Legal Issues & Study Abroad

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September 20, 2012

Today’s Flight Plan

• Work Collaboratively
• Clery Act
• ADA
• FERPA
• Title IX
Collaboration

- Understand scope of issues that can arise
- Identify your team / resources
- Educate & Train
- Develop templates & checklists

CLERY ACT
What is the Clery Act?

- Jeanne Clery Campus Security Act (20 USC 1092 § (f)(3))
- Govern consumer disclosure requirements for institutions that participate in the Federal student financial assistance programs

Clery Act

- Tracking / Reporting of crime stats
- Crime log
- Policy Statements
- Emergency Notifications
- Timely warnings
Clery Handbook

• The Handbook for Campus Safety and Security Reporting issued by the U.S. Dept. of Education - February 2011


Location, Location, Location

WHERE (not Who)

• Clery focuses on WHERE crimes occur

• Don’t focus on identity of victim / perpetrator
## Education Abroad Models

<table>
<thead>
<tr>
<th>MODEL</th>
<th>CLERY IMPACT</th>
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</thead>
<tbody>
<tr>
<td>U.S. institution opens &amp; operates campus in another country</td>
<td>Full Clery reporting obligations / need to define “public property”</td>
</tr>
<tr>
<td>Students go abroad for credit in program not run by their home institution</td>
<td>No Clery reporting obligations</td>
</tr>
<tr>
<td>U.S. based institution runs own program overseas – contracts with overseas entity to provide services and/or space</td>
<td>Clery obligations if &quot;own or control &quot;any property overseas</td>
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### KEY QUESTION?

- Does the institution own or control property abroad?

- Change in February 2011 - Foreign educational operations that are either owned or maintained by domestic institutions are governed by the Clery Act and have Clery Act reporting requirements.
### Non-Campus Buildings / Property

- Any building or property owned or controlled by an institution
  - used in direct support of, or in relation to, the institution’s educational purposes,
  - frequently used by students, and
  - not within the same reasonably contiguous geographic area of the institution

### What Does “Controlled” Mean?

“CONTROLLED”

- institution purchased, rents, leases or

- has some other type of written agreement for a building or property, or a portion of a building or property
Control / Agreements

• Could include e-mails
• Is the agreement for the program?
• Or is the agreement for use of the physical space?
• NOTE: duration/term of the agreement does not matter

Control / Agreements

• classroom space
• housing (dorms, hotel, family stay)
  – Host family situations not usually non-campus locations unless written agreement with the family gives your school some significant control over space in the family home
• Student lounge area
**Control Over Portion of Bldg.**

- If agreement only for section of a building (e.g. the 3rd floor of an office building) only have to disclose statistics for crimes that occur on the 3rd floor, plus any other areas of the building that your students or employees must use to access the contracted space (main lobby, stairs, elevators, restrooms)
- (See map for example)

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**Partial Control of Bldg.**

[Diagram of building layout with labels for stairs, hallway, elevator, lobby, and areas for private apartments and noncampus student housing]
### Field Trips / Overnight Stays

- Typically, crimes are not reportable because
  1. they did not occur on property “owned or controlled” by the institution (field trips); or
  2. geography not “frequently-use-by-students” (overnight trips).
- See page 30 of the Handbook.

### Control for Short Duration

- Statistics would only be reported for the time period (dates/times) that your agreement allows you to use the property
- EX: Mon. – Fri. / 8:00 a.m. – 5:00 p.m.
Field Trips / Overnight Stays - Exception

- Non-campus property if institution *arranges* to rent or lease space for students

- Frequently used by students (same hotels or hostels used on a regular basis)

- If students stay in one location for an extended amount of time (i.e., more than one night)

- See page 27 of the Handbook.

