

Preventable Tragedy in the Lauren McCluskey Case: Addressing Campus-Based Intimate Partner Violence Under the Clery Act

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Introduction

On October 22, 2018, Melvin Rowland entered the University of Utah's campus to hunt down and kill his ex-girlfriend, Lauren McCluskey.^{1, 2} Lauren was a successful, twenty-one-year-old student-athlete and college senior set to graduate in May 2019.³ In contrast, Rowland was a thirty-seven-year-old convicted felon and registered sex offender who had hidden his true identity from Lauren, claiming instead to be a twenty-eight-year-old community college student named "Shawn Fields" studying computer

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1. All facts cited in this Introduction are taken from the civil complaint in the *McCluskey* case unless otherwise cited.

2. Complaint, ¶¶ 20, 97.

3. *Id.*, ¶ 38; see also Ashley May, *Lauren McCluskey, University of Utah Student Killed by Sex Offender, Remembered as "Standout" Athlete*, USA TODAY (Oct. 24, 2018), <https://www.usatoday.com/story/news/nation-now/2018/10/24/lauren-mccluskey-utah-student-shot-sex-offender-remembered/1748143002/>.

science.⁴ After learning about Rowland’s true identity, she sought to end the relationship with support from her friends.⁵ During this time, as argued by the McCluskey family in its pending lawsuit, the University of Utah had the opportunity to protect Lauren,⁶ which might have saved her life.

The University of Utah had the opportunity to take meaningful action based upon good faith, third-party reports regarding Rowland’s dating violence, and stalking of Lauren.⁷ Instead of reaching out to offer support to Lauren upon notice of this abuse, campus officials decided to safeguard Lauren’s “privacy” unless and until she herself reported Rowland.⁸ Even upon learning that Rowland intended to bring a gun onto campus, which led a fellow student to express fear for Lauren’s life, campus officials failed to appreciate the risk and thus failed to intervene.⁹ Rowland continued his harassment after Lauren ended the relationship,¹⁰ so she reported him to campus law enforcement.¹¹ After informing Rowland that she had reported him to law enforcement, the harassment and stalking continued and even escalated.¹² The McCluskey family’s civil complaint argues that the University of Utah showed deliberate indifference towards Rowland’s pattern of dating violence and stalking, which left Lauren vulnerable to ongoing harassment and violence.¹³ Leading up to her murder, there were multiple warning signs that Rowland was trying to lure Lauren, including his efforts to impersonate a law enforcement officer on the day of the murder.¹⁴ Despite this and previous dangerous behavior, the University of Utah failed to ban Rowland, a nonstudent, from accessing Lauren’s residence hall and the campus,¹⁵ and it failed to provide Lauren with information on how to obtain a restraining order or other protective

4. Complaint, ¶ 40.

5. *Id.*, ¶¶ 68–71 (recounting how Rowland effectively held Lauren hostage one night in her dorm room, refusing to leave campus or end the relationship, as part of his escalating stalking and abuse).

6. *Id.*, ¶¶ 15–17, 85, 111–15.

7. *Id.*, ¶¶ 48–58.

8. *Id.*, ¶¶ 54, 59.

9. *Id.*, ¶ 52.

10. *Id.*, ¶¶ 13, 69, 71, 75, 76.

11. *Id.*, ¶ 7.

12. *Id.*, ¶¶ 79, 91, 94.

13. *Id.*, ¶¶ 14, 78–84, 111–15; *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999) (holding that “recipients may run afoul of Title IX not merely by ‘caus[ing]’ students to undergo harassment but also by ‘mak[ing] them liable or vulnerable’ to it”).

14. Complaint, ¶¶ 13, 74, 75, 77, 94.

15. *Id.*, ¶¶ 8, 111, 113.

measures against him.¹⁶ It also failed to arrest Rowland, thus leaving him to freely stalk her on campus.¹⁷ Instead of receiving support from her university, this “senior track standout” faced an abusive, and ultimately deadly, felon alone when he came for her on the University of Utah’s campus.¹⁸

That fateful day, like so many days before, Rowland came onto campus to stalk and abuse Lauren.¹⁹ Rowland grabbed an unsuspecting Lauren, who was returning from class while talking on a cell phone with her mother, Jill McCluskey.²⁰ Mrs. McCluskey heard Rowland kidnapping her daughter—he dragged Lauren across a parking lot while she cried out for help.²¹ Lauren’s father immediately reached out to law enforcement, hoping to save his daughter’s life.²² Hours away in Washington state, waiting helplessly, Mr. and Mrs. McCluskey eventually learned that Rowland had shot Lauren seven times to tragically end her promising life before taking his own.²³ These murderous actions were part of an ongoing pattern of “stalking, abuse, intimidation, dating violence, domestic violence, sexual harassment, gender based discrimination, and other dangerous and abusive behaviors” occurring on and off campus.²⁴ The Lauren McCluskey case represents the high cost of educational institutions failing victims of intimate partner violence. Sadly, it is not the only tragedy of its kind. In 2010, Yeardey Love’s murder grabbed national

16. *Id.*, ¶¶ 85, 113; see Clery Act, 20 U.S.C. § 1092(f)(8)(B)(iii)(IV) (2018) (requiring federal recipients to provide written procedures on 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”).

17. Complaint, ¶¶ 8, 85 (citing UTAH CODE ANN. §§ 77-36-2.1, 76-5-106.5(17), and 78B-7-408 requiring campus law enforcement to “use all reasonable means to protect the victim and prevent further violence” and to “arrange, facilitate, or provide the victim with immediate and adequate notice of the rights of victims and of the remedies and services available to victims of domestic violence,” such as how to obtain a civil order of protection or stalking injunction).

18. See USA TODAY, *supra* note 3.

19. Complaint, ¶¶ 13, 20, 43, 97.

20. See *id.*, ¶ 20, 97.

21. *Id.*

22. *Id.*, ¶ 20.

23. *Id.*

24. *Id.*, ¶ 1.

headlines,^{25,26} as did the murder of Rebecca Eldermyre in 2015.²⁷ There are many students suffering from intimate partner violence on campuses each day. Gone unchecked, perpetrators of dating violence and stalking claim far too many victims on college campuses across the country.²⁸ It is time for colleges and universities to do more.

In loving memory of Lauren McCluskey, this law article reminds campus officials about the realities of dating violence and stalking on campus;²⁹ outlines victim rights and prevention education requirements under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act);³⁰ and ends with a case study on how the University of Utah could have done more to prevent this tragedy.³¹ As well articulated within the 2013 Violence Against Women Reauthorization Act (VAWA) amendments to the Clery Act,³² campus officials must do more to ensure their responses to campus intimate partner violence both “protects the *safety of victims* and promotes *accountability*” for abusers.³³

I. Campus-Based Intimate Partner Violence

Starting in 2010, campus sexual assaults have routinely grabbed national headlines, and the resulting pressure on colleges and universities to do more has caused significant changes within institutions of higher education across the country.³⁴ As found by the U.S. Department of Justice’s Bureau of Justice Statistics (BJS), female college students have long faced high rates of sexual assaults, more often committed at the hands of acquaintances

25. Mary Pat Flaherty, *George Huguely Sentencing Set in Yeardeley Love Murder*, WASH. POST (Aug. 29, 2012), https://www.washingtonpost.com/local/crime/george-huguely-sentencing-set-in-yeardeley-love-murder/2012/08/29/ecfc2d6a-f127-11e1-adc6-87dfa8eff430_story.html.

26. Learn more at <https://www.joinonelove.org>.

27. Assoc. Press, *Violent Death of Miami University Student Highlights Potential Domestic Dangers*, CBS CLEVELAND (Feb. 9, 2015), <https://cleveland.cbslocal.com/2015/02/09/violent-death-of-miami-university-student-highlights-potential-domestic-dangers/>.

28. *See infra*, Section I.

29. *Id.*

30. *See infra*, Section II.

31. *See infra*, Section III.

32. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (codified at 20 U.S.C. § 1092(f)).

33. Clery Act, 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(bb) (2018) (emphasis added) (regarding annual training for campus officials involved in campus proceedings).

