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**Using Past Clery Findings to Avoid  
Future Compliance Issues:  
Implementing Best Practices for  
Clery Success**


July 18, 2022

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**Agenda**

- Setting the stage
- Clery Enforcement Basics
- Recent Enforcement Actions
  - Case Study One
  - Case Study Two
  - Case Study Three
- Key Takeaways
- Questions



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# Setting the Stage

An overview of Clery requirements

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## Overarching Requirements

- Collect and classify reports of certain crimes
- Publish/Distribute Annual Security Report by Oct. 1 each year
- Provide crime statistics to ED via online survey
- Issue timely warnings and emergency notifications
- Comply with VAWA requirements
  - ASR statements
  - Educational programming
  - Disciplinary procedures
  - Rights & Options document

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## Contingent Requirements

- Does the institution have a campus police or security department?
- If yes, must have Daily Crime Log
- Does the institution have on-campus student housing?
- If yes, must:
  - Include missing student policy and procedures in ASR
  - Comply with certain requirements related to fire safety



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## Why Does Compliance Matter?

- More secure campus environment
- Protect institutional reputation
- Possible fines of over \$60,000 per violation
- Possible continued oversight by ED if there are findings of noncompliance



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# Clery Enforcement Basics

A look at the U.S. Department of Education's enforcement mechanisms

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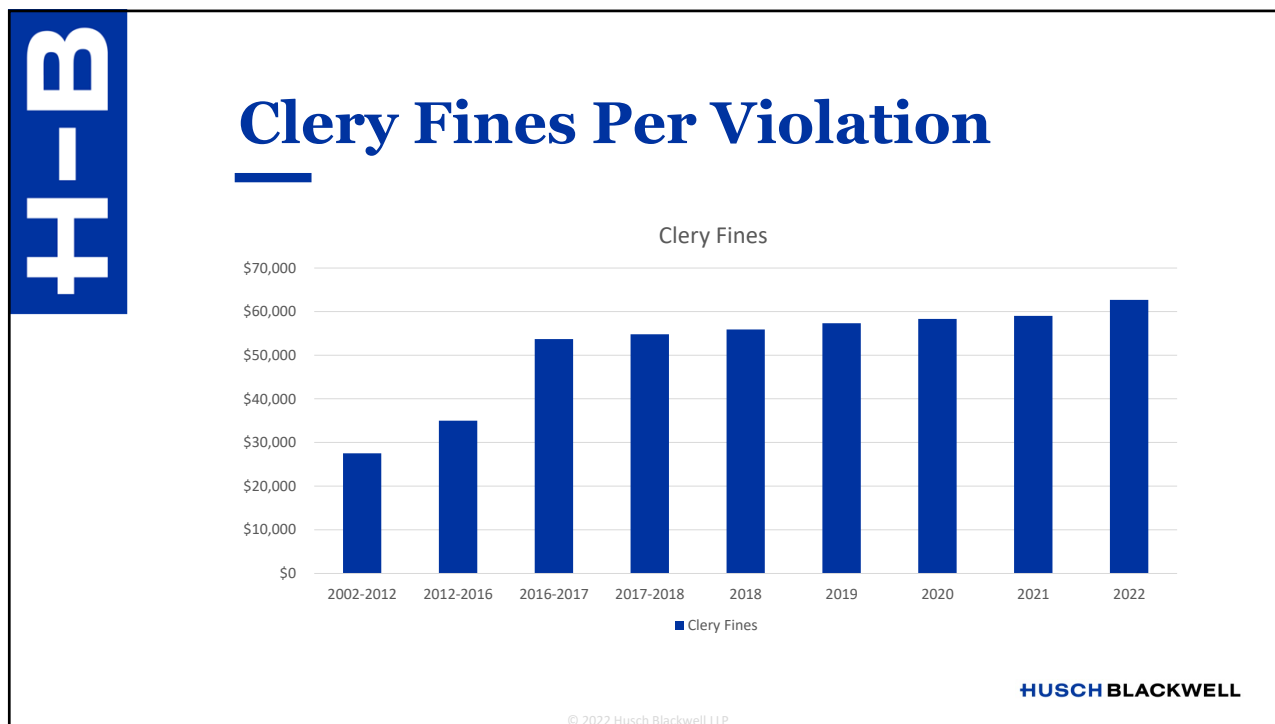
## General Process (Focused Clery Review)