Control Over Property

- NOTE: Only crimes that occur during the time in which the property is used by the institution are reportable

- EX: if the institution hosts only a summer trip to France, a crime occurring in the winter at that location is not reportable
REPORTING CRIMES

Annual Security Report

Clery requires reporting of:

• 3 categories of crimes

• 3 geographic areas

Location, Location, Location

3 Geographic Areas – Where (not Who)

1. Campus
2. Non-campus property (no public property reporting requirement)
3. Public property adjacent to and accessible from campus
### Reportable Crimes

3 Categories of Crimes – Where (not Who)

1. Criminal Offenses (using FBI definitions under the FBI’s Uniform Crime Reporting Handbook)
2. Hate Crimes
3. Arrests & Referrals for Disciplinary Actions (using local law definitions)

### Clery Crimes

1. Criminal Offenses (using FBI definitions under the FBI’s Uniform Crime Reporting Handbook)

2. Hate Crimes

3. Arrests & Referrals for Disciplinary Actions (using local law definitions)
Criminal Offenses

1. Criminal Homicide
   • Murder & non-negligent Manslaughter
   • Negligent Manslaughter
   • Sex Offenses (forcible & non-forcible)

2. Robbery

3. Aggravated Assault

4. Burglary

5. Motor Vehicle Theft

6. Arson

Hate Crimes - Definitions

- Criminal offense committed against a person or property which is motivated, in whole or in part, by the offender’s bias.

- Bias = a pre-formed negative opinion/attitude toward a group of persons based on:
  - Race
  - Gender
  - Religion
  - Disability
  - Sexual orientation
  - Ethnicity/national origin
### Hate Crimes Include Any Offense in Column A or B

<table>
<thead>
<tr>
<th>Column A</th>
<th>Column B</th>
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</thead>
<tbody>
<tr>
<td>Murder &amp; Non-negligent manslaughter</td>
<td>Larceny-theft</td>
</tr>
<tr>
<td>Forcible &amp; Non-forcible sex offenses</td>
<td>Simple assault</td>
</tr>
<tr>
<td>Robbery</td>
<td>Intimidation</td>
</tr>
<tr>
<td>Aggravated Assault</td>
<td>Destruction / damage / vandalism of property</td>
</tr>
<tr>
<td>Burglary</td>
<td></td>
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<tr>
<td>Motor vehicle theft</td>
<td></td>
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<tr>
<td>Arson</td>
<td></td>
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</tbody>
</table>

### Hate Crimes

- For counting purposes, no hierarchy rule applies
- Count each offense
- Different from Criminal Offense counting where you count the most egregious of the multiple criminal charges
**Arrest & Referrals for Disciplinary Actions**

- Must disclose the number of arrests and the number of persons referred for disciplinary action for the following actions:
  - Weapons: carrying, possessing, etc…
  - Drug Abuse Violations
  - Liquor Law Violations

- Counting includes arrests which later result in a release without a formal charge
Arrest & Referrals for Disciplinary Actions

Must use Local Law Definitions
Ex: Drinking age in foreign country is 18 (rather than U.S. 21)
Ex: Smoking marijuana (may be permitted in Amsterdam)
Ex: Research vessel or semester-at-sea program – multiple countries’ laws or international maritime law may apply depending on the boat’s location

Annual Security Report

• Policy Statements – certain statements are required (see Handbook – Chap. 7 & 8)
• Disclose What You Do and How You Do It
• Policies re timely warnings
• Policy for preparing the annual disclose of crime statistics
• Policies re reporting on a voluntary, confidential basis
Annual Security Report

- List of titles of each person/organization to whom students and employees should report criminal offenses

- Sex Offenses and Offenders
  - Must include a statement addressing your institution’s campus sexual assault programs to prevent sex offenses and procedures to follow when a sex offense occurs.