34. *See, e.g.*, Laura L. Dunn, *The Anti-Campus Sexual Assault Activism Movement Under Title IX*, in PREVENTING SEXUAL VIOLENCE ON CAMPUS: CHALLENGING TRADITIONAL APPROACHES THROUGH PROGRAM INNOVATION (Sara Carrigan Wooten & Roland W. Mitchell eds., 2016).

than intimate partners.³⁵ This stands in contrast to the comparable rates of sexual assaults experienced by college-aged female nonstudents, which is equally committed by intimate partners and acquaintances.³⁶ While the national focus on campus sexual assault has led several institutions to improve their awareness and prevention education efforts as well as create more Title IX offices to better respond to complaints,³⁷ an unintended consequence is the increased institutional focus on acquaintance sexual assault rather than on intimate partner violence and stalking.³⁸

In 2013, VAWA sought to rectify this situation by directly including dating violence, domestic violence, and stalking along with sexual assault (hereinafter referred to collectively as “gender violence”) in the Clery Act’s requirements for reporting within the annual crime statistics and daily crime log.³⁹ In addition to expanding reporting requirements, VAWA mandated prevention education efforts,⁴⁰ imposed procedural protections for both parties in campus hearings,⁴¹ and created statutorily based victim rights.⁴² Despite these additions, Congress’s continued failure to create any private cause of action or allowance for the Clery Act to serve as a standard of care⁴³ means that far too many institutions of higher education have ignored the VAWA amendments at great cost to their students.

In filing their federal lawsuit, the McCluskey family, by and through their counsel, took the time to educate the public and school officials about

35. BUREAU OF JUSTICE STATISTICS (BJS), U.S. DEP’T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 7 (2014), <https://bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

36. *Id.* (finding that sexual assaults were committed by friends and acquaintances (thirty-seven percent) at comparable rates to intimate partners (thirty-four percent)).

37. *See* Dunn, *supra* note 34 (recounting the influence of student activism on Title IX policy and compliance at the national and campus levels).

38. Know Your IX organizer and activist Siobhan Kelly warned about this during the 2014 VAWA rulemaking committee and pushed for more recognition of intimate partner violence and the spectrum of related abuse. *See also* VAWA; Final Rule, 79 Fed. Reg. 62752 (Oct. 20, 2014) (recounting how “numerous commenters raised concerns about our proposal not to include psychological or emotional abuse in the definition of ‘dating violence,’ which would ‘more accurately reflect the range of victims’ experiences of abuse and recognize the serious and disruptive impact that these forms of violence have’ given the risk that ‘victims would not feel comfortable reporting or pressing charges for cases in which they were psychologically or emotionally abused if the definition did not explicitly speak to their experiences’”).

39. *See* Violence Against Women Reauthorization Act; *see also* 20 U.S.C. § 1092(f)(1)(F)(iii) (2018).

40. 20 U.S.C. § 1092(f)(8)(A)(i), (B)(i).

41. 20 U.S.C. § 1092(f)(8)(B)(iv).

42. 20 U.S.C. § 1092(f)(8)(B)(ii)–(vii).

43. 20 U.S.C. § 1092(f)(14)(i); *see also* 20 U.S.C. § 1092(f)(14)(ii) (prohibiting the Act’s use as a standard of care).

the deadly realities of intimate partner violence in America, occurring both on and off campus:

Domestic violence, dating violence and other forms of sexual harassment are widespread and serious problems on university campuses and throughout the United States, which disproportionately affect women and often have deadly consequences. For example, 21% of college students have experienced dating violence at the hands of a current partner with 32% experiencing dating violence at the hands of a former partner. Over 13% of college women report they have been stalked and 42% by a boyfriend or ex-boyfriend. Nearly one third of college students report having physically assaulted a dating partner in the previous 12 months. Fifty women in the United States are killed every month by gun violence alone at the hands of an intimate partner. Twenty people in the United States are assaulted by an intimate partner every minute.⁴⁴

Of particular note, there is a high rate of gun violence committed by intimate partners within the United States.⁴⁵ Research has found that firearms are commonly used both in fatal and non-fatal intimate partner violence, and regarding the former, firearms are the most commonly used murder weapon as compared to “all other means combined.”⁴⁶

Often correlated with intimate partner violence is stalking behavior, which includes unwanted and often persistent communications or correspondence, following or spying, and the spreading of rumors or other private information about a victim, among other things.⁴⁷ The BJS has found that almost one-third of reported stalking incidents are committed by a former intimate partner.⁴⁸ Stalking behavior is most common after a

44. Complaint, ¶ 5 (quoting statistics from SEXUAL ASSAULT PREVENTION & AWARENESS CTR., UNIV. OF MICH., <https://sapac.umich.edu/article/311> (citing statistics from NAT'L COAL. AGAINST DOMESTIC VIOLENCE (2007), <https://ncadv.org>, and BREAK THE CYCLE, INC. (2005), <https://www.breakthecycle.org>)).

45. VIOLENCE PREVENTION CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2015 HOMICIDE DATA 1 (2017), <http://www.vpc.org/studies/wmmw2017.pdf> (citing Leonard J. Paulozzi et al., *Surveillance for Homicide Among Intimate Partners—United States, 1981–1998*, 50 MORBIDITY & MORTALITY WEEKLY REP., CDC SURVEILLANCE SUMMARIES, No. SS-3, Oct. 12, 2001, at 1).

46. *Id.*

47. KATRINA BAUM ET AL., BJS, U.S. DEP'T OF JUSTICE, STALKING VICTIMIZATION IN THE UNITED STATES 1 (Jan. 2009), <https://victimsofcrime.org/docs/src/baum-k-catalano-s-rand-m-rose-k-2009.pdf?sfvrsn=0>.

48. *See id.* at 4.

breakup and positively correlates with an escalation into physical and/or sexual violence by that former partner.⁴⁹ Given this reality, the McCluskey family, by and through counsel, informed the public and school officials about the relationship between stalking, intimate partner violence, and homicide:

Moreover, three quarters of the abusers who ultimately killed their intimate partners engaged in stalking of the intimate partners before killing them. In addition to stalking, several other factors are known to significantly increase the risk of violence or death at the hands of an intimate partner and such factors are commonly evaluated to assess the danger for those at risk. Such factors include, but are not limited to: a short courtship, extreme jealousy, isolation from friends or family, attempts to monitor or control daily activities, stalking, substance abuse, chronic unemployment, access to a gun, prior instances of domestic violence or dating violence, threats to harm or kill the victim, threats of suicide from the abuser, forced sex, manipulative behavior, visions of grandiosity, profound narcissism, lies about military service, bravery or heroism, exaggerated fear of danger associated with the outside world or any attempt by the victim to end the relationship. In fact, danger to the victim *drastically* increases when a victim leaves an abuser, remains extremely high for three months, dips slightly for the next nine months and drops off precipitously after one year. Other warning signs of abusive behavior that are often evident with respect to the victim include, but are not limited to: unexplained bruising, depression, chronic fatigue, changes in personality or appearance, changes in eating or sleeping patterns, a decline in self-esteem, increased worry about pleasing, displeasing or angering the other partner and constantly checking in with the other partner.⁵⁰

Every campus official should know these warning signs and risk factors in order to better assist victims of intimate partner violence and stalking in order to improve victim safety on campus and ensure accountability for abuse.⁵¹

49. Sadguna Anasuri, *Intimate Partner Violence on College Campuses: An Appraisal of Emerging Perspectives*, 5 J. EDUC. & HUMAN DEV. 2, 7 (June 2016).

50. Complaint, ¶ 6; see VIOLENCE PREVENTION CTR., *supra* note 45.

51. See 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(bb) (2018).

While some institutions of higher education are working to ensure victim safety, far too few are focused on ensuring accountability. Accountability, however, is the best way to prevent tragedy. Tragedies like the Lauren McCluskey case will become #NoMore only when educational institutions center campus safety as part of their educational mission by saying #TimesUp to perpetrators. Institutions need to see prevention and response as full-circle efforts in order to save the lives of campus community members and ensure access to education on a safe campus.

