that would directly relate to a complainant. Such information would include, for example, information that a complainant would need to evaluate whether continuing contact with a respondent would be likely to occur post-adjudication, such as whether the respondent had been suspended or restricted from certain areas of campus. The letter also noted that

required as a matter of positive law, as opposed to administrative guidance.⁸ In addition to complying with the requirements imposed by the statutory text of the VAWA Amendments, covered institutions must also comply, as of July 1, 2015, with related regulations implemented by the US Department of Education.⁹

in cases that involve sexual violence that rises to the level of a “non-forcible sex offense” under the Clery Act (copy missing?). The letter noted that where a disciplinary proceeding involves alleged Clery Act crimes, FERPA permits an institution to share the final results of the proceeding with the complainant even if the respondent is found not responsible, and permits the institution to share the final results with anyone if the respondent is found responsible. The *2011 DCL* recommended that notice of outcomes be provided to the parties “concurrently” and in writing.

⁸ On April 29, 2014, OCR also issued a forty-six-page guidance document titled “*Questions and Answers on Title IX and Sexual Violence*,” which is available at: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (*2014 Q&A*). The cover letter to the *2014 Q&A* states that it was intended to “further clarify the legal requirements and guidance articulated in the [2011 DCL] and the *2001 Guidance* and [to] include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects.” Further demonstrating the interrelationship between governmental efforts in these areas, on the same day that the *2014 Q&A* was issued, April 29, 2014, the White House issued *Not Alone, The First Report of the White House Task Force to Protect Students from Sexual Assault (Not Alone Report)*, which is available at: <https://www.notalone.gov/assets/report.pdf>. Related suggested policies regarding, for example, the role of Title IX Coordinators and the implementation of interim measures, and an example memorandum of understanding with off-campus law enforcement, have subsequently been published by the Task Force. These publications are not positive law or regulation, and they do not have the “significant guidance document” status or connection to OCR enforcement activities of the *2011 DCL* and *2014 Q&A*. Nonetheless, institutions that wish to stay apprised of best and promising practices should at least be conversant with the recommendations in the *Not Alone Report* and related publications, and should be able to articulate a reasoned, institution-specific rationale as to why they chose not to adopt policies and practices consistent with such recommendations.

⁹ The final VAWA regulations were released on October 20, 2014. An electronic version is available at: <https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act>; a more succinctly-printable version with page numbers (which will be used in this chapter) is accessible by clicking on the “View Printed Federal Register Page 62783” link at the following URL: <http://www.ecfr.gov/cgi-bin/text-idx?SID=6e679699f2badb987343e05dfd63e48e&mc=true&node=20141020y1.22>.

Unlike the Department’s “Dear Colleague” letters and guidance documents, these regulations were developed through a negotiated rulemaking process, which means that they have the effect of law and would be accorded substantial deference by a court. The Preamble to the new regulations discusses public comments received during the negotiated rulemaking process, provides the Department’s rationale as to why it either accepted or rejected the various comments, and provides other interesting information about why the Department phrased the final regulations as it did.

In the 2014 *Q&A* guidance document referenced in the footnote below, the Department of Education emphasized that institutions that receive federal funding are covered by Title IX *and* the Clery Act, as amended by the VAWA Amendments and otherwise, and that the VAWA Amendments have “no effect on a school’s obligations under Title IX” or related OCR guidance document such as the 2014 *Q&A* or the 2011 *DCL*.¹⁰ What this means in practice is that institutions must comply with both statutory and regulatory schemes, and that institutions cannot argue that their failure to comply with one or the other is excused due to conflicts between the differing requirements of either scheme.

Differing enforcement mechanisms further emphasize the need to comply fully with the separate (but often related) requirements of Title IX and the Clery Act. Unlike Title IX, violation of which is enforced administratively by attempts at voluntary resolution, violations of the Clery Act can be, and often are, addressed with fines. The Clery Act is enforced administratively by the United States Department of Education’s Federal Student Aid office (FSA).¹¹ The FSA has ramped up its enforcement activity significantly in recent years. In 2008, Eastern Michigan University paid what was then a record fine of \$350,000, and other six-figure fines have been levied since. In 2012, the per-violation fine amount was increased from \$27,500 to \$35,000, making substantial fines for noncompliance even more likely. The FSA can base investigations on complaints from individuals, or can conduct a compliance audit if it chooses to do so. Letters from the FSA describing

¹⁰ 2014 *Q&A* at 44.

¹¹ Fortunately, the Clery Act cannot be enforced through a private right of action. Specifically, the statutory language provides that: “Nothing in this subsection may be construed to—(i) Create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or (ii) Establish a standard of care.” 20 U.S.C.A. § 1092(f)(14)(A). The Clery Act also provides further that “Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with [the Act] shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action to enforce [the Act.]” Despite this clear language, plaintiffs have nonetheless attempted to base claims on Clery Act provisions. These attempts appear to have failed uniformly. The law on this point was referenced in the court’s decision in *Moore v. Murray State University*, 2013 WL 960320 (W.D. Ky. 2013) (holding that there is no private right of action to enforce the Clery Act) (citing *Doe v. University of the South*, 687 F. Supp. 2d 744, 760, 256 Ed. Law Rep. 160 (E.D. Tenn. 2009); *King v. San Francisco Community College Dist.*, 2010 WL 3930982, *4-5 (N.D. Cal. 2010) (“[T]he Act itself does not provide any private right of action.”). *Moore*, 2013 WL 960320 at *3.

finer levied and the bases therefore are available on the Department's website.¹² In a noteworthy decision issued in October 2013, the FSA fined Lincoln University \$275,000 for various recordkeeping and policy statement violations, which included a \$27,500 fine for the university's failure to include a statement about the potential sanctions for sexual assault in its ASR.¹³ Institutions and their legal counsel must therefore pay close attention to the requirements of the VAWA Amendments to the Clery Act when drafting their ASRs and policies, to ensure that they incorporate all of the new policy-related statements required by the Amendments.

VAWA Amendments Requirements of Particular Interest

This sobering outline of the web of statutory, regulatory, and enforcement schemes and consequences begs the question: what do the VAWA Amendments and regulations require? Consulting the statutory and regulatory Preamble language is practically necessary to discern all of VAWA's requirements. While coverage of all VAWA requirements is beyond the scope of this chapter, some requirements that are particularly relevant to the IPV and stalking-related issues discussed later in the chapter are also discussed here.¹⁴

Procedural Fairness and Equity

The VAWA Amendments require colleges and universities to publish notice of "prompt, fair and impartial investigation and resolution" procedures that will be used in domestic violence, dating violence, sexual assault, and stalking cases, in which parties shall be "simultaneously" informed in writing of the outcome of covered disciplinary proceedings. The Amendments also require that institutions specify what standard of proof will be used in institutional disciplinary proceedings, without specifying what that standard needs to be. As noted above, OCR requires that institutions use a "preponderance of the evidence" standard in sexual violence cases, but that would not necessarily have to be used as the

¹² See <http://studentaid.ed.gov/about/data-center/school/clery-act> (last visited May 10, 2015).

¹³ See http://studentaid.ed.gov/sites/default/files/fsawg/datacenter/cleryact/lincoln/1871_001.pdf.

¹⁴ All VAWA requirements are equally mandatory; therefore, institutions should consult the text of the statute and the regulations directly to ensure that each requirement, many of which are not covered here, is included in their ASR and referenced policies.

standard in IPV or stalking cases (though it is difficult to conceive of a rationale for imposing a higher standard of proof in IPV or stalking cases).

The VAWA Amendments advance the “equal procedural rights for each party” concept championed in the *2011 DCL* by providing that “the accuser and the accused” in domestic violence, dating violence, sexual assault, and stalking cases 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.” While the language of the *2011 DCL* appeared to require only that complainants and respondents in sexual violence cases have the same rights as each other in terms of selecting an advisor from constituencies chosen by the institution (e.g., members of the campus community, and excluding attorneys), the VAWA Amendments language is unqualified, and appears on its face to require affirmatively that institutions must allow advisors of choice in VAWA-covered proceedings (without qualification as to constituency), regardless of whether that was previously allowed by institutional policy. The VAWA Amendments regulations and the Preamble thereto make clear, to the chagrin of many student conduct administrators and their legal counsel, that the language should be read to require institutions to allow attorneys and other non-campus community members to attend discipline-related meetings and hearings as advisors.

Specifically, the Preamble emphasizes that while the Department received many comments from institutions regarding their concerns about allowing attorneys into campus disciplinary investigations and proceedings, “the Clery Act clearly and unambiguously supports the right of the accused and the accuser to be accompanied to any meeting or proceeding by ‘an advisor of their choice,’ which includes an attorney.”¹⁵ The regulations and Preamble do, helpfully, at least emphasize that institutions can restrict the role that advisors (attorneys or otherwise) can play in meetings and proceedings, so long as the restrictions apply equally to the advisors for all parties. Therefore, an institution could decide that advisors will not be allowed to speak to anyone but their advisees during a meeting or proceeding (often referred to as the “potted plant” rule).¹⁶ The Preamble

¹⁵ Violence Against Women Act; Final Rule, 79 Fed. Reg. 62752 (October 20, 2014) (to be codified at 34 C.F.R. Pt. 668) (hereafter “Preamble”) at 62774.

¹⁶ *Id.* at 62773.

also emphasizes that institutions may remove from meetings or proceedings advisors who become disruptive or who do not follow the institution's restrictions on participation.¹⁷ The Preamble further emphasizes that institutions are not required to pay for an attorney-advisor for a party who cannot afford to hire one, even if the other party has done so, but notes that institutions are required to provide notice to victims of the contact information for any legal assistance programs that might be available.¹⁸

The VAWA Amendments also appear to extend the equal rights principle to the appeals context, by requiring institutions to describe any procedures “for the accused *and* the victim to appeal the results of the institutional disciplinary proceeding.”¹⁹ This language suggests that if a respondent has a right to appeal the result of a domestic violence, dating violence, sexual assault, or stalking case, then the complainant should have an equivalent right. There is no question that complainants in sexual violence cases practically have such a right, given OCR's statement to that effect in the *2011 DCL*. Institutions should have a relatively easy time extending equal appeal rights to all parties to student-on-student sexual violence, IPV, and stalking cases, by simply changing student conduct codes accordingly. Institutions may have a more difficult time adapting faculty and staff-related procedures to provide for equal appeal rights (to the extent that faculty or staff respondents are provided with appeal rights), particularly if respondents' unilateral appeal rights are currently established by collective bargaining agreement. Despite these anticipated difficulties, institutions should explore with legal counsel the pros and cons of reading this statutory language to require equal appeal rights.

