

# Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices

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## **I. Introduction:**

Colleges and universities send more and more students each year to a myriad of different international higher education experiences. These experiences are a very important part of the educational experience for many students and almost all students have a positive and safe experience when they go abroad. A very small percentage of students who study internationally are arrested, go missing, or are injured or killed. While incidents occur domestically as well, in the international environment, a number of overlapping laws and standards apply to international education, and those different laws and standards are compounded by language and cultural differences in these countries.

Several United States federal laws govern higher education overseas study. These laws should not be confused with risk management standards or best practices for insuring safety. In fact, some of the laws when applied in certain ways may actually lead to greater danger for our students. Colleges should endeavor to comply with the laws discussed in this presentation and outline but should not do so at the cost of properly managing risk.

This conference paper assumes a general knowledge of the Clery Act, Title IX and related obligations.<sup>1</sup> Further, this conference paper concentrates on international reporting and response requirements, not general liability questions in study abroad.<sup>2</sup>

## **II. Legal Requirements:**

Federal law, regulations and sub-regulatory guidance require that colleges and universities report statistics of certain crimes in specific locations, and take certain actions when they learn of certain crimes and of harassment or unequal treatment on the basis of sex. The laws and guidance overlap somewhat when students study overseas, but they use different standards and definitions that can be confusing to higher education professionals, and the regulatory regimes leave substantial gaps that can be filled by institutional policy.

As a note, the Clery Act (including VAWA) and Title IX are not risk management laws, nor should they be seen as prescriptions for running safe overseas programs.<sup>3</sup>

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<sup>1</sup> Rather than including general information this paper will, where applicable, point towards resources that may assist in compliance.

<sup>2</sup> Readers interested in the more general questions of liability are commended to a recent Journal of College and University Law article on point. See Footnote 20 in Robert J. Aalberts, Chad Marzen, and Darren Prum, *Studying is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 J. of College and Univ. L. 189 (2015) (collecting articles on point).

<sup>3</sup> For information on risk management standards, please see *Standards of Good Practice for Education*

Primarily these laws require response and consumer reporting, and do very little to lower the risk of injury, illness, or victimization in study abroad.<sup>4</sup> Below please find information on these laws and special issues raised in the overseas environment.

### A. The Clery Act:<sup>5</sup>

Prior to 2011, the 2005 Clery Act Handbook<sup>6</sup> listed few requirements outside the United States. The 2011 Clery Act Handbook<sup>7</sup> significantly expanded reporting and response requirements in certain international programs.<sup>8</sup> These reporting requirements maintain the Clery Act's geographic rules and require reporting of certain incidents that occur in certain locations, referred to as Clery geography. In 2013, the reauthorization of the Violence Against Women Act<sup>9</sup> amended the Clery Act to add new reporting within those geographic locations. Interestingly, while reporting maintains the traditional geographic standards, the VAWA added certain response requirements that eschew geography and require action based on status as victim of a crime, regardless of where the incident occurred. This aspect of the VAWA looks more like Title IX, discussed below.

### B. Title IX:

Title IX prohibits unequal treatment on the basis of sex in access to educational programs. While the text of Title IX begins "No person in the United States shall..." the Department of Education has been inconsistent in its interpretation of this law in international environments. There is no written ED guidance on the topic, and different regional offices of the Office for Civil Rights have said that Title IX does not apply outside of the United States while others insist that Title IX is completely applicable outside of the United States and, in fact, is not based on geographic location at all. Case law is similarly split on whether Title IX applies outside of the U.S.<sup>10</sup> Due to the unsettled nature of this requirement, this conference paper will assume *arguendo* that Title IX applies overseas.

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*Abroad (5<sup>th</sup> Ed.)*, FORUM ON EDUCATION ABROAD, available at <http://www.forumea.org/wp-content/uploads/2014/08/Standards-2015.pdf> (2015).

<sup>4</sup> There are aspects of the Violence Against Women Act that *do* address training and risk reduction in an effort to address and prevent future crimes and incidents.

<sup>5</sup> For a more detailed treatment of precise Clery Act requirements in the distance and overseas environment, please see Joseph Storch, *The Clery Act and Overseas/Distance Study: New Developments and Compliance Guidance*, 10 NACUA Notes 5 (Apr. 5, 2012). Please ensure that you are using the version with the *Editor's Note*, as federal sub-regulatory guidance changed after the NACUA Note was initially published. Please also note that the NACUA Note precedes VAWA Reauthorization.

<sup>6</sup> U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Crime Reporting*, Washington, D.C., 2005.

<sup>7</sup> U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, Washington, D.C., 2011.

<sup>8</sup> It should be noted that the Department, in a conversation agreed that these requirements had never been written down, but insisted that the same rules had always applied; they just had never been placed in writing. There were no relevant statutory or regulatory changes to Clery Act geography during the time period between 2005 and 2011.

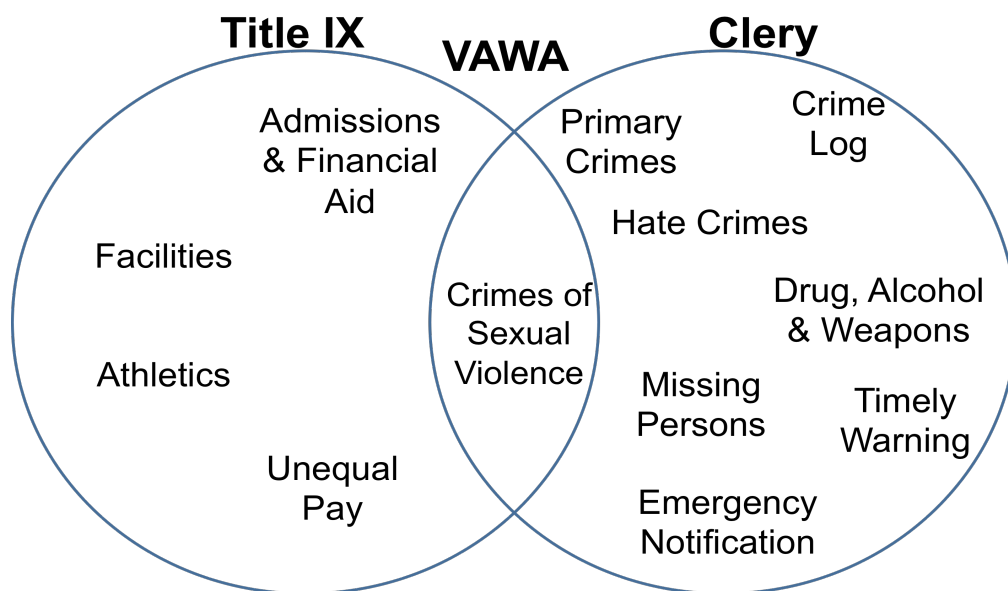
<sup>9</sup> P.L. 113-4, Mar. 7, 2013; Codified at 20 U.S.C. §1092(f).

