

S-A²: Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes

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“My only regret is that I didn’t go sooner. If I had gone sooner, the outcome may have been totally different. It’s something I think about a lot.”¹

INTRODUCTION

Halloween will never be the same. It was the second month of her freshman year, and she was still adjusting to her new life on a small, yet urban college campus. It was Saturday, October 30, 2010 she will never forget the date. Around 10:00 p.m., she and four friends made their way to a party at Humphrey Hall, a dormitory that housed many student-athletes.² Music blared from an iPod. Coeds danced. Alcohol was consumed. It was not unlike any other Saturday night on any other college campus in the country. That is, until she overheard one athlete say, “We’re (going to have sex with) these bitches tonight.”³

Later that night, the woman was in a bedroom when one student-athlete grabbed her by the ears and forced her to perform a sexual act.⁴ He claimed the sex was consensual. A short while later, the

¹ Ryan Haggerty, Todd Lighty & Stacy St. Clair, *One Woman’s Stand Against College Athletes*, CHI. TRIB., Oct. 28, 2011, at C1 (interview with an alleged victim of a sexual assault committed by student-athletes at Marquette University).

² *Id.*

³ *Id.*

⁴ *Id.*

woman was locked in another bedroom with three other athletes—the door had been slammed in the face of the woman’s concerned friend.⁵ The woman was told to touch the young men sexually, and one student-athlete put his hand down her pants. The assault finally ended when the friend convinced another athlete to unlock the door.⁶

The woman reported the incident to campus security just three hours after the alleged attack.⁷ During the investigation, Marquette University’s Department of Public Safety (DPS) learned that a second freshman was allegedly assaulted at the same party.⁸ Nevertheless, DPS did not report either incident to the local police.⁹ A few months later—and disappointed with how the university dealt with her allegations—the woman went to the police herself.¹⁰ The news quickly spread through campus. On March 31, another woman filed a police report accusing a fifth student-athlete of sexually assaulting her a month earlier, again at Humphrey Hall.¹¹ No criminal charges were filed in either case.¹²

In June of 2011, Marquette University President Father Wild sent a letter to students publicly acknowledging that the university had made mistakes in handling the allegations of sexual assault.¹³ Milwaukee County District Attorney John Chisholm criticized the university as well.¹⁴ Subsequently, on November 11, 2011, the United States Department of Education (DOE) confirmed that it had launched its own investigation into whether Marquette complied with federal law in its handling of the allegations.¹⁵

University officials at Marquette and other schools were criticized for their actions (or lack thereof) in responding to the serious allegations.¹⁶ Commentators clamored that these individuals should have “done more.” This criticism begs the question, however: what legal obligations do universities have in responding to allegations of sexual misconduct? In light of these developments, this paper provides an analysis of university responsibility for reporting allegations of sexual assault, specifically focusing on the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act).¹⁷ Empirical data regarding campus sexual assaults is briefly discussed in Part II. The history of the Clery Act is examined in Part III, along with the Act’s specific requirements, and the process of review by

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Don Walker & Sharif Durhams, *DA’s Office Rebukes MU*, MILWAUKEE J. SENTINEL, May 27, 2011, at B1, available at <http://www.jsonline.com/Milwaukee/122678858.html>.

¹⁰ Haggerty et al., *supra* note 1.

¹¹ Don Walker, *U.S. Reviewing Marquette Response to Sex Assault Reports*, MILWAUKEE J. SENTINEL, Nov. 11, 2011, at A1.

¹² Walker & Durhams, *supra* note 9.

¹³ Letter from Father Robert A. Wild, President, Marquette Univ., to Marquette Students (June 22, 2011), available at <http://www.marquette.edu/newsbriefs/2011/Students/June-2011-Students/June222011NewsBriefsMarquetteUniversity.html>.

¹⁴ Sharif Durhams & Gitte Laasby, *Marquette Revises Sex Assault Policies*, MILWAUKEE J. SENTINEL, June 23, 2011, at A1.

¹⁵ Walker, *U.S. Reviewing Marquette Response*, *supra* note 11. Just two days earlier, the DOE announced that it was investigating whether Penn State University violated the same federal law concerning allegations of sexual offenses committed on campus by former assistant football coach Jerry Sandusky. Press Release, U.S. Dep’t of Educ., U.S. Dep’t of Educ. to Investigate Penn State’s Handling of Sexual Misconduct Allegations (Nov. 9, 2011), available at <http://www.ed.gov/news/press-releases/us-department-education-investigate-penn-states-handling-sexual-misconduct-alleg>. However, the focus of this paper is on peer-on-peer sexual violence.

¹⁶ See, e.g., *Ex-Penn State Coach Joe Paterno Dead at 85*, CBSNEWS (Jan. 22, 2012), http://www.cbsnews.com/8301-400_162-57363500/ex-penn-state-coach-joe-paterno-dead-at-85/?tag=contentMain;contentBody.

¹⁷ Other reporting laws (e.g., mandatory reporters of child abuse) are beyond the scope of this paper.

the DOE. Next, Part IV focuses on Marquette University's then-existing policies and whether its recent actions constituted a violation of the Act. Finally, concluding remarks are presented in Part V on how the events at Marquette and other schools provide universities with an incentive to revamp their sexual misconduct policies to ensure compliance with this federal law.