It is at least helpful that the Preamble to the VAWA regulations makes clear that the Department of Education does “not believe that [it has] the statutory authority to require institutions to provide an appeal process.”²⁰ Therefore, if respondents in a particular category are not provided by an institution's existing policies with appeal rights in VAWA Amendments-covered cases (e.g., staff members who have no right to appeal disciplinary actions taken in such cases), the VAWA Amendments do not require that the institution *create* an appeal process for individuals in such category.

¹⁷ *Id.*

¹⁸ See Preamble at 62774.

¹⁹ 20 U.S.C.A. § 1092(f)(8)(B)(III)(bb) (emphasis added).

²⁰ Preamble at 62775.

Confidentiality and Notification of Law Enforcement

The VAWA Amendments also provide that covered institutions must include in their ASR a statement to the effect that victims have a right to either choose to notify law enforcement (with institutional support) or to decline to notify law enforcement. An institution's having knowledge of safety-implicating information that a victim does not wish to report to the authorities can raise difficult issues. Fortunately, the Preamble makes a point significant to this issue to the effect that an institution could comply with state mandatory reporting laws (which require reporting abuse of minors, for example), even if a victim chooses not to be involved personally in making that contact. Specifically, the Preamble provides that "[t]his requirement does not conflict with an institution's obligation to comply with mandatory reporting laws because the regulatory requirement relates only to the *victim's* right not to report, not to the possible legal obligation on *the institution* to report."²¹ Given the importance of campus safety issues, institutions should consult with legal counsel in particular cases as to whether, by analogy to this Preamble language, the institution can best promote the safety of a victim or others by contacting law enforcement where IPV, sexual assault, or stalking have been reported, without unduly curtailing the victim's right not to be personally involved in making such contact.

It is further noteworthy on this issue that the Preamble also recognizes in another section that there may be instances when institutions need to contact on-campus or off-campus law enforcement to address safety concerns, even where victims prefer that their reports remain confidential. This section provides:

We believe that [the regulation providing that the victim can choose to contact law enforcement with institutional support, or decline to do so] makes it clear that institutions must protect a victim's confidentiality while also recognizing that, in some cases, an institution may need to disclose some information about a victim to a third party to provide necessary accommodations or protective measures. Institutions may disclose only information that

²¹ Preamble at 62761 (emphasis added).

is necessary to provide the accommodations or protective measures and should carefully consider who may have access to this information to minimize the risk to a victim's confidentiality.²²

Significantly, the Department of Education disagreed with a commenter's suggestion that to better protect victims' desire for confidentiality the Department should require that institutions obtain written consent from victims before providing accommodations or protective measures. The Department declined to do that because it believed that doing so could "limit an institution's ability to act quickly to protect a victim's safety."²³ The Department did state, however, that it "strongly encourage[s] institutions to inform victims before sharing personally identifiable information about the victim that the institution believes is necessary to provide an accommodation or protective measure."²⁴ While institutions should consult with legal counsel about how they should approach these sensitive issues, these Preamble comments could tenably support the view that institutions have the discretion to institute protective measures internally or through external law enforcement, even if the victim does not initially want that to occur.²⁵ The importance of this discretion will be discussed later in this chapter.

Notification About Preserving Evidence

The VAWA Amendments and regulations carry forward the preexisting Clery Act requirement (previously applicable in the sexual assault context) that victims of domestic violence, dating violence, sexual assault, or stalking must receive notice regarding "the importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful

²² Preamble at 62762.

²³ *Id.*

²⁴ *Id.*

²⁵ It is noteworthy by comparison that while the *2011 DCL* and the *2014 Q&A* both encourage institutions to defer substantially to a victim's wishes as to whether law enforcement should be contacted or an investigation should be commenced, both guidance documents outline factors that could be considered in balancing the victim's desire for confidentiality and self-determination against the institution's prerogative in extraordinary circumstances to take steps designed to enhance the safety of the victim and other members of the campus community.

in obtaining a protection order.”²⁶ The Preamble responds to a commenter’s suggestion that institutions should be required to also tell victims specifically where to obtain forensic examinations by declining to do so because “[t]he statute does not require institutions to provide information specifically about where to obtain forensic examinations.”²⁷ The Department did, however, “urge” institutions to provide that information “when stressing the importance of preserving evidence,” and “encouraged” institutions to make clear in their ASR that completing a forensic examination would not require a victim to file a police report.²⁸ The Department’s apparent point, made at that section of the Preamble and at another section (which refers specifically to informing victims about their options to have examinations done by forensic nurses),²⁹ is that it wants institutions to encourage victims to have forensic examinations done regardless of whether they currently wish to pursue criminal prosecution or a protection order, so that forensic evidence will be available if it becomes necessary.³⁰ Of course, while this point is not discussed in the regulations or the Preamble, forensic evidence of a sexual assault or other physical assault conducted by a forensic nurse is not the only evidence that could be relevant in IPV, sexual assault, or stalking cases. Student conduct professionals know that in the vast majority of student sexual assault cases, neither party denies that sexual contact occurred; the respondent usually claims, however, that the contact was consensual. Further, physical injuries related to a victim’s resistance are not present in many of the sexual assaults reported on college campuses, either because the victim was incapacitated by alcohol or was intimidated enough by the reported behavior that physical resistance was not attempted. In such cases, a physical examination to collect forensic evidence, particularly for use in a campus disciplinary proceeding, is less likely to be helpful or utilized. On the other hand, other forms of evidence (such as text messages, Facebook posts, audio and video recordings, etc.) can be extremely valuable and probative. This may be especially true in IPV and stalking cases, in which patterns of controlling behavior, abuse and threats of abuse, and courses of conduct that constitute stalking (as discussed further below) may be evidenced by electronically stored information. Therefore, when institutions create policies and

²⁶ 34 C.F.R. § 668.46(b)(11)(ii)(A).

²⁷ Preamble at 62761.

²⁸ *Id.*

²⁹ See Preamble at 62762.

³⁰ See Preamble at 62761-62762.

statements regarding the importance of preserving evidence, they should consider emphasizing the need to preserve electronic communications in addition to the physical evidence traditionally addressed in sexual assault policy statements.

Notifications About Accommodations, Services, and Protective Measures

The VAWA Amendments also expand on previously existing sexual assault case-related provisions to require that institutions give notice to victims about options for, and available assistance in, changing academic, living, transportation, and working situations and how to request such accommodations.³¹ Under the VAWA Amendments, the institution's obligation to give this notice and, as spelled out in the Preamble and regulations, to actually offer such accommodations if reasonably available,³² applies "regardless of whether the victim chooses to report to campus police or local law enforcement."³³ The Preamble emphasizes that a determination of what accommodations are "reasonably available" should be made on a "case-by-case basis," and that while institutions "are expected to make reasonable efforts to provide acceptable accommodations or protective measures," they do not have to grant "unreasonable" requests.³⁴ The breadth or depth of institutions' responsibilities in such cases is not explored in any detail in the VAWA regulations or the Preamble, and the lack of a private right of action to enforce the Clery Act likely means that institutions can use their good faith discretion, with an eye toward enhancing campus safety, in deciding what accommodations can be provided reasonably.

The VAWA Amendments also expand the previous list of resources about which victims of IPV, sexual assault, and stalking must be given notice, providing that victims must receive notice about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available to victims both on-campus and in the community.³⁵

³¹ See 20 U.S.C.A. § 1092(f)(8)(B)(vii).

³² See Preamble at 62763 and 34 C.F.R § 668.46(b)(11)(v).

³³ *Id.* This has implications particularly in employee complainant cases in which the institution has no jurisdiction over the alleged perpetrator of IPV, sexual assault, or stalking even if the complainant wanted to make a report to campus police, but where the complainant seeks institutional support and accommodations.

³⁴ Preamble at 62763.

³⁵ See 20 U.S.C.A. § 1092(f)(8)(B)(vi).

The VAWA regulations add “student financial aid” to this list,³⁶ based on the Department’s conclusion that it “is critical for schools to provide student victims with financial aid-related services and information, such as information about how to apply for a leave of absence or about options for addressing concerns about loan repayment terms and conditions....”³⁷

A new subsection requiring that victims receive written notice of “the rights of victims and the institution’s responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court,” was also added by the VAWA Amendments.³⁸ The VAWA regulations add the words “or by the institution” to the end of this list, which means that the notification must also include reference to the types of protective measures (e.g., institutional no contact orders) that the institution can provide on its own, without court intervention.³⁹

Training for Institutional Officials

VAWA Amendments-required notifications about prevention and awareness programs for students and employees in general are addressed below, but it is worth emphasizing separately here that the VAWA Amendments also impose a very substantial mandatory training requirement through a procedure-related provision. Specifically, the Amendments provide that institutional disciplinary proceedings shall “be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.”⁴⁰ Institutions have certainly expanded their sexual assault-related training programs for administrators, staff, and hearing panels following the advice of the *2011 DCL*, but the VAWA Amendments’ specification of annual training is positive statutory law, and the addition of domestic violence, dating violence, and stalking issues to the now-mandatory curriculum is a substantial change that will have to be addressed by covered institutions.

³⁶ See 34 C.F.R. § 668.46(b)(11)(iv).

³⁷ Preamble at 62762.

³⁸ See 20 U.S.C.A. § 1092(f)(8)(B)(iii)(IV).

³⁹ See 34 C.F.R. § 668.46(b)(11)(ii)(D).

⁴⁰ 20 U.S.C.A. § 1092(f)(8)(B)(iv)(I)(bb). See also 34 C.F.R. § 668.46(k)(2)(ii).