Annual Security Report

- Distribution
  - Institution’s main campus
    - Currently enrolled students
    - All employees
    - Students overseas
  - If no main campus
    - to currently enrolled students
    - Prospective students of overseas program

- Maintain for 7 years
### DAILY CRIME LOG

- Log may be made available in paper or electronic format
- May maintain log in police or security office or on-line
- Must be available to the public (not just students)

### OBTAIN CRIME INFO FROM LOCAL AUTHORITIES

- Good-faith effort to obtain info from local law enforcement
- Request in writing/document the good-faith effort.
  - use the U.S. Federal definitions of crimes
  - Not required to pay local agency for info
- If local agency fails to provide info – note in Annual Report that info was requested but was not supplied
TIMELY WARNINGS

- The institution issues "timely warnings" regarding
  - Clery Act crimes
  - Occurring on Clery geography (own/control property)
  - that the institution deems to be
  - Serious or continuous threat to students and employees; and
  - may aid in the prevention of a similar crime

- Email / Text
- Timely = as soon as pertinent info is available

EMERGENCY NOTIFICATION

- Wider focus than the timely warnings
- Significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.
  - Ex: Tsunami
  - Ex: Forest Fire
  - Ex: outbreak of deadly virus
DISABILITY LAWS

DO THEY APPLY OVERSEAS?

FEDERAL DISABILITY LAWS

• Section 504 of the Rehabilitation Act (“Section 504”)
• Titles II and III of the Americans with Disabilities Act (“ADA”)
• all apply in the higher education context
• prohibit discrimination on the basis of disability against otherwise qualified individuals.
FEDERAL DISABILITY LAWS

• Section 504 of the Rehabilitation Act ("Section 504")

• prohibits discrimination in connection with programs and activities that receive federal financial assistance

FEDERAL DISABILITY LAWS

Title II of the ADA

• prohibits discrimination in state and local government-operated higher education institutions.
FEDERAL DISABILITY LAWS

Title III of the ADA

- prohibits discrimination by *private* providers of *public accommodations* – including, specifically, private colleges and universities

FEDERAL DISABILITY LAWS

What is “Disabled?”

- Must qualify as an individual with a disability under the applicable statutory definitions
FEDERAL DISABILITY LAWS

Per ADA - “Disabled” is:
• one who has a physical or mental impairment that
• substantially limits one or more major life activities;
• a record of such impairment; or
• is regarded as having such an impairment; and
• are “otherwise qualified” for the programs in question; and
• Are able to carry out the essential requirements of the program with or without reasonable accommodation

FEDERAL DISABILITY LAWS

Does Section 504 or Title II or III of the ADA apply overseas?
• No Extraterritoriality
• General presumption that federal legislation does not reach beyond the borders of the United States.
FEDERAL DISABILITY LAWS

Does Section 504 or Title II or III of the ADA apply overseas?

The answer is a bit murky.

Should try to accommodate

Federal Disability Laws Overseas

- Title VII of the Civil Rights Act and Title I of the ADA which prohibit *employment* discrimination have been extended to apply overseas.


- However, Congress did not extend Section 504 or Titles II or III of the ADA overseas.
COURT DECISIONS

2 Federal Court Cases

• Presumption re extraterritoriality should not apply (1 finding, 1 silent)
• Found programs were readily accessible and usable by individuals with disabilities

Bird v. Lewis & Clark College, 303 F.3d. 1015 (9th Cir. 2002) – be careful what you represent but try to accommodate

• Found programs were readily accessible and usable by individuals with disabilities
COURT DECISIONS

**Bird v. Lewis & Clark College**

- Oregon Federal District Court held - Section 504 and ADA applied to a study abroad program
- Court emphasized plaintiff was
  - American student
  - participating in an American University overseas program
  - taught by American faculty.

COURT DECISIONS

**Bird v. Lewis & Clark College**

- 9th Circuit did not address the district court’s ruling on extraterritoriality
- Denied plaintiff’s Section 504 an ADA claims
- Found program when viewed in its entirety was readily accessible to / usable by individuals with disabilities.
- 9th Circuit stressed the fiduciary relationship under state law - college assured the student it would accommodate her disability.
COURT DECISIONS

Tecza v. University of San Francisco

• Law student with attention deficit hyperactivity disorder alleged that USF did not accommodate his disability during his study abroad in Dublin and Prague.