I. Prevalence of Peer-on-Peer Campus Sexual Assaults

Despite the recent wave of media coverage surrounding allegations of sexual assaults committed at various universities, campus sexual offenses are unfortunately not a recent phenomenon. In fact, numerous comprehensive studies have been conducted regarding the prevalence of “campus-based, peer sexual violence...over the last several decades.”¹⁸ These studies revealed that women ages sixteen to twenty-four are the most vulnerable victims of sexual assault, leading one advocate to recently conclude, “rape is the most common violent crime on American campuses.”¹⁹ The liberating nature of the college environment—which often encourages binge drinking and sexual promiscuity²⁰—helps explain why women who attend college are more at risk than women of the same age who are not in college.²¹ Accordingly, studies “have consistently found that 20–25% of college women are victims of attempted or completed nonconsensual sex” while in college.²² Perhaps more troubling is that these sexual offenses frequently occur soon after the victim arrives on campus,²³ and contrary to popular belief, are overwhelmingly committed by acquaintances in dorm rooms or during parties.²⁴

Furthermore, sexual violence is particularly widespread among student-athletes. Statistics indicate that male athletes are more likely to commit sexual assaults than other male students.²⁵ Consequently, one study of thirty Division I schools found that, while male athletes comprised only 3.3% of the total male college population, these athletes committed 19% of the reported sexual assaults on campus.²⁶ Another study established that the rate of sexual offenses is especially high among men's basketball and football players.²⁷ Overall, male student-athletes commit one in three college sexual

¹⁸ Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 209–10 (2011).

¹⁹ See, e.g., Rana Sampson, U.S. Dep't of Justice, *Acquaintance Rape of College Students 1* (2002), available at <http://www.cops.usdoj.gov/pdf/e03021472.pdf>.

²⁰ Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1009 (2004).

²¹ Sampson, *supra* note 19, at 2.

²² Cantalupo, *supra* note 18, at 210 (citing Christopher P. Krebs et al., *The Campus Sexual Assault Study 2-1* (Oct. 2007) (unpublished report), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>); See also Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond 4* (Oct. 2002) (unpublished report), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>. Commentators have noted that that the findings of these older studies are consistent with those conducted today; thus, the statistics remain valid.; See, e.g., Cantalupo, *supra*, at 210 n.7; see also Office for Civil Rights, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*, ED.GOV (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html>.

²³ Krebs et al., *supra* note 22, at 6-3.; See also Sampson, *supra* note 19, at 7.

²⁴ Anderson, *supra* note 20, at 1008 (citing Sampson, *supra* note 19, at 7, 9); See also Krebs et al., *supra* note 22, at 6-3; Karjane et al., *supra* note 22, at 4.

²⁵ Jenni E. Spies, Comment, *Winning at All Costs: An Analysis of a University's Potential Liability for Sexual Assaults Committed by Its Student Athletes*, 16 MARQ. SPORTS L. REV. 429, 430 (2006) (citing *Statistics*, NAT'L COALITION AGAINST VIOLENT ATHLETES, <http://www.ncava.org/Statistics.html> (last visited Apr. 11, 2012)); See also Sampson, *supra* note 19, at 14.

²⁶ *Statistics*, *supra* note 25 (citing Crosset et al., *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus*, 19(2) J. SPORT & SOCIETAL ISSUES 126, (1995)).

²⁷ Spies, *supra* note 25, at 430 (citing CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 21 (1993)).

assaults.²⁸

Notwithstanding the significant prevalence of peer-on-peer campus sexual assaults, an alarming number of victims do not report such incidents to the police.²⁹ Studies have demonstrated that at least 90% of campus sexual offense victims never tell the police or campus authorities what happened to them.³⁰ Victims fear that they will not be believed or worse that they will be treated with hostility by authorities and their peers.³¹ Other victims fail to report because they fear that officials will mishandle their allegations.³² Moreover, some commentators suggest that campus policies deter reporting in an attempt to protect the institution's reputation.³³

II. The Clery Act

Given the increasing prevalence of campus violence, as well as a particularly disturbing incident at one university, Congress passed a federal law that requires universities to disclose their campus crime statistics and security policies. Lawmakers hoped that awareness of campus crime-related issues would permit students to make more informed decisions when choosing a university.³⁴ Likewise, Congress intended the law to encourage universities to take campus safety more seriously.³⁵ Since the Clery Act was passed, several developments have demonstrated a commitment to these original goals, including clarifying regulations, amendments, and a comprehensive guidebook. Nevertheless, compliance with this federal law—which is monitored by the United States Department of Education—is problematic for many universities, especially with respect to policies and procedures concerning campus sexual offenses.

A. History of the Clery Act

The Clery Act was passed as a result of years of lobbying by two parents who had tragically lost their daughter. On April 5, 1985, eighteen-year-old freshman Jeanne Clery was sleeping in her dorm room at Lehigh University when an intruder entered her room, beat her, raped her, and strangled her to death.³⁶ The drunken killer was a fellow Lehigh student who had a violent criminal past.³⁷ Shortly after their daughter's funeral, Howard and Connie Clery learned that the school had experienced thirty-eight assaults and other violent crimes in the three years prior to Jeanne's murder.³⁸ The Clerys sued the university, arguing that their daughter never would have attended Lehigh if they had known the prevalence of violent crime at the school.³⁹ The Clerys also formed a nonprofit organization—Security on Campus, Inc.—and dedicated their lives to helping ensure that their tragedy would not be re-lived by other parents.⁴⁰ Success

²⁸ *Statistics*, *supra* note 25 (citing Crosset et al., *supra* note 26).

²⁹ See Kathy Ahn, *The Pendulum Swings Backwards: The Clery Act Must Be Amended to Address University Policies that Discourage Rape Reporting*, 31 WOMEN'S RIGHTS L. REP. 514, 518 (2010); see also Cantalupo, *supra* note 18, at 213; Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 83–85 (2002) (hereinafter Fisher et al., *Making Campuses Safer*).

³⁰ Cantalupo, *supra* note 18, at 213 (citing Bonnie S. Fisher et al., U.S. Dep't of Justice, *The Sexual Victimization of College Women 23–24* (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (hereinafter Fisher et al., *Sexual Victimization*)).

³¹ Fisher et al., *Sexual Victimization*, *supra* note 30, at 23.

³² Cantalupo, *supra* note 18, at 213 (citing BOHMER & PARROT, *supra* note 27, at 5, 198).