It is noteworthy that while several commenters expressed concern through the negotiated rulemaking process that this and related provisions would “place a considerable compliance burden on small institutions” that the Department should mitigate by regulation, the Department responded that it would not do so, because there is “no basis to suggest that students and employees at small institutions should have fewer protections than their counterparts at larger institutions.”⁴¹ The Department expressly declined to “waive this requirement for small institutions.”⁴² The Department also declined a commenter’s request that the Department develop and provide such training at no cost to institutions, Preamble at 62773; therefore, institutions will have to identify or develop and provide this training on their own.⁴³

Substantial resources will have to be invested into this effort, but institutions have no choice given the VAWA Amendments to the Clery Act, and considerations beyond basic compliance should be taken into account as well. For example, officials who understand the effects of trauma and how to conduct a trauma-informed investigation and adjudication process are more likely to hold respondents accountable as appropriate. Fair, compliant, and trauma-informed procedures administered by knowledgeable officials should also engender more confidence in the system on the part of support resources and complainants, which should increase reporting. These factors are likely to enhance campus safety, which is obviously a worthwhile investment. On the other hand, because training programs should be balanced and take account of the rights of all parties, better educated officials will also recognize the need to adhere strictly to their institutions’ due process requirements for respondents, thereby reducing the risk of civil liability to respondents that can result from procedural errors and unfair adjudications.

⁴¹ See Preamble at 62771-62772.

⁴² *Id.* at 62773.

⁴³ Institutions should, however, anticipate and take advantage of the trauma-informed sexual assault investigation and adjudication curriculum that is, as of the time this chapter is being written, under development by the Department of Justice’s National Center for Campus Public Safety (see <http://www.nccpsafety.org/>) (last visited May 10, 2015). This curriculum was first mentioned on pages three and thirteen of the White House’s April 2014 publication titled “Not Alone: The First Report of the Task Force to Protect Students from Sexual Assault.” See <https://www.whitehouse.gov/1is2many/notalone>. The curriculum, which will be rolled out nationwide when the pilot phase is completed, focuses on sexual assault investigations and adjudications, but other forms of violence and stalking are covered to some extent, and many of the investigation and adjudication considerations covered are adaptable to the IPV and stalking context.

Consideration of Employee Issues

Institutions will also have to address the fact that the VAWA Amendments require that both students and employees have the benefit of the listed policies, procedures, accommodations, and training programs. This is consistent with other elements of the Clery Act, which require the provision of campus crime statistics and campus safety-related information to employees as well as students. Therefore, institutions will have to work to conform employee handbooks, faculty contracts, and collective bargaining agreements to the various requirements imposed by the VAWA Amendments.

Prevention and Awareness Programs

In terms of education, prevention, and training requirements, in addition to the annual training for officials practically required by the procedure-related provisions discussed above, the VAWA Amendments require covered institutions to implement extensive training programs for students, faculty, and staff regarding domestic violence, dating violence, sexual assault, and stalking. Specifically, the VAWA Amendments and regulations require that each covered institution's ASR must describe "primary prevention and awareness programs for all incoming students and new employees," which must include:

- A statement that the institution prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking, as defined in VAWA (see discussion below);
- The definition of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction (or jurisdictions, if an institution operates in more than one jurisdiction);
- The definition of consent in reference to sexual activity in the jurisdiction (or jurisdictions);
- Training on "safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual";
- "Information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks;" and

- Information about the numerous notices that institutions must give under VAWA regarding their educational programs, procedures, evidence preservation, reporting, options for involving law enforcement (or not), confidentiality, resources and accommodations for victims, and other matters specified in 34 C.F.R. §§ 668.46(b)(11) and 668.46(k)(2).⁴⁴

Institutions must also offer “ongoing prevention and awareness campaigns for students and faculty” that address the information outlined above.⁴⁵

In addition to these required curricular elements, the VAWA Amendments regulations also provide additional information about the general expectations that the Department of Education has regarding such programs. Specifically, the regulations define the required “programs to prevent dating violence, domestic violence, sexual assault and stalking” as follows:

- i. Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking that—
 - A. Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome; and
 - B. Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.
- ii. Programs to prevent dating violence, domestic violence, sexual assault, and stalking include both primary prevention and awareness programs directed at incoming students and new employees and ongoing prevention and

⁴⁴ See 20 U.S.C.A. § 1092(f)(8)(B)(i)(I); 34 C.F.R. §§ 668.46(j), 668.46(b)(11), 668.46(k)(2).

⁴⁵ See 20 U.S.C.A. § 1092(f)(8).

awareness campaigns directed at students and employees, as defined in paragraph (j)(2) of this section.⁴⁶

Preamble comments regarding this language note that the Department did not believe it had the authority to prohibit institutions from using computer-based training (so long as it comprehensively covered the required topics), but the Department did express a preference for some “homegrown” programming that drew upon the knowledge and experience of local rape crisis centers and sexual assault coalitions.⁴⁷ Utilizing the expertise of local advocacy groups is a sound suggestion, but institutions must recognize that training curricula and materials would be subject to discovery in a civil lawsuit filed by a respondent or a complainant. Therefore, from an ethical and risk management perspective, institutions should ensure that their programs, when viewed as a whole, also include information about their due process protections for respondents, and are otherwise balanced and fair to all students and employees.

In response to questions on this point from commenters, the Preamble emphasized that while the statute and regulations require that institutions offer primary and ongoing prevention programs as described above, neither the statute nor the regulations require that every incoming student, new employee, current student, or faculty member must actually take or attend such programs.⁴⁸ Not surprisingly, though, the Preamble encourages institutions “to mandate such training to increase its effectiveness.”⁴⁹

The obvious intent of these prevention and awareness training program requirements is to raise awareness on campus regarding domestic violence, dating violence, sexual assault, and stalking issues, to ensure that students and employees are knowledgeable about related policies, procedures, and resources, and to enhance opportunities for prevention and intervention through bystander and risk reduction programming. It is fair to assume that if

⁴⁶ 34 C.F.R. § 668.46(a). The VAWA regulations contain further detailed definitions regarding the intended meanings of the terms “awareness programs,” “bystander intervention,” “ongoing prevention and awareness programs,” “primary prevention programs,” and “risk reduction programs,” as well as some basic curricular requirements. See 34 C.F.R. § 668.46(j).

⁴⁷ Preamble at 62770.

⁴⁸ Preamble at 62770.

⁴⁹ *Id.*

the awareness-raising goals of such programs are met successfully, the rollout of the programs will, at least initially, result in an increase in reports of these types of misconduct. The implications of that are discussed further below.

Beyond basic compliance, it should go without saying that institutions that approach the prevention, awareness, bystander intervention, and risk reduction programming required by the VAWA Amendments with innovation and commitment will reap substantial moral, financial, and legal benefits in the long run. Even beyond the obvious ethical benefits, any institution that has been involved in a drawn-out, expensive legal and public relations scenario following from a tragic incident of IPV or stalking would likely attest that investments in prevention constitute money well spent.

VAWA Definitions of Domestic Violence, Dating Violence, and Stalking

To be clear regarding the types of crime and misconduct covered, it is worth noting here how domestic violence, dating violence, and stalking are defined in VAWA, and the purposes for the definitions. The VAWA Amendments incorporate by reference the definitions of the crimes from the Violence Against Women Act.⁵⁰ Grounded as it is in the Clery Act, the definitions are first and foremost for the purposes of determining whether reported misconduct in these areas should be recorded by institutions as “Clery crimes,” and therefore be included in institutions’ annual Clery Act crime statistics.⁵¹ Second, the definitions are important for purposes of drafting institutional policy, because the VAWA Amendments regulations state that ASR statements regarding campus prevention and awareness programs must include “a statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking, *as those*

⁵⁰ See 42 U.S.C.A. § 13925(a).

⁵¹ The VAWA regulations contain detailed requirements regarding how reports of domestic violence, dating violence, and stalking should be recorded for Clery Act crime statistics purposes. A detailed discussion of these requirements is beyond the scope of this chapter, but it is worth noting that the requirements are relatively complex (particularly with regard to stalking that occurs over time), and individuals responsible for compiling Clery Act crime statistics will want to review the pertinent regulations closely. See, e.g., 34 C.F.R. § 668.46(a) (definitions); 34 C.F.R. § 668.46(c)(6) (recording reports of stalking); 34 C.F.R. § 668.46(c)(9)(iv) (relationship of the Federal Bureau of Investigation’s (FBI’s) UCR Program and the Hierarchy Rule to compiling reports of domestic violence, dating violence, and stalking). See also Preamble at 62766-62768 (further detailed guidance in the Preamble).

*terms are defined in paragraph (a) of this section.*⁵² Third, the definitions are incorporated by reference into the definition of the prevention programs that institutions must offer.⁵³ Though not saying so directly, VAWA thus requires covered institutions to adopt policy definitions that prohibit those types of misconduct and crime as they are defined in VAWA. Further, institutions must tailor their awareness and prevention programs accordingly. Institutions should therefore understand how VAWA defines these crimes.

Domestic Violence

Adopting a definition substantially similar to that used in the VAWA definition found at 42 U.S.C. § 13925(a)⁵⁴, the VAWA regulations define “domestic violence” as follows:

- Domestic violence.* (i) A felony or misdemeanor crime of violence committed—
- A. By a current or former spouse or intimate partner of the victim;
 - B. By a person with whom the victim shares a child in common;
 - C. By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - D. By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or
 - E. By any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.⁵⁵

⁵² 34 C.F.R. § 668.46(j)(1)(A) (emphasis added).

⁵³ See 34 C.F.R. § 668.46(b)(11).

⁵⁴ 42 U.S.C.A. § 13925(a)

⁵⁵ 34 C.F.R. § 668.46(a). The only discussion in the Preamble about this definition was in response to a commenter’s concern that this definition would require institutions in some states to include incidents between roommates and former roommates in their Clery Act crime statistics, “because they would be considered household members under the domestic or family laws of those jurisdictions.” Preamble at 62757. The Department dismissed this

Dating Violence

Relying substantially on the VAWA definition but adding language that encourages more deference to the victim's characterization of the relationship, the VAWA regulations define "dating violence," in pertinent part, as follows:

Dating violence. Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

- (i) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- (ii) For the purposes of this definition—
 - A. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - B. Dating violence does not include acts covered under the definition of domestic violence...⁵⁶

This definition prompted numerous comments during the negotiated rulemaking process. Two areas of discussion were particularly interesting.