II. Federal Laws Addressing Intimate Partner Violence on Campus

On the federal level, both the Clery Act, 20 U.S.C. § 1092(f), as amended by VAWA, and Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681, *et seq.*, offer protections for victims of campus-based intimate partner violence. These two laws apply to educational institutions in receipt of federal funding (hereinafter, recipients).⁵² While Title IX covers a variety of educational settings,⁵³ the Clery Act is limited to institutions of higher education.⁵⁴ Neither law limits its federal rights or protections to students only; instead, the Clery Act provides rights to “victims” without limitation,⁵⁵ and Title IX’s statutory language protects any “person” seeking educational access, opportunities, or benefits.⁵⁶ As interpreted, Title IX requires recipients to remedy hostile educational environments for all those impacted within the campus community,⁵⁷ not

52. 20 U.S.C. § 1092(f)(1); Title IX, 20 U.S.C. § 1681(a) (2018).

53. 20 U.S.C. § 1681(c) (“For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.”).

54. *Id.* § 1092(f)(1).

55. *Id.* § 1092(f)(8)(B)(iii); *see also id.* § 1092(f)(8)(C) (articulating that students and employees also should receive information under these victims’ rights provisions regardless of whether the gender violence “occurred on or off campus”).

56. *Id.* § 1681(a); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979) (noting the “unmistakable focus on the benefitted class” per the statutory language of Title IX).

57. *See, e.g.*, OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER 17 (2011) [hereinafter 2011 DCL] (outlining “[r]emedies for the broader student population might include but are not limited to: *Counseling and Training*”) (emphasis in original). In 2017, Education Secretary Betsy DeVos and Assistant Secretary for Civil Rights Candice Jackson rescinded this guidance. OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER 1–2 (2017).

just for those directly victimized by sexual misconduct.⁵⁸ The Clery Act likewise protects the whole campus community by mandating prevention education and related trainings on campus throughout the educational term.⁵⁹ It also contains explicit victims' rights for survivors of intimate partner violence and stalking.⁶⁰ Given the prevalent scholarship around Title IX, this article focuses on the often-overlooked protections offered by the Clery Act in an effort to improve institutional practices and thus prevent future tragedies on campus.

A. Victims' Rights Under the Clery Act

Separate from the civil rights–based protections of Title IX,⁶¹ the Clery Act contains statutorily based victim rights that obligated recipients to do more for those who report gender violence. While there is no private cause of action to enforce the Clery Act, and it cannot be used as a standard of care,⁶² anyone may seek federal enforcement of the Act through the U.S. Department of Education's Clery Act Compliance Division (CACD) within the Office for Federal Student Aid.⁶³ For violations of the Clery Act, the Department may issue fines for violations committed within the last five years.⁶⁴ The Department has issued significant fines in recent years for widespread violations, such as those regarding the systemic mishandling of

58. See OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: SEXUAL HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 15, 20 (2001) [hereinafter 2001 TITLE IX GUIDANCE] https://www.nccpsafety.org/assets/files/library/Revised_Sexual_Harassment_Guidance_2001.pdf.

59. See *infra* Section II.B.

60. 20 U.S.C. § 1092(f)(8)(B)(ii)–(vii) (2018); see also *id.* § 1092(f)(17) (prohibiting retaliation).

61. *Doe v. U.S. Dep't of Health & Hum. Servs.*, 85 F. Supp. 3d 1, 4 (D.D.C. 2015) (holding that the 2013 VAWA amendments to the Clery Act “had no effect on Title IX” given the different statutory focuses of each law).

62. See 20 U.S.C. § 1092(f)(14).

63. See *Clery Act Reports*, FED. STUDENT AID, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports> (“A review may be initiated when a complaint is received, a media event raises certain concerns, the school’s independent audit identifies serious non-compliance, or through a review selection process that may also coincide with state reviews performed by the FBI’s Criminal Justice Information Service (CJIS) Audit Unit. Once a review is completed, the Department issues a Final Program Review Determination.”).

64. Fines are issued pursuant to 20 U.S.C. § 1094(c)(3)(B) (2018) and 28 U.S.C. § 2462 (2018). See *In re Lincoln Univ.*, Docket No. 13-68-SF (FSA) (Apr. 25, 2016) (finding a five-year statute of limitations applies to fines regarding violations of the Clery Act and that such violations can be renewed by a recipient’s ongoing misrepresentation) (citing *U.S. SEC v. E-Smart Techs.*, 31 F. Supp. 3d 69, 88–89 (D.D.C. 2014)).

campus sexual violence.⁶⁵ Under the Clery Act, victims of intimate partner violence are entitled to certain rights, options, and information, which is dominantly found under 20 U.S.C. § 1092(f)(8)(B)(ii)–(vii). Each victims’ rights provision within the Clery Act is discussed below in turn.

1. INFORMATION ON SANCTIONS AND PROTECTIVE MEASURES

Under 20 U.S.C. § 1092(f)(8)(B)(ii), a recipient must provide written information to a victim about the “[p]ossible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking.” This statutory provision clearly relates to situations where a campus community member has been implicated, such as a student or employee who is subject to an institution’s disciplinary procedures. Arguably, it also applies to incidents involving noncampus community members because recipients may still issue no-trespass orders to ban such individuals from entering campus as a protective measure under relevant campus procedures.⁶⁶ Pursuant to its implementing regulations, the Clery Act requires recipients to list “*all* of the possible sanctions” issuable per offense rather than merely providing a range, as is the common practice of many educational institutions to thus avoid the specificity required under the law.⁶⁷ This

65. See, e.g., Jake New, *Historic Fine for Penn State*, INSIDE HIGHER ED (Nov. 4, 2016), <https://www.insidehighered.com/news/2016/11/04/education-departments-historic-sanction-against-penn-state-clery-violations> (\$2.4 million); Keila Szpaller, *University of Montana Fined Nearly \$1 Million for Clery Act Violations; UM to Appeal*, MISSOULIAN (Oct. 1, 2018), https://missoulian.com/news/local/university-of-montana-fined-nearly-million-for-clery-act-violations/article_219218a5-0bc5-5eea-8d55-6f5f962ddc00.html (\$996,614); Paula Lavigne & Dan Murphy, *Federal Report Cites Michigan State with Systemic “Serious Violations” of Campus Safety Law*, ESPN (Jan. 30, 2019), https://www.espn.com/espn/story/_/id/25885611/us-department-education-cites-michigan-state-university-clery-act-violations-espn-lines.

66. See, e.g., *Doe v. Old Dominion Univ.*, 289 F. Supp. 3d 744 (E.D. Va. 2018) (asserting deliberate indifference under Title IX based in part on the institution’s failure to issue a written no-trespass order against a campus visitor after a reported on-campus rape to effectively deny ongoing educational access to the victim).

67. 34 C.F.R. § 668.46(k)(iii) (2018) (emphasis added); see also OFFICE OF POSTSECONDARY EDUC., U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 8-17 (2016) [hereinafter 2016 CAMPUS SAFETY HANDBOOK] (requiring institutions to “[b]e specific,” with an example of listing the “type and length of the suspension” possible) (emphasis added).

information is essential to help victims determine whether to formally report an offense or otherwise seek institutional intervention.⁶⁸

2. PROCEDURES AFTER GENDER VIOLENCE

Under 20 U.S.C. § 1092(f)(8)(B)(iii), a recipient must provide written information to a victim about the procedures she, he, or they⁶⁹ should follow after an incident of gender violence to ensure their safety and the potential prosecution of the offense, if so desired.

a. Subpart (I)

Subpart (I) requires recipients to provide written information to victims on the “importance of preserving evidence” following an incident of gender violence.⁷⁰ This information helps ensure victims understand the critical role of timely evidence gathering that may “assist in proving that the alleged criminal offense occurred” or otherwise assist in “obtaining a protection order.”⁷¹

Unfortunately, there is a fundamental flaw in the way that the U.S. Department of Education interprets this long-standing statutory provision.⁷² Specifically, the Department does not interpret this mandate to require that recipients provide information about where victims may obtain forensic

68. As repeatedly found in research, many victims choose not to report gender violence out of fear that there will be a lack of consequences, while other victims may worry that the consequence for reporting may be too severe to self-censor their reporting. *See, e.g.*, BONNIE S. FISHER ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>; Marjorie R. Sable et al., *Barrier to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157, 158 (2006), http://www.middlebury.edu/media/view/240971/authentic/sable_article.pdf.

