

## COVID-19 AND CLERY ACT CONSIDERATIONS FOR INSTITUTIONS OF HIGHER EDUCATION

*Updated April 9, 2020 with ED's April 3, 2020 Guidance<sup>1</sup>*

The COVID-19 pandemic has brought unprecedented attention to the intersection of public health and campus safety considerations. Effective campus responses in institutions of higher education (IHE) must be driven by close coordination between public health/medical professionals, campus safety and emergency management personnel, and the IHE's Clery Act Team. This coordination will ensure real-time, accurate, and reliable tracking of public health information to effectively notify and update campus community members upon confirmation of health and safety threats. Accessing critical information in a timely and efficient manner will assist institutions of higher education (IHE) in providing campus communities with relevant and useful information and is an important step in limiting community spread and flattening the curve.

As campuses navigate their responses to the on-going COVID-19 pandemic, we want to highlight issues IHEs should consider regarding Clery Act emergency notification obligations. These notes reflect our research and conversations with representatives of the U.S. Department of Education's Clery Act Compliance Division (ED). This document includes information from the Clery Act, the implementing regulations, and sub-regulatory guidance from *The Handbook for Campus Safety and Security Reporting (2016)*, as well as new electronic guidance released by ED on April 3, 2020; direct quotes are italicized for ease of reference.

The Clery Act is premised on providing complete and accurate information to campus communities about issues related to health and safety – that is one of the underlying principles driving emergency notifications, which are required upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on campus. The Clery Act emergency notification requirements, however, are only one facet of the public health and safety considerations facing IHEs. IHEs must also consider the responsibility to identify foreseeable risks and give timely notice to impacted community members as necessary to prevent or control the spread of COVID-19 or otherwise carry out public health interventions or investigations. In the context of the ongoing pandemic, leaning into campus medical and public health professionals can help lead and guide decision making on communications, audiences, messaging and timing. At the conclusion of the Clery Act discussion below, we outline additional public health coordination considerations regarding more expansive steps that IHEs may wish to consider to address campus health and safety needs.

### 1. Emergency Notification (EN): Law, Regulations and Guidance

- a. The Clery Act requires each IHE to *“prepare, publish, and distribute . . . an annual security report containing at least the following information with respect to the campus security policies and campus crime statistics of that institution: . . . A statement of current campus policies regarding immediate emergency response and evacuation procedures, including the use of electronic and cellular communication (if appropriate), which policies shall include procedures to—*

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<sup>1</sup> On April 3, 2020, the U.S. Department of Education, Federal Student Aid Office, Office of Postsecondary Education, released “UPDATED Guidance for interruptions of study related to Coronavirus (COVID-19).” See: <https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19>.

*(i) immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, as defined in paragraph (6), unless issuing a notification will compromise efforts to contain the emergency.<sup>2</sup>*

b. The Clery Act implementing regulations provide as follows:

*“(e)(3) If there is an immediate threat to the health or safety of students or employees occurring on campus, as described in paragraph (g)(1) of this section, an institution must follow its emergency notification procedures. An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed.*

Section (g) (1) provides: *An institution must include a statement of policy regarding its emergency response and evacuation procedures in the annual security report. This statement must include –*

*(1) The procedures the institution will use to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus;*

*(2) A description of the process the institution will use to –*

*(i) Confirm that there is a significant emergency or dangerous situation as described in paragraph (g)(1) of this section;*

*(ii) Determine the appropriate segment or segments of the campus community to receive a notification;*

*(iii) Determine the content of the notification; and*

*(iv) Initiate the notification system.*

*(3) A statement that the institution will, without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system, unless issuing a notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency;*

*(4) A list of titles of the person or persons or organization or organizations responsible for carrying out the actions described in paragraph (g)(2) of this section*

*(5) The institution's procedures for disseminating emergency information to the larger community; and*

*(6) The institution's procedures to test the emergency response and evacuation procedures on at least an annual basis . . .<sup>3</sup>, including –*

c. The Clery Act Handbook states:

*Under the Clery Act, institutions are required to immediately notify the campus*

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<sup>2</sup> 20 U.S.C. § 1092(f)(1)(J).

<sup>3</sup> 34 C.F.R. 668.46

community<sup>4</sup> upon confirmation of a significant emergency or dangerous situation occurring on the campus that involves an immediate threat to the health or safety of students or employees. An “immediate” threat as used here includes an imminent or impending threat, such as an approaching forest fire, or a fire currently raging in one of your buildings.