First, with respect to the question of when a relationship should be classified as a "dating" relationship, some commenters expressed concern that a reporting party's use of generationally-specific terms such as "hanging out" or "hooking up" to describe what might generally be thought of as "dating" could cause confusion and misclassification of offenses. The Department responded that institutions should be able to discern whether a

concern, replying that "the final definition of 'domestic violence,' consistent with the proposed definition, requires more than just two people living together; rather, the people cohabitating must be spouses or have an intimate relationship." *Id.* While this response should effectively control the issue for purposes of an institution's compilation of Clery crime statistics, institutions still may wish to consult with legal counsel and watch for further guidance from the Department regarding the definitions and scope of the domestic and family violence laws, when determining how to define "domestic violence" in their policy statements and prevention and awareness programs.

⁵⁶ 34 C.F.R. § 668.46(a).

“social relationship was of a romantic or intimate nature” based largely on the reporting party’s characterization of the relationship and the other factors, even if the reporting party used generationally-specific terms rather than “dating.”⁵⁷ Second, the Department rejected the suggestions of several commenters that the definition of “dating violence” include psychological or emotional abuse in addition to “sexual or physical abuse or the threat of such abuse.”

While the Department stated that it “fully support[s] the inclusion of emotional and psychological abuse in definitions of ‘dating violence’ used for research, prevention, victim services, or intervention purposes,” it was “not persuaded that they should be included in the definition of ‘dating violence’ for purposes of campus crime reporting.”⁵⁸ The Department’s rationale for this was that emotional and psychological abuse would not always rise to the level of violence, and that broadening the definition as requested for campus crime reporting purposes “would pose significant challenges in terms of compliance and enforcement” of the law.⁵⁹

Of course, this does not mean that the prevention and awareness programs developed and offered by institutions should not include information about power and control issues and the continuum of inappropriate behaviors that can occur in a dating relationship. Where deemed appropriate by prevention professionals, such discussions would certainly have a place in the curriculum, so long as the difference between that discussion and the institution’s definition of dating violence for crime reporting and policy purposes remains clear. Obviously, most institutions can and should sanction psychological and emotional abuse under existing student and employment policies, even if the misconduct does not rise to the level of “dating violence.”

Stalking

The VAWA regulations define “stalking” in pertinent part as follows:

Stalking. (i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

⁵⁷ See Preamble at 62756-62757.

⁵⁸ Preamble at 62757.

⁵⁹ *Id.*

- A. Fear for the person's safety or the safety of others; or
- B. Suffer substantial emotional distress.

(ii) For the purposes of this definition—

- A. *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- B. *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.
- C. *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.⁶⁰

This definition also generated several comments of interest.

For example, in response to a commenter's argument that this definition was too broad because it did not require that the stalker intended to cause substantial emotional distress (an argument based on the intent requirement of the federal criminal stalking statute, 18 U.S.C. § 2261A⁶¹), the Department observed that the VAWA Amendments incorporated the different standard of the VAWA statute codified at 42 U.S.C. § 13925(a)(30)⁶², which does not include this intent requirement.⁶³ Thus, the standard for VAWA purposes, and for purposes of the protective policies that institutions must, at a minimum, implement to prohibit stalking on their campuses, focuses on an objective view of whether a reasonable person under similar circumstances and with similar identities to the victim would fear for the safety of others or suffer substantial emotional distress, not on whether the stalker intended that to occur.⁶⁴

⁶⁰ 34 C.F.R. § 668.46(a).

⁶¹ 18 U.S.C.A. § 2261A.

⁶² 42 U.S.C.A. § 13925(a)(30).

⁶³ Preamble at 62759.

⁶⁴ See *id.*

The Department similarly advocated a broad reading of “substantial emotional distress” in addressing a commenter’s expressed concern that the “substantial” qualification might lead to undercounting of stalking offenses for campus crime statistics purposes, because, in the commenter’s view, the qualification “risked minimizing the wide range of responses to stalking and trauma.”⁶⁵ The Department declined to remove the qualification. In explaining this decision, the Department could have noted that doing so would have made the regulatory definition inconsistent with the VAWA statutory definition on which it was supposed to have been based (because 42 U.S.C. § 13925(a)(30)⁶⁶ contains the “substantial” qualification), but it did not do so. Instead, it noted in response that institutions “should not exclude a report of stalking merely because the victim’s reaction (or the description of the victim’s reaction by a third party) does not match expectations for what substantial emotional distress might look like.”⁶⁷ In other words, the Department worked within the statutory definition, but encouraged institutions to take a broad view of how “substantial” emotional distress had to be to meet the threshold for stalking.

Beyond Compliance: Enhancing Campus Safety Through the Use of Threat Assessment and Management in the IPV and Stalking Contexts

As noted above, if the awareness-raising programs and campaigns offered by institutions pursuant to the VAWA Amendments to the Clery Act are effective at raising awareness, they likely will result, initially at least, in an increase in reporting of IPV and stalking by students and employees. This may seem ironic, but since research shows that these forms of misconduct and crime are currently affecting individuals in the traditional undergraduate student age group,⁶⁸ as well as employees as members of society at large, it

⁶⁵ Preamble at 62759.

⁶⁶ 42 U.S.C.A. § 13925(a)(30).

⁶⁷ *Id.* at 62760.

⁶⁸ There can be little doubt that individuals in the traditional undergraduate student age range are at significant risk for IPV and stalking. For example, the Centers for Disease Control and Prevention’s 2010 National Intimate Partner and Sexual Violence Survey (NIPSVS) found in surveying 16,507 adults (9,086 women, 7,421 men) that among those who had experienced rape, physical violence, or stalking, 47.1 percent of female victims and 38.6 percent of male victims were between eighteen and twenty-four years of age when they first experienced violence by an intimate partner. A College Dating Violence and Abuse Poll published in 2011 found that 43 percent of dating college women reported experiencing some violent and abusive dating behaviors including physical,

only stands to reason that institutions will receive more reports once community members are better informed about the applicable prohibitions, procedures, accommodations, and resources. Hopefully, bystander and risk reduction programming will also be effective and will eventually reduce the underlying occurrence of incidents of IPV and stalking, but until that happens, institutions should expect that they will need in the near term to devote more attention to responding to IPV and stalking reports.

In anticipation of this, there are some steps that institutions and their legal counsel will obviously need to take to enhance the capacity of campus disciplinary processes, such as ensuring that procedures are designed to address IPV and stalking cases involving students and employees, training investigators and adjudicators as required by the VAWA Amendments, hiring or contracting for skilled, experienced investigators as necessary, staffing offices with jurisdiction to handle reports appropriately, and ensuring that disciplinary procedures are trauma-informed and fair to all parties. There are also some less obvious, but crucial, steps that institutions should consider taking in the interest of enhancing campus safety, which entail the use of campus threat assessment and management (TAM) teams and methodologies in parallel to the disciplinary process. The balance of this chapter focuses on those steps.

sexual, technology-enabled, verbal, or controlling abuse, 22 percent of college women reported actual physical abuse, sexual abuse, or threats of physical violence, and 52 percent of college women reported knowing a friend who had experienced violent and abusive dating behaviors including physical, sexual, tech, verbal, or controlling abuse. When comparing a research study to a National Violence Against Women (NVAW) survey, an “Intimate Partner Stalking and Femicide” paper posted as a resource on the Stalking Resource Center’s website (see McFarlane, J., Campbell, J., Wilt, S., Ulrich, Y., and Xu, X., “Stalking and Intimate Partner Femicide,” *Homicide Studies* (1999) (posted at: <https://www.victimsofcrime.org/docs/src/mcfarlane-j-m-campbell-j-c-wilt-s-sachs-c-j-ulrich-y-xu-x-1999.pdf?sfvrsn=0>)) also noted that “[t]he highest percentage of intimate violence was among women aged sixteen to twenty-four, paralleling the results of the NVAW survey, which found that 52 percent of the female victims of stalking were eighteen to twenty-nine years of age,” and observed: “[t]hus, a strong connection appears to exist between intimate partner stalking and assault, with younger women more often victimized (Office of Justice Programs, 1998).” Further, a Stalking Fact Sheet posted on the Stalking Resource Center’s website (see https://www.victimsofcrime.org/docs/src/stalking-fact-sheet_english.pdf?sfvrsn=4 (last visited on May 10, 2015)) cited a summary of the NIPSVS for the proposition that “[m]ore than half of female victims and more than one-third of male victims of stalking indicated that they were stalked before the age of twenty-five.” (citing Michele C. Black et al., “The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report,” (Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2011)).

Step One: Ensure that You Have a Threat Assessment and Management Team

If the discussion above regarding the role of TAM teams in IPV and stalking cases caused you to wonder whether your institution or client institution actually *has* a TAM team, then it is worth considering the following.

Threat assessment and management is a methodology refined initially by United States governmental entities such as the Federal Bureau of Investigation (FBI), the US Secret Service, and the US Postal Service. To be effective on campus, TAM teams must educate their communities regarding the existence and purpose of the team; encourage reporting of and receive information regarding behavior and statements of concern; efficiently investigate surrounding circumstances to determine, among other things, the person of concern's motivations, capacity to do harm, and status on a potential pathway to violence; and develop strategies to manage the threat. In the *Guide for Developing High-Quality Emergency Operations Plans for Institutions of Higher Education (Emergency Operations Guide)* published in 2013 by numerous federal government entities, the need for and functions of campus TAM teams are summarized aptly, as follows:

[R]esearch shows that perpetrators of targeted acts of violence engage in both covert and overt behaviors preceding their attacks. They consider, plan, prepare, share, and, in some cases, move on to action. One of the most useful tools an IHE can develop to identify, evaluate, and address these troubling signs is a multidisciplinary IHE [Threat Assessment Team (TAT)]. A TAT with diverse representation often will operate more efficiently and effectively. TAT members should include IHE administrators, counselors, current employees, medical and mental health professionals, and residential life, public safety, and law enforcement personnel. The TAT serves as a central convening body that ensures that warning signs observed by multiple people are not considered isolated incidents and do not slip through the cracks as they actually may represent escalating behavior that is a serious concern. IHEs should keep in mind, however, the importance of relying on factual information (including observed behavior) and avoid unfair labeling or

stereotyping, to remain in compliance with civil rights and other applicable federal and state laws.

For the purposes of consistency and efficiency, a TAT should be developed and implemented in coordination with IHE policy and practice. In addition, staff already working to identify student and staff needs can be a critical source of information on troubling behavior for a TAT.