³³ Anderson, *supra* note 20, at 1010–12 (citing Karjane et al., *supra* note 22, at 23, and Sampson, *supra* note 19, at 1).

³⁴ Fisher et al., *Making Campuses Safer*, *supra* note 29, at 63–64.

³⁵ *Id.* at 64.

³⁶ Mark Fritz, *The Politics of Parental Grieving*, L.A. TIMES, June 3, 1999, at A1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

was first achieved at the state level as Pennsylvania and several other states passed crime-reporting laws.⁴¹ Soon thereafter, the Federal Crime Awareness and Campus Security Act of 1990 was signed into law by President George H.W. Bush.⁴² In 1998, the Act was formally renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.⁴³

B. Disclosure of Campus Security Policy and Campus Crime Statistics

All universities that participate in federal student financial assistance programs are subject to the requirements of the Clery Act.⁴⁴ Thus, nearly every post-secondary institution—public and private—must comply with this federal law as a result of its participation in federal student loan programs.⁴⁵ Failure to adhere to these daily, annual, and ongoing requirements can result in sanctions from the DOE.⁴⁶

1. Collection of Campus Crime Statistics

Pursuant to the Clery Act, universities have an ongoing duty to “[c]ollect, classify and count crime reports and crime statistics.”⁴⁷ As such, universities must disclose certain crimes that are reported to local police agencies or to a campus security authority (CSA).⁴⁸ However, neither an investigation nor a finding of responsibility is necessary before disclosure.⁴⁹ Likewise, CSAs are not responsible for determining whether a crime occurred or convincing victims to contact the police.⁵⁰ Rather, CSAs must simply report such incidents to the university official designated to collect Clery Act information, if “there is a reasonable basis for believing that the information is not simply rumor or hearsay.”⁵¹

The Clery Act does, however, place restrictions on the types of crimes that must be disclosed. For instance, the Act covers only three general categories of crime statistics: criminal offenses, arrests and referrals for campus disciplinary action, and hate crimes.⁵² Criminal sexual offenses are further divided into two categories—forcible and non-forcible⁵³—and include both completed and attempted acts.⁵⁴ Moreover, the Clery Act mandates a geographic breakdown of where the above crimes transpired.⁵⁵ Thus, universities shall disclose only reported crime statistics that occur: (1) on campus, including residence

⁴¹ *Id.*

⁴² The Act was codified as 20 U.S.C. § 1092(f). Notwithstanding their success, the Clerys’ advocacy continues today via their nonprofit organization. See SECURITY ON CAMPUS, INC., <http://www.securityoncampus.org/> (last visited Mar. 6, 2012).

⁴³ Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act, Pub. L. No. 105-244, 112 Stat. 1745 (Oct. 7, 1998). See also 20 U.S.C. § 1092(f)(18) (2012).

⁴⁴ See 20 U.S.C. § 1092(f)(1).

⁴⁵ U.S. Dep’t of Educ., Office of Postsecondary Educ., *The Handbook for Campus Safety and Security Reporting 2* (2011), <http://www2.ed.gov/admins/lead/safety/handbook.pdf> (hereinafter *Campus Safety Handbook*).

⁴⁶ 20 U.S.C. § 1092(f)(13).

⁴⁷ *Id.* at 5.

⁴⁸ 34 C.F.R. § 668.46(c) (2012). A “campus security authority” is anyone who has “significant responsibility for student and campus activities,” § 668.46(a), including an athletic director or team coach, *Campus Safety Handbook*, *supra* note 45, at 75.

⁴⁹ *Id.*

⁵⁰ *Id.* at 77.

⁵¹ *Id.* at 73.

⁵² 20 U.S.C. § 1092(f)(1)(F).

⁵³ 34 C.F.R. § 668.46(c)(1)(ii).

⁵⁴ *Campus Safety Handbook*, *supra* note 45, at 37. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Nonforcible sex offenses include incest and statutory rape. *Id.* at 37–40. Universities must use the definitions provided in the Federal Bureau of Investigation’s *Uniform Crime Reporting Handbook*. 34 C.F.R. § 668.46(c)(7).

⁵⁵ § 668.46(c)(4).

halls; (2) in or on non-campus buildings or property that is owned or controlled by the university; and (3) on public property that is within or immediately adjacent to the campus.⁵⁶

2. Annual Security Report

Consequently, the Clery Act compels universities to publish an annual security report (ASR) that outlines these campus crime statistics as well as various other policies and procedures.⁵⁷ The report must be in a single document and distributed to all enrolled students and current employees by October 1 of each year.⁵⁸ In addition to a table describing crime statistics for the preceding three years, the ASR shall contain several policy statements.⁵⁹ Universities must explain their policies regarding procedures for reporting criminal offenses, the university's policies for responding to such reports, and a statement concerning campus security policies.⁶⁰ The report must also contain a statement of policies relating to campus law enforcement, including the scope of its authority and its relationship with other law enforcement agencies, and a policy that encourages prompt reporting of crimes to the appropriate authorities.⁶¹ Furthermore, universities shall describe programs informing students and staff about campus security procedures and the prevention of crimes.⁶² Finally, the ASR must contain a statement of the university's drug and alcohol policies and a statement of policies regarding emergency response procedures.⁶³

3. Sexual Assault Policy Statements

Although the Clery Act generally does not require particular policies or procedures,⁶⁴ a more detailed policy statement is necessary with regard to campus sexual assaults. This sexual assault policy is incorporated within the annual security report and focuses on programs to prevent sexual offenses and the procedures to follow when such offenses do occur, "including who should be contacted ... and to whom the alleged offense should be reported."⁶⁵ Additionally, the policy must describe "[e]ducational programs to promote the awareness of" the many different types of sexual offenses.⁶⁶

In 1992, the Clery Act was amended to broaden reporting requirements and to compel universities to incorporate within their sexual assault policies a "victims' bill of rights."⁶⁷ These specific rights target peer-on-peer sexual violence and focus on the campus disciplinary process.⁶⁸ Accordingly, the sexual assault policy statement shall address procedures utilized in disciplinary cases involving allegations of sexual assault, including the possible sanctions that may be imposed.⁶⁹ Furthermore, the policy must include "a clear statement that ... the accuser and the accused are entitled to the same opportunities to

⁵⁶ 20 U.S.C. § 1092(f)(6).