Typical review process takes 2-3 years



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## Recent Enforcement Activity

- 2016: ~\$2.4 million fine against Penn State
- 2019: ~\$4.5 million fine against Michigan State
- 2019: ~\$1.5 million fine against University of North Carolina, Chapel Hill
- 2020: ~\$2.4 million fine against University of California, Berkeley
- 2020: ~\$462,000 fine against Baylor University

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## Glossary ... Just a Few Abbreviations

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- ASR – Annual Security Report
- AFSR – Annual Fire Safety Report
- CSA – Campus Security Authority
- DCL – Daily Crime Log
- DFSCA – Drug Free Schools and Communities Act
- ED or Department – Department of Education
- EN – Emergency Notification
- FPRD – Final Program Review Determination
- PPA – Program Participation Agreement
- PRR – Program Review Report
- TW – Timely Warning
- UCR – Uniform Crime Reporting

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## Recent Enforcement Actions

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## Department of Ed Reviews

Clery findings are available here:  
<https://studentaid.gov/data-center/school/clery-act-reports>

Current through 2020

Webinar addresses *only* information publicly available; however, we have elected to share the findings only – not a particular institution’s name



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# Case Study – University One


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## Case Study – University One FPRD May 2020



- Review began in November 2015
- PRR issued in April 2019
- University submitted its response in September 2019

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## University One Findings

-  Lack of Administrative Capability
-  Violations Related to the Incidents of Specific Crime that Occurred
-  Failure to Properly Classify Reported Crimes and Disclose Crime Statistics
-  Failure to Maintain and Accurate and Complete Daily Crime Log

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## University One Findings (cont.)



Timely Warning Issuance and Policy Violations



Omitted and/or Inadequate ASR Policy Statements and AFSR Statistics



Failure to Produce Accurate and Complete ASRs and AFSRs for Separate Campuses



Statistical Discrepancies between the Annual Security Report and the Department's Online Campus Crime Statistics Database

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## Finding #1: Lack of Administrative Capability

*"[University One] substantially failed to develop and implement an adequate Clery Act compliance program on its main campus during the period of review. Accordingly, the Department finds that the University lacked the ability and/or willingness to properly administer the duties of a participating institution in the Title IV Federal student financial aid programs."*



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## Finding #1: Lack of Administrative Capability (cont.)

- More than 1,000 crime log entries were not made in the required timeframes during the review period
- Institution:
  - failed to issue timely warnings
  - struggled to produce and complete ASRs/respond to Department's annual survey
  - did not employ adequate number of qualified employees for compliance
  - failed to develop an effective communication and coordination strategy for compliance

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## Finding #1: Lack of Administrative Capability (cont.)

*“The review process could have moved along much more efficiently and without the less productive interactions and delays that ensued if [University One] had simply presented the facts of the case and its positions more clearly and much earlier in the process. A program review is not a criminal investigation. An institution should not narrowly answer direct questions. An institution's PPA requires cooperation and effective assistance to the Department so that officials can fully assess a school's compliance. The task of an institution undergoing a program review is to provide information and context. The review process requires partnership, clear communication, and follow-through by all parties.”*

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## Finding #1: Lack of Administrative Capability – Takeaways

- Improvements made during the Department’s review will not hurt the institution
- Cooperate with the Department during the review process
- Remember this is not litigation



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## Finding #2: Violations Related to the Incidents of Crime that Occurred on a Specific Date

Failure to Properly Record Crimes in the Daily Crime Log and Failure to Issue a Timely Warning

- The University did not properly report in its DCL a serious Clery offense:
  - The events were reporting in the DCL as “criminal mischief”
  - The Department determined that, at a minimum, that they should have been reported as Kidnapping and Robbery



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### **Finding #3: Failure to Properly Classify Reported Crimes and Disclose Crime Statistics**

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An institution subject to the Clery Act must:

- Disclose statistics
  - For Clery crimes
  - Reported to have occurred on the institution's Clery geography
  - That have been reported to a Campus Security Authority (CSA) or to local police