The TAT reviews troubling or threatening behavior of current or former students, staff, and parents, or other persons brought to the attention of the TAT. The TAT contemplates a holistic assessment and management strategy that considers the many aspects of the potentially threatening person's life—academic, residential, work, and social. More than focusing on warning signs or threats alone, the TAT assessment involves a unique overall analysis of changing and relevant behaviors. The TAT takes into consideration, as appropriate, information about behaviors, various kinds of communications, not-yet substantiated information, any threats made, security concerns, family issues, or relationship problems that might involve a troubled individual.... Once the TAT identifies an individual who may pose a threat, the team will identify a course of action for addressing the situation. The appropriate course of action—whether law enforcement intervention, counseling, or other actions—will depend on the specifics of the situation.⁶⁹

TAM has been used at certain colleges and universities for many years, but the number of institutions with TAM teams has grown exponentially following the tragic shootings at Virginia Tech in 2007.⁷⁰

⁶⁹ *Emergency Operations Guide* at 80. The *Emergency Operations Guide* is available at: http://rems.ed.gov/docs/REMS_IHE_Guide_508.pdf. Agencies involved in producing the *Emergency Operations Guide* included the US Department of Education (DOE), the US Department of Health and Human Services (HHS), the US Department of Homeland Security (DHS), the US Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Federal Emergency Management Agency (FEMA).

⁷⁰ See *Emergency Operations Guide* at 80 (“[TAM teams] are increasingly common in [institution of higher education] settings, pushed to the forefront of concern following the

Higher education institutions in some states are required by law to have threat assessment teams,⁷¹ but teams are not legally mandated in the vast majority of states. Nonetheless, institutions have recognized after the Virginia Tech shootings and other high-profile incidents that TAM teams can enhance campus safety and are consistent with best and promising practices. Many resources, in addition to the *Emergency Operations Guide*, support this conclusion. For example, many of the investigative reports that were conducted in the wake of the Virginia Tech shootings contain recommendations to the effect that campuses should create and/or support campus TAM teams. These reports are summarized well in *The IACLEA Blueprint for Safer Campuses* (IACLEA Special Review Task Force, April 18, 2008) (*Blueprint*), a document published by the International Association of Campus Law Enforcement Administrators (IACLEA).⁷² The *Blueprint* was

2007 shooting at Virginia Polytechnic Institute and State University in Blacksburg, Va., where thirty-two individuals were killed.”).

⁷¹ See, e.g., Conn. Gen. Stat. Ann. § 10a-156a (2014) (Connecticut statute enacted in 2014 that requires public and independent institutions of higher education to adopt threat assessment teams); 110 Ill. Comp. Stat. 12/20(b) (2009) (Illinois statute, enacted after the February 2008 shootings at Northern Illinois University, which requires each Illinois institution of higher education to develop a campus threat assessment team); Va. Code Ann. § 23-9.2:10 (2008) (Virginia statute enacted after the April 2007 shootings at Virginia Tech which requires public higher education institutions in Virginia to establish a threat assessment team that includes members from law enforcement, mental health professionals, representatives of student affairs and human resources, and, if available, college or university counsel, and which charges such team to provide guidance to students, faculty, and staff regarding recognition of behavior that may represent a threat to the community, to identify members of the campus community to whom threatening behavior should be reported, and to implement policies and procedures for the assessment of individuals whose behavior may present a threat, and for “appropriate means of intervention with such individuals, and sufficient means of action, including interim suspension or medical separation to resolve potential threats.”).

⁷² The *Blueprint* is available at: http://www.margolishealy.com/files/resources/VT-taskforce-report_Virginia-Tech.pdf. In preparing the *Blueprint*, the authors (Raymond H. Thrower, Steven J. Healy, Dr. Gary J. Margolis, Michael Lynch, Dolores Stafford and William Taylor) consulted and referenced the following documents: Mass Shootings at Virginia Tech, April 16, 2007, Report of Review Panel, Presented to Governor Kaine, Commonwealth of Virginia, August 2007; Investigation of April 16, 2007 Critical Incident At Virginia Tech Prepared by Office of the Inspector General For Mental Health, Mental Retardation & Substance Abuse Services, James W. Stewart, III. Report: # 140-07; Presidential Internal Review, Working Group Report on the Interface Between Virginia Tech Counseling Services, Academic Affairs, Judicial Affairs and Legal Systems, Submitted to President Charles Steger, August 12, 2007; Oklahoma Campus Life and Safety and Security Task Force (CLASS) Final Report, January 15, 2008; New Jersey Campus Security Task Force Report, Submitted to Governor Jon S. Corzine, October 2007; Expecting the Unexpected—Lessons from the Virginia Tech Tragedy, by American

designed as a synthesis of the various reports done regarding the Virginia Tech shootings, and it contains numerous recommendations for campus safety from IACLEA. On the specific topic of TAM teams, the *Blueprint* recommends that “[i]nstitutions of higher education should have a behavioral threat assessment team that includes representatives from law enforcement, human resources, student and academic affairs, legal counsel, and mental health functions.”⁷³

The creation and use of campus TAM teams is also supported by a publication known as “*A Risk Analysis Standard for Natural and Man-Made Hazards to Higher Education Institutions*,” published by the ASME Innovative Technologies Institute, LLC (ASME-ITI), and approved by the American National Standards Institute (ANSI), in 2010 (*RA Standard*). This publication outlines a “methodology to identify, analyze, quantify, and communicate asset characteristics, vulnerabilities to natural and man-made hazards, and consequences of these hazards on the campuses of colleges and universities.” *RA Standard* at 1. On the topic of TAM teams, the *RA Standard* recommends “that Threat Assessment Teams be put into place on campus to help identify potential persons of concern and gather and analyze information regarding the potential threat posed by an individual(s).”⁷⁴ In addition to this recommendation, the *RA Standard* identifies “resources for implementing Threat Assessment Teams on campus” that “may be helpful in conducting a risk assessment” which include, for example, *The Handbook for Campus Threat Assessment* &

Association of State Colleges & Universities; The Report of the University of California Campus Security Task Force, University of California Office of the President, January 2008; Gubernatorial Task Force for University Campus Safety, Report on Findings and Recommendations, State of Florida, May 24, 2007; Governor’s Task Force on Campus Safety, State of Wisconsin, November 15, 2007; International Association of Campus Law Enforcement Administrators Special Review Task Force on Virginia Tech; Missouri Campus Security Task Force, Report on Findings and Recommendations, August 21, 2007; Association of American Universities August, 2007; Survey on Safety on AAU Campuses after the Virginia Tech Shootings; Report of the Campus Safety Task Force Presented to North Carolina Attorney General Roy Cooper; National Association of Attorneys General, Task Force on School and Campus Safety, Report & Recommendations, September 2007; Report to the President of the United States on Issues Raised by the Virginia Tech Tragedy, June 13, 2007; The Report of the Virginia Tech Review Panel Synopsis prepared by Charles F. Carletta, J.D., Secretary of the Institute and General Counsel, Rensselaer Polytechnic Institute, October 2007.

⁷³ *Blueprint* at 7.

⁷⁴ *Id.* at 10.

Management Teams (Handbook for Campus TAM Teams). The *Handbook for Campus TAM Teams* is discussed further below.⁷⁵

Recognizing again that the VAWA Amendments to the Clery Act require institutions to respond to IPV and stalking reported by employees as well as students, it is also significant that TAM is also recommended as a strategy for preventing workplace violence in a document published in fall 2011 by ASIS International and the Society for Human Resource Management (SHRM). The document is an American National Standard titled: “Workplace Violence Prevention and Intervention” (*WVPI Standard*).⁷⁶ Chapter 10 of the *WVPI Standard* is devoted to the topic of how employers can tailor their workplace violence prevention strategies to deal with the issue of IPV spilling into the workplace. This issue is discussed further below.

Any institutions that have not yet developed TAM teams should recognize in light of the recommendations made in these resources that courts have often allowed expert witnesses to testify to the effect that standards prepared by voluntary standards organizations such as ANSI represent the standard of care on a topic, and/or have otherwise allowed such standards into evidence.⁷⁷ While voluntary standards do not have the force of law like statutes do, they can be persuasive evidence of the standard of care, given the deliberative, consensus-driven process by which many are created.

⁷⁵ See Deisinger, Randazzo, O’Neill and Savage, *The Handbook for Campus Threat Assessment & Management Teams* (Applied Risk Management 2008), available at: http://www.tsgsinc.com/?page_id=2225. The *RA Standard* also cites Randazzo and Plummer, *Implementing Behavioral Threat Assessment on Campus: A Virginia Tech Demonstration Project* (Virginia Polytechnic Institute and State University, 2009) (“*Implementing Behavioral Threat Assessment on Campus (2009)*”) (available at: http://www.threatassessment.vt.edu/Implementing_Behavioral_Threat_Assessment.pdf), and The Virginia Tech Review Panel Report, August 2007 (<http://www.vtreviewpanel.org/report/index.html>).

⁷⁶ The *WVPI Standard* is available at: <http://www.shrm.org/hrstandards/documents/wvpi%20std.pdf>.

⁷⁷ See Dobbs, *The Law of Torts*, § 164 (“As a sword, the plaintiff can show the defendant’s violation of a safety custom as some evidence that the defendant failed to act as a reasonable person under the circumstances. In some cases, evidence of the custom is presented by an expert, but the rule is no less applicable if the custom is institutionalized in advisory standards of the relevant industrial association” (citing, e.g., *Hansen v. Abrasive Engineering and Mfg., Inc.*, 317 Or. 378, 856 P.2d 625 (1993) (ANSI advisory standard deemed admissible but not conclusive)).

There is ample case law to this effect,⁷⁸ so it is fair to assume that some courts would similarly permit reference to these resources in the event of litigation that involved the issue of whether an institution should have had an effectively functioning TAM team.⁷⁹

Step Two: Ensure That Your TAM Team Operates Effectively

If your institution's or client institution's TAM team is to provide helpful assessment and guidance for institutional conduct officers and administrators in potentially dangerous IPV or stalking cases, it must, obviously, be an effective TAM team. TAM teams must be chartered, staffed, and organized appropriately and be known to and supported by the institution, and their members must be trained adequately to perform the high-stakes work at hand. While a detailed outline of these issues is beyond the scope of this chapter, some resources can be cited here that teams can consult to verify that they are operating in accordance with best and promising practices.