⁵⁷ *Id.* at § 1092(f)(1).

⁵⁸ 34 C.F.R. § 668.41(e).

⁵⁹ 20 U.S.C. § 1092(f)(1).

⁶⁰ *Id.* at §§ 1092(f)(1)(A)–(B).

⁶¹ *Id.* at § 1092(f)(1)(C).

⁶² *Id.* at §§ 1092(f)(1)(D)–(E).

⁶³ *Id.* at §§ 1092(f)(1)(H), (J).

⁶⁴ *Id.* at § 1092(f)(2).

⁶⁵ *Id.* at §§ 1092(f)(8)(A), (B)(iii).

⁶⁶ *Id.* at § 1092(f)(8)(B)(i).

⁶⁷ Higher Education Amendments of 1992, Campus Sexual Assault Victims' Bill of Rights, Pub. L. No. 102-325, § 486(c). See also *Clery Act Legislative History (1989-2000)*, SECURITY ON CAMPUS, INC., http://www.securityoncampus.org/index.php?option=com_content&view=article&id=300%3Aclery-act-legislative-history-1989-2000&catid=64%3Acleryact&Itemid=60 (last visited Mar. 20, 2012).

⁶⁸ See *Higher Education Amendments §486(c)*.

⁶⁹ 20 U.S.C. §§ 1092(f)(8)(B)(ii), (iv).

have others present during a campus disciplinary proceeding,” and that both parties must be informed of the outcome of the disciplinary proceeding.⁷⁰ The Clery Act regulations specify that compliance with this provision “does not constitute a violation of the Family Educational Rights and Privacy Act.”⁷¹ Moreover, a university cannot condition disclosure of the campus disciplinary outcome on the victim signing a nondisclosure agreement.⁷² Students shall also be notified of existing services for victims of sexual assault and of options for modifying a victim’s academic and living situations following an alleged sexual offense.⁷³ Finally, the sexual assault policy must inform “students of their options to notify proper law enforcement authorities, including on-campus and local police, and the option to be assisted by campus authorities in notifying such authorities, if the student so chooses.”⁷⁴

4. Emergency Notification and Timely Warnings

Aside from the various policy statements, the Clery Act also requires universities to keep members of the campus community informed about ongoing threats to their safety. An emergency notification is required “[i]f there is an immediate threat to the health or safety of students or employees occurring on campus.”⁷⁵ Similarly, a university must issue a “timely” warning to the entire campus community of crimes in a manner that will help prevent similar incidents.⁷⁶

5. Daily Crime Log

In addition to the requirements listed above, universities that maintain a campus police or security department must keep a daily crime log that records all reported crimes (i.e., not simply Clery Act crimes).⁷⁷ This written log must include “the nature, date, time, and general location of each crime,” as well as “the disposition of the complaint,” and the log must be updated when new information becomes available.⁷⁸ Although the daily crime log must be made available to the public,⁷⁹ a university may withhold information “[i]f there is 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.”⁸⁰ However, the withheld information must be disclosed as soon as the adverse effect no longer exists.⁸¹

6. Sanctions for Noncompliance

Although the Clery Act does not provide a private cause of action,⁸² universities that fail to

⁷⁰ *Id.* at § 1092(f)(8)(B)(iv).

⁷¹ 34 C.F.R. § 668.46(b)(11)(vi)(B).

⁷² *See Campus Safety Handbook, supra* note 45, at 144.; *See also*, U.S. Dep’t of Educ. Fed. Student Aid, Final Program Review Determination, Georgetown University, No. 200320325004 (July 16, 2004), <http://federalstudentaid.ed.gov/datacenter/cleryact/georgetownuniversity/GUFPRD07162004.PDF>.

⁷³ 20 U.S.C. §§ 1092(f)(8)(B)(vi)–(vii).

⁷⁴ *Id.* at § 1092(f)(8)(B)(v).

⁷⁵ 34 C.F.R. § 668.46(e)(3).

⁷⁶ *Id.* at 668.46(e)(1).

⁷⁷ 20 U.S.C. § 1092(f)(4)(A).

⁷⁸ *Id.* at §§ 1092(f)(4)(A)–(B).

⁷⁹ 34 C.F.R. § 668.46(f)(5).

⁸⁰ 20 U.S.C. § 1092(f)(4)(B)(iii).

⁸¹ *Id.*

⁸² §§ 1092(f)(8)(C), (14)(A).; *See also* *Doe v. Univ. of the South*, No. 4:09-cv-62, 2009 U.S. Dist. LEXIS 95410, at *30–34 (E.D. Tenn. Oct. 13, 2009) (noting that the statute explicitly outlines an alternative remedial framework involving review by the DOE and possible sanctions).

comply with the Act's requirements are subject to sanctions by the DOE.⁸³ Universities that violate the Act may be fined up to \$27,500 per violation⁸⁴ and may be suspended from participating in financial aid programs.⁸⁵

C. Clery Act Review Process by the Department of Education

The DOE Federal Student Aid office is responsible for conducting reviews of universities' compliance with the Clery Act.⁸⁶ While reviews are sometimes initiated after a school's independent audit or via a review selection process, the DOE may also commence a review if a complaint is filed against a particular institution or if media attention raises concerns.⁸⁷ Reviews are either part of a general program review regarding federal student aid programs or "focused strictly on campus security."⁸⁸ Regardless of whether the review is conducted on or off-site, reviews typically involve "comparing the campus crime logs, the institution's annual security report data and incidents reported to local police agencies."⁸⁹ When a review is completed, the DOE issues a "Program Review Report that describes noncompliance concerns."⁹⁰ Universities are then afforded an opportunity to respond before the DOE releases its Final Program Review Determination letter, which outlines any punishment handed down on the institution.⁹¹

III. Alleged Sexual Assaults at Marquette University

Despite various attempts to clarify their responsibilities, universities continue to have difficulty complying with the Clery Act.⁹² Accordingly, the recent events at Marquette University are particularly relevant when analyzing how a university should handle allegations of peer-on-peer sexual violence, especially when the alleged assaults involve student-athletes. An in-depth look at how Marquette dealt with these incidents, as well as the university's then-existing policies, can therefore expose common problems other institutions will likely encounter when faced with similar situations. Thus, the Marquette situation serves as an example of how universities should shape their policies to ensure compliance with federal law.