Some other examples of significant emergencies or dangerous situations are:

- i. outbreak of meningitis, norovirus or other serious illness;<sup>5</sup>
2. April 3, 2020 Guidance from ED
    - a. ED introduced the COVID-19 Guidance as follows:
      - i. The Department appreciates that postsecondary institutions and their students face unique and urgent circumstances as a result of the novel coronavirus disease (COVID-19) pandemic.
      - ii. The Department . . . provides the following information about additional emergency flexibilities and regulatory relief for institutions of higher education and their students.
      - iii. We recommend that institutions **document in their records**, as contemporaneously as possible, any actions taken as a result of COVID-19, including those actions described in this document.
      - iv. Unless otherwise specifically stated in this guidance document, the emergency flexibilities set forth below remain effective until and through June 30, 2020.
    - b. With respect to Emergency Notifications, the COVID-19 Guidance provides:

**Notifications Regarding an Immediate Threat to Health or Safety (§ 668.46)**

*The Clery Act and its implementing regulations require institutions to notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on campus. The Department does not interpret the statutory language as requiring institutions to give regular, on-going updates on COVID-19 or to proactively identify positive COVID-19 cases within the campus community. The Department also does not interpret the statutory language to apply to positive COVID-19 cases among individuals who are not attending classes, working, or residing on campus or to require notifications to such individuals.*

*An institution may satisfy the emergency notification requirements of the Clery Act and § 668.46 as follows: (1) provide students and employees a single notification through the regular means of communicating emergency notifications informing them about COVID-19 and necessary health and safety precautions, as well as encouraging them to obtain information from health care providers, state health authorities, and the CDC’s COVID-19 website; or (2) create a banner at the top of the institution’s homepage containing that same information, including a statement about the global*

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<sup>4</sup> The campus community generally includes students, employees, visitors and the “larger community.” See 34 CFR 668.46(g)(5). In addition, the Handbook discusses “how you will inform the campus community and other individuals, such as parents and guardians, in the event of an emergency.” Handbook, p. 6-1.

<sup>5</sup> Handbook, p. 6-2.

*pandemic and a link to the CDC's website.*

3. Initial vs. Subsequent COVID-19 Confirmations:

a. Initial COVID-19 Confirmations:

In the COVID-19 Guidance, ED provided two options to satisfy the emergency notification requirements of the Clery Act:

- (1) Provide a single notification through the regular means of communicating emergency notifications; or
- (2) Create a banner at the top of the institution's homepage.

Recognizing that many campuses have significantly reduced populations on campus given residence hall closures, work from home, and other social distancing measures, we recommend disseminating a single notification, rather than relying upon a banner on the institution's home page. While both forms of EN meet compliance obligations, the direct dissemination of an EN provides information related to immediate threat to the health or safety of students or employees to campus community members in a direct and timely manner. The EN can be supplemented with the webpage banner, which is a more passive measure that requires community members to seek out the information.

b. Subsequent COVID-19 Confirmations:

In the COVID-19 Guidance, ED confirmed that it did **not** require IHEs to “*give regular, on-going updates on COVID-19 or to proactively identify positive COVID-19 cases within the campus community.*” Further, ED clarified that the EN requirement was tied to significant emergencies or dangerous situations impacting campus, and that it did not apply to COVID-19 cases “*among individuals who are not attending classes, working, or residing on campus.*”

While the EN compliance requirement (following an initial EN) has been relaxed by ED, the underlying public health considerations for campus communities may still inform a more expansive approach. Campus leaders, in the exercise of judgment and consistent with institutional values, may choose to further communicate with impacted community members in a timely manner – even absent a compliance requirement.<sup>6</sup> In addition, while there is no need to proactively identify or apply Clery Act requirements to individuals not on campus, when an IHE becomes aware of an impact to on campus constituents, the IHE may choose to issue a subsequent notification. Any subsequent communication should reference the initial EN.

In keeping with these public health considerations, we recommend that IHEs analyze new reports on a case-by-case basis to ensure that the nature of the risk to public health has not been elevated based on the circumstances of subsequent positive diagnoses. In cases involving subsequent confirmations indicating a potential significant exposure, such as a report indicating a potential “hot spot,”

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<sup>6</sup> Note that the Office for Civil Rights (OCR) at the U.S Department of Health and Human Services (HHS) announced, as of April 2, 2020, that “it will exercise its enforcement discretion and will not impose penalties for violations of certain provisions of the HIPAA Privacy Rule against health care providers or their business associates for the good faith uses and disclosures of protected health information (PHI) by business associates for public health and health oversight activities during the COVID-19 nationwide public health emergency.” See <https://www.hhs.gov/about/news/2020/04/02/ocr-announces-notification-of-enforcement-discretion.html>.

cluster, other significant factors or change to original information, the data should trigger additional *analysis* that *may or may not* lead to a follow-up EN or similar update to a particular segment of your on campus community. We emphasize that this more protective approach is not required by the relaxed Clery Act standards, but instead, is informed by broader health and safety considerations. Consistent with the COVID-19 Guidance and longstanding effective Clery Act practices, we also recommend that IHEs contemporaneously document COVID-19 related considerations and institutional determinations.

