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## The Department of Education Rescinds and Replaces the 2016 Clery Handbook

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On Friday, October 9, 2020, the Department of Education [announced](#) the rescission of and a replacement for the 2016 Handbook for Campus Safety and Security Reporting (“2016 Handbook”). The announcement also identified and explained the more significant changes between the 2016 Handbook and the “replacement,” which is a new Clery-related Appendix to the Federal Student Aid (FSA) Handbook.

### **Why the rescission?**

Two reasons: First, the Department concluded that much of the guidance in the 2016 Handbook exceeded its relevant statutory (20 U.S.C. 1092) and regulatory authority (34 CFR 668.41 and 668.46). Second, the Department determined that the 2016 Handbook was “unnecessarily voluminous,” resulting in an “overriding focus on lengthy annual statistical reports, which may have taken resources away from the mission of campus safety.”

### **What is the replacement?**

As noted above, the replacement is a Clery-specific Appendix to the existing FSA Handbook. You can access a copy of the Appendix [here](#).

Interestingly, and in stark contrast to the Handbook, the Appendix amounts to 13 pages – and, for the most part, simply reiterates the existing statutory and regulatory requirements. Moreover, the Appendix expressly states that: “other than the statutory and regulatory requirements included in this document, the contents of the new Appendix do not have the force and effect of law and are not meant to bind the public.” This is a bit of a change from the 2016 Handbook, which indicated that the Handbook was “intended for use by the Department’s program reviewers who are responsible for evaluating an institution’s compliance with the requirements as well as postsecondary institutions and outside reviewers.” (Handbook, at 1-4). So, while not law, the 2016 Handbook was viewed as persuasive if not binding guidance by many institutions. But what now? How will this Appendix guide the Department’s interpretation, and how much deference will the Department give to institutions’ interpretations of the Appendix? Only time will tell.

### **What are the biggest changes?**

*A word of caution, though the Appendix is far fewer pages than the Handbook, we suspect that brevity may result in more questions than answers. As we continue to unpack this abrupt change, we will undoubtedly identify more questions. But for now, here are some highlights:*

- **Campus Security Authorities.** According to the Appendix, the Department will “defer to an institution’s designation of CSAs as authoritative.” This is a big swing. Lest there be any confusion, the Announcement echoes this change noting “the Department’s new guidance makes clear that it is up to an institution to identify which individuals are CSAs and it is beyond the Department’s authority to disagree with that reasonable determination.” That is meaningful, but before you run to change your CSA list, please remember that you remain bound by the CSA categories contained in 34 CFR 668.46(a). This Appendix change primarily gives you flexibility in interpreting the fourth CSA category, that being “an official who has significant responsibility for student and campus activities.” As just one example, and with the new Title IX regulations top of mind, the Appendix emphasizes that “a CSA for

Clery purposes may or may not include employees who meet the definition of “any official...who has the authority to institute corrective measures” for Title IX purposes under 34 CFR 106.30(a).