69. Given the high rates of gender violence committed against individuals who identify outside the gender binary, the pronoun “their” is used here in the singular to acknowledge this population through the use of a gender-neutral pronoun. BUREAU OF JUSTICE STATISTICS, CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT, APP. E-9 (2016) (finding that transgender and gender nonconforming students experienced higher rates of sexual violence (27.8 percent) compared to female students (20.4 percent) since entering college).

70. 20 U.S.C. § 1092(f)(8)(B)(ii)(I) (2018).

71. 34 C.F.R. § 668.46(b)(11)(ii)(A) (2018).

72. The original Clery Act passed as Title II of the Student Right-to-Know and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2384–87 (codified as 20 U.S.C. § 1092(f) (2018)). In 1992, the Campus Sexual Assault Victim’s Bill of Rights amended the Clery Act to add this relevant provision. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 486(c), 106 Stat. 448, 621 (codified as 20 U.S.C. § 1092(f)(7)(B)(iii) (2018)).

examinations.⁷³ This exceedingly poor statutory interpretation has real-life consequences that may deter victims from preserving forensic evidence.⁷⁴ For example, within the District of Columbia, while there are around twenty institutions of higher education and six hospitals, only one hospital provides forensic examinations, which severely limits a victim's ability to access medical services that will allow them also to preserve evidence.^{75, 76}

b. Subparts (II) and (III)

Subparts (II) and (III) require recipients to provide written information to victims about to “whom the alleged offense should be reported.”⁷⁷ Reporting sources include a recipient's Title IX coordinator, who should inform victims about their right to access the Title IX–based grievance process on campus.⁷⁸ The Clery Act goes on to include the right for victims to “notify proper law enforcement authorities, including on-campus and local police,”⁷⁹ the right to be “assisted by campus authorities in notifying law enforcement authorities,”⁸⁰ and the right to “decline to notify such authorities.”⁸¹ Regarding the right to report to law enforcement, the Clery Act requires recipients to disclose the law enforcement authority (or lack

73. See VAWA; Final Rule, 79 Fed. Reg. 62762 (Oct. 20, 2014) (“The statute does not require institutions to provide information specifically about where to obtain forensic examinations; however, we urge institutions to provide this information when stressing the importance of preserving evidence.”).

74. See *infra* note 71.

75. In 2008, the Executive Office of the Mayor and the Office of Victim Services established the Sexual Assault Nurse Examiners (SANE) division within Washington Hospital Center. See *Hospital Center Milestones*, MEDSTAR WASH. HOSP. CTR., <https://www.medstarwashington.org/our-hospital/media-center/media-kit/hospital-center-milestones>.

76. While in law school, this author performed research for Network of Victim Recovery of D.C. (NVRDC), <https://www.nvrdc.org/>, to find that many survivors went to the closest hospital to receive forensic examinations and necessary medical care. These same survivors routinely waited for hours in the emergency room, only to be accepted back into the treatment areas where they would then learn that they could not receive a forensic examination because they were at the wrong hospital. This research found that these survivors often would forgo transportation to the correct hospital for a forensic examination given the previous wait time given the high likelihood of further delay before receipt of necessary medical care. Thus, many survivors often chose to obtain medical care at the wrong hospital to effectively lose the opportunity for forensic evidence collection. While this is but one jurisdiction, many jurisdictions across the country offer limited locations for forensic examinations to suggest that this issue may occur elsewhere, thus making “rape kit” access as important an issue as rape kit testing. See *What Is the Rape Kit Backlog?*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/what-rape-kit-backlog>.

77. 20 U.S.C. § 1092(f)(8)(B)(iii)(II) (2018).

78. 34 C.F.R. § 106.8(a) & (b) (2018).

79. 20 U.S.C. § 1092(f)(8)(B)(iii)(III)(aa); 34 C.F.R. § 668.46(b)(11)(ii)(C)(1).

80. 20 U.S.C. § 1092(f)(8)(B)(iii)(III)(bb); 34 C.F.R. § 668.46(b)(11)(ii)(C)(2).

81. 20 U.S.C. § 1092(f)(8)(B)(iii)(III)(cc); 34 C.F.R. § 668.46(b)(11)(ii)(C)(3).

thereof) of their campus security team.⁸² This prevents any confusion around whether a victim's report to campus authorities will trigger the criminal process.

Despite the Clery Act's clarity around these reporting rights and options, many recipients continue to get this provision wrong in practice. Some recipients habitually force reports into the criminal system, possibly to avoid their own responsibilities under federal law, which is something Obama-era Title IX guidance sought to correct.⁸³ Still other recipients may discourage victims from reporting to law enforcement in order to sweep crimes under the proverbial rug.⁸⁴ The Department's subregulatory guidance on the Clery Act clarifies that these reporting rights and options are mandatory.⁸⁵ Rather than tipping the scale, recipients need to honor the rights of survivors to choose whether and when to report to law enforcement.^{86, 87}

c. Subpart (IV)

Subpart (IV) requires recipients to share written information about "orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court," as well as the recipient's "responsibilities" regarding such orders.⁸⁸ Small but mighty, this provision packs a punch! First, it requires recipients to provide victims of intimate

82. 20 U.S.C. § 1092(f)(1)(C)(i)–(iii); see also 34 C.F.R. § 668.46(b)(4).

83. See 2011 DCL, *supra* note 57, at 10 ("[A] criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.").

84. See, e.g., Alex Garland, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <https://time.com/2905637/campus-rape-assault-prosecution/>; Laura LaFay, *Student Date-Rape Complaint Jolts William and Mary*, WASH. POST (Apr. 7, 1991), <https://www.washingtonpost.com/archive/local/1991/04/07/students-date-rape-complaint-jolts-william-and-mary/f0f9511f-f108-458d-abf6-a4d35efcc925/?noredirect=on>.

85. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-10 (requiring "appropriate and specific contact information for the authorities, for example, your campus police or a local law enforcement agency" along with a statement that "must explain what is involved in making a police report" and "that your institution will comply with a student's request for assistance in notifying authorities" because it "is mandatory").

86. As seen in this detailed article regarding the high-profile campus sexual assault case against Jameis Winston, too often law enforcement may collude to protect perpetrators; thus, the criminal process is not always the right choice for a survivor. Walt Bogdanich, *Error in Inquiry on Rape Allegations Against FSU's Jameis Winston*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

87. *But see infra* note 123 (discussing obligations under Title IX that may require recipients to proceed with the campus process regardless of a victim's consent based on obligations to the broader campus community).

88. 20 U.S.C. § 1092(f)(8)(B)(iii)(IV) (2018).

partner violence with information on available campus-level protective orders.⁸⁹ These often include no-contact orders or directives,⁹⁰ as well as no-trespass orders to ban noncampus community members from entering the physical campus.⁹¹ It also requires recipients to provide victims with information about available civil order options (i.e., restraining orders, peace orders, protective orders, etc.). Specifically, the Department requires a recipient to ensure victims know (1) “what legal options are available to them and under what circumstances,” (2) “how to request information about the available options” with “specific contact information” provided; and (3) “how to file a request” through the provision of “instructions” for each available order.⁹² This is a level of information that far too many recipients fail to provide, leaving many victims without access to available protective measures on campus and within the community. Finally, this provision requires recipients to disclose how they will comply with and otherwise enforce those civil orders. Whenever recipients comply with this provision, victims of intimate partner violence are empowered to seek orders that ensure their safety and security, both on campus and within the community.

3. EQUITABLE PROCEDURAL PROTECTIONS

Under 20 U.S.C. § 1092(f)(8)(B)(iv), recipients must provide written information to victims on their “[p]rocedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking.” This provision breaks down into several subparts, each addressed below.

89. 34 C.F.R. § 668.46(b)(11)(ii)(D) (2018) (specifying that institutions must provide information on their available orders, not merely civil options within the community); *see also* 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-11.