• Federal District Court cited Bird v. Lewis & Clark in rejecting student’s claims because the program, when viewed in its entirety, was readily accessible to the student

OCR DECISIONS

What is OCR?

• Department of Education’s Office of Civil Rights (enforces Section 504 and the ADA re disability accommodations for college and university students)
OCR DECISIONS

• 3 OCR opinion letters declined to address extraterritoriality but analysis seemed to assume it applied

• 1 OCR opinion federal antidiscrimination laws do NOT apply overseas
  – Arizona State University (OCR Region VIII, November 29, 2001)
  – program was run by foreign institution / not ASU

FEDERAL DISABILITY LAWS

Aspects of Program that Should Comply with Section 504 and ADA

• Recruitment
• Application
• Screening
• Acceptance Procedures
DISABILITY RELATED INQUIRIES

Student must disclose disability to receive reasonable accommodations

• Do not require pre-admission inquiries

• Encourage students to make disability accommodation requests as early as possible

• You may make post-admission disability inquiries on a confidential basis.

ACCOMMODATIONS ABROAD

• Accommodations must be reasonable
• Factors
  • Level of institutions control over program
  • Country’s laws, customs, lack of resources

• Institution not required to fundamentally alter the nature of the programs or activities in question
• College/university not required to take on an undue financial or administrative burden
## ACCOMMODATIONS ABROAD

- Courts will defer to institution’s diligent assessment of the reasonableness and appropriateness of requested accommodations

- See Wynn v. Tufts University (1st Cir.) – court deference to institution re reasonable accommodations in academic program.

- Court concluded if school reaches “a rationally justifiable conclusion that the available alternatives would result in either lowering academic standards or requiring substantial program alteration,” an accommodation would be deemed unreasonable

## BEST PRACTICES

- State essential program requirements in informational materials

- If require medical certification
  - do so with all students (not just disabled)
  - make sure form does not directly inquire regarding disabilities

- Involve local disability office to assist with determining whether student is “disabled” and reasonableness of accommodations requested
FERPA

PRIVACY / SHARING

FERPA

• Federal Educational Rights and Privacy Act ("FERPA")

• Applies to all educational institutions that receive funds through DOE's programs.

• Prohibits disclosure of student’s educational records or personally identifiable information from education records, without written consent.
FERPA

What is an “Educational Record”? 

- All records that are: 
  - Directly related to a student 
  - Maintained by an educational agency or institution or by a party acting for the agency or institution.

FERPA EXCEPTIONS

- Sharing with own school officials when they have legitimate educational interest in the record
- Disclosure permitted without prior written consent to the officials of another school or institution where the student seeks to enroll
- Health and safety – threat to self or others
TITLE IX

SEXUAL HARASSMENT

WHAT IS TITLE IX?

• Title IX (20 U.S.C. Section 1681) provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance… .”
**TITLE IX APPLIES OVERSEAS**

- King, et al. v. Eastern Michigan University

- Court found broad language of Title IX and legislative history provide affirmative evidence that Congress intended for Title IX to apply to every single program of a university or college, *including study abroad programs*.

**TITLE IX**

- Sexual harassment in education includes
  - any unwanted and unwelcome sexual behavior
  - that significantly interferes with
  - a student's access to educational opportunities
OCR April 4, 2011 Dear Colleague Letter

- Sexual violence = form of sexual harassment prohibited by Title IX
- If student sexually harasses another student, harassing conduct = hostile environment if conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.

SEXUAL HARASSMENT & TITLE IX

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school:

1. take immediate action to eliminate the harassment,
2. prevent its recurrence, and
3. address its effects
Sexual Harassment

Requirements
- Publish notice of nondiscrimination
- Adopt / publish grievance procedure
- Train employees re harassment
- Protect victim from further harassment / discrimination
- Investigate

CONCLUSION
SUMMARY

• U.S. legal requirements may apply to operations abroad
• Work collaboratively to resolve issues

Bon Voyage