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### **Finding #3: Failure to Properly Classify Reported Crimes and Disclose Crime Statistics (cont.)**

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The Department cited University One for:

1. Errors in identifying and classifying reported crimes
2. Identification and disclosure errors, commonly referred to as “under-reports”
3. Improper use and/or application of the “unfounded” classification
4. Persistent record keeping weaknesses and
5. Systemic Clery Act and UCR compliance failures, such as documenting multiple and distinct Clery-reportable offenses in a single incident report

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## Finding #4: Failure to Maintain an Accurate and Complete Daily Crime Log

- The Department determined that the 2014 DCL revealed more than 400 delayed entries of incidents that occurred between 2011 and 2014, and the 2015 DCL revealed more than 500 delayed entries of incidents that occurred between 2010 and 2015, ranging from drinking to sexual assault.
- The Department described this as “a serious and persistent pattern of noncompliance that either stemmed from longstanding administrative impairments or purposeful misconduct.”



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## Finding #4: Daily Crime Log – Takeaways

- DCL is a significant document that the Department will review
- The Department will review the DCL to determine whether or not entries were made in a timely fashion (two business days)



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## **Finding #5: Timely Warning Issuance and Policy Violations**

Timely Warning Should Be Issued When These Four Conditions Have Been Met:

1. Clery crime
2. On Clery Geography
3. Reported to a CSA or local police agency
4. Considered by institution to represent a serious or continuing threat to students and employees



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## **Finding #5: Timely Warning Issuance and Policy Violations (cont.)**

- The Department listed several incidents, including those involving sexual assault, for which University One should have issued a timely warning but did not.
- The Department required University One to conduct an eight-year file review of its Clery-reportable offenses to determine whether appropriate timely warning decisions were made and to defend decisions not to issue timely warnings

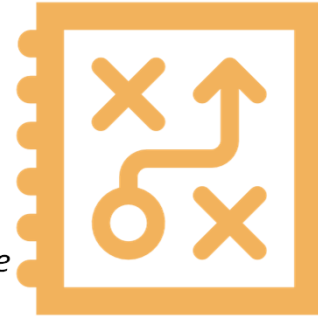
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## Finding #5: Timely Warning Issuance and Policy Violations -- Takeaway

- “[University One] is reminded again that the University should have had a clear process in place to evaluate the need for such warnings at the time and a process to document its rationale for not warning campus community members about these serious crimes. It is the Department’s understanding that a decision matrix is now in place to guide such decisions and to document the University’s determinations.”
- We recommend having a matrix or decision tree in place to make TW decisions.



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## Finding #6: Omitted and/or Inadequate ASR Policy Statements and AFSR Statistics

The Department determined that University One did not make the following required disclosures:

1. Procedures regarding pastoral and professional counselors
2. Sanctions for the VAWA offenses
3. Applicable legal sanction for drug and alcohol crimes
4. Description of drug/alcohol counseling and treatment programs available to students and employees
5. Hate crime statistics
6. Missing student procedures
7. Fire statistics



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## Finding #6: Annual Security Report – Takeaways

- Based on University One’s response to the PRR, the Department backed off some of its PRR findings
- Regarding the sustained findings, the Department reiterated that bringing the program into compliance “cannot and do[es] not diminish the seriousness of the violations.”



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## Finding #7: Failure to Produce Accurate and Complete ASRs and AFSRs for Separate Campuses

The Clery Handbook\* states:

“If your institution has **multiple campuses**, remember that *Clery Act* requirements must be met individually for each separate campus. ... You may publish a single document covering all campuses as long as you clearly identify the policy statements and crime statistics that are associated with each campus.”

\*While the Clery Handbook has been rescinded, it is still considered a safe harbor.

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### **Finding #7: Failure to Produce Accurate and Complete ASRs and AFSRs for Separate Campuses (cont.)**

- The Department determined that University One had not been issuing ASRs for its separate campuses and stated that the University “must take all necessary corrective actions to ensure that an accurate and complete ASR and AFSR (if necessary) is produced and distributed for each of the ... separate campuses as required.”