<sup>10</sup> Compare *King v. Board of Control of Eastern Michigan University*, 221 F.Supp. 2d 783 (E.D. Mich. 2002) with *Mattingly v. Univ. of Louisville*, 2006 WL 2178032 (W.D. Ky. July 28, 2006) and *Phillips v. St. George's University*, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007). For an excellent in-depth discussion of each of these cases in a very recent *Journal of College and University Law*, please see Aalberts, *supra* Note 2.

Title IX currently requires no formal reporting (as Clery does in the Crime Log and Annual Security Report). The applicability of Title IX in the overseas environment is primarily in the area of response to reports of sex discrimination. Title IX guidance requires prompt response, investigation and (where called for) action to address and ameliorate unequal treatment on the basis of sex.<sup>11</sup>

### C. Where VAWA and Title IX Meet:<sup>12</sup>

Though they are often discussed together, most of Title IX *does not* overlap with most of the Clery Act. In addition to using different standards, very little of each law is also included in the other law. The following Venn diagram (prepared with SUNY Associate Counsel Andrea Stagg) shows where these laws do not overlap and highlights the very limited area where these laws and the concepts in these laws overlap.



Title IX and VAWA/Clery meet in the area of response to (most)<sup>13</sup> sexual and interpersonal violence. Colleges must provide certain notifications to all students and other

<sup>11</sup> It goes without saying that it is a best practice to address discrimination, including sex discrimination, whether it is technically required or not.

<sup>12</sup> For a more detailed discussion of the requirements of the Violence Against Women Act, please see Andrea Stagg and Joseph Storch, *Preventing and Addressing Sexual Assault, Domestic Violence, Dating Violence and Stalking on College Campuses: Implementing the Violence Against Women Act Amendments to the Clery Act*, 13 NACUA Notes 5 (In Press 2015).

<sup>13</sup> Many in the popular media conflate these two laws, but higher education professionals must be careful as they do not completely overlap. There are several VAWA reportable crimes that do not implicate Title IX. For instance, if a student constantly contacts a professor regarding a paper, and the professor contacts student affairs to complain of the incessant contact, the report may count as a VAWA stalking if it meets all the applicable requirements (course of conduct directed at a specific person that could cause a reasonable person to suffer emotional distress, and either the student is on Clery property when sending the messages or the professor is on Clery property when reviewing the messages). But there is no unequal treatment on the basis of sex. Similarly if a father meets up with his son, a student, in institutional-owned property overseas and commits an aggravated assault against the student, that would be reportable as an aggravated assault and as a domestic violence felony or misdemeanor crime of violence, but it does not implicate Title IX responsibilities.

notifications to all victims/survivors of these crimes. Further, the law and the guidance create rules that govern the conduct process. Inasmuch as the same rules apply overseas, institutions (and their vendors and partners) should prepare for the reporting and response requirements of sexual and interpersonal violence in the study abroad environment.

#### **D. Reporting for Clery/VAWA Overseas:**

The Clery Act requires that we report all Clery Act countable crimes which occur on relevant Clery geography that are either reported to a Campus Security Authority or to local law enforcement.<sup>14</sup> The Department of Education, in oral guidance to the author, stated that it looks positively on a policy of declaring all faculty and staff who travel overseas with students as Campus Security Authorities. This makes sense as our college students are most likely to look to faculty and staff from their home institution for support in crisis. The other requirement, querying local law enforcement is a bit more challenging.

Clery Act Part I (classic Clery crimes), Part III (hate crimes), and Part IV (VAWA crimes and incidents) are reportable using United States F.B.I. Uniform Crime Reporting definitions.<sup>15</sup> It goes without saying that local law enforcement in small towns and big cities outside of the U.S. look askance at being asked to report statistics using such definitions. While there is no empirical data on reporting rates, anecdotal evidence is that few if any schools receive useful information for Clery reporting when requesting statistics from overseas law enforcement. Colleges are in compliance simply by sending the letter,<sup>16</sup> even if they never hear back from the local law enforcement, or the data received back cannot be used.<sup>17</sup> The Department of Education has declined to exempt overseas locations from the requirement that we request statistics from local law enforcement, even when presented with an argument about how little data institutions receive back. The Department sees no difference between the law enforcement surrounding the main campus property or domestic non campus property, and such property on another continent.

But requesting such statistics is not without cost. Anecdotal stories have come back of local law enforcement in certain countries reacting very poorly to these requests. They become suspicious of the programs, especially since many of the questions revolve around sexual assaults, which they view very differently than we do here. On occasion, the request has led to heated discussions with program providers. The Department, to date, has declined to allow exemptions, even in countries where requesting such statistics might actually create more danger than it prevents (more on this in Section II(G) below).

While Clery Act crimes in Parts I, III, and IV require that an institution report all reports of such crimes, regardless of whether victim or assailant is identified, and

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<sup>14</sup> See 2011 Clery Handbook at 73-87.

<sup>15</sup> See 2011 Clery Handbook at 34, 57-60. On occasion, the Department looks to definitions from the National Incident Based Reporting System.

<sup>16</sup> See 2011 Clery Handbook at 84.

<sup>17</sup> For example, if a request for statistics from local law enforcement after a semester in Paris where the institution rented apartments for students yields all the crimes in all of Paris for all dates, an institution need not report all those crimes unless they can be broken down to Clery Act crimes occurring in the relevant Clery geography during the times that the students lived in the apartments. Further, institutions need not pay for statistics or purchase special software to view statistics. See 2011 Clery Handbook at 83-87.

regardless of whether there is an arrest, trial, or conviction, for Part II drug, alcohol and weapons arrests and referrals for discipline, we only count arrests or referrals for discipline for breaking local law.<sup>18</sup> This leads to significant comparison issues domestically (some states ban all guns from campus while others allow open or concealed carry; state law on possession of marijuana can differ significantly) and even more difficulty internationally.