A. Marquette's Handling of the Alleged Sexual Assaults

From October 2010 to February 2011, five Marquette student-athletes were accused of sexually assaulting female students in three separate incidents. The first incident, which occurred on October 30, 2010, involved four athletes forcing a freshman student to touch them sexually while the young woman was locked in a room during a Halloween party at the athletes' dormitory.⁹³ The victim reported the assault to Marquette's Department of Public Safety just three hours later,⁹⁴ and the report was recorded in

⁸³ 20 U.S.C. § 1092(f)(13).

⁸⁴ 34 C.F.R. § 668.84(a)(1) (2012).

⁸⁵ *Id.* at § 668.85(a)(1) (2012).

⁸⁶ *Background Information: Clery Act Reviews*, FED. STUDENT AID, available at <http://federalstudentaid.ed.gov/datacenter/cleryact/CleryDataCenterv3.pdf> (last visited Mar. 6, 2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* The Federal Student Aid office maintains a database of all Clery Act reviews. *Data Center – Clery Act Reports*, FED. STUDENT AID, available at <http://federalstudentaid.ed.gov/datacenter/cleryact.html> (last visited Mar. 6, 2012).

⁹² MARILYN D. MCSHANE & TRAQINA Q. EMEKA, *AMERICAN VICTIMOLOGY* 81 (2011).

⁹³ Haggerty et al., *supra* note 1.

⁹⁴ *Id.*

the university's daily crime log.⁹⁵ According to the victim, however, campus security officials discouraged her from reporting the incident to the local police department, fearing that "the allegations would draw ... media attention."⁹⁶

Instead of reporting the alleged assault to local authorities, which was required by state law,⁹⁷ the university conducted its own "non criminal" investigation.⁹⁸ Campus security officials met with the victim several times during their investigation and, contrary to her statement, officials maintained that no one denied her the right to go to the Milwaukee Police Department (MPD).⁹⁹ Furthermore, one Marquette official stated that the victim was offered "an array of services, including assistance from Milwaukee police, a local sexual assault treatment center, a mental health counselor, and campus ministry."¹⁰⁰ After DPS conducted a "full investigation into the incident," the accused student-athletes were subject to a disciplinary hearing before the university's Division of Student Affairs.¹⁰¹ According to the victim, three athletes were found responsible for "harassment," while the fourth athlete was found responsible for "sexual assault."¹⁰² However, the fourth athlete appealed, and his responsibility was reduced to "harassment" as well.¹⁰³ Consequently, all four student-athletes—and the coaches in their sport—"were disciplined under the student conduct code [and] athletic department rules,"¹⁰⁴ though no one was barred from competition. Moreover, the university insisted that the disciplinary hearings and resulting sanctions were all consistent with campus policy and that the student-athletes' status "did not come into play in any way."¹⁰⁵

Dissatisfied with how the university dealt with her accusations, the victim reported the incident to MPD on March 22, 2011, nearly five months after the alleged assault.¹⁰⁶ The police investigation revealed that the accused student-athletes met together with their coaches the day after the incident.¹⁰⁷ During that team meeting, one athlete texted the victim to ask if she had reported the alleged assault to campus security; another athlete called her as well.¹⁰⁸ MPD officials also learned that another freshman student was allegedly assaulted at the same Halloween party.¹⁰⁹ The second victim indicated that she was forced to perform a sexual act on a student-athlete after she voluntarily entered a bedroom at the party.¹¹⁰ Nevertheless, the second victim informed local police that she did not want to press charges and that she was satisfied with how campus security handled her complaint.¹¹¹

⁹⁵ John Diedrich, Sharif Durhams & Gitte Laasby, *Police Investigate Alleged Sexual Assault at Marquette University*, MILWAUKEE J. SENTINEL, Mar. 29, 2011, at B3.

⁹⁶ Haggerty et al., *supra* note 1.

⁹⁷ Under Wisconsin law, private security officials must "promptly" "notify" "an appropriate law enforcement agency" when they have "reasonable grounds to believe that a crime ... has been committed." WIS. STAT. § 940.34(2)(b) (2011).

⁹⁸ Diedrich et al., *supra* note 95.

⁹⁹ *Id.* In fact, the university's daily crime log entry noted that "MPD assistance [was] declined." Marquette Univ. Dep't of Pub. Safety, Daily Log, Nov. 1, 2010, # 10-1128.

¹⁰⁰ Haggerty et al., *supra* note 1.

¹⁰¹ Walker, *U.S. Reviewing Marquette Response*, *supra* note 11.

¹⁰² Haggerty et al., *supra* note 1.