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### **Finding #7: Failure to Produce Accurate and Complete ASRs and AFSRs for Separate Campuses (cont.)**

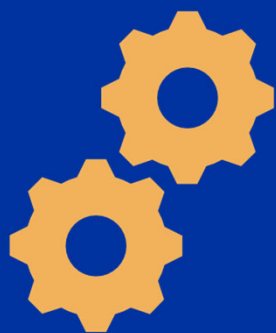
- University One’s review of its campus geography revealed other Clery geography issues (having misidentified some noncampus property), and generally sustained the Department’s findings
- The Department recognized, however, that the University made several upgrades and improvements to its processes for classifying Clery geography and encouraged the University to continue to do so.
- The Department again stressed that the remedial actions “cannot and do not diminish the seriousness” of the violations “nor do they eliminate the possibility that the Department will require additional remedial measures as a result.”

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## Case Scenario



University's alumni association purchased a residential complex from private owners, where 1,500 hundred University students reside. The management company that runs the complex has partnered with the University's Department of Residence Life, and Residence Life coordinates the residence life program in the complex. Is the complex part of the University's Clery Geography?

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## From the Department . . .

“These facts, along with statements collected during the review team's interviews indicate the University exercised a significant amount of control over the operation of [the complex] and that the buildings were operating in support of/in relation to the University's institutional purposes. Accordingly, the [complex] should have been included in the University's Clery Geography.”



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## Finding #8: Failure to Report Crime Statistics Accurately – Takeaways

- Have resources in place for accurate reporting and accountability
- Make sure ASR and ED Statistical Reporting match; explain and fix any discrepancies



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## Case Study – University Two

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## Case Study – University Two FPRD March 2020

- Review began in May 2017, focusing on calendar years 2011-2016
- Result of over 30 media reports chronicling a series of student-on-student sexual assaults, and an April 2016 complaint from End Rape on Campus
- PRR issued in April 2019
- University Two submitted its response in September 2019



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## University Two Findings



Lack of Administrative Capability



Failure to Report Crime Statistics Accurately to the Office of Post-Secondary Education and in Annual Security Reports



Failure to Issue Timely Warnings



Failure to Identify and Notify Campus Security Authorities to Ensure Accurate Crime Reporting and Timely Warnings



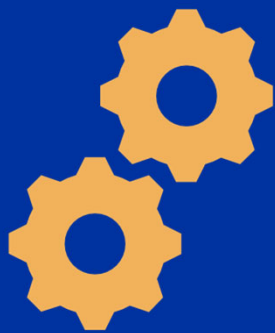
Failure to Maintain and Accurate and Complete Daily Crime Log

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## Case Scenario



Every year, Paul, a University employee, receives an emailed letter informing him of his role as a CSA and requesting that he report any crimes or other relevant information reported to him in the previous year.

Is this sufficient communication between the institution and the CSA?

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## Finding #1: Lack of Administrative Capability

- University Two failed to develop and implement an adequate system of internal controls
  - Failure to adequately train CSAs (training was provided, but not all CSAs attended)
  - Failure to exercise sufficient oversight, governance, and coordination of official and departments responsible for campus safety, resulting in a failure to keep community informed of crime and other threats



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## Case Scenario



The Department, during a Clery audit, determined that the Public University had made several errors in reporting its crime statistics both in the ASR and to the Department.

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## Finding #2: Failure to Report Crime Statistics Accurately – Takeaways

- Statistical errors tend to result in the most significant fines because each error is fine-able
- Discrepancies between statistics reported to the Department and those that appear in the ASR are an easy target for the Department



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## Finding #3: Failure to Issue Timely Warnings –Takeaways

- If you have procedures for issuing Timely Warnings, follow them!
- Not following existing procedures as bad as not having them in the first place



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## Finding #4: Failure to Identify and Notify Campus Security Authorities to Ensure Accurate Crime Reporting and Timely Warnings

- University Two failed to provide adequate policies and procedures for CSAs to gather and submit information reported to them pertaining to incidents of crime
  - University Two had no CSA materials prior to 2015 (despite a consultant recommendation to provide them)
  - CSA reporting form that was created was, for a time, insufficient
  - Camp directors were not identified as CSAs



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## Finding #4: Campus Security Authorities – Takeaways

- CSA identification and training/communication is extremely important
- Institutions need to look at all facets of their programming to determine who might be a CSA, even under the FSA Appendix