For example, a 19-year-old student becomes very drunk on a trip to England and is referred for campus discipline at the home campus for possession of alcohol and other bad behavior. While such a violation at the home campus would count for Clery, it does not here as such drinking does not violate local law in London. Additional examples abound. To correctly report, an institution must know what the local law is for each such violation. Frankly, this is a difficult bureaucratic exercise with little practical return for student consumer information. Neither the Department, nor any other federal agency, have published a list of drug, alcohol and weapons laws in other countries, making reporting difficult and leading to inconsistent reporting among different colleges.

#### **E. Confusion in Defining On Campus Property Overseas:**

In recent years, many institutions have opened campuses in overseas locations. These locations may count as on campus property under the Clery Act if they meet the definitions established in the Handbook.<sup>19</sup> The most important of these definitions for international programs is the definition of “separate campus.”<sup>20</sup> This definition covers distant locations owned or controlled by the institution that have an “organized program of study” and “at least one person on site acting in an administrative capacity.”<sup>21</sup> The Handbook does not define organized program of study, but in oral guidance, a Department representative told the author that this is a location wherein a student can complete a degree, diploma or certificate without ever taking a class at the main campus of the institution. The only written discussion of this rule (in a manner of speaking) is in a Final Program Review Determination of the Department of Education<sup>22</sup> where the Department says that “for Clery Act reporting purposes, educational instruction at a location does not have to result in a certification or a degree to be included in the crime statistics. Such locations may include satellite, extension, or similar types of noncontiguous sites that have an organized program of study regardless of length or resulting credentials.”<sup>23</sup> While inartful, this sentence seems to support the oral guidance provided by the Department.

#### **F. Confusion in Defining Non Campus Property Overseas:**

Study abroad mostly makes use of the second definition of non campus property.<sup>24</sup>

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<sup>18</sup> Regardless of the United States definition. See 2011 Clery Act Handbook at 64.

<sup>19</sup> See 2011 Clery Handbook at 14-17.

<sup>20</sup> See 2011 Clery Handbook at 15.

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Cynthia Thornton, Area Case Director, School Participation Team, Dallas, United States Department of Education to V. Burn Hargis, President, Oklahoma State University, *available at* <https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/cleryact/oklahomastate/OklaFinalFPRD080411.pdf> (Aug. 4, 2011).

<sup>23</sup> *Id.* at 13.

<sup>24</sup> “Any building or property owned or controlled by an institution that is used in direct support of, or in

The first definition of non campus property<sup>25</sup> mostly applies to fraternity and sorority houses near the institution's on campus property, and rarely, if ever, applies overseas. Yet all non campus statistics are combined into a single column for reporting in the Annual Security Report.<sup>26</sup> Frankly, this makes the data all but useless. Combining crimes that occur in certain recognized Greek housing with the same crimes that occur on a study abroad trip does not provide useful data either about Greek housing or international and other non campus crimes. Thus, even if colleges work diligently to appropriately collect data from overseas local law enforcement and Campus Security Authorities, and even if they provide useful statistics, those statistics are made unusable when combined with the crimes that occur at certain houses near the campus.

The Department has never officially drawn the lines for when an international location must be counted as non campus property. The closest that we have is a set of Department of Education approved clarifications<sup>27</sup> that were issued in March of 2012. The clarifications outline two methods where a location for which an institution has a written agreement can rise to the level of non campus property. Either an institution makes "repeated use of a location" or an institution sponsors a "trip of longer duration."<sup>28</sup> The Department, despite repeated requests, has not defined the time period within which a second visit to a location would be considered "repeated use," and has not defined the minimum time period for a visit to be considered "longer duration." For longer duration, the clarification gives the *example* of "a three week art study trip to another city for a series of art lectures and demonstrations at a museum,"<sup>29</sup> but when asked, the Department would not agree that three weeks or 21 days is the line separating short duration (does not count) and longer duration (counts).

To address this, the SUNY policy below uses the somewhat conservative definitions of repeated use as twice within a 730 calendar day period (two years) and 20 days or nights as the line above which a trip counts as longer duration and, thus, reportable as non campus property. This is not the only way to define these terms. Each institution should develop definitions and use them consistently.<sup>30</sup>

### **G. Issues with VAWA and Title IX Response Overseas:**

The Clery Act, as amended by VAWA, and Title IX require responses to reports of VAWA crimes and discrimination on the basis of sex (for the purposes of this conference paper, these will be treated together as the requirements are very close, but with

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relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution." 2011 Clery Handbook at 25.

<sup>25</sup> "Any building or property owned or controlled by a student organization that is officially recognized by the institution" 2011 Clery Handbook at 25.

<sup>26</sup> See 2011 Clery Handbook at 25-29.

<sup>27</sup> Department of Education, *Approved Clarifications*, available at [http://www.nacua.org/documents/Clery\\_Campus\\_Safety\\_Survey.pdf](http://www.nacua.org/documents/Clery_Campus_Safety_Survey.pdf) (Mar. 26, 2012).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.*

<sup>30</sup> Study abroad is not the only program that can benefit from these definitions. Many institutions maintain athletic programs that travel to games at other locations. The same standards for repeated use and longer duration can assist with accurate and consistent Clery Act reporting for athletic travel.

acknowledgment that not all VAWA crimes are Title IX discrimination and they are governed by two separate laws). The VAWA and Title IX response requirements include providing information/access to counseling, medical assistance, resources, the student conduct process and the opportunity to report to local law enforcement (as well as the choice not to report).<sup>31</sup> These rules apply uniformly with no flexibility for programs in the international environment.

There are countries where colleges and universities bring students to study at which a report to local law enforcement will have significant negative repercussions for the reporting student. Some countries do not recognize sexual assault for the crime that it is, while other countries severely punish gays and lesbians, even potentially including the death penalty.<sup>32</sup> While academic freedom supports the notion of studying in countries and cultures that have very different views as the United States, institutions should be especially careful in training students (as well as faculty and staff) about the consequences of reporting to local law enforcement (and even the consequences of seeking medical care locally, as some locations are mandated to report to law enforcement). The VAWA requires that the student makes the final decision on whether to report to local law enforcement, but they should do so with eyes wide open through useful and accurate advice by institutional personnel.