¹⁰³ *Id.*

¹⁰⁴ Don Walker, *MU Athletic Director Resigns Amid Allegations' Fallout*, MILWAUKEE J. SENTINEL, July 1, 2011, at A1. Citing federal privacy laws, the university refused to specify which student-athletes or which athletic programs were involved. *Id.*

¹⁰⁵ Haggerty et al., *supra* note 1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

While local authorities were investigating the October 2010 incidents, a third accuser alleged that she was sexually assaulted by a fifth Marquette student-athlete in a completely separate incident.¹¹² This third victim notified campus security on March 31, 2011, though she claimed the assault occurred on February 27, 2011—again at the Humphrey Hall dormitory.¹¹³ Although she alleged that university officials discouraged her from reporting the incident in an attempt to protect the university's reputation and athletic program, the victim filed a police report the same day she notified campus security.¹¹⁴

Notwithstanding the allegations, no criminal charges were filed in connection with any of the three assaults.¹¹⁵ Still, Milwaukee County District Attorney John Chisholm criticized how the university handled the investigations: “‘An immediate and thorough investigation of this incident might have yielded additional compelling evidence’ ... ‘Unfortunately, a police investigation taken even four weeks later was not able to produce corroborative evidence that would support a criminal prosecution.’”¹¹⁶ Chisholm was also concerned with the team meeting that occurred the day after the first incident, which allowed the student-athletes to compare their stories of what had transpired the night before.¹¹⁷ Thus, by not following proper procedures, as outlined by state law, the university compromised any potential criminal prosecution.¹¹⁸

Ultimately, Marquette admitted publicly that it had made mistakes in dealing with the allegations.¹¹⁹ Consequently, Athletic Director Steve Cottingham resigned just months after the incidents went public.¹²⁰ The media attention did, however, increase awareness of the issue of campus sexual violence, which led to sweeping reform of the university's sexual misconduct policy. Moreover, new President Rev. Scott R. Pilarz announced that Marquette welcomed the review by the DOE and that the university turned over more than 6000 pages of documents relating to the Clery Act investigation.¹²¹

B. Marquette's Then-Existing Policies and Clery Act Noncompliance Concerns

Undoubtedly, the main document turned over to the DOE was Marquette's *Safety Resource Guide*,¹²² a pamphlet produced by the Department of Public Safety and distributed each year to students and staff to satisfy its responsibilities under the Clery Act. The guide, which also serves as the university's annual security report, discloses campus crime statistics and security policies.

1. Marquette's Crime Statistics and Policy Statements

As mandated by the Act, the *Safety Resource Guide* presents a table that displays campus crime statistics and disciplinary referrals for the previous three calendar years.¹²³ The crimes are arranged by

¹¹² Walker & Durhams, *supra* note 9.

¹¹³ *Id.*

¹¹⁴ Haggerty et al., *supra* note 1.

¹¹⁵ Walker & Durhams, *supra* note 9.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Letter from Father Wild, *supra* note 13.

¹²⁰ Walker, *Athletic Director Resigns*, *supra* note 104. Although Cottingham expressed in his resignation letter that he was disappointed by the “‘recent events involving a few student-athletes,’” he maintained that he left Marquette “‘to pursue other interests.’” *Id.*

¹²¹ Rev. Scott R. Pilarz: *Marquette Leader Welcomes Review*, WIS. STATE J., Nov. 16, 2011, http://host.madison.com/wsj/news/opinion/mailbag/rev-scott-r-pilarz-marquette-leader-welcomes-review/article_1f924624-106e-11e1-835f-001cc4c002e0.html.

¹²² 2010 *Safety Resource Guide*, MARQUETTE U. DEP'T PUB. SAFETY (2010).

¹²³ *Id.* at 14.

year, offense type, and geographic location. In addition, the guide provides footnotes that further explain a few entries in the table. For example, the guide defines the three separate Clery Act locations and delineates which sexual offenses involved an acquaintance.¹²⁴ The table indicates that three forcible sexual offenses were committed at Marquette in 2010.¹²⁵ However, it is impossible to discern whether the October 2010 incidents involving four different student-athletes are included within the reported crime statistics.

Marquette's *Safety Resource Guide* also contains various Clery Act policy statements. The guide begins by explaining general campus safety policies and procedures, including the steps students and staff can take to maintain a safe environment, the need to timely report incidents to the appropriate authorities, and the university's emergency response procedures.¹²⁶ Furthermore, the guide clarifies that, while trained and able to detain suspects, DPS officials are not legally authorized to make arrests.¹²⁷ The university's policies and procedures concerning campus security programs are discussed within the guide as well.¹²⁸ Finally, the guide contains an extensive drug and alcohol policy, specifically noting the possible sanctions for any violations.¹²⁹

2. Marquette's Sexual Misconduct Policy Statements

Most importantly, the *Safety Resource Guide* addresses the university's policies and procedures with regard to campus sexual offenses. The policy begins by affirming Marquette's commitment to providing support and assistance to all victims of sexual assault.¹³⁰ While the policy notes that DPS officers will inform victims of their various confidential reporting options, it assures victims that reporting the incident to campus security officials "does not obligate the victim to pursue formal action through the university's student conduct process or criminal justice system."¹³¹ However, DPS officers "will assist the victim with the reporting process" if he or she so chooses.¹³² The sexual assault policy then explains that the university will make reasonable attempts to modify the victim's academic and living arrangements "to accommodate counseling, court proceedings, security or other concerns."¹³³

Thereafter, the policy addresses the option of pursuing the incident via the campus disciplinary system and the corresponding rights afforded to victims throughout this process. For instance, the victim and suspect both have the right to be present during the hearing, and a support person may accompany each party.¹³⁴ Likewise, students found responsible for peer-on-peer sexual misconduct are "subject to all levels of university discipline, including suspension or expulsion," and the victim will be informed of the hearing result "unless the release of such information is prohibited [by law]."¹³⁵ The policy concludes by listing and describing programs designed to prevent and promote awareness of campus sexual violence as well as various victim support services.¹³⁶

¹²⁴ *Id.* at 15.

¹²⁵ *2011 Safety Resource Guide*, MARQUETTE U. DEP'T PUB. SAFETY 14 (2010).

¹²⁶ *2010 Safety Resource Guide*, *supra* note 122, at 2–5.