- c. Patient vs. medical student/resident or employee in the context of IHEs with Teaching Hospitals or Medical Centers
  - i. Patients with confirmed COVID-19 would not necessarily create a need for an EN or updated communication unless they are part of a “hot spot” or there are other conditions, described in the prior section, where medical and public health analysis points to a follow-up EN or communication to an impacted segment of your community.
  - ii. An employee, student or member of the campus community who is the first confirmed COVID-19 case would create this “*immediate threat*” necessitating an EN or, based on the April 3 guidance, COVID-19 Guidance, a banner at the top of the IHE’s homepage.
  - iii. Again, as stated above and consistent with long-standing ED guidance, campus safety and public health and medical professionals should analyze new reports on a case-by-case basis to determine whether the IHE should issue additional ENs or communications to impacted segments for subsequent positive confirmations.
4. Geography Considerations: Where does the EN requirement apply?
  - a. The Clery Act requires ENs for situations “*on campus*.”<sup>7</sup> In addition, IHEs may also have an obligation to give an EN for “non-campus” or “off campus” locations if the IHE maintains a written policy that addresses:
    - i. Emergency notifications for incidents at noncampus buildings or properties;<sup>8</sup> or
    - ii. Notification of emergencies at off campus locations, not required by the Act.<sup>9</sup>
  - b. *Noncampus* is a complex and nuanced set of locations that an IHE uses and are commonly located more than a mile from the main campus. As noted in footnote 2, ED devotes considerable attention to descriptions of potential noncampus properties. As noted above, while the EN requirements do not typically apply to noncampus properties, an IHE’s policy may include provisions for issuing ENs beyond those circumstances required by the Act.
  - c. *Institution-associated hospitals and/or medical centers that are controlled by your institution and reasonably contiguous with your campus should be included as part of your campus [On-Campus Clery Act Geography]. Beyond formal legal arrangements, other factors that are considered in determining whether, for Clery Act purposes, the*

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<sup>7</sup> Handbook, p. 6-16.

<sup>8</sup> The Handbook contains a detailed explanation of Clery Act geography. See pp. 2-18 – 2-26.

<sup>9</sup> The Handbook notes that if “your IHE has a policy for such notices you must follow that policy.” See p. 6-3. If an IHE revises its policies, those policies must be republished, as addressed later in this document.

*institution controls a hospital or medical center include overlapping faculty/doctors, overlapping boards of directors or officers, use of the hospital or medical center as part of the institution's educational program, geographic proximity, an ongoing relationship between the institution and the hospital, and whether students consider the hospital or medical center to be part of the campus.<sup>10</sup>*

d. *Institutions With More Than One Campus<sup>11</sup>*

*Each campus must comply independently with all Clery Act and the fire safety-related HEA requirements described in this handbook, including publishing its own annual security report as discussed in Chapter 9 (or your institution may publish and distribute to students and employees a single annual security report as long as it clearly differentiates each campus's policies and statistics). For the purpose of these requirements, consider an additional location a separate campus if it meets all of the following criteria:*

- i. Your institution owns or controls the site;*
- ii. It is not reasonably geographically contiguous with the main campus;*
- iii. It has an organized program of study; and,*
- iv. There is at least one person on site acting in an administrative capacity.*

*An organized program of study means that the location offers courses in educational programs leading to a degree, certificate, or other recognized credential.<sup>12</sup>*

- e. If an IHE provides "surge capacity" in support of local COVID-19 public health or public safety efforts (i.e. hosting testing centers or additional hospital treatment areas or shelters), the Clery Act applies to the expanded program of the IHE. Institutions should ensure these "mutual aid" efforts consider Clery Act requirements. For example, local law enforcement or security staff members provided by the local hospital using the campus might be CSAs *if the location is frequently used by students.*<sup>13</sup> As noted earlier, EN requirements remain in effect for these locations.

5. Campus Security Authorities

- a. As noted above, all Clery Act obligations apply to *separate* campuses, including the

<sup>10</sup> Handbook, p. 2-3.