Institutions may choose to interim suspend a student accused of certain crimes from a program. It is recommended that in the initial waivers and information that the students sign, that notice be given that a student accused of certain crimes or policy violations of the home institution (as well as the policies of the host institution and third parties) may be interim suspended and sent home at their own expense. This will alleviate difficult conversations with parents (and their lawyers) who will seek institutional reimbursement for the expensive last minute flight from the international location that their student had to purchase. Institutions should also prepare (and work with third party providers to plan and prepare) accommodations for victims and survivors of crimes and policy violations that can include access to counseling (whether local or with institutional counselors over Skype or Google Chat, if permitted by the counselor's license), academic and housing accommodations, and access to the student conduct process, even from a distance. Department Guidance<sup>33</sup> is clear that when making accommodations, institutions must move the student accused of the violation before moving the victim, and must give the victim the choice in how to best accomplish this requirement.

#### **H. Differences With Study Abroad Home Stays:**

While the Department's Handbook uses the terms "ownership" or "control" to describe when property is covered under the definition of Clery geography, they only stray from that term once, in the area of home stays. There, the Department's sub-

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<sup>31</sup> For detailed information on these requirements, see Stagg and Storch NACUA Note referenced above.

<sup>32</sup> See Terri Ruppger, *Here are 10 Countries Where Homosexuality May be Punished By Death*, THE WASHINGTON POST, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2014/02/24/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death/> (Feb. 24, 2014). The countries referenced are Yemen, Iran, Iraq, Mauritania, Nigeria, Qatar, Saudi Arabia, Sudan, and United Arab Emirates. Note that this is not a complete list.

<sup>33</sup> See April 4 "Dear Colleague" Letter on Sexual Violence, U.S. Department of Education (April 4, 2011).

regulatory guidance says “Host family situations do not normally qualify as noncampus locations unless your written agreement with the family gives your school some significant control over space in the family home.”<sup>34</sup> Significant control is not defined, however.<sup>35</sup> In oral guidance to the author of this conference paper, the Department of Education indicated that significant control means that the students enter and exit the home through a separate entrance, rather than through the same entrance as the home owners. The comparison told to the author was an “in law apartment.” It is not clear why this is a difference that matters for Clery Act reporting, but that oral statement is the only guidance found on defining the difference between “control” and “significant control.”

### **I. Obligations Rarely Applying Overseas:**

In the 2008 Higher Education Opportunity Act, Congress added a requirement that institutions with on campus student housing collect data on certain fires and issue an Annual Fire Report concurrent with the Annual Security Report.<sup>36</sup> Likewise, institutions with on campus student housing must have policies for addressing missing on campus residential students.<sup>37</sup> To the extent that an institution is not operating an actual campus overseas that contains on campus student housing, neither of these obligations apply.<sup>38</sup> Further, the Emergency Notification component of that same law only covers emergencies occurring in on campus property as defined under the Clery Act.<sup>39</sup> The related Timely Warning provisions of the Clery Act apply for any Clery Act geography, regardless of whether that property is domestic or overseas.<sup>40</sup>

### **III. The Importance of Communication and Record Keeping:**

In order for any institution to appropriately comply with the Clery Act and Title IX requirements discussed above, clear communication channels and prior planning are required. No longer can a college assign one office the role of complying with these laws and assume all is well. While there are many methods to approach these requirements, this author recommends a “hub and spoke” approach to addressing Clery Act crime and Title IX violations in study abroad.

Each faculty or staff advisor who is accompanying students overseas should be declared as both a Campus Security Authority (Clery/VAWA) and a Responsible Employee (Title IX) and offered training on the meaning of those requirements.<sup>41</sup> When a reportable crime or incident occurs, those individuals should immediately<sup>42</sup> contact the

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<sup>34</sup> See 2011 Clery Handbook at 30-31.

<sup>35</sup> Compare *Id.* to 2011 Clery Handbook at 12 (defining “control” for the purposes of Clery Act reporting).

<sup>36</sup> See 34 CFR 668.49 et seq.; 2011 Clery Handbook at 171-179, 181-187, 189-197.

<sup>37</sup> See 34 CFR 668.46 et seq.; 2011 Clery Handbook at 161-169.

<sup>38</sup> See 2011 Clery Handbook at 161 (missing students) and 171 (fire reporting).

<sup>39</sup> See 2011 Clery Handbook at 97, 118.

<sup>40</sup> See 2011 Clery Handbook at 111, 118.

<sup>41</sup> For a chart comparing the reporting requirements of Campus Security Authorities and Responsible Employees in various crimes, please see Andrea Stagg and Joseph Storch, *Crime and Incident Reporting Guidelines for CSAs and Responsible Employees*, State University of New York, available at <http://system.suny.edu/media/suny/content-assets/documents/compliance/Crime-and-Incident-Reporting-Guidelines-for-CSAs-and-Responsible-Employees-FINAL.pdf> (Sep. 2014).

<sup>42</sup> Or as soon as practicable taking into consideration emergency medical and other requirements. It should go



individual designated by the college or university as the spoke in the wheel (likely a Study Abroad Director or similarly titled individual). That individual can then reach out to the appropriate offices and individuals at the main campus, including the Title IX Coordinator, campus police or security, student affairs, conduct, counseling and health, president's office, media relations and others. This will only work if the college or university has planned out such communication in advance and either has written protocols or has run table top simulations (or both). The ideal result is that the hub can have individuals and offices at the various spokes work together to address all aspects of the incident.

Record keeping is also important. Statistics for an Annual Security Report may be prepared for publication months or more than a year after the incident or crime occurs. Memories fade, and so returning to a Campus Security Authority for details 18 months after they receive a report of a crime may not yield accurate information for Clery Act reporting. We are well-served by getting this information right at or near the time of the event. One method for doing so is the Forum on Education Abroad's Critical Incident Database<sup>43</sup> discussed in the companion paper for this conference session. Provided that all relevant Clery Act information is collected, institutions can use other appropriate methods. Regardless of what method is used, auditors from the Department of Education may request data to determine whether Clery Act reportable crimes occurring in relevant Clery geography are counted in the appropriate columns in the Annual Security Report.

Just as important as internal communication is communication between entities. It is not unheard of for a student from College A to attend a study abroad trip organized by College B, located at International College C, alongside students from Colleges D, E, F, G, and H. If a College A student sexually assaults a College E student in Clery geography (each of the colleges has a written agreement for use of the space, or as the Clery Handbook refers to it, "control"), then it is reportable in each college's Annual Security Report, and College A has responsibilities under the conduct process for its student, while College E (and perhaps College B) has responsibilities to provide the victim with resources and accommodations. At a minimum, it is incumbent upon College B and College C to share information with Colleges A and E such that they may take the required action.