¹²⁷ *Id.* at 2.

¹²⁸ *Id.* at 3, 5–12.

¹²⁹ *Id.* at 19–29.

¹³⁰ *Id.* at 7.

¹³¹ *Id.*

¹³² *Id.* at 8.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

Overall, the policies and procedures in place at the time of the alleged October 2010 and February 2011 sexual assaults present a few compliance concerns with respect to the Clery Act. First, the policy statement did not describe the university's specific procedures for campus disciplinary actions. Rather, the policy simply states that "victims . . . will be informed about the on-campus student conduct procedures."¹³⁷ Second, the policy inaccurately places a limit on victims' rights to be informed of the outcome of any subsequent disciplinary hearing. However, the regulations enforcing the Clery Act explicitly state that the victim's right to be informed of such outcomes is absolute and that compliance with this mandate does not constitute a violation of federal privacy laws.¹³⁸

3. Marquette's Emergency Notification Policies

Nonetheless, Marquette had no obligation under the Clery Act to notify members of the campus community about the alleged sexual assaults that occurred in October 2010 and February 2011. Clearly, no emergency notification was necessary because the incidents did not present an immediate threat to the safety of students and staff.¹³⁹ Likewise, a timely warning would not have helped in preventing similar occurrences. In each case, the alleged perpetrator was identified as a known acquaintance and spoke with campus security officials shortly after the matters were reported; the university was not searching for an unknown suspect.¹⁴⁰ Thus, the isolated incidents did not represent an ongoing threat to the campus community, so no warning was needed.¹⁴¹

4. Marquette's Daily Crime Log

Lastly, by maintaining a campus security department (i.e., the Department of Public Safety), Marquette must keep a daily crime log that records all reported crimes.¹⁴² The last five days of the log can be viewed online,¹⁴³ while the entire log is available for public inspection at DPS headquarters. The daily crime log is organized by the date the incident was reported and includes "all crimes and other serious incidents" related to the university both on and off campus.¹⁴⁴ At the top of each log is a disclaimer warning viewers that the log entries are in the early stages of the investigation process. Therefore, the information provided has not been verified and updates may be necessary.

The October 2010 and February 2011 incidents were each recorded in Marquette's daily crime log. The log indicates that a sexual assault allegedly occurred on Saturday, October 30, 2010, between 10:30 and 11:45 pm and was reported to DPS on Sunday, October 31, 2010, at 2:23 am.¹⁴⁵ It further specifies that the assault was committed in Humphrey Hall by an acquaintance and that MPD assistance was declined.¹⁴⁶ A similar entry was made with respect to the other reported incident. A student stated that she was sexually assaulted in Humphrey Hall by an acquaintance on Sunday, February 27, 2011,

¹³⁷ *Id.*

¹³⁸ See 34 C.F.R. § 668.46(b)(11)(vi)(B).

¹³⁹ *The Handbook for Campus Safety and Security Reporting* lists examples of situations requiring an emergency notification (e.g., an outbreak of a serious illness, extreme weather conditions, a terrorist incident, an armed intruder, etc.). An alleged sexual assault does not comport with these examples. *Campus Safety Handbook*, *supra* note 45, at 98–99.

¹⁴⁰ See *id.* at 112–13.

¹⁴¹ In addition, Marquette's annual security report did contain a description of the university's policies regarding safety warnings. See *2010 Safety Resource Guide*, *supra* note 122, at 3–4.

¹⁴² 20 U.S.C. § 1092(f)(4)(A).

¹⁴³ See *Daily Log*, MARQUETTE U., available at <http://www.marquette.edu/publicsafety/daily-log/index.shtml> (last visited Mar. 22, 2012).

¹⁴⁴ *2010 Safety Resource Guide*, *supra* note 122, at 3.

¹⁴⁵ Marquette Univ. Dep't of Pub. Safety, *Daily Log*, Nov. 1, 2010, # 10-1128.

¹⁴⁶ *Id.*

between 12:00 and 1:00 am.¹⁴⁷ However, that incident was not reported to DPS until March 31 at 1:00 pm.¹⁴⁸ Moreover, the second log entry indicates that MPD was contacted.¹⁴⁹

Given these details, it appears that Marquette is satisfying its Clery Act obligations with respect to the daily crime log. The log is available to the public and contains the nature, date, time, general location, and disposition of each reported crime. The second relevant entry also seems to contradict the third victim's assertion that campus officials discouraged her from reporting the incident to the police. Nevertheless, the log's disclaimer was updated a few months later to reflect that all reported crimes are forwarded to the Milwaukee Police Department.

5. Summary of Marquette's Noncompliance Concerns

The Clery Act investigation by the United States Department of Education will likely uncover several areas of noncompliance with respect to the alleged sexual assaults that occurred at Marquette University in October 2010 and February 2011.

First, the university may have violated the Act if campus officials did in fact discourage the victims from contacting the police. The Clery Act compels universities to inform sexual assault victims of their option to notify local law enforcement authorities and to assist victims with the reporting process.¹⁵⁰ However, the first and third accusers each maintained that campus security officials discouraged her from reporting the incident to the Milwaukee Police Department in an attempt to protect the university's reputation.¹⁵¹ Marquette, on the other hand, contends that no one denied either victim the right to report the alleged assault to MPD,¹⁵² and the university's position seems to be supported—at least relative to the third accuser—as the daily crime log indicates that MPD was contacted the same day the incident was reported.¹⁵³

Second, Marquette likely violated the Clery Act by not disclosing its duty under Wisconsin law to inform local authorities of crimes reported to campus security officials. Although the Clery Act itself does not require universities to report allegations of sexual assault to the police, the Act does require a statement concerning campus law enforcement, including the scope of its authority and its relationship with local agencies.¹⁵⁴ Wisconsin law requires Marquette's Department of Public Safety to notify local police when it believes that a crime has been committed.¹⁵⁵ Despite this legal obligation, the university did not inform MPD about any of the alleged offenses. Likewise, the university admitted that it had not been complying with this state law for several years.¹⁵⁶ Accordingly, Marquette likely violated the Clery Act by not informing students and staff that DPS must refer all reported crimes to MPD.