<sup>11</sup> Handbook p. 2-7 **Examples of separate campuses:**

- **Branch:** A branch campus is always a separate campus. **Branch campus** is a specific Department designation. It is defined as a location of an institution that is geographically apart and independent of the main campus of the institution. A location of an institution is considered independent of the main campus if the location is permanent in nature, offers courses in educational programs leading to a degree or other recognized educational credential, has its own faculty and administrative or supervisory organization, and has its own budgetary and hiring authority.
- **School:** A school is a division of an institution that is organized to give instruction of a defined type, such as a school of business, law, medicine, or nursing. A school may be, but is not always, a separate campus. For example, if your institution has a school of law that is reasonably geographically contiguous with the main campus, include it as part of your main campus. If the school of law has an organized program of study and administrative personnel on-site, and is not reasonably contiguous to the main campus, treat it as a separate campus. Note that if you have a beauty school or technology school, etc., with multiple locations that each function as a main campus, each campus must comply independently with the Clery Act's requirements. 34 CFR 600.2.

<sup>12</sup> Handbook, p. 2-6.

<sup>13</sup> Handbook, p. 2-2.

requirement to identify CSAs and require them to report applicable crimes to the institution, as outlined in institutional policies.

- b. As IHEs implement institutional closures similar to holiday shutdowns, maintaining only essential staff and exceptionally small residential or campus populations, Clery Act obligations remain in effect. As of this time, CSAs must forward reports of crimes as institutional policies dictate. We do not expect ED will dilute these requirements based upon the COVID-19 pandemic.

## 6. Additional Considerations

- a. We highly encourage higher education administrators to stay connected with institutional, local, and county public health officials and follow the guidance issued by the Centers for Disease Control and Prevention (CDC), available online at (<https://www.cdc.gov/coronavirus/2019-nCoV/index.html>).
- b. If an IHE revises its Clery Act-required policies, it must republish the current ASR or AFSR.<sup>14</sup> Policies an IHE may have revised during the current pandemic include the emergency response and evacuation (i.e., adapting the policy for *segmenting* the notification as the Handbook discusses on p. 6-9).
- c. Daily crime log requirements remain in effect and we do not expect changes to these on-going requirements.
- d. In recent conversation with the Department, we have confirmed that where institutions are unable to undertake annual tests of their Emergency Response and Evacuation requirements,<sup>15</sup> they recommend that institutions carefully document their inability to meet this, and any other requirement, due to the on-going circumstances.

## 7. Public Health and Emergency Management Coordination

As noted above, the flexibility provided by the federal government's options to satisfy the specifics of a Clery Act EN requirement removes the burden of continuous EN technical requirements; it does not, however, remove the broader medical and public health decision-making related to on campus exposures. Those decision making processes may be supported through the existing Clery Act infrastructure and campus Clery Act personnel who have experience in identifying and delivering targeted communications to impacted segments of your campus community.

In the context of COVID-19, a well-functioning Clery Act Team should align with and augment the good work of healthcare professionals who are responsible for identifying cases in your community, evaluating exposures, contact tracing, and notifying public health officials and close contacts. The non-Protected Health Information (PHI) gathered by healthcare professionals will assist IHEs in mapping broader community contacts and exposures, preparing communications, notifying impacted audiences, identifying and activating needed support measures (health, mental health, academic, workforce), planning operational actions (i.e. decontamination services, physical plant decisions) and informing short-term and long-term strategic planning efforts.

A coordinated process based on consistent and reliable information will assist institutions of higher education in making confident and informed decisions about the health and safety of

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<sup>14</sup> The Handbook provides guidance for this process on pp. 9-10 – 9-11.

<sup>15</sup> 34 CFR 668.46(g)(6); Handbook, pp. 6-9 – 6-10.

institutional communities, workforce planning, operational needs, academic and research options, strategic planning, and the necessary and attendant communications. Those steps will reinforce institutional values which prioritize care for the health, safety and welfare of campus community members.

Coordinated campus teams should position themselves for meaningful sharing of information through confident leadership; clear messaging of values and expectations; identification of teams, roles and responsibilities; clearly-delineated processes for coordination of teams; a commitment to tracking data; protocols for centralization of information; training of teams; identification of a hotline or website tracking tool; use of an advice hotline and standardized FAQ; accurate documentation practices; routine meetings (daily); real time information updates; and coordinated communications plans. The concomitant benefits of a coordinated approach allow for strategic planning assessment for broader community impacts and operational planning for the evolving context of the pandemic.