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## Finding#5: Daily Crime Log – Takeaways

- The Daily Crime Log is a focal point for the Department
- The information provided must be clear and forthcoming
  - It is not enough simply to record an incident; the information provided must be valuable



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# Case Study – University Three

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## Case Study – University Three FPRD September 2019 (Corrected 9/2020)

- Review began in July 2014
- Initiated based on an assessment of a complaint filed by several students (also involving End Rape on Campus)
- Clery Act review, although some review of Title IX Process was necessary
- Focus on 2009-2016 (expanded from 2009-2012)
- PRR issued in April 2017
- University Three responded in August 2017, supplemented in March 2018



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## University Three Findings



Lack of Administrative Capability



Failure to Issue Emergency Notifications



Failure to Comply with the University's Sexual Violence Policies and Procedures



Failure to Comply with Daily Crime Log Requirements



Failure to Issue Timely Warnings in Accordance with Federal Regulations



Failure to Disclose Accurate and Complete Hate Crime Statistics

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## University Three Findings (cont.)



Failure to Compile and Disclose Accurate and Complete Crime Statistics



Reporting Discrepancies between Crime Statistics Published in the ASR and Data Submitted to the Crime Statistics Database



Failure to Produce and Distribute the ASR in Accordance with Federal Regulations



Omitted and/or Inadequate ASR and AFSR Information Disclosures



Failure to Distribute the Annual Fire Safety Report in Accordance with Federal Regulations

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## University Three Settlement Agreement



- Agreed to significant fine “to resolve the matter short of going through the Department’s issuance of fines, an appeal, potential hearing and litigation process.”
- Post-monitoring review (the post monitoring review provisions are not included on the Department’s website)

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## Finding #1: Lack of Administrative Capability – Takeaways

- While CSA training isn’t formally required, the Department clearly thinks that it is necessary and important
- Failure to train seems to result in other compliance failures that lead to a finding of lack of administrative capability
- Again, lack of administrative capability is a serious finding that institutions want to avoid



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## Finding #2: Failure to Issue Emergency Notifications

- University Three did not issue an EN to warn students and employees that a student accused of multiple sexual assaults posed an imminent threat to the safety of the campus community – **NOT** sustained
- University Three did not initiate EN procedures upon confirming that a controversial guest speaker's presence on the campus could create an extremely volatile situation and endanger the safety of the campus community -- Sustained



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## Finding #2: Emergency Notifications – Takeaways

- If an institution disagrees with a finding, it should push back with documentation and convincing arguments
- The Department wants ENs to be issued very quickly – even slight delays can result in findings
  - This can create difficulties for institutions who are having to make decisions in the heat of the moment

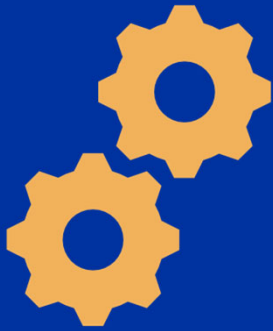


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## Case Scenario



Sky, a student, was sexually assaulted by another student. After making the report, Sky was informed that the school would “look into it.” When Sky reached out for an update, Sky was told that “sanctions had been imposed.”

Has the institution complied with Clery as it relates to its outcome determination notice?

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### **Finding #3: Failure to Comply with the University’s Sexual Violence Policies and Procedures**

- University Three didn’t not inform complainants of the outcome of a sexual assault case until after a complainant made three written requests
- University Three failed to include a clear statement of policy in the ASR about its process for informing a complainant about the outcome of a campus disciplinary proceeding regarding a sexual assault allegation (suggested that information would be disclosed at the discretion of the Dean and only if a sanction was imposed)

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## Finding #4: Daily Crime Log – Takeaways

- The Department clearly finds that the maintenance of a DCL is extremely important
- The entries must be *clear* and *complete*
- Even if the DCL doesn't negatively impact crime statistics, it must be properly maintained



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## Finding #5: Timely Warnings – Takeaways

- If you have a policy, follow it
- *Don't* create a policy that specifies a timeframe for issuing TWs; "timely" should *not* be defined
- Be wary of consolidating incidents for TWs
- Department recommends the use of a basic matrix or rubric to guide institutional officials as they contemplate the need to warn the campus community