Third, the university's policy statements failed in several areas to adhere to the regulations set forth in the Clery Act. The Act mandates special considerations in cases of peer-on-peer sexual violence.¹⁵⁷ While Marquette's sexual misconduct policy referenced campus disciplinary actions, the

¹⁴⁷ Marquette Univ. Dep't of Pub. Safety, Daily Log, Mar. 31, 2011, # 11-0386.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 20 U.S.C. § 1092(f)(8)(B)(v).

¹⁵¹ Haggerty et al., *supra* note 1.

¹⁵² Diedrich et al., *supra* note 95.

¹⁵³ Marquette Univ. Dep't of Pub. Safety, Daily Log, Mar. 31, 2011, # 11-0386.

¹⁵⁴ 20 U.S.C. § 1092(f)(1)(C).

¹⁵⁵ WIS. STAT. § 940.34(2)(b).

¹⁵⁶ Haggerty et al., *supra* note 1.

¹⁵⁷ *Clery Act Legislative History*, *supra* note 67.

specific procedures were not described within the policy itself.¹⁵⁸ Similarly, the policy merely stated that individuals responsible for sexual offenses were subject to all levels of university discipline without identifying all of the possible sanctions. Furthermore, in direct contravention of the Act's regulations, the policy limited victims' rights to be informed of the result of the disciplinary hearing.¹⁵⁹ Finally, the Clery Act compels universities to follow consistent policies and procedures for all accusers and suspects.¹⁶⁰ Thus, one can speculate whether the suspects' status as members of an athletic team influenced the discipline imposed or played any role in how the university handled the allegations.

Consequently, the DOE's Program Review Report will likely include several of the potential violations outlined above. The university, however, will be given an opportunity to respond before the department levies any fines or other sanctions.

CONCLUSION

The Clery Act is merely one of several laws that creates a duty for certain individuals to report allegations of sexual assault. This federal law requires universities to keep detailed records of certain criminal conduct that occurs both on and near campus and mandates disclosure of such information via an annual security report and a daily crime log. The Act also requires universities to establish and publish policy statements detailing the school's sexual assault programs and the procedures utilized once such an offense has occurred. The Clery Act does not, however, compel universities to report allegations of sexual assault to local authorities. Rather, a school must only notify the alleged victim of his or her option to report the incident to local law enforcement and to assist the victim in reporting the incident if he or she so chooses.¹⁶¹

In November of 2011, the U.S. Department of Education announced that it was investigating whether Marquette University complied with all of the Clery Act requirements in its handling of three separate allegations of sexual assault committed by five different student-athletes. During the paper review, Marquette provided the DOE with thousands of pages of records concerning the incidents as well as documents outlining the university's then-existing sexual assault policies. Overall, the DOE likely will determine that the university violated the Act in dealing with the various allegations. Specifically, the university failed to disclose and follow its reporting duties, and the rights afforded to sexual offense victims were inadequate. Therefore, Marquette may be fined for its conduct, and the university may be restricted from participating in federal financial aid programs.

Notwithstanding its responsibilities under the Clery Act, Marquette University implemented several important changes to its sexual assault policy statement since the wave of criticism began. The first step, perhaps the most obvious one, was to fix a shortcoming that likely hampered any criminal prosecution of the alleged incidents (not to mention violated state reporting laws). The university now reports any allegations of sexual assault to the sensitive crimes unit of the local police department.¹⁶² Moreover, the sexual misconduct policy was rewritten for the 2011–12 school year to explain and define key sexual assault concepts, to outline procedures for handling reports of sexual misconduct, and to describe the rights afforded to students with respect to sexual misconduct.¹⁶³ Likewise, the university

¹⁵⁸ 2010 *Safety Resource Guide*, *supra* note 122, at 8.

¹⁵⁹ *Id.*

¹⁶⁰ *Campus Safety Handbook*, *supra* note 45, at 54.

¹⁶¹ As seen in Wisconsin, other laws may specifically require universities to report sexual assaults to the police, however. WIS. STAT. § 940.34(2)(b).

¹⁶² Durhams & Laasby, *supra* note 14.

¹⁶³ *At Marquette Student Handbook and Planner*, MARQUETTE U. 44 (2011–2012), available at http://www.marquette.edu/osd/policies/doc/Student_Handbook.pdf.

launched a new sexual misconduct website,¹⁶⁴ and all athletes are now required to participate in sexual violence awareness and prevention training.¹⁶⁵

The recent events at Marquette and other schools have cast a bright light on the issue of campus sexual offenses and will hopefully encourage all universities to reevaluate their policies and procedures to not only ensure compliance with federal law, but also to ensure the safety of all students. A university's response to such allegations sends an important message to future victims and suspects.¹⁶⁶ As a result, mishandled cases can have severely damaging effects.¹⁶⁷ When interviewed for the first time following the incident, one of the Marquette accusers stated, "The university made mistakes, and I live with that every day. But I think they really are trying to do better. I was skeptical about their efforts initially, but now I have more hope than I did a few months ago. Time will tell."¹⁶⁸ Consequently, in the end, the widely publicized sexual assault allegations may lead to reform that helps reduce some of the sexual violence that has plagued campuses for decades. However, only time will tell whether universities heed to the message.

¹⁶⁴ See *Sexual Misconduct*, MARQUETTE U., <http://www.marquette.edu/sexual-misconduct/> (last visited Mar. 23, 2012).

¹⁶⁵ Haggerty et al., *supra* note 1.

¹⁶⁶ Karjane et al., *supra* note 22, at 12.

¹⁶⁷ *Id.*

¹⁶⁸ Haggerty et al., *supra* 1.