90. As part of a disturbing Trump-era trend, recipients are commonly imposing default “mutual no contact orders” onto reporting victims, as well as those accused. *See* OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 2–3 (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [hereinafter 2017 INTERIM TITLE IX GUIDANCE] (“It may be appropriate for a school to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.”); *but see* *Doe v. Ore. State Univ.*, 6:18-cv-01432 (D. Or.) (challenging a mutual no-contact order under Title IX as retaliation and discrimination).

91. *See Doe v. Old Dominion Univ.*, 289 F. Supp. 3d 744 (E.D. Va. 2018).

92. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-11.

a. Subpart (I)(aa)

Subpart (I)(aa) requires this campus process to be “prompt, fair, and impartial” regarding both the “investigation and resolution” of the proceeding.⁹³ These statutory requirements are similar to the standards set under the U.S. Department of Education’s guidance from the Office for Civil Rights (OCR), which requires that the Title IX grievance process be “prompt, thorough and impartial” and “adequate, reliable and impartial.”⁹⁴ The Clery Act’s implementing regulations provide significant detail on what a “prompt, fair, and impartial” process should include.⁹⁵ Specifically, a recipient must have written policies that provide for the completion of the process “within reasonably prompt timeframes” and that allow for “extension[s] of timeframes for *good cause* with written notice to the accuser and the accused of the delay and the reason for the delay.”⁹⁶

A process cannot be “prompt, fair, and impartial” unless it “lacks hidden agendas and conditions”; thus, the Department requires recipients to “make appropriate information available to each party” in a manner that “is fair and clear to all parties.”⁹⁷ Furthermore, it requires recipients to avoid any “conflict of interest or bias” when conducting the campus process, which has been a historical issue at some institutions.⁹⁸ It also means recipients must follow their written policies and procedures,⁹⁹ provide timely notice of meetings to the relevant parties,¹⁰⁰ and give the parties equal access to “any information that will be used during informal

93. 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa) (2018); 34 C.F.R. § 668.46(k)(2)(i) (2018).

94. 2001 TITLE IX GUIDANCE, *supra* note 58, at 15, 20.

95. 34 C.F.R. § 668.46(k)(3)(i).

96. *Id.* § 668.46(k)(3)(i)(A) (emphasis added); *see also* 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-15, 8-16, 8-18 (requiring a recipient to provide information on “steps” and “anticipated timeframes” within its process).

97. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-18.

98. 34 C.F.R. § 668.46(k)(3)(i)(C) (prohibiting a conflict or bias against either party). In high-profile cases, some recipients have intentionally selected biased adjudicators or investigators to stack the deck in favor of those accused, who are often college athletes. *See, e.g.,* Tom Fornelli, *Woman Boycotts Hearing After Florida Picks Booster to Hear Callaway Assault Case*, CBS SPORTS (Aug. 5, 2016), <https://www.cbssports.com/college-football/news/women-boycotts-hearing-after-florida-booster-picked-to-lead-callaway-assault-case/>; Christina Cauterucci, *Major Title IX Lawsuit Says University of Tennessee Is “Indifferent” to Athletes’ Alleged Rapes* (Feb. 10, 2016), <https://slate.com/human-interest/2016/02/major-title-ix-lawsuit-says-university-of-tennessee-is-indifferent-to-athletes-alleged-rapes.html> (quoting the lawsuit as alleging “[a]thletes knew in advance that UT would: support them even after a complaint of sexual assault; arrange for top quality legal representation; and then direct them to the . . . hearing procedure that denies victims the right to a hearing and to the same equal procedural, hearing, and process rights as given to perpetrators of rape and sexual assault”).

99. 34 C.F.R. § 668.46(k)(3)(i)(B)(1).

100. *Id.* § 668.46(k)(3)(i)(B)(2).

and formal disciplinary meetings and hearings.”¹⁰¹ For cases involving accused campus community members, these procedural protections are essential for recipients to ensure proper handling of intimate partner violence complaints with an eye towards accountability.

b. Subpart (I)(bb)

Subpart (I)(bb) requires that all stages of the campus process be conducted by campus officials who are trained on an annual basis regarding “issues related to domestic violence, dating violence, sexual assault, and stalking,” and in particular know how to “conduct an investigation and hearing process that protects the safety of victims and promotes accountability.”¹⁰² The Department does not leave recipients to guess about what these trainings should entail and instead provides detailed information in its subregulatory guidance. Specifically, recipients should provide trainings that include “*relevant evidence* and how it should be used during a proceeding; *proper techniques* for questioning witnesses; basic procedural rules for conducting a proceeding; and avoiding actual and perceived conflicts of interest.”¹⁰³

Ensuring campus officials are adequately trained to identify the warning signs of escalating violence is key to properly addressing intimate partner violence and stalking on campus, yet it is too often missed by campuses that focus narrowly on acquaintance sexual assault, as discussed *supra*. Recipients need to ensure proper annual training to campus officials around intimate partner violence and stalking to ensure victim safety and accountability for perpetration.¹⁰⁴

c. Subpart (II)

Subpart (II) requires recipients to notify both parties that they have the same right to have “others present” during the institutional disciplinary

101. *Id.* § 668.46(k)(3)(i)(B)(3).

102. 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(bb) (2018); 34 C.F.R. § 668.46(k)(2)(ii).

103. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-19 (emphasis added) (requiring also that annual trainings be “updated as necessary to address the latest issues and techniques for conducting proceedings on these topics from beginning to end”).

104. *See* 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(bb), *supra* note 33.

process,¹⁰⁵ including an “advisor of their choice.”¹⁰⁶ An advisor means “any individual who provides the accuser or accused support, guidance, or advice” without limitation, thus including attorneys, advocates, counselors, parents, or anyone else of the party’s choosing.¹⁰⁷ Recipients are prohibited from limiting a party’s choice of advisor to campus community members only, as was debated and declined during the 2014 VAWA rulemaking committee deliberations.¹⁰⁸

Importantly, advisors may be present throughout the campus process, both in proceedings and during any prior or subsequent meetings; thus, the Clery Act ensures victims (and the accused) have support at all stages of the process.¹⁰⁹ This right to an advisor of choice is essential for victims who often may not realize that the accused has obtained counsel or another advisor, such as a coach or professor, to advocate on his, her, or their behalf to potentially influence the process. Too often survivors assume the process will work effectively without an advisor, and only after failing to receive the support they deserve do they realize otherwise.

d. Subpart (III)

Subpart (III) requires recipients to provide written information on the right to be notified about the outcome of the process.¹¹⁰ While this may seem simple enough, many recipients struggle to provide simultaneous

105. Some recipients have traditionally allowed parents to be present, though it is unclear how this comports with the requirements of the Family Educational Rights and Privacy Act (FERPA). *See* 20 U.S.C. § 1232g(a)(1) (2018) (“If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review *only such part of such material or document as relates to such student* or to be *informed of the specific information contained in such part of such material.*”) (emphasis added).

106. 20 U.S.C. § 1092(f)(8)(B)(iv)(II); 34 C.F.R. § 668.46(k)(2)(iii).

107. 34 C.F.R. § 668.46(k)(3)(ii).

108. *Id.* § 668.46(k)(2)(iv) (prohibiting a recipient from “limit[ing] the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding” to allow only restrictions on the advisor’s ability to directly participate rather than merely support a party); *see* 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-20 (detailing additional guidance around the role and an institution’s authority regarding advisors).

109. 34 C.F.R. § 668.46(k)(2)(iv); *see also id.* § 668.46(k)(3)(iii) (defining the process to include “all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, factfinding investigations, formal or informal meetings, and hearings” to exclude only “communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim”).