This can be complicated, especially inasmuch as each of these students' records are covered by FERPA. The solution is agreements between the institutions to properly respond to these reports. Additionally, institutions may have students waive in writing their FERPA rights vis-à-vis these other institutions in the limited set of circumstances that require exchange of information after report of a crime or policy violation. The SUNY policy below addresses this requirement in the latter sections.

#### **IV. Recent Case of Note:**

Although the case does not strictly address crime reporting, a recent case of note in a high school study abroad trip raises serious issues about the liability of institutions for

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without saying that immediate emergency needs must be addressed on site, but the study abroad office should be brought in as soon as possible.

<sup>43</sup> The Critical Incident Database includes a Clery Act notation for crimes and incidents that meet the definitions under the Clery Act.

injuries to students and is, thus, briefly discussed here. In *Munn v. Hotchkiss*,<sup>44</sup> Cara Munn, a high school student, contracted tick-borne encephalitis while on a trip to China run by her high school.<sup>45</sup> She was bit by a tick while on an excursion when, instead of taking the cable car down with her teacher and classmates, she and two or three other classmates walked down a path.<sup>46</sup>

Munn and her parents had received extensive pre-trip material from Hotchkiss including a list of items to bring, such as bug spray, but the material did not mention insect-borne diseases among its discussion of risks that students may encounter.<sup>47</sup> The court found that “as Munn headed to China, neither she nor her parents had notice that she would visit a non-urban forested area that might contain ticks or other insect carrying disease...[or] any warnings about how to prevent insect-borne disease during the trip.”<sup>48</sup> A jury found for Munn and assessed damages at over 41 million dollars.<sup>49</sup>

The court, in rejecting post-trial motions, found that Hotchkiss had a duty to Munn as she was a minor in its care.<sup>50</sup> This likely differs significantly from the duty owed by a college to its students on overseas travel.<sup>51</sup> Damages were clear, inasmuch as the encephalitis was debilitating in many ways to Munn.<sup>52</sup> The case really hinged on the question of whether contracting encephalitis in this way was foreseeable.<sup>53</sup> While it seems that everyone agreed that the chance of contracting tick-borne encephalitis in this manner was remote, the court downplayed the specifics of *this* injury, limiting the analysis to the “general nature”<sup>54</sup> of insect-borne diseases as a whole in China, which are more common than this specific injury.<sup>55</sup> The court wrote that the “test of foreseeability is not limited to whether a specific harm could have resulted from the defendant’s conduct; instead it determines whether the injury suffered falls within a reasonably foreseeable category of potential risks or harms.”<sup>56</sup>

Although the costs of the damage are high enough that, if the case stands, it may seriously discourage institutions at all levels from engaging in overseas study with students, the court rejected an argument that such a verdict violates public policy.<sup>57</sup> Also of note, in a prior ruling in the case, the court barred admissibility of the waiver signed by Munn and her parents, poking holes in the wording of the waiver in an analysis that is commended to any higher education attorney preparing a such a waiver.<sup>58</sup>

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<sup>44</sup> *Cara Munn et al. v. The Hotchkiss School*, 24 F. Supp.3d 155 (D. Conn. June 5, 2014).

<sup>45</sup> *Id.* at 163.

<sup>46</sup> *Id.* at 165.

<sup>47</sup> *Id.* at 164-165.

<sup>48</sup> *Id.* at 165.

<sup>49</sup> *Id.* at 163-164.

<sup>50</sup> *Id.* at 169-172.

<sup>51</sup> *See see* Aalberts, *supra* Note 2 at 208-213 (collecting cases).

<sup>52</sup> *See* *Munn v. Hotchkiss* at 208-213.

<sup>53</sup> *Id.* at 172-180.

<sup>54</sup> *Id.* at 172.

<sup>55</sup> *Id.* at 172-173, 179.

<sup>56</sup> *Id.* at 173-174.

<sup>57</sup> *Id.* at 194-198. The court disagreed with the notion that such a verdict would increase litigation or cause a wholesale abandonment of overseas travel and study. *Id.*

<sup>58</sup> *Cara Munn et al. v. Hotchkiss School*, 933 F. Supp.2d 343, 345-346 (D. Conn. March 22, 2013).

The case is currently on appeal to the Second Circuit, and a bevy of higher education organizations, led by the American Council on Education, have filed an amicus brief arguing against this verdict and pointing out the devastating impact such a regime can have on study abroad.<sup>59</sup>

## **V. Future and Pending Legislation:**

There has been an uptick in state and federal interest in injuries, crimes and accidents in overseas programs. The State of Minnesota passed reporting legislation, and a member of Congress proposed legislation that may be considered as part of the renewal of the Higher Education Act.

### **A. Minnesota Legislation:**

In 2014, the State of Minnesota adopted legislation requiring that all higher education institutions report health and safety statistics to the State Office of Higher Education.<sup>60</sup> For privacy purposes, institutions report statistics to the Office of Higher Education and the Office compiles them and issues a report on its website. The law requires reports of deaths, accidents, illnesses requiring hospitalization.<sup>61</sup>

Colleges and universities in Minnesota worked closely with the Office of Higher Education to implement the requirements in a workable way.<sup>62</sup> The law may become a model for other states to adopt, and is a model for federal legislation introduced in the last Congress that is discussed below.

### **B. Federal Legislation:**

Ironically, some of the worst crimes that led to lawsuits and media attention occurred outside of Clery geography and, thus, are not reportable in the Annual Security Report.<sup>63</sup> A Bill proposed by Congressman Sean Patrick Maloney called the Ravi

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<sup>59</sup> Amicus Brief of American Council on Education et al. in *Cara Munn v. The Hotchkiss School*, available at <http://www.acenet.edu/news-room/Documents/Amicus-Munn-Hotchkiss.pdf> (Oct. 21, 2014). On a personal note, this was likely the last brief filed by ACE General Counsel Ada Meloy before she passed away in December of 2014. Ada was a leader in the field of higher education law and a person to whom many, including this author, owe a debt of gratitude for her knowledge of the law and the field, and for her mentoring and kindness.

<sup>60</sup> 2014 Minnesota Session Law, Chapter 312-H.F. No. 3172, Section 5.41, available at <https://www.revisor.mn.gov/laws/?year=2014&type=0&doctype=Chapter&id=312>.