The resources cited by the *RA Standard* as "helpful in conducting a risk assessment" are worth consulting, particularly the *Virginia Tech Demonstration Project* publication and the *Handbook for Campus Threat Assessment Teams*, because they, respectively, address how to stand up and operate a TAM team, and conduct threat assessment and management on campus. A brief summary of the TAM process is also included in the free-of-charge *Campus TAM Teams* URMIA publication cited below. Numerous helpful background resources are also cited in the *Emergency Operations Guide*.⁸⁰

⁷⁸ See *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 326-27, 60 Fed. R. Serv. 3d 480 (1st Cir. 2004) (providing detailed analysis and citations to numerous other cases on the issue); *Kent Village Associates Joint Venture v. Smith*, 104 Md. App. 507, 657 A.2d 330, 337 (1995) ("[S]afety standards ... may be admitted to show an accepted standard of care, the violation of which may be regarded as evidence of negligence." See also generally Feld, Annotation, Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 A.L.R.3d 148 (1974 & 2010 Supp.).

⁷⁹ A more detailed analysis of the legal duties of colleges and universities to protect and control individuals on campus and related standard of care issues in the threat assessment context is provided in Jeffrey J. Nolan, Marisa R. Randazzo, Ph.D. and Eugene R. Deisinger, Ph.D., *Campus Threat Assessment and Management Teams: What Risk Managers Need to Know Now* (University Risk Management and Insurance Association Annual Journal, 2011) (available at: http://www.sigmatma.com/images/NolanRandazzoDeisinger_CampusThreatAssessmentTeams_FINAL_20110802.pdf) ([Campus TAM Teams](#)).

⁸⁰ The *Emergency Operations Guide* cited the following threat assessment-related resources that should be helpful to TAM teams looking for background information about the

Step Three: Integrate Your Title IX/VAWA and TAM Teams

Title IX coordinators, conduct administrators, and Title IX teams (Title IX teams) are well versed in responding to the all-too-common scenario in which two students who do not have an ongoing personal relationship have engaged in one instance of sexual activity that was reportedly not consensual because of alcohol-induced incapacitation. Usually, interim measures, accommodations, and support resources are offered to the complainant, and no contact orders are issued to both parties. Often, the respondent expresses “complete shock” when informed of the report, responds that the sexual activity was wholly consensual, and appears to have no inclination to violate the no contact order or otherwise pursue or retaliate against the complainant. The institution then conducts an investigation and/or disciplinary hearing process to determine, forensically, whether the respondent’s reported past conduct violated the institution’s sexual misconduct policy. As difficult as these cases are to investigate and adjudicate, the management of interactions between the parties before, during, and after the investigation and/or disciplinary process is relatively simple. Fortunately, the parties want absolutely nothing to do with each other, and want to think about the other party and the process as little as possible. Title IX teams and their colleagues on campus can manage such cases safely under existing protocols.

fundamentals of the threat assessment and management process and TAM team operations: Bryan Vossekuil, Robert Fein, Marisa Reddy, Randy Borum, and William Modzeleski, *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* (Washington, DC: US Department of Education and US Secret Service, 2004) (available at: http://www2.ed.gov/admins/lead/safety/preventing_attacksreport.pdf); Robert Fein, Bryan Vossekuil, William Pollack, Randy Borum, William Modzeleski, and Marisa Reddy, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates* (Washington, DC: US Department of Education and US Secret Service, 2004) (available at: <http://www2.ed.gov/admins/lead/safety/threatassessmentguide.pdf>); Frederick Calhoun and Stephen Weston, *Contemporary Threat Management: A Practical Guide for Identifying, Assessing, and Managing Individuals of Violent Intent* (San Diego, CA: Specialized Training Services, 2003); Gene Deisinger, Marisa Randazzo, Daniel O’Neill, and Jenna Savage, *The Handbook for Campus Threat Assessment and Management Teams* (Stoneham, MA: Applied Risk Management, 2008); Robert Fein, Bryan Vossekuil, and Gwen Holden, *Threat Assessment: An Approach to Prevent Targeted Violence* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 1995); and John Monahan, Henry Steadman, Eric Silver, Paul Appelbaum, Pamela Robbins, Edward Mulvey, Loren Roth, Thomas Grisso, and Steven Banks, *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence* (New York, NY: Oxford University Press, 2001). See *Emergency Operations Guide* at 79, n.33 and accompanying text at 78- 81.

On the other hand, when responding to IPV and stalking cases, and sexual assault cases that involve long-term relationships that have elements of IPV, stalking, or both, institutions must recognize that the interim and long-term management of such cases can be relatively much more complex. Title IX teams or other disciplinary authorities must, of course, investigate to the extent appropriate to determine forensically whether misconduct in violation of institutional policy occurred in the past, but the institution must also be prepared to assess whether the respondent poses a current and ongoing threat to the complainant, and to manage any such threat to the extent reasonably possible.

Institutions should not assume that the mere initiation of a campus investigation or disciplinary process would necessarily dissuade a violent perpetrator of IPV or stalking from continuing their course of conduct. For example, according to a paper posted as a resource on the Stalking Resource Center's website, "Stalking and Intimate Partner Femicide," 54 percent of women killed by a stalker had reported stalking to the police before they were killed by their stalkers.⁸¹ It is fair to assume that college disciplinary proceedings would have a less deterrent effect on a would-be perpetrator than a run-in with law enforcement. Also demonstrating the interrelated nature of IPV, stalking, and further violence, this paper also reported that 67 percent of femicide victims had been physically abused by their intimate partner, 89 percent of femicide victims who had been physically assaulted had also been stalked in the twelve months before their murder, and 79 percent of abused femicide victims reported being stalked during the same period that they were abused.⁸²

Further, in some cases, the victim's reporting the violence may even increase the risk of further violence, as discussed further below. Given these concerns, the responsibility for assessing and managing current risk should not be left to the Title IX coordinator or conduct administrators alone, because it is unlikely that they will have the training, time, or resources to do appropriate threat assessment and management while simultaneously managing a disciplinary investigation and their other responsibilities.

⁸¹ See McFarlane, J., Campbell, J., Wilt, S., Ulrich, Y., and Xu, X., "Stalking and Intimate Partner Femicide," *Homicide Studies* (1999) (posted at: <https://www.victimsofcrime.org/docs/src/mcfarlane-j-m-campbell-j-c-wilt-s-sachs-c-j-ulrich-y-xu-x-1999.pdf?sfvrsn=0>) (last visited May 10, 2015).

⁸² *Id.*

This is where the TAM team comes in. TAM teams should (ideally) have the training, time, and resources to assess and manage potential threats posed by respondents in IPV, stalking and, where necessary, sexual assault cases. Institutions should appoint a TAM team liaison to their Title IX team, and Title IX teams should involve the TAM team as necessary before, during, and after a report of IPV or stalking so that any current, ongoing threats can be assessed and managed.

There are many facets of IPV and stalking cases on which TAM teams can provide valuable assistance. As outlined above, the VAWA Amendments require institutions to provide interim measures and accommodations, provide and respect no contact and protection orders, and provide disciplinary procedure options for students and employees who report IPV and stalking. The manner in which these measures are implemented can either escalate or de-escalate a current risk of harm to the complainant. Therefore, Title IX teams should make related decisions based on an appropriate threat assessment and, within the bounds of Clery Act requirements, should take threat management principles into account when implementing accommodations, interim measures, no contact orders, and disciplinary proceedings.

To be clear, this is not to suggest that institutions should hand all aspects of IPV and stalking cases over to TAM teams. Instead, the retrospective, forensic investigations of such cases should proceed (as required by Title IX and the Clery Act) in parallel with quicker-moving TAM investigations and prospective threat management efforts. TAM teams can provide input to Title IX teams as suggested here, but should not also be tasked with primary responsibility for gathering evidence for use in disciplinary proceedings, nor should TAM teams determine the outcome of those proceedings.

It should also be considered that in cases where a victim seeks support and accommodations but does not wish to pursue a disciplinary proceeding and the institution decides that it can respect that choice, the Title IX team and conduct administrators may have relatively less ability to influence the ongoing relationship between the victim and the perpetrator. Unless a TAM team is involved, the institution's counseling or victims' support centers may be the only longer-term points of contact for the victim. The professionals providing one-on-one support in those centers will not likely be in a position to conduct threat assessment and management.

Transitioning the ongoing management of such cases from the Title IX team to the TAM team should enhance safety.

In sum, institutions will have to determine how best to involve TAM teams in their management of IPV, stalking and, where necessary, sexual assault cases, but the bottom line is this: Title IX teams cannot handle current threats on their own, so institutions should find a way to bring TAM teams to the Title IX teams' table, and tap the expertise of TAM teams to manage any current threats appropriately. Given the potentially life-and-death gravity of the issues that may be involved in such cases, institutions should avoid a "silo mentality" that might allow a disciplinary process to progress in "business as usual" fashion and remain the sole institutional response, without recognizing that larger, safety-related issues may be in play.

Step Four: Ensure That Your TAM Team is Up to Speed on IPV and Stalking Issues

Institutions that plan to involve their TAM teams in assisting Title IX teams where necessary should ensure that their TAM teams are up to speed on the literature and practices regarding the assessment and management of threats in the IPV and stalking contexts. A detailed treatment of these issues is beyond the scope of this chapter, but some example resources will be identified here for reference.

One resource that efficiently summarizes a substantial body of research on the use of threat assessment in the IPV and stalking contexts is the *International Handbook of Threat Assessment (TAM Handbook)*, which was published by the Oxford University Press in 2014.⁸³ One chapter of the *TAM Handbook*, titled "Intimate Partner Violence, Stalking and Femicide,"⁸⁴ relies upon over one hundred research papers, government studies, and other resources to support many observations about IPV and stalking that should be of interest to TAM teams. For example, the chapter observes (based on research findings) that while the ability to interview the victim provides a relative advantage over potential targeted violence situations where the victim or victims are unknown, TAM teams should also recognize that victims of

⁸³ See Meloy, J.R. & Hoffmann, J. (eds.) (2014) *International Handbook of Threat Assessment*. New York, NY: Oxford University Press.

⁸⁴ Kropp, P.R. & Cook, A.N. "Intimate Partner Violence, Stalking and Femicide," *TAM Handbook* at 178-194.