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## Finding #6: Failure to Disclose Accurate and Complete Hate Crime Statistics

- University Three disclosed hate crime statistics without indicating the types of criminal offenses that were associated with the actual or perceived biases that were reported
  - The Department required University Three to develop and implement new policies and
  - Appoint a person with the requisite knowledge, experience, and authority to oversee the compilation and disclosure of its campus crime statistics

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## Finding #6: Hate Crime Statistics – Takeaways

- While it is permissible to use a narrative format for disclosing hate crime data, the reporting must still be accurate, complete, and fully reconciled
- It is imperative that institutions check the accuracy and completeness of their data
- “Checks and balances” are essential to an institution’s “ability to demonstrate acceptable levels of administrative capability”



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## Finding #7: Crime Statistics – Takeaways

- The review resulted in *considerable* work for the institution in preparing its response to the PRR
- The institution's own work resulted in expansion of the findings of problems
- A review that starts small can grow significantly
- Cooperation with the Department is key in those circumstances



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## Finding #8: Discrepancies between Published Crime Statistics (ASR and ED) – Takeaways

- Clerical errors are still errors for which institutions will be fined
- Having good documentation enables an institution to dispute inappropriate Department findings



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## Finding #9: Failure to Produce and Distribute the ASR in Accordance with Federal Regulations

- University Three failed to produce and distribute an ASR as a single comprehensive document in 2013 by the October 1 deadline
- University Three failed to notify its *prospective* students and employees about the availability of the report



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## Findings #9 & #11: Produce and Distribute the ASR/AFSR – Takeaways

- The ASR/AFSR must be comprehensive. Using links to cover required information is not acceptable (except with regard to the DFSCA)
- The ASR/AFSR must be made available to prospective students and employees
- The Department will make findings and issue fines for AFSR violations separately from ASR violations, *even when an institution publishes both as one document*
- It is crucial that the AFSR not take a back seat to ASR compliance because both are reviewed for compliance by the Department



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## Finding #10: ASR/AFSR Information Disclosures –Takeaways

- The Department will check ASRs and AFSRs for *all* the required policy statements
- We recommend drafting a checklist against which to check your reports and having someone not responsible for drafting the reports conduct the check



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## Key Takeaways


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## Takeaways . . .

- Reviews can happen for a variety of reasons (complaints, press reports, etc.)
- The scope of a review can grow significantly after the review is initiated
- Reviews often involve a tremendous amount of work (creating audit trails, reviewing statistics, writing policies and procedures)
- Documentation of decision making is essential (matrices, rubrics, etc.)



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## Takeaways . . .




- Don't be afraid to push back if you think the Department is wrong
- Cooperate with the Department in its reasonable requests for information
- Fines can be significant
- Post-review monitoring can last for years
- Do what you can to ensure your institution's compliance *before* you find your institution on the Department's radar

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# Questions?

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## Upcoming Demo – Clery Compliance Toolset



**Wednesday, July 27 @ 12:00 PM (CDT)**  
For more information, contact  
**Anastasia Caffrey**  
[Anastasia.Caffrey@huschblackwell.com](mailto:Anastasia.Caffrey@huschblackwell.com)  
816-983-8513



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## Clery Services Offered

- Perform various levels of Clery compliance audits, including mock program reviews
- Advise institutions responding to Department of Education program reviews
- Provide training for institutional personnel responsible for Clery compliance
- Prepare institution-specific internal procedures for ensuring Clery compliance obligations are consistently being considered and met
- Advise on other miscellaneous Clery-related issues, including, but not limited to:
  - Clery geography
  - Crime reporting mechanisms
  - Analysis of crime reports to determine Clery classification
  - Daily crime log compliance
  - Requesting crime statistics from local law enforcement agencies
  - Campus Security Authorities (designations, notifications, informational materials, etc.)
  - Drafting MOUs with local law enforcement
  - Preparing and distributing the Annual Security Report (including to prospective students and prospective employees)
  - Timely warning process
  - Developing emergency management plans
  - Educational programs and campaigns for the campus community (related to dating violence, domestic violence, sexual assault, and stalking)

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