<sup>61</sup> *Id.*

<sup>62</sup> For an analysis of the legislation and implementation, please see Minnesota Office of Higher Education, *Study Abroad Health and Safety Regulation: Report to the 2015 Legislature*, available at <http://www.oh.e.state.mn.us/pdf/StudyAbroadReport.pdf> (Jan. 29, 2015); Forum on Education Abroad, *The Implications of New Legislation in the State of Minnesota*, available at <http://www.forumea.org/wp-content/uploads/2014/10/Minnesota-Legislation-Oct-13.pdf> (Oct. 15, 2014); Kris Kaplan, Interim General Counsel, *PowerPoint: Study Abroad: Meeting the New Reporting Requirements and More!*, Minnesota State Colleges and Universities Office of General Counsel, available at <http://www.ogc.mnscu.edu/documents/2ndThurs2015FebPowerPoint.pdf> (Feb 2015).

<sup>63</sup> Perhaps the most famous case of a crime while studying abroad, the accusation that Amanda Knox murdered her roommate Meredith Kercher is not reportable as both Kercher and Knox were apparently renting

Thackurdeen Students Study Abroad Act<sup>65</sup> would amend the Clery Act to require extensive reporting of crimes, injuries, accidents, illnesses and deaths that occur on study abroad over a 10 year period.<sup>66</sup> Further, these incidents would be reportable internationally without regard for traditional Clery Act geography.<sup>67</sup> The Bill did not become law in the 2013-2014 session of Congress.<sup>68</sup> The language of the Bill may be included in the upcoming reauthorization of the Higher Education Act.

The main problem with such a regime is that the numbers of incidents from any individual institution (even those that send dozens of students to a single location) would be so small as to be meaningless when analyzed within the hundreds of thousands of students that study overseas each year. The numbers would not be large enough to analyze the relative safety or danger of a specific location with any type of confidence.

## VI. Conclusion:

While several federal laws require reporting and action by institutions when incidents occur during study abroad, the requirements do not align or use the same definitions, and they lack clear lines for institutions to rely upon. Institutions should use best practices and a good faith effort to develop policies and protocols that not only comply with the requirements but (more importantly) take steps toward providing a safer environment for our students when they travel overseas.

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space in a private apartment (not arranged for by an American institution) while studying in Italy. Knox was apparently on leave from the University of Washington to study at the University for Foreigners Perugia in Italy at the time of the murder. See Kristi Oloffson, *Amanda Knox, Convicted of Murder in Italy*, TIME, available at <http://content.time.com/time/world/article/0,8599,1945430,00.html> (Dec. 4, 2009). Her conviction was later overturned. Kercher was a British student on an exchange program. Nick Squires, *Amanda Knox freed: tears of joy as four-year nightmare is over*, THE TELEGRAPH, available at <http://www.telegraph.co.uk/news/worldnews/europe/italy/8805395/Amanda-Knox-freed-tears-of-joy-as-four-year-nightmare-is-over.html> (Oct. 4, 2011). Thus, for all the attention given to this case, no college had to report the crime in an Annual Security Report.

<sup>64</sup> For a detailed list and analysis of crimes committed by and against American students studying overseas, see Aalberts, *supra* Note 2 at 208-214. A careful analysis of the facts of each case cited by Aalberts et al. would show that not a single one would be reportable in a Clery Act Annual Security Report.

<sup>65</sup> H.R.5485 - Ravi Thackurdeen Safe Students Study Abroad Act, 113<sup>th</sup> Congress, available at <https://www.congress.gov/bill/113th-congress/house-bill/5485/text> (Nov. 17, 2014).

<sup>66</sup> *Id.*

<sup>67</sup> “with respect to the incidents described in items (aa) through (dd) of subclause (II), whether the incidents occurred— (aa) on campus; (bb) in or on a noncampus building or property; (cc) on public property; (dd) in dormitories or other residential facilities for students; or (ee) at a location not described in items (aa) through (dd) of this subclause, without regard to whether the institution owns or controls a building or property at the location.” *Id.* at § III.

<sup>68</sup> As of the date of this conference paper, the Bill has not been re-introduced in the 114<sup>th</sup> Congress. See list of legislation by sponsor, United States Congress, available at <https://www.congress.gov/member/sean-maloney/M001185?pageSize=250> (last accessed May 1, 2015).

## **SUNY Clery & Title IX Reporting Procedure for International Programs**

Adopted unanimously by the SUNY Council on International Education, October 28, 2014

Available at: <http://system.suny.edu/media/suny/content-assets/documents/compliance/international/SUNY-Clery-Policy-for-Council-on-International-Programs-FINAL.pdf><sup>69</sup>

### **SUNY Clery & Title IX Reporting Procedure for International Programs**

- I- SUNY campuses will include all Clery reportable crimes and incidents in the Annual Security Report when those incidents occur in geographic locations covered by the Clery Act. These locations include:
- On-Campus
    - All campuses of the institution.
    - At a Separate Campus, defined as a geographic location staffed by administrative personnel and where a student can take an organized program of study. An “organized program of study” means an entire educational program from which a student can attain a degree, diploma, or certificate. It does not include locations where a student can simply take some courses.
    - At any location designated as On Campus property, the institution will also collect and include crimes occurring in Public Property adjacent to and accessible from the On Campus property.
  - Non-Campus
    - All of the following factors must be met in order to make crimes at a given property reportable in the Non-Campus category:
      - Building or property;
      - Owned or controlled by the 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.
    - Property is controlled by the institution if the institution has a written agreement for use of the geographic location or parts thereof, and it meets all the factors above. Analyze the following to determine whether the agreement meets the factors:
      - Geographic locations that are owned or controlled by the campus that are only used by faculty/staff and not students do not count for Clery reporting purposes.
      - The determination of whether an agreement for space meets the delineated factors will be determined based on an analysis of:
        - What the parties specifically agree to, whether the agreement outlines the terms of an experience without reference to any specific geographic location (e.g., building names or street addresses), or whether the agreement includes information regarding access and control of a specific geographic location;

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<sup>69</sup> This SUNY policy, as with all SUNY policies referenced here, is available for non-commercial higher education institutions to be used in whole or part, with appropriate attribution.