110. 20 U.S.C. § 1092(f)(8)(B)(iv)(III)(aa) (“both the accuser and the accused shall be simultaneously informed, in writing of the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.”); 34 C.F.R. § 668.46(k)(2)(v)(A).

written outcomes to the parties involved.¹¹¹ In fact, it is very common for a recipient to provide the results orally after a hearing or to refuse the release of the written results unless a party first agrees to meet or speak with a campus official, despite the Clery Act prohibiting such tactics.¹¹² Furthermore, recipients often fail to provide the level of detail required within the written outcome under the Clery Act's implementing regulations.¹¹³

As further clarified within subregulatory guidance, the written outcome must include the "rationale for the result and sanctions" and that requires an "explain[ation] [of] how it weighted the evidence" and considered "information presented during the proceeding" to then "explain how the evidence and information support the result and sanctions."¹¹⁴ The Department has required this level of detail to ensure that the right to appeal may be fully recognized by the parties to a campus proceeding.¹¹⁵

The Clery Act further requires notification to the parties whenever there have been changes to the outcome,¹¹⁶ which should prevent backdoor deals and negotiations between defense attorneys and recipients to exclude victims and thus subvert their federal rights.¹¹⁷ It also requires recipients to confirm when the outcome regarding the campus process is final to fully resolve the campus process.¹¹⁸ These rights ensure that victims understand how and when recipients reach the final results while also ensuring transparency around the reasoning relied upon to do so in order to prevent bias, discrimination, or other prohibited considerations.

111. See 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 7-9 (requiring provision of the outcome to a victim without requiring a written request).

112. See *id.* at 8-22 (prohibiting "substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result").

113. 34 C.F.R. § 668.46(k)(3)(iv) (requiring the result to "include the rationale for the result and the sanctions").

114. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-22 ("It is *not* sufficient to say only that the evidence presented either met or did not meet the institution's standard of evidence.") (emphasis added).

115. 20 U.S.C. § 1092(f)(8)(B)(iv)(III)(bb); 34 C.F.R. § 668.46(k)(2)(v)(B); see also *id.* § 106.8(b) (requiring an equitable grievance process); but see 2017 INTERIM TITLE IX GUIDANCE, *supra* note 90, at 7 (stating a recipient may allow only a respondent to appeal the results despite this portion of the interim guidance).

116. 20 U.S.C. § 1092(f)(8)(B)(iv)(III)(cc); 34 C.F.R. § 668.46(k)(2)(v)(C).

117. See 34 C.F.R. § 668.46(k)(3)(i)(C), *supra* note 98.

118. 20 U.S.C. § 1092(f)(8)(B)(iv)(III)(dd); 34 C.F.R. § 668.46(k)(2)(v)(D).

4. CONFIDENTIALITY

Under 20 U.S.C. § 1092(f)(8)(B)(v), recipients must provide written information to victims of gender violence about how they will protect confidentiality, including “how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.”¹¹⁹ Recipients must maintain the confidentiality of the victim during the issuance of any timely warning for “crimes considered to be a threat to other students and employees.”^{120, 121} Likewise, daily crime logs must include “the nature, date, time, and general location of each crime” and “the disposition of the complaint,”¹²² but not include anything that would “jeopardize the confidentiality of the victim.”¹²³ Recipients also must provide confidentiality for victims regarding any provided accommodations or protective measures they receive, unless that would impair the provision of the same.¹²⁴ More generally, the Clery Act requires recipients to create a confidential crime reporting process to allow for the report of crimes by victims and witnesses alike.¹²⁵ Regarding victim confidentiality, Title IX may require recipients to proceed upon some reports of gender violence regardless of a victim’s consent, thus

119. 34 C.F.R. § 668.46(b)(11)(iii)(A); *see also* 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-13.

120. 20 U.S.C. § 1092(f)(3) (“Such reports shall be provided to students and employees in a manner that is timely, that withholds the names of victims as confidential, and that will aid in the prevention of similar occurrences.”); 34 C.F.R. § 668.46(e)(1).

121. The Clery Act does not require recipients to withhold identifying information regarding a suspect. *See, e.g.*, *Havlik v. Johnson & Wales Univ.*, 490 F. Supp. 2d 250, 258–59 (D.R.I. 2007) (holding that the Clery Act’s requirements for crime reporting raised a qualified privilege that protected the university from defamation claims after it published identifying information about the alleged perpetrators regarding a timely warning issued to the campus community).

122. 20 U.S.C. § 1092(f)(4)(A).

123. *Id.* § 1092(f)(4)(B)(i); 34 C.F.R. § 668.46(f)(2); *see also* 20 U.S.C. § 1092(f)(4)(B)(iii) (allowing a recipient to temporarily withhold information from the daily crime log upon “clear and convincing evidence that the release of such information would jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence”); 34 C.F.R. § 668.46(f)(3).

124. 34 C.F.R. § 668.46(b)(11)(iii)(B); 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-13.

125. 34 C.F.R. § 668.46(b)(2)(iv).

limiting this right to confidentiality.¹²⁶ In such a case, recipients must be transparent with the victim to help ensure confidentiality is honored to the extent possible, and thus hopefully encourage more victims to come forward and report using their campus process.¹²⁷

5. ON- AND OFF-CAMPUS RESOURCES

Under 20 U.S.C. § 1092(f)(8)(B)(vi), the Clery Act requires recipients to provide written information about available on- and off-campus resources for victims of intimate partner violence and stalking. This information on “counseling, health, mental health, victim advocacy, legal assistance, and other services available,”¹²⁸ such as crime victim funds when relevant. While many recipients willingly provide information about counseling and other on-campus resources, far too few recipients provide information about off-campus resources generally or legal resources specifically.^{129, 130} This information is vital for victims of intimate partner violence to learn about key resources, such as available shelters within the community, legal assistance for obtaining civil orders, available victim advocacy for navigating various legal proceedings, and relevant counseling centers. Without recipients proactively identifying these resources, many victims

126. See 2001 TITLE IX GUIDANCE, *supra* note 58, at 17 (“In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that a confidentiality request may limit the school’s ability to respond. . . . The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint *consistent with the student’s request* as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.”) (emphasis added).

127. See Fisher, *supra* note 68, and Sable, *supra* note 68 (both studies also noting fear of retaliation as another reason many victims do not report).

128. 20 U.S.C. § 1092(f)(8)(B)(vi); 34 C.F.R. § 668.46(b)(11)(iv) (including information about visa and immigration assistance as well as student financial aid); 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-14; see also 2011 DCL, *supra* note 53, at 16 (“[S]chools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.”).

129. See 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-14 (“We recommend that institutions reach out to organizations that assist victims of dating violence, domestic violence, sexual assault and stalking, such as local rape crisis centers and state and territorial coalitions against domestic and sexual violence, when developing this list of services.”).

130. For a shining example of a recipient meeting and exceeding Clery Act requirements, check out SUNY’s Sexual Assault & Violence Response Resources website, <https://www.suny.edu/violence-response/>.

on campus may not realize their options to ensure their personal safety and healing, or otherwise seek the enforcement of their rights.

6. REASONABLE ACCOMMODATIONS

Under 20 U.S.C. § 1092(f)(8)(B)(vii), recipients must provide written information to victims about their “options for, and available assistance in, changing academic, living, transportation, and working situations.” Such accommodations must be “requested by the victim” and *must* be provided by a recipient when “reasonably available.”¹³¹ This is a right for all victims “regardless of whether the victim chooses to report the crime to campus police or local law enforcement.”¹³² These accommodations include the right to seek protective measures, as clarified by the Clery Act’s implementing regulations.¹³³ Despite this clear provision of victim rights, several institutions of higher education routinely deny reasonable accommodations; thus, the Department has clarified in subregulatory guidance that this obligation to grant such accommodations is mandated.¹³⁴ Such accommodations “should minimize the burden on the victim,”¹³⁵ which had been a requirement repeated under the now-rescinded Obama-era Title IX guidance.¹³⁶ Ensuring victims have the support they need on and off campus to ensure their safety and wellbeing after gender violence is key to the VAWA amendments to the Clery Act.

7. PROHIBITION ON RETALIATION

Beyond the expansive victims’ rights section of the Clery Act, discussed *supra*, the VAWA amendments also added a prohibition on retaliation, which states:

131. 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).

132. 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).

133. 34 C.F.R. § 668.46(b)(11)(v).

134. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-14, 8-15 (“Factors that might be considered during this process include, but are not limited to the following: the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).”).

135. *Id.* at 8-15 (“For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the victim from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.”).

136. *See* 2011 DCL, *supra* note 57, at 15–16 (“When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.”).