IPV can also “grossly misjudge the risk posed by their partners,” and that “victims underestimated their spouses’ risk” in 47 percent of femicide (i.e., killing of women) cases and 53 percent of attempted femicide cases.⁸⁵ The chapter further observed that victims may be reluctant to participate in a threat assessment due to concerns about whether their participation will be kept confidential, and the “realistic fear” that participating could increase their risk of harm, particularly if the perpetrator faces sanctions as a result.⁸⁶ These example observations and the research cited to support them should inspire TAM teams to learn more about the unique and “complicated victimology”⁸⁷ that may be in play in IPV cases.

In terms of risk factors, the chapter cites “a number of comprehensive reviews on risk factors for IPV,” and summarizes “[c]ommonly mentioned perpetrator risk factors” as including:

prior violence in intimate relationships, past antisocial behavior or attitudes, attitudes that support violence, prior threatening or stalking behavior, substance abuse, personality disorder, sexual proprietariness, homicidal or suicidal ideation, recent relationship problems, recent employment/financial problems, and minimization/denial of violent behavior.⁸⁸

On the topic of intimate partner femicide in particular, which the chapter states is “the most common form of homicide perpetrated against women worldwide,” and which research shows accounts for “30 percent to 60 percent of all culpable homicides against women” in the United States, Canada, and the United Kingdom, the chapter identifies the following commonly cited risk factors, which are:

1. Proprietariness of the abuser toward the female partner;
2. Possession or availability of firearms;
3. Escalation in severity or frequency of IPV;
4. Mental health problems;

⁸⁵ *Id.* at 179.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

5. Stalking (“especially in context of a recent separation and when the stalking involves threats of harm, extreme jealousy, possessiveness, and proprietariness”); and
6. Recent separation or divorce (“especially within the first few months following estrangement”).⁸⁹

The chapter noted that it is “possible to organize the femicide literature into a threat assessment model for life-threatening IPV” involving consideration of “three domains—acute conflict, capacity for serious violence, and severe disinhibition [that is, a state in which the perpetrator’s mental state is overriding his natural inhibitions against life-threatening violence],” the combination of which should be seen as indicating that a serious risk of harm may be present. Again, TAM teams charged with responding to IPV and related stalking cases, and the legal counsel who advise them, should strive to educate themselves about these issues.

The chapter also summarizes some of the considerations that should be taken into account when managing risk in IPV situations, which can involve monitoring (that is, continuing to assess) the person of concern on an ongoing basis in cooperation with law enforcement and other resources, determining whether the person is engaging in required mental health or substance abuse treatment, supervising the person to the extent the team or institution can restrict the person’s freedoms in some manner, and engaging in victim safety planning.⁹⁰ Again, these examples illustrate that there are IPV-specific issues with which TAM teams should be familiar.

Finally, with respect to IPV issues, the chapter identifies several IPV-specific threat assessment instruments and provides information about their validity.⁹¹ Some of these instruments were developed for use by law enforcement officers in the field and were not developed in the higher education context; therefore, campus TAM teams could reasonably do threat assessment of IPV cases without using these specific instruments.

⁸⁹ *Id.* at 186.

⁹⁰ *Id.* at 180.

⁹¹ See *id.* at 180-183 (citing the Danger Assessment, the Domestic Violence Screening Inventory, the Ontario Domestic Assault Risk Assessment and Domestic Violence Risk Appraisal Guide, the Spousal Assault Risk Assessment Guide, and the Brief Spousal Assault Form for the Evaluation of Risk).

Nonetheless, campus TAM teams may find it helpful to become conversant with the factors highlighted in these instruments, and, exercising their professional judgment, to consider the results of such instruments among other information gathered in assessing IPV cases.⁹²

The chapter also summarizes research on stalking that should be of interest to campus TAM teams and their counsel. The chapter observes that the “stalking of current and former intimate partners is a particularly common and potentially lethal form of stalking behavior,” and that

[t]he threat assessment of intimate stalkers poses some special problems for professionals owing to the complex—often ambivalent—relationship between stalker and victim, the diversity of the problematic behavior, the persistence of the stalker, the extremely dynamic nature of the risk, the often complicated psychopathology of the stalker, and the highly emotionally charged context in which the stalking occurs.⁹³

The chapter then describes two stalking-specific threat assessment instruments, the guidelines for Stalking Assessment and Management and the Stalking Risk Profile.⁹⁴ Other chapters of the *TAM Handbook* address electronic threats and harassment, which are perennial issues in stalking cases, and the consideration of threat assessment factors in the criminal prosecution of stalking cases.⁹⁵ Both of these chapters contain information that can be adapted for use by TAM teams in their assessment and management of stalking cases. Overall, these chapters of the *TAM Handbook* and the resources and instruments cited therein illustrate that there are stalking-specific issues that should be of interest to campus TAM

⁹² Another chapter in the *TAM Handbook* (K. Dormand, “Domestic Violence Threat Assessment: Putting Knowledge and Skills Into Practice”), *TAM Handbook* at 330-339, provides interesting case studies regarding use of the Brief Spousal Assault Form for the Evaluation of Risk in the law enforcement context.

⁹³ *Id.* at 183. See also Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011 (posted at: <http://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf>).

⁹⁴ *Id.* at 184-186.

⁹⁵ See *TAM Handbook* at 214-223 (Scalora, M., “Electronic Threats and Harassment”); *id.* at 340-350 (Solov, R., “An Operational Approach to Prosecuting Stalking Cases”).

teams and their counsel, and that a specific body of research exists that can inform how campus teams address stalking cases.

Other resources of interest are described more generally above. Again, the ASIS/SHRM Workplace Violence Prevention and Intervention Standard, which advocates the use of threat assessment methodologies to help prevent workplace violence, devotes a chapter to the specific concerns raised when domestic violence threatens to spill into the workplace.⁹⁶ This issue is also addressed in a Federal Bureau of Investigation monograph titled: “Workplace Violence: Issues in Response” (*FBI Monograph*).⁹⁷ The *FBI Monograph* resulted from a 2002 violence in the workplace symposium convened by the FBI. It contains helpful statistics and suggested workplace violence prevention strategies. As noted above, the VAWA Amendments to the Clery Act require institutions to receive reports of dating and domestic violence and provide support and resources to students and employees, even if the victim is unwilling to engage in a disciplinary process, and even if the institution has no jurisdiction over the perpetrator. Of course, just because an IPV perpetrator has no connection to the campus other than the victim’s employment there, that does not mean that the campus community is safe from him. After all, victims of IPV can leave their home, seek refuge through a shelter, get a new cell phone number, etc., but unless they want to give up their livelihood in addition to their living and/or relationship situation, abusers will still know where to find them during the day—that is, at work. Of course, if an abuser comes to the workplace seeking to do harm to the intended victim, there is a possibility that other employees could be caught up in violence as well. It thus makes good sense to involve the campus TAM team in assessing the threat posed when IPV is reported, and managing that threat to the extent it can reasonably do so.

The *FBI Monograph* quotes an American Bar Association (ABA) publication to the effect that “Domestic violence is a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation and emotional, sexual or economic abuse to control the other partner in a relationship,” and also notes that “[s]talking or other harassing behavior is often an integral part of domestic violence.” The *Monograph* then

⁹⁶ See WVPI Standard, Chapter 10.

⁹⁷ The *FBI Monograph* is available at: https://www.google.com/?gws_rd=ssl#q=fbi+workplace+violence+issues+in+response.

cites the results of a study that found that 5 percent of workplace homicides (which represents approximately one-third of homicides that are not associated with robbery or other crimes where the assailant was a stranger) were connected with IPV spilling into the workplace. The *Monograph* then observes that IPV-related workplace homicides “represent a tiny fraction of workplace incidents related to domestic violence; [f]ar more frequent are cases of stalking, threats, and harassment.” It should be noted in connection with this observation that research has shown that instances of IPV-related homicides of women are often preceded by stalking, sexual abuse, and other forms of physical abuse. The background information in the *FBI Monograph* should be of interest to campus TAM teams and their legal counsel.

In terms of policy recommendations, the *WVPI Standard* recommends that employers “require or strongly encourage” employees to report protection orders. The VAWA Amendments require institutions to give notice of how they will respond to protection orders; therefore, it is consistent with that requirement to encourage employees to inform the institution when a protection order has been issued. Both the *WVPI Standard* and the *FBI Monograph* recommend that employers should adopt a policy that would provide leave to employees who need to go to court to seek protection orders. Such leave is mandated in some states. In states where it is not, institutions should nonetheless consider whether allowing such leave would be appropriate as an “accommodation in work situations” as contemplated by the VAWA Amendments.

In terms of prevention strategies, the *WVPI Standard* recommends that employers provide training that:

- Covers warning signs that an employee may be involved in an abusive relationship;
- Outlines circumstances in which behavior potentially related to IPV should be reported to the employer’s TAM team;
- For TAM team members, HR personnel, and/or supervisors (if consistent with their respective roles in your organization), provides advice on how they can sensitively inquire about whether an employee thought to be in an abusive relationship needs support, or has any information to provide that might enhance the employee’s safety in the workplace, and that of others in the workplace as well;

- Identifies resources in the community (such as abuse prevention programs and law enforcement resources) and within the organization (such as EAP) that could assist victims of IPV; and
- For TAM team members and HR personnel, that is more advanced and that provides more detailed information about the nature of IPV, how to respond, and the relationship between a victim's legitimate privacy concerns and an employer's desire to provide assistance in the workplace, and to keep the workplace safe.

The *FBI Monograph* contains similar suggestions, although in less detail.

Campus TAM teams should note that both the *WVPI Standard* and the *FBI Monograph* include lists of behaviors and other indicators that could suggest that an employee is being subjected to IPV. These include (not surprisingly) visible physical injuries, particularly if repeated; the wearing of clothing that is seasonally inappropriate (e.g., scarves and turtlenecks in the summer) in what appears to be an attempt to cover up signs of strangulation or other physical abuse; changes in behavior such as absenteeism or lateness, poor concentration, and errors that are uncharacteristic of the employee's work; need for time off to attend court proceedings; unusual phone calls with an outside person, particularly if the employee is upset afterwards; abrupt changes in address; and disruptive visits to the workplace by an intimate partner.