- Whether the institution maintains documents stating that students will live or study at a specific geographic location; and
    - Who makes the living or academic arrangements
      - If the student makes arrangements directly, the property does not count for Clery Act purposes; but
      - If the institution makes the arrangements, the property may count if it meets the factors delineated above.
  - Frequently used by students: Third party property, hotels, and hostels. Property is frequently used by students if it is used for a “long duration” **or** is subject to “repeated use.”
    - Long Duration: A trip of long duration is a trip to a single geographic location for which the institution has a written agreement for accommodation or other use that includes at least two students for at least 20 nights or 20 days.
    - Repeated Use: A location is subject to repeated use if the institution has a written agreement for use of the geographic area for at least two students and for at least two nights at least twice within a two calendar year period. If there is a separation of at least two calendar years (730 days between stays), the location would not be subject to counting as a repeated use location.
  - Host families: Count crimes in the geographic location used for housing students with a host family if the institution has “significant control” of the space. An institution has significant control over a property when the students have a separate entrance to their living space, but not in homes where the students and the host family use the same entrance.
- If an institution owns property, crimes are reportable year round.
- If an institution controls property pursuant to a written agreement, crimes are only reportable during the times when the institution has control, not before or after.
- There is no reporting obligation for public property around Non-Campus property.

Crimes committed at locations that do not meet Clery geography definitions are not counted for Clery Act purposes, although certain crimes may need to be reported to campus officials pursuant to Title IX and other laws.

- II- To properly learn of and report crimes that occur in international and domestic education, Campus Security Authorities shall report crimes to the institution’s designated Clery compliance official. In addition, the institution will query local law enforcement and Campus Security Authorities for information about crimes occurring in qualifying geographic locations during times of institutional use and/or control (as defined in Part I).
- Campus Security Authorities are:
    - Police/Campus Security (Department members and others affiliated);
    - Those designated by the institution as Campus Security Authorities; and
    - Faculty/staff with **significant responsibility** for students and campus activities.
      - All faculty or staff **travelling with students** overseas or to a distant location that meets Clery geographic definitions established in Part I,

are automatically designated as Campus Security Authorities, regardless of whether they ordinarily possess significant responsibility for student and campus activities.

*All faculty or staff travelling with students overseas or to a distant location regardless of whether it meets Clery geographic definitions established in Part I, are designated as responsible employees for Title IX purposes, and are required to report learned of or observed cases of sex discrimination, including sexual violence, to the institution's Title IX Coordinator or designee.*

- The institution will query local law enforcement for locations that meet the definitions of Clery Act geography in Part I asking for records of Clery Act reportable crimes occurring during the timeframes in which the institution controlled the property (or if the property is owned, during the entire calendar year). The institution will use “good faith” to contact these law enforcement entities via paper mail, telephone, or electronic messaging, and will keep a record of the contact and whether or not any statistics were received.
- Reporting Crimes:
  - Campus Security Authorities must report all crimes to the individual designated by the institution, with no exceptions.
  - Crimes are to be reported immediately or as soon as possible.
  - It is *never* appropriate for faculty or staff to handle crimes in house, investigate, or adjudicate, except as specifically instructed by institutional officials.
  - It is *never* appropriate for faculty or staff to attempt to mediate an accusation of sexual assault or sexual violence.
  - With the exception of crimes that include sexual violence or sexual harassment, the Campus Security Authority may keep the identity of the victim private.
  - If the Campus Security Authority receives a report of sexual harassment, including sexual violence, s/he is required to report to the Title IX Coordinator (or designee) regardless of where or when the incident is alleged to have occurred.
  - If the Campus Security Authority is a pastoral or professional counselor, s/he may keep reports confidential pursuant to law and policy.
- Timely Warnings: The College will provide students with Timely Warnings of crimes occurring in relevant Clery Act geography.
  - For Clery act crimes occurring in Clery Act geography:
    - The institution, trip leader or designee will notify students on the trip of such crimes in a timely fashion;
    - Notification may occur by use of paper or digital messaging or may have an oral warning come through the group leader;
    - While there is no defined method, the Timely Warning must be active, not passive.

III- To ensure student safety and Title IX compliance, SUNY campuses will follow the protocol established below when informed about cases of sex discrimination, including sexual violence, involving SUNY students or employees.

- Definitions:
  - Home Institution: Student's original institution, from which the degree is anticipated, or to which the study abroad credits will transfer.
  - Host Institution: Domestic or overseas institution that student from Home Institution will be temporarily enrolled for a term or set length of time.
  - Provider (Program, Administering, Sponsor): Non-SUNY institution or entity through which an overseas academic program is provided (e.g., partner).
  - Complainant: Individual with a complaint of sex discrimination, including sexual violence (i.e., victim, survivor, accuser).
  - Accused Individual: Person accused of misconduct.
- Host Institutions and Providers that learn about incidents of sex discrimination, including sexual violence, will work collaboratively with the Home Institution(s) of the complainant and accused individual to ensure the following:
  - The complainant is notified of any and all options, remedies, resources, and services available through the Home, Host and Provider;
  - The appropriate institution or entity can conduct a prompt, impartial investigation, which may lead to adjudication through the formal student conduct or Title IX grievance process.
- Students participating in study abroad through a Host or Provider are subject to the policies and procedures of the Provider or Host, as well as those of his or her Home Institution.
  - Which institution takes the lead in investigating and responding to allegations of sexual harassment and/or violence shall be determined immediately following the reporting of an incident. Factors to consider include:
    - the location of the incident;
    - the enrollment status of the student(s) involved;
    - the nature and duration of the program;
    - the timing of the report (during or after a program).
  - Generally, the institution with immediate and primary control over the parties and evidence shall lead the investigation and response.
  - At all times the fairness of the process, effectiveness of the investigation/response, and best interests of the parties shall govern the decision making of SUNY officials.
- The Title IX Coordinators of the SUNY institutions should consider all incidents and allegations consistent with their responsibilities to spot patterns and track complaints.
- Consistent with working collaboratively, a Host Institution or Provider will promptly provide any incident reports and related information to the Home Institution.



# **Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices**

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## **I. Introduction to The Forum on Education Abroad**

The Forum on Education Abroad is a 501(c)(3) non-profit, membership association recognized by the U.S. Department of Justice and the Federal Trade Commission as the [Standards Development Organization \(SDO\)](#) for the field of education abroad. The Forum provides training and resources to education abroad professionals and its *Standards of Good Practice* are recognized as the definitive means by which the quality of education abroad programs may be judged. The Quality Improvement Program for Education Abroad (QUIP) and The Professional Certification for Education Abroad Program provide quality assurance for the field through use of the *Standards* in rigorous self-study and peer reviews for institutions and professional certification for individuals.