No officer, employee, or agent of an institution participating in any program under this subchapter shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under any provision of this subsection.¹³⁷

This broad protection covers whistleblowers and victims alike.¹³⁸ Such comprehensive protections and rights under the Clery Act create an effective system that ensures campus safety by protecting victims and ensuring accountability after gender violence.

B. The Clery Act's Requirements to Prevent Intimate Partner Violence

The Clery Act ensures campus-wide safety through mandating that recipients provide prevention education, along with safety and awareness programming.¹³⁹ Pursuant to 20 U.S.C. § 1092(f)(8)(A)(i), the Clery Act requires recipients to provide a public annual security report summarizing their “programs to prevent domestic violence, dating violence, sexual assault, and stalking.” This is expanded upon elsewhere in the Clery Act to specifically require that recipients provide both “primary prevention and awareness programs for all incoming students and new employees”¹⁴⁰ as well as “ongoing prevention and awareness campaigns.”¹⁴¹ Such educational requirements ensure continual efforts by recipients to prevent gender violence and encourage early identification and intervention when gender violence does occur in order to avoid further tragedy.

As mandated by the Clery Act, primary prevention education requires recipients to notify incoming students and new employees that the institution prohibits gender violence¹⁴² and to define the covered offenses,

137. 20 U.S.C. § 1092(f)(17); 34 C.F.R. § 668.46(m); *see also* 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 1–11.

138. CACD recently enforced this provision for the first time through a program review of the University of North Carolina–Chapel Hill. Campus Crime Final Program Review Determination, (CACD, Aug. 23, 2019), <https://police.unc.edu/files/2019/11/U.S.-Department-of-Education-Final-Program-Review-August-2019.pdf>.

139. 20 U.S.C. § 1092(f)(1)(D), (E).

140. *Id.* § 1092(f)(8)(B)(i)(I).

141. *Id.* § 1092(f)(8)(B)(i)(II).

142. *Id.* § 1092(f)(8)(B)(i)(I)(aa).

which include sexual assault (along with the definition of consent¹⁴³), as well as dating violence, domestic violence, and stalking.¹⁴⁴

- “Dating violence” is defined to include “sexual or physical abuse or the threat of such abuse”¹⁴⁵ when “committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.”¹⁴⁶ This definition is meant as a catchall for violence within current or former intimate partner relationships not otherwise covered by the definition of domestic violence under the Clery Act.¹⁴⁷
- “Domestic violence” is defined to include any “felony or misdemeanor” committed “by a current or former spouse or intimate partner of the victim,” “by a person with whom the victim shares a child” or “has cohabitated with,” or by another person covered within a jurisdiction’s applicable laws.¹⁴⁸ Recipients must refer to state law to properly define domestic violence and convey that information to campus community members during prevention education efforts.¹⁴⁹
- “Stalking” is defined as “a course of conduct directed at a specific person that would cause a reasonable person to—[f]ear for the person’s safety or the safety of others; or [s]uffer substantial

143. *Id.* § 1092(f)(8)(B)(i)(I)(cc) (“in reference to sexual activity, in the applicable jurisdiction”).

144. *Id.* § 1092(f)(8)(B)(i)(I)(bb).

145. 34 C.F.R. § 668.46(a) (2018) (“Dating Violence”).

146. *Id.* § 668.46(a)(i) (determining whether a social relationship exists based upon “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”); *see also* 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 3-36 (cautioning that “differences in the culture of different people and their use of terms may mean that a reporting party may describe a dating relationship using different terms from how an institutional official might describe ‘dating,’” citing common terms of “‘hanging out’ or ‘hooking up’ rather than ‘dating’” to signal such a relationship, and discouraging consideration of whether the relationship was “monogamous” or “serious” to then advise recipients to “assume that the victim and perpetrator were in a dating relationship to avoid incorrectly omitting incidents”).

147. 34 C.F.R. § 668.46(a)(ii)(B) (distinguishing domestic violence from dating violence).

148. *Id.* § 668.46(a) (“Domestic Violence”).

149. Regarding the Lauren McCluskey matter, Utah law defines domestic violence based upon whether the accused had a consensual sexual relationship with the victim and thereafter committed, or attempted to commit, or threatened to commit, any criminal offense involving “violence or physical harm” against the victim regardless of marriage or cohabitation. *See* UTAH CODE ANN. § 77-36-1(4); *see also* Complaint ¶ 4 (citing the definition of a criminal offense as one that involves “‘violence or physical harm’ includ[ing], but [] not limited to, assault, harassment, electronic communication harassment, stalking, tampering with a witness, retaliation against a victim, unlawful distribution of an intimate image and voyeurism.”).

emotional distress.”¹⁵⁰ A “course of conduct means two or more acts” whether committed “directly, indirectly, or through third parties” that involve “any action, method, device, or means” used to “follow[], monitor[], observe[], surveil[], threaten[], or communicate[] to or about a person, or interfere[] with a person’s property.”¹⁵¹ The Clery Act progressively defines a “reasonable person” to involve “similar circumstances and . . . similar identities to the victim.”¹⁵² The Act also defines “substantial emotional distress” to cover “significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.”¹⁵³ Per the statutory language, online and other cyber-based stalking behaviors are captured, including dissemination of “revenge porn” and hacking to surveil.¹⁵⁴

Beyond these definitions, a recipient’s primary prevention efforts should train incoming students and new employees on how to engage in bystander intervention and about risk reduction. Bystander intervention is a key provision, given how many survivors first report intimate partner violence to a friend.¹⁵⁵

- “Bystander intervention” means “safe and positive options . . . 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.”¹⁵⁶ This requires recipients to help incoming students and new employees “recogniz[e] situations of potential harm” as well as to “understand[] institutional structures and cultural conditions that facilitate violence, overcome[] barriers to intervening, identify[] safe and effective intervention options, and tak[e] action to intervene.”¹⁵⁷

150. 34 C.F.R. § 668.46(a)(i) (“Stalking”).

151. *Id.* § 668.46(a)(i)(A).

152. *Id.* § 668.46(a)(i)(B).

153. *Id.* § 668.46(a)(i)(C).

154. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 3–40 (Scenario 3).

155. *See, e.g.*, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, TEEN DATING VIOLENCE: HOW PEERS AFFECT RISK & PROTECTIVE FACTORS 5 (2014), <https://www.ncjrs.gov/pdffiles1/nij/248337.pdf> (reporting “more than three-quarters (77.2%) turned to a friend for help and 48.5% turned to parents”).

156. 20 U.S.C. § 1092(f)(8)(B)(i)(I)(dd) (2018).

157. 34 C.F.R. § 668.46(j)(2)(ii).

- “Risk reduction” means training on how to “recognize warning signs of abusive behavior and how to avoid potential attacks.”¹⁵⁸ It also must aim to “decrease perpetration and bystander inaction, and to increase empowerment for victims in order to promote safety and to help individuals and communities address conditions that facilitate violence.”¹⁵⁹ While not explicitly required by the Clery Act, comprehensive risk reduction should also address the role drugs and alcohol play to facilitate gender violence in order to decrease prevalence and increase reporting when such violence does occur.¹⁶⁰

To avoid reliance on sexist myths or other historically ineffective approaches to combatting gender violence, the Clery Act requires recipients to use primary prevention methods that are “informed by research or assessed for value, effectiveness, or outcome” with the aim “to stop dating violence, domestic violence, sexual assault, and stalking before they occur.”¹⁶¹ Such efforts must then be followed up on through “ongoing prevention and awareness campaigns,”¹⁶² which includes “programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of topics relevant to and skills for addressing dating violence, domestic violence, sexual assault, and stalking, using a range of strategies with audiences throughout the institution” to cover primary prevention topics as well as additional relevant topics for the campus community.¹⁶³ When recipients comply with these comprehensive prevention education provisions, which are expounded upon at length in subregulatory guidance,¹⁶⁴ recipients can better prevent and respond to intimate partner violence and stalking to improve campus safety and student wellbeing.

III. McCluskey Case Study—Improving Campus Responses to Intimate Partner Violence

While Rowland successfully took the life of Lauren McCluskey, there were individuals along the way who quickly identified the warning signs

158. 20 U.S.C. § 1092(f)(8)(B)(i)(I)(ee).

159. 34 C.F.R. § 668.46(j)(2)(v).