- *On-Campus Geography - Reasonably Contiguous.* The Department will no longer apply any measurable distance definition to the “reasonably contiguous” component of your on-campus classifications. In other words, the one-mile radius guidance from the 2016 Handbook is no longer the Department’s guidepost, nor is the requirement to “extend” your reporting area one mile into a bordering public park or body of water. (Handbook, at 2-3 and 2-4). You could still use these as your guide, but you are not required to do so.
- *On-Campus Geography - Controlled By & In Direct Support Of.* In the Announcement, the Department appears to distance itself from the 2016 Handbook’s descriptions of what constitutes “owned or controlled by” and “in direct support of” for purposes of on-campus geography classifications – though the Appendix does seem to retain the notion that a lease would indicate control. Meaningfully, the terms “controlled by” and “in direct support of” do appear in the statutory and regulatory language, so you cannot disregard them. But the Department appears to be providing you more flexibility in interpreting these terms. As one example, this change may impact your classification of institution-associated hospitals and medical centers, as those entities were captured in the Handbook’s “controlled by” description that is now being disavowed. You may wish to seek clarification or technical guidance before removing such properties from your Clery geography list, however, as there may be reasons these properties would still fall within your on-campus definition.
- *Public Property.* Have we reached the end of the sidewalk-street-sidewalk? Yes, it appears that this is no longer the reigning guidance for classifying public property. In the Announcement, the Department appears to distance itself from the 2016 Handbook’s descriptions of what constitutes public property, specifically what constitutes property “within or immediately adjacent to and accessible from the campus.” Again, those terms are contained in the statutory language and pertinent public property regulations, so you cannot disregard them entirely. But the Handbook’s descriptions of public property – including the famous “sidewalk, street, sidewalk” phrase – are no longer binding. You are also, for example, no longer bound by the Handbook’s suggestion that certain standards of use (i.e., students climbing over walls or through fences) create Clery-reportable “public property.” Indeed, the Appendix clearly states that “private property where students have established regular usage – whether legal, illegal, open, or inconspicuous – that is not otherwise campus or noncampus property, is not public property for Clery reporting purposes.” But before you reclassify your public property, we suggest that you carefully consider what changes, if any, you are permitted to (and want to) make for your institution.
- *Noncampus Considerations for Away Trips.* According to the Announcement, the Appendix provides some (much needed) relief to institutions regarding the collection of crime statistics for sponsored stay-away trips and trips to international destinations. The Appendix, however, does not clearly address this issue. Instead, it briefly provides a non-exhaustive list of noncampus examples, including “institution-owned, off-campus apartment units that are rented to students, ancillary research or athletic facilities utilized by students and faculty, and event facilities located off-campus and utilized for campus activities.” Are we to assume that the lack of specific reference to repeated use locations, short-stay away trips, and study abroad programs indicates that these locations are no longer required to be captured within your noncampus geography? That seems to be the suggestion, particularly given the Announcement’s citation to, and reliance on, the [Senate Report of the Task Force on Federal Regulation of Higher Education, “Recalibrating Regulation of Colleges and Universities.”](#) The Senate Report, unlike the Appendix, is clear and expressly recommends that the definition of noncampus property should “[a]t a minimum, ... exclude all foreign locations as well as short-term stays in domestic hotels.” Report at 27. This seems to be the direction the Department is moving, but clarification would be helpful.
- *ASR/AFSR Statements of Policy.* Notably, the Appendix addresses the required ASR/AFSR statements of policy in six pages whereas the 2016 Handbook took several chapters, spanning over 60 pages, to discuss these policy statements. Does this mean that the Department will not require the same level of detail in your ASR/AFSR

statements that is called for by the 2016 Handbook? That seems to be the indication, as the Announcement hints at a desire to curtail overly complicated and lengthy ASRs/AFSRs. But, before you strip segments from your ASR/AFSR, we suggest that you do two things: (1) ensure that you are not stripping something required by statute or regulation; and (2) ask whether that information, even if not required, is useful to the reader.

- *Classifying Clery Offenses.* You are no longer bound by the “explanations, summaries, and examples” of Clery offenses provided in the Handbook, as the Department recognizes that these “may have, at times, created misperceptions and confusion for institutions attempting to properly interpret and apply the definitions.” That being noted, be sure that you continue to apply the appropriate regulatory definitions (based on the offense category) in a consistent manner and document your classification decisions in real time.
- *Guidance for Future Program Reviews.* Per the Appendix, the Department will apply the plain meaning of terms contained within each Clery requirement, and “will accept an institution’s reasonable interpretation of terms as long as those terms are defined clearly to individuals who review the campus’ Clery Act reports.” This sounds promising, but only time will tell how accepting the Department will be with a school’s interpretation.
- *Future Rulemaking?* Per the Appendix, “In the event that the Department believes that more specific definitions are required, it will engage in future negotiated rulemaking to ensure that institutions and the public have an opportunity to comment on those definitions.”

#### ***What if I have questions not covered in the Appendix?***

According to the Announcement, the new Appendix will be accompanied by a “renewed emphasis on technical assistance, including a robust schedule of future webinar offerings.” No specifics are provided yet, but we will continue to track these offerings.

#### ***Can we use this rescission to overturn a prior Clery violation determination made by the Department?***

No. The Announcement states that “[w]hile this rescission will inform the Department’s views moving forward, the rescission will not retroactively apply to previous Department determinations regarding Clery Act violations, fines, enforcement actions, or any other related actions by the Department.”

#### ***What if we have an ongoing program review?***

The Announcement states that, “**where appropriately applied** to prior calendar years, [the 2016 Handbook] will continue to be referenced in program review reports, final program review determinations, and final audit determinations.” But what is meant by “where appropriately applied” remains unclear. Accordingly, institutions undergoing current program reviews will benefit from additional technical guidance.

#### ***Does the Appendix disturb the previously-granted ASR/AFSR extension to December 31, 2020?***

No. None of the changes in the Appendix impact the July 10, 2020 temporary extension (to December 31, 2020) that the Department provided, regarding Clery reporting due to COVID-19.

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We appreciate that this is a big change in the Clery world, and we will continue to track any developments. Should you or your colleagues have any questions, please feel free to contact us.

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