The Forum on Education Abroad's mission is to develop and disseminate comprehensive *Standards of Good Practice* for the field of education abroad. It promotes best practices and excellence in curricular design, engages in data collection and research, conducts program assessment and quality improvement, and advocates on behalf of its members and the field of education abroad. The Forum serves institutions and organizations that sponsor and support education abroad programs for students enrolled at U.S. colleges and universities. The Forum also collaborates with international member institutions and organizations to identify and facilitate best practices and standards for education abroad. <http://www.forumea.org/>

## **II. Introduction to the Critical Incident Database**

The field of education abroad has long been haunted by the fact that there has never been any sort of reliable or methodical means to track what happens when US students travel abroad for academic credit. In 2009, a committee came together to design a pilot database to track such data. Membership on this committee included representatives from a diverse group of organizations invested in the endeavor of education abroad (program providers; small, large, private, public, colleges and universities; not-for-profit organizations).

The CID was piloted in 2009-10 and a Preliminary Report was issued in March of 2010 by The Forum. During 2011 The Forum embarked upon a re-design of the CID based upon user feedback. This coincided with the Department of Education's release of *The Handbook for Campus Safety and Security Reporting*. Collaborating with colleagues in NACUA, the CID's re-design included tags for Clery crimes using appropriate vocabulary and definitions.

The CID was re-released for use in the 2012/13 academic year, and the first full year of data was gathered and reported for 2014.

### **III. What is the Critical Incident Database?**

The Critical Incident Database (CID) is a free tool for use by Forum member institutions in tracking critical incidents that occur while students are abroad. In addition, the CID serves as a method for tracking required information on incidents that should be reported in a member's Annual Security Report as required by the Department of Education in compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act).

The CID is an easy and convenient way to track what happens to students while off campus (types of incidents, locations, etc.). It sits on a web based platform and is accessible from anywhere using laptops, tablets, or smart phones. It is a reliable method to identify which incidents should be reported in an Annual Security Report to the Department of Education to comply with the Clery Act. Use of the CID provides a way to track critical incidents so that risk management decisions about education abroad programs can be made using appropriate data. To use the Critical Incident Database, one must have been assigned access and be logged in.

<http://www.forumea.org/resources/member-resources/critical-incident-database>

### **IV. Who is using the Critical Incident Database?**

In the calendar year 2014 (Jan 1 – Dec 31) there were 44 organizations using the Critical Incident Database to track what was happening with their students while off-campus. The organizations represented a wide variety of different types of institutions: liberal arts colleges; large public universities; small, medium and large private universities; community colleges; state-wide systems; and, program providers.

### **V. What have we learned from the CID?**

In order to analyze the data collected, baseline information was requested from each CID user. Those organizations that were unable to provide that baseline information (city, country, duration [in days], number of students and type of program), were removed from the analysis. Data from 38 different organizations, representing nearly 900,000 student program days in over 100 different countries was analyzed. The data analyzed represents roughly 10% of the data reported by IIE in 2013's Open Doors Report. The data sets that were comparable indicate consistency in the length of students' experiences abroad and to which continents they are going.

#### **A. What is the data telling us?**

The data collected in the CID provides an indication of the types of challenges they are encountering. More than 300 incidents were reported using the CID including the deaths of 2 students. Incidents occurred in 49 different countries on every day of the week. Not surprisingly, the most incidents were reported as occurring in Europe – 53% of US

students still travel to Europe for their education abroad experience. However, the frequency with which incidents occurred in South America and Africa was worth investigating further as 1 in 2 students was likely to have been affected by a critical incident while on either of those continents. With further drilling, it was determined that the incidents that were afflicting students in those two locations were gastro-intestinal illnesses.

Incidents were reported on every type of program (definitions provided by The Forum on Education Abroad's *Education Abroad Glossary* 2<sup>nd</sup> edition, 2011) although "study abroad centers" tended to have more incidents reported. The types of incidents included behavioral issues (for example: eating disorders, suicide ideation, psychosis, extreme intoxication), injury, larceny, hospitalization, civil unrest, simple assault, motor vehicular accidents, missing persons and natural disasters. Analysis was also done for Clery crimes and Title IX reportable incidents.

The CID also provides an opportunity for reports to indicate what the contributing factors might be for an incident (more than one can be selected). When analyzed, these responses indicate that "poor judgement" is the leading contributing factor, followed by the misuse of alcohol. Students were mostly being afflicted by incidents while on "free-time" as opposed to being on a program sponsored excursion or field research. And finally, most (47%) incidents occurred on programs that were between 31 and 90 days in length.

## **B. What have we learned about the use of the CID**

The Forum sent electronic surveys to the users of the CID asking for feedback regarding different aspects of the instrument. A response rate of 55% gave The Forum some very solid insights. Overwhelmingly respondents found the CID easy to use and that it encompasses the issues they wanted to track. However, we did find that the "field staff" function was not perceived as being useful. Of these respondents, 33% are using the CID as the only way to track what happens to their students when off campus. The majority of respondents are using it so that they can contribute to a national data set of critical incidents.

We also learned that many organizations have other means to collect, track and respond to incidents overseas. Expecting these education abroad offices to duplicate their efforts by also using the CID is unreasonable. We found that there were instances where institutions who were using the CID just didn't have the human resources to provide us with the baseline data that we needed for our analysis. And we also discovered that there were systems using the CID to track *all* international travel by *all* personnel (undergraduate and graduate students, faculty and staff) for any purpose (study abroad, research, conference attendance). While we had to eliminate that system's data from our analysis, we do not want to discourage CID use of this kind.

## **VI. Where do we go from here?**

It is very important to continue to make the CID available at no cost to members who have no other means to collect and track incident data. Gathering data of this kind is very valuable in a variety of best practices: training faculty leaders; comparing institution specific incidents to the national norm; and, information based decision making. The CID

will also be available to those who want to track more than just their students on education abroad experiences.

Because The Forum now understands that the Critical Incident Database will not become the repository for national critical incident data, we have begun to explore and embark upon a new data project. The Forum is now working with insurance companies to provide a comprehensive report regarding critical incidents that occur in education abroad. Based on claims data, this has the potential to be a highly representative sample that can help to paint a picture of the range, types and number of incidents that occur during education abroad. This effort will provide for the first time data upon which deliberations can be based rather than assumptions about incidents involving students during education abroad. In addition, data from the Critical Incident Database will help us further to understand these incidents.