160. Sable et al., *supra* note 68, at 161.

161. 34 C.F.R. § 668.46(j)(2)(iv) (requiring the “promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions”).

162. 20 U.S.C. § 1092(f)(8)(B)(i)(II); 34 C.F.R. § 668.46(j)(2)(iii).

163. 34 C.F.R. § 668.46(j)(2)(iii).

164. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 67, at 8-3 to 8-9.

of intimate partner violence and took action to report the abuse to the University of Utah in hopes of preventing this tragedy.¹⁶⁵ According to the McCluskey family’s civil complaint, starting in September 2018, Lauren’s friends were concerned about the dynamic within that dating relationship and “noticed that Melvin Rowland was possessive, controlling and manipulative.”¹⁶⁶ The complaint goes on to list several warning signs of dating violence and abuse:

- Rowland routinely told Lauren what to wear;
- Rowland would review Lauren’s correspondence with others;
- Rowland often accused Lauren of lying and other betrayals as part of a pattern of jealousy;
- Rowland would prohibit Lauren from attending social events or associating with friends unless he was present;
- Rowland interrogated Lauren on the phone about what she was doing, where she was, and who she was with;
- Rowland would stalk Lauren when they were not together and tell her after the fact to scare her into thinking that he could be watching her at any given moment;
- Rowland would become enraged if Lauren did not answer his calls or meet up with him; and
- Rowland demanded sex from Lauren.¹⁶⁷

Due to these abusive and controlling behaviors, the complaint alleges that Lauren’s wellbeing started to suffer.¹⁶⁸ Eventually, Lauren confided in a friend about the abusive relationship, and that friend then reached out to two more friends—all three were alarmed that Rowland wanted to bring a gun onto campus.¹⁶⁹ All three friends decided it was time to alert the University of Utah so it could take action.¹⁷⁰ These efforts by her friends to assess and report the situation is the ideal byproduct of effective prevention education on campuses pursuant to the Clery Act’s mandates.

165. Complaint ¶¶ 53, 54.

166. *Id.* ¶ 42.

167. *Id.* ¶¶ 41–44.

168. *Id.* ¶ 45.

169. *Id.* ¶ 47.

170. *Id.* ¶ 48 (reporting to Graduate Assistant Diamond Jackson, who allegedly passes on this information to additional campus officials).

Such third-party reporting is not uncommon in dating violence cases,¹⁷¹ as victims may be caught up in the cycle of abuse while bystanders seek to intervene or have an institution intervene to address the situation. All recipients should have policies and procedures in place to respond to these third-party reports by collecting information from relevant witnesses while also reaching out to the reported victim of the intimate partner violence.¹⁷² This latter outreach can be done in a way that preserves a victim's privacy while still ensuring the victim has information about his, her, or their rights and options under the Clery Act, including formal, informal, and confidential reporting options. A recipient's outreach also ensures compliance with Title IX, which requires an educational institution to respond upon actual knowledge of sex-based harassment or abuse in a matter that is "not clearly unreasonable in the light of the known circumstances."¹⁷³ Outreach is always preferred to dismissing a third-party report or otherwise claiming such intimate partner violence is a "private matter" until the victim chooses to formally report, as allegedly occurred in Lauren's case.¹⁷⁴

Recipients also must ensure campus officials are properly trained on dating violence, domestic violence, and stalking so that third-party reports are properly received and diligently followed up on. Prior to her murder, Lauren lived on campus at the Shoreline dormitory, which was supervised and managed by the University of Utah's Department of Housing and Residential Education.¹⁷⁵ It is alleged that one of the first housing officials who received actual knowledge of the dating violence did not know what to do,¹⁷⁶ and that subsequent housing officials claimed nothing could be

171. See, e.g., *Doe v. Univ. of Colo.–Boulder*, 255 F. Supp. 3d 1064 (D. Colo. 2017) (alleging sex discrimination against accused male athlete based upon a third-party report of sexual abuse within a dating violence context).

172. See also 34 C.F.R. § 668.46(b)(4)(iii) (2018) (requiring reporting policies when a victim is "unable" to make a report).

173. *Davis ex rel. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (attaching liability for peer-on-peer harassment where a recipient has substantial control over the harasser and the context of harassment); see *Doe v. Old Dominion Univ.*, 289 F. Supp. 3d 744 (E.D. Va. 2018), (finding Title IX liability may attach where a recipient has substantial control over the harasser and the context of harassment for a campus visitor).

174. See Complaint, ¶¶ 48–58, 54, 59, 52 and text accompanying notes 7–9, *supra* (recounting the allegation that university officials declined any outreach to Lauren to allegedly protect her "privacy" despite concerned third-parties reporting ongoing dating violence and stalking, as well as a gun being brought on campus).

175. Complaint ¶ 39.

176. See Complaint ¶¶ 8, 111, 113 and text accompanying note 15, *supra*; see also Complaint ¶ 53.

done.¹⁷⁷ These housing officials should have been trained to reach out to Lauren and offer accommodations, such as excused time away from campus (until the situation had diffused or otherwise been resolved through an arrest or the implementation of appropriate safety measures), or safety escorts to and from track practice and her classes to ensure she could continue accessing her education free from a hostile environment. The University of Utah could and should have informed Lauren about her right to seek a civil protective order and supported her if she chose such a safety measure. Such efforts could have ensured her safety.

The University of Utah also could have exercised its authority to hold Rowland accountable by banning this felon and sex offender from Lauren's residence hall and the campus more generally. It also could have increased security patrols and called in local law enforcement to deter or otherwise address the ongoing stalking behavior and threats that preceded Rowland's efforts to kidnap and murder Lauren. Furthermore, campus officials could have convened a threat assessment team to determine the risks associated with Rowland's abusive behavior in light of his known criminal background and history.¹⁷⁸ While threat assessment teams are commonly used to address potential campus shooters, there has been a growing push to use threat assessment teams in cases of gender violence as well.¹⁷⁹ Such accountability goes hand-in-hand with ensuring a victim's safety and generally preventing gender violence on campus. Accountability is the essential piece of the comprehensive campus safety picture created under the Clery Act to prevent tragedies like the untimely death of Lauren McCluskey at the hands of a known criminal offender.

IV. Conclusion

While intimate partner violence and stalking remain prevalent within the United States, and particularly on college campuses,¹⁸⁰ tragedies such as those suffered by Lauren McCluskey and her family are preventable when institutions of higher education do more to center victim safety and ensure accountability for abusers. Pursuant to the Clery Act,

177. Complaint ¶¶ 59, 89.

178. See generally Jeffrey J. Nolan et al., *Campus Threat Assessment and Management Teams: What Risk Managers Need to Know Now*, 15 UNIV. RISK MGMT. & INS. ASSOC. J. 105 (2011).

179. Jeffrey J. Nolan & Marissa Randazzo, *Responding to Intimate Partner Violence and Stalking*, INSIDE HIGHER ED (Feb. 4, 2019), <https://www.insidehighered.com/views/2019/02/04/colleges-should-use-threat-assessment-teams-deal-intimate-partner-violence-and>.

180. See Section I, *supra*.

recipients must work to prevent gender violence before it starts through educational and awareness efforts targeting incoming students as well as new employees.¹⁸¹ Furthermore, colleges and universities must empower victims with information about their rights and options through the provision of the Clery Act's statutorily based victims' rights.¹⁸² Recipients are obligated through the acceptance of federal funding to ensure the safety of everyone accessing their campuses, whether students, employees, or visitors.¹⁸³ While Title IX carries the risk of liability through private action¹⁸⁴ and the Clery Act does not (though hopefully will soon),¹⁸⁵ recipients would do well to heed the mandates of the latter because it provides a comprehensive strategy for addressing intimate partner violence on campus. The Clery Act already existed to prevent tragedies like those suffered by the McCluskey family. It is on recipients to do more to ensure there are no similar tragedies in the future.

181. See Section II(B), *supra*.

182. See Section II(A), *supra*.

183. See Section I, *supra*.

184. See 2001 TITLE IX GUIDANCE, *supra* note 58, at 171.

185. 20 U.S.C. § 1092(f)(14).