Campus TAM teams that are planning community outreach and awareness-raising activities should add to the list of training topics above a suggestion that all students and employees be encouraged through training and policy to come forward with information about all threatening behaviors of which they become aware (arising out of IPV or otherwise), so that the institution will be in a better position to look into and address such concerns through its TAM team and/or law enforcement notification as necessary. Again, stalking, harassment, and other forms of emotional abuse can in some cases be precursors to an escalation into physical violence; therefore, students and employees should be trained to raise lower-level concerns so they can be assessed before escalation occurs. Further, students and particularly employees should be advised that keeping such information to themselves, even if motivated by a well-intentioned but misguided concern about "confidentiality," could jeopardize the safety of everyone in the community.

The *WVPI Standard* and the *FBI Monograph* (in relatively less detail) also discuss helpful strategies for approaching threat assessment in the IPV context. These include the general advice that IPV issues related to a third-party abuser should be subject to a threat assessment inquiry to the extent possible, even though they are not under an employer's control. Not as much information may be available as would be available if the person were an employee, but a TAM team can still, for example, gather information from the victim and others who might know the abuser, can do social media searches to determine if the abuser has been posting information that indicates that he or she poses a risk of harm, and can work with on-campus or off-campus law enforcement officials to make them aware of the situation and seek any information that law enforcement is willing and able to provide.

Finally, the *WVPI Standard* includes specific suggestions about doing a threat assessment in the IPV context, and physical safety measures that could be considered as part of threat management activities. These detailed suggestions are beyond the scope of this chapter, but TAM teams may wish to review Sections 10.4 and 10.6 of the *WVPI Standard*, and consider how those suggestions might be implemented, as necessary, at their institutions.

Campus TAM teams and their counsel can also educate themselves regarding IPV and stalking by reviewing the wealth of information available on the websites of government agencies and advocacy groups. The Department of Justice's Office on Violence Against Women, the Centers for Disease Control and Prevention, the Stalking Resource Center, the National Resource Center on Domestic Violence, and the National Center for Victims of Crime maintain voluminous resource pages that should be of interest to campus TAM teams and their counsel.⁹⁸

In addition to ensuring that they are up to speed on published resources regarding IPV and stalking, campus TAM teams and their counsel should also consider whether they could profit from informal meetings with local subject matter experts. For example, TAM teams could reach out to on- and off-campus advocacy and support professionals, special victims units of local law enforcement agencies, and local prosecutors, advise them of the new

⁹⁸ See <http://www.justice.gov/ovw>, <http://www.cdc.gov/ViolencePrevention/index.html>, <https://www.victimsofcrime.org/our-programs/stalking-resource-center>, <http://www.nrcdv.org>, and <https://www.victimsofcrime.org> (all last visited on 5/10/2015).

requirements imposed by the VAWA Amendments to the Clery Act and the likelihood that the teams will be facing an increase in IPV and stalking cases, and seek their advice regarding how they can best work together on the issues that are likely to arise. Teams could also seek more formal training from local advocacy organizations, many of whom have outreach specialists whose job it is to raise awareness about IPV and stalking issues. Finally, teams that wish to move quickly to upgrade their knowledge of threat assessment and management in the IPV and stalking context could also seek formal training on the topic from subject matter experts and threat assessment professionals.

Implementing the Recommendations on Campus

This chapter contains many suggestions regarding steps that institutions should consider as they prepare to respond to reports of IPV and stalking. A detailed discussion of implementation steps is beyond the scope of this chapter, but some example approaches that some institutions are taking can be outlined here.

First, institutions are ensuring that their policies, procedures, and ASR are compliant with the detailed requirements of the Clery Act, as amended by the VAWA Amendments. This is a foundational, non-negotiable compliance step. Second, institutions are identifying or creating, then offering, primary prevention and awareness programs as required by the Clery Act. Again, institutions that receive federal funding have no choice but to do this. Those that do so well will raise awareness and help reduce incidents of IPV and stalking, in addition to complying with the law.

Third, institutions that are looking to excel and enhance campus safety further are recognizing the connection between IPV, stalking, and potential ongoing threats of harm, and are engaging their Title IX teams, disciplinary authorities, legal counsel, and TAM teams in basic education and advanced training programs that focus on these issues. These efforts help institutions comply with the specific annual training requirement imposed by the VAWA Amendments, and also help institutional officials to understand their obligations and the unique issues posed by IPV and stalking cases. Fourth, such institutions are working to develop organizational structures that ensure that these constituencies actually work together actively on IPV and stalking cases when they arise.

Legal counsel can be crucial in ensuring legal compliance, and in initiating and participating in the conversations necessary to promote education and practical inter-disciplinary cooperation. Counsel are in fact playing that role on forward-thinking campuses.

Conclusion

As illustrated in the first section of this chapter, the requirements imposed by the VAWA Amendments to the Clery Act are extensive, and institutions and their counsel will have to invest substantial time and effort to comply with those requirements. The remainder of the chapter's suggestion that institutions should go beyond "basic" compliance and use threat assessment and management methodologies to enhance campus safety may therefore seem a bit audacious. Nonetheless, given the challenges inherent in basic compliance, institutions should recognize that they will likely face an unprecedented number of IPV and stalking reports once the campus community is appropriately aware of the policies, procedures, and resources available to address those types of misconduct and crime. Institutions will therefore have to make choices regarding how to handle those reports: they can either react to reports only through their disciplinary processes and hope that no further violence or stalking occurs, or they can be more active, recognize that the Clery Act's emphasis on accommodations, support, and protection will inevitably involve them more deeply into the active management of such cases, and use the capacities of their campus TAM teams to help assess and manage ongoing risk in parallel with their disciplinary responses. Hopefully, this chapter has convincingly made the case that the latter approach is worth the effort.

Developments in these areas in the near future will likely include an increase in reported incidents of IPV and stalking, and efforts by institutions and their counsel to refine responsive policies, disciplinary procedures, and prevention and awareness programs. Further, as institutions and their counsel gain more experience in these areas, it is likely that they will see an increased need for an integrated approach, through which Title IX teams and other disciplinary authorities will work with TAM teams so that the institution can better investigate past misconduct while assessing and managing potential future risks. In addition to mastering the legal requirements outlined in this chapter, legal counsel for colleges and universities should also consider working to

develop an awareness of the victimology and TAM issues unique to IPV and stalking cases, as discussed in the resources referenced in this chapter, to better help their clients navigate this challenging area.

Key Takeaways

- Advise client institutions that when they create policies and statements regarding the importance of preserving evidence in campus assault cases, they should consider emphasizing the need to preserve electronic communications in addition to the physical evidence traditionally addressed in sexual assault policy statements.
- Inform university officials that they should recognize the need to adhere strictly to their institutions' due process requirements for respondents, thereby reducing the risk of civil liability to respondents that can result from procedural errors and unfair adjudications.
- Work to conform employee handbooks, faculty contracts, and collective bargaining agreements to the various requirements imposed by the VAWA Amendments. Ensure that university clients implement extensive training programs for students, faculty, and staff regarding domestic violence, dating violence, sexual assault, and stalking.
- Assist clients in enhancing the capacity of their disciplinary processes. Ensure that procedures are designed to address IPV and stalking cases involving students and employees, train investigators and adjudicators as required by VAWA, hire or contract for skilled, experienced investigators as necessary, staff offices with jurisdiction to handle reports appropriately, and ensure that disciplinary procedures are trauma-informed and fair to all parties.
- Recognize that IPV and stalking cases may require both a disciplinary response and a threat assessment and management response, which can be provided by the coordinated, simultaneous efforts of Title IX teams, other disciplinary authorities, and TAM teams.
- Note that institutions that plan to involve their TAM teams in assisting Title IX teams where necessary should ensure that their TAM teams are fully up to speed on the literature and practices regarding the assessment and management of threats in the IPV and stalking contexts.
- Ensure that the client institution's TAM team gathers information from the victim and others who might know the abuser, conducts

social media searches to determine if the abuser has been posting information that indicates that he or she poses a risk of harm, otherwise conducts an appropriate threat assessment, and works with on-campus or off-campus law enforcement officials as necessary to manage any potential ongoing threat.

Jeffrey J. Nolan is director and shareholder with Dinse Knapp & McAndrew PC. Mr. Nolan's litigation and counseling practice focuses on representing employers and institutions of higher education before courts and administrative agencies in employment and student-related matters; advising employers and institutions of higher education on the resolution and legal implications of employment and student-related issues; and assisting employers and institutions of higher education in the development and implementation of appropriate policies, handbooks, and training programs. Mr. Nolan speaks regularly at national, regional, and local-audience seminars on employment law issues and legal issues affecting colleges and universities. He often provides training for and consults with clients around the country regarding workplace violence prevention, campus threat assessment, and sexual violence prevention and response. Mr. Nolan is admitted to practice in Massachusetts, New York, and Vermont.

From 2009 to 2011, Mr. Nolan participated as a subject matter expert in the development of the curriculum for a US Department of Justice-funded program, "Campus Threat Assessment Training: A Multidisciplinary Approach for Institutions of Higher Education," and co-presented that training at ten locations throughout the United States. In 2014, Mr. Nolan worked with a team assembled by the Department of Justice's National Center for Campus Public Safety to develop the curriculum for the trauma-informed sexual assault investigation and adjudication training program that is mentioned at pages three and thirteen of the April, 2014 First Report of the White House Task Force to Protect Students from Sexual Assault. Mr. Nolan is a faculty member for pilot presentations of the resulting curriculum that were presented in 2014 and will be presented in 2015 at various locations throughout the United States. Mr. Nolan often collaborates on Title IX/Clery Act and campus threat assessment and safety issues with colleagues at Margolis Healy & Associates (www.margolishealy.com) and Sigma Threat Management Associates (www.SigmaTMA.com).

Mr. Nolan has published numerous nationally distributed articles regarding threat assessment (in both peer-reviewed and non-peer-reviewed journals), employment law, and related issues. Mr. Nolan is listed in Chambers & Partners America's Leading

Lawyers for Business in the area of Labor and Employment law, in The Best Lawyers in America in the area of Labor and Employment law, and in New England Super Lawyers in the area of Employment and Labor law. Mr. Nolan earned his JD with honors from University of Connecticut School of Law, and his BA, magna cum laude, from University of Vermont, where he was elected to Phi Beta Kappa.



ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE