

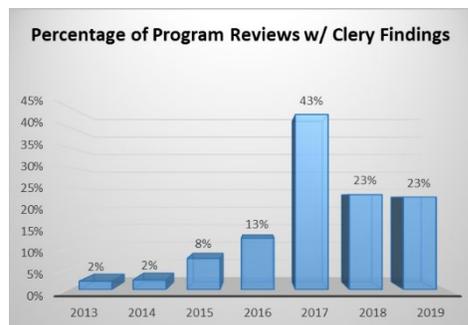


Clery Act Enforcement Actions Taken by the Department of Education: 2013-2019

In recent years, the Department of Education has placed increased emphasis on enforcement of the provisions of the Clery Act. In this paper we will examine common challenges institutions have faced as revealed by The Department's Clery Act related findings during program reviews issued between 2013 and 2019.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act [20 U.S.C. § 1092(f)], commonly known as the Clery Act, was put into law in 1990 in response to the brutal rape and murder of Jeanne Clery a nineteen year old student at Lehigh University in Pennsylvania in her dorm room on Lehigh's campus. The Clery Act mandates specific policy and statistical disclosures be tracked by each institution of higher education and reported annually both to the Department of Education and to students and employees.

We have seen an increased emphasis within the Department on Clery Act compliance during the program review process, to a point where two hundred and ten of the six hundred and seventy four program reviews conducted between 2017 and 2019 had at least one finding related to Clery Act compliance. This was a significant increase from earlier levels which saw only a few Clery related findings per year, and is part of a trend beginning in 2013.



While penalties for non-compliance with the Clery Act can theoretically result in denial of Title IV funds to an institution, it is much more common for such a finding to result in a monetary penalty and/or mandatory plan of correction. As of 2019, the

THE AUTHOR

Drew Neckar, MBA, CPP



Drew is the President and Principal Consultant for Security Advisors Consulting Group a consulting firm which offers security assessment, training, and litigation support services.

He has served as the senior most security executive (CSO) for organizations in the healthcare, financial services, education, hospitality sectors, and as a Regional Security Director for Mayo Clinic.

As the Director of Enterprise Safety and Security for ECMC Group he was responsible for overseeing the redesign of the Clery Act compliance program for a non-profit career college system operating sixty-eight campuses located across twenty seven states, and as President of Security Advisors he has assisted institutions, including one of the top ten medical schools in the US, in optimizing their Clery Act compliance processes.



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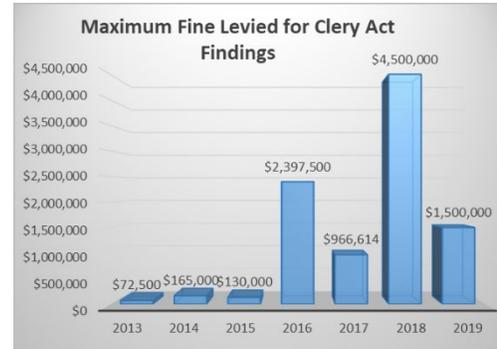
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maximum fine for each individual violation of a provision of the Clery Act has more than doubled from \$25,000 when the law was first enacted to its current level of \$58,328.

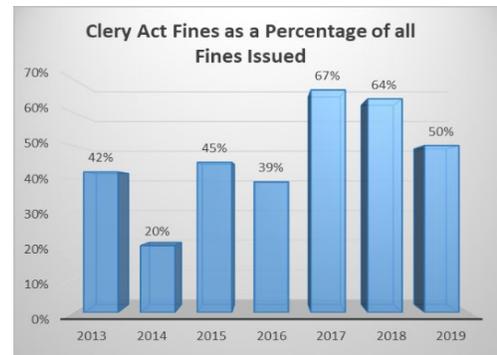
Prior to 2016 the largest fine assessed under the Clery Act had been \$130,000, a record which was shattered by a \$2,397,000 fine levied against Penn State. Each year since 2016 has seen at least one fine levied of close to or above one million dollars. With a new record set in 2018 by the \$4.5 million fine assessed against Michigan State University. During this period, median fines for Clery Act related findings have also increased substantially from \$27,500 in 2013 to \$68,000 in 2018¹.



The cost to an institution of a Clery Related finding is not limited to the potential for a fine. During the Program Review process, an institution typically has the opportunity to “resolve” or “correct” the vast majority of findings issued before the Final Program Review document is issued. The Department has taken a stance numerous times that nearly any violation of the Clery Act is not eligible for this treatment, stating:

“The exceptions identified above constitute serious violations of the Clery Act that, by their nature, cannot be cured. There is no way to truly ‘correct’ violations of this type once they occur.... these violations deprived students and employees of important campus safety and crime prevention information to which they are entitled. For these reasons, the College is advised that its remedial actions cannot and do not diminish the seriousness of these violations.”²

Clery Act, Drug Free Schools and Communities Act, and Title IX findings are some of the few violations that the Department has determined cannot be “corrected.” This results in Clery Act findings resulting in a disproportionate percentage of fines levied by the Department. Also eliminating the ability for the organization to “resolve” the finding prior to a final determination being issued and opening the organization up to additional corrective action and monitoring from the Department.



¹ 2019 data on median fines is not available. Due to lag in ED issuance of fines the only fine issued for a Clery Act finding from a Program Review conducted in 2019 to date is the \$1.5 million fine received by University of North Carolina.

² US Department of Education, Final Program Review Determination, College of The Redwoods; May, 2016.

Accessed at: [https://www.redwoods.edu/Portals/34/2013-](https://www.redwoods.edu/Portals/34/2013-2014%20Financial%20Aid%20Audit%20Final%20Program%20Review%20Determination.pdf?ver=2017-06-15-093615-547)

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What we have typically seen in cases where Clery Act findings have been sustained is that in addition to any fine action The Department requires the institution to make necessary corrections to its processes, retroactively correct and redistribute the Annual Security Reporting for the years reviewed, and provide ongoing reporting to the Department on Clery Compliance efforts for a period of time (most often three years).

The corrective action process can be so intensive and lengthy (in some cases eight years from initial Program Review to the end of Department monitoring) that a Compliance Manager we spoke with, whose institution had received a Program Review which found gaps in their Clery Act compliance, told us that in order to meet the Department's requirements they were forced to reassign multiple employees whose sole job became managing the corrective action process for a three year period, and that the total cost of the process for their institution was in the millions of dollars even though no fines were assessed.

In an effort to assist institutions from experiencing this fate we have, in this study, undertaken an analysis of the 269 Program Reviews that contained Clery Act related findings from 2013 (7), 2014(8), 2015 (26), 2016 (16), 2017 (101), 2018 (70), and 2019 (39) to determine the most common areas in which the Department of Education was finding institutions non-compliant and other any factors that may play into The Department's enforcement of the Clery Act.

INITIAL INVESTIGATION, CLASSIFICATION, AND DOCUMENTATION

When an incident is reported to a campus' leadership or public safety department, the Clery Act mandates a number of things that must be assessed in order for the campus to take the necessary steps to maintain compliance.

Campus geography

The campus must determine if the incident occurred within its Clery Geography. A campus' Clery Geography includes "on campus property", "public property" within or immediately adjacent to the campus, and "non-campus" buildings or property that an institution owns or controls but that are not geographically contiguous to the campus.

Compliance Challenges

Misclassification of campus geography was cited in 8% of all Program Review findings, the citations were primarily related to:





- Failing to identify “non-campus” geography or classifying as “non-campus” a facility that should have been identified as a separate campus
- Failing to provide statistics for incidents that occurred on public property within or adjacent to the campus.
- While not often cited, there is one instance of the Department citing an institution for misclassifying an incident as “on campus” that occurred two feet onto the sidewalk next to the campus and therefore should have been classified as “on public property”.

Incident classification

The campus must determine if incident falls into one or more of the categories of crimes reportable under the Clery Act, and if so, which elements are reportable. Under the Clery Act reportable offenses are broadly categorized to include: criminal offenses, hate crimes, violence against women Act (VAWA) offenses, and arrests and referrals for disciplinary action due to drug, liquor law, or weapons related offenses.

Compliance Challenges

While the incident classification was a rarely cited element in Program Reviews, 4% of all findings, they primarily related to:

- Failure to classify incidents as “hate crimes”.
- Confusion in classification between “burglary” and “larceny”.
- Incorrect counting of statistics due to the “hierarchy rule” which specifies which crime should be counted in the annual statistics when multiple crimes occur within the same incident.

Documentation

The campus must complete documentation of incident that will allow for later statistical disclosures and ensure that all documentation and related documents are retained as required for annual reporting.

If the campus has any public safety, police, or security function it must also create, maintain, and make available to anyone who requests it a “daily crime log” which details all incidents reported to the campus’ public safety department.



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Compliance Challenges

Documentation requirements were a rarely cited element in Program Reviews, 5% of all findings, they primarily related to:

- Missing documentation that was not retained for the length of time the Department requires (typically seven years).
- Missing entries in the crime log.
- Crime logs that did not contain all required fields.

ANNUAL AND ONGOING REQUIREMENTS

Annual Security Report

The institution must produce and disseminate an Annual Security Report (ASR) that includes all necessary elements and statistics. The Clery Act requires that the ASR contain thirty-eight separate safety and security related policy statements and disclosures.

Compliance Challenges

Producing and disseminating an ASR is the most basic of Clery compliance elements but was still often cited in program review findings. The most common of these findings were:

- Failing to produce an ASR, or the ASR being “materially incomplete” due to missing elements (12%).
- Late distribution of the ASR after October 1st (6%).
- Failure to provide documentation that proves dissemination of the ASR to all employees and students annually and to all prospective employees and students throughout the year (12%).
- Failure to report the required statistical data (including failure to document “0” in categories where no offenses occurred) or discrepancies between the data reported to the Department and that published in the ASR (17%).
- The policies and disclosures included in the ASR were by far the most often cited element in the Program Reviews analyzed, findings were directly related to required statements that were either missing completely or did not contain all of the information required (31%).





It should be noted that while failure to produce an ASR and failure to distribute an ASR are cited regularly, they may be slightly overrepresented. In many instances the Department has found that missing elements or errors in an institution's ASR made the ASR "materially incomplete" and therefore constituted a "failure to comply with the ASR active distribution and notification requirements." So it should not be construed that institutions found not to have complied with the ASR production and distribution requirements of the Clery Act had not actually produced and distributed an Annual Security Report that contained many, or even most, of the required elements.

The second most cited finding related to the Clery Act was for failure to accurately report the required statistical crime data in the ASR and to the Department. In our review we found that the most common cause for this finding was that statistics reported in the ASR did not match with those that were reported to the Department for the same period. This error is easily resolved by ensuring that persons responsible for publishing the ASR are communicating and comparing statistics with those who are responsible for reporting data to the Department.

Not quite so easily resolved were cases where data either included in the ASR or reported to the Department did not match other sources of information that the Department reviewed. These alternative sources were most often student conduct records, but also included Security or Campus Police documents, the institution's Crime Log, local Police reports, local news reports, and interviews with staff or students.

Annual Fire Safety Report

If an institution has any "on campus student housing" it must produce and disseminate an Annual Fire Safety Report (AFSR) that includes additional fire safety policies and fire statistics.

This report must be published and disseminated in addition to the ASR, but the Department has ruled that the ASR and AFSR can be combined into a single document as long as the combined document contains all necessary elements for both reports and is titled so as to indicate that it is both the ASR and AFSR.

Compliance Challenges

Producing and disseminating an AFSR would appear to be one of the most basic of Clery compliance elements but was still often cited in program review findings. The most common of these findings were:

- Failing to produce an AFSR, or the AFSR being "materially incomplete" due to missing elements. (5%).



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- Failure to report the required statistical data (including failure to document “0” for housing units where no fires occurred or where no injuries or loss of life was sustained in fires that did occur) or discrepancies between the data reported to the Department, that published in the AFSR, or that contained in the institution’s “Fire Log” or other documentation (3%).
- Policies and disclosures included in the AFSR related to required statements that were either missing completely or did not contain all of the information required (3%).

Annual Reporting to the Department of Education

The campus must submit crime, and if on-campus housing is present fire, statistics from the Annual Security and Annual Fire Safety Reports to the Department of Education via the annual online Campus Safety and Security Survey.

Compliance Challenges

While the submission of statistics to the Department was cited directly in only one of the program reviews analyzed, there were multiple findings issued for inconsistencies in the statistics supplied during the reporting to the Department and those published in the institution’s ASR or AFSR.

Emergency response and evacuation

The campus must maintain emergency response and evacuation procedures, must conduct exercises and drills to test those procedures, and publicize the procedures to the campus community in coordination with at least one test annually.

Compliance Challenges

The emergency response and evacuation portion of Clery was cited in 5% of the Program Reviews analyzed, citations were typically related to:

- The campus failing to maintain and update an emergency response plan.
- Failure to provide evidence of education of students and employees on the emergency response plan.
- Failure to maintain documentation of at least one annual test of the emergency evacuation plan that included dissemination to students.





Other findings

In addition to the most commonly cited findings outlined above other findings included the following:

- Failure to document that the Health and Wellness programs and ongoing prevention and awareness campaigns required by the Clery Act had occurred or failure to document their content. (2%).
- Failure to maintain documentation of the annual request to local law enforcement for crime statistics on the campus and of the surrounding geography (2%).
- Failure to issue “timely warnings” or “emergency notifications” to make the campus community aware of incidents that could pose a potential for harm (2%).
 - While the Department has not specified the numeric meaning of “timely” it has found institutions to be out of compliance with this requirement for delays of forty-five minutes after the initial report depending on circumstances.
 - Institutions have also been found to not be non-compliant for timely warnings that were delayed due to the institution failing to follow its own policies and procedure on issuance.
- Failure to correctly identify, train, or request statistics from all employees who meet the Clery Act’s definition of a “Campus Security Authority” (2%).

THE ROLE OF INSTITUTIONAL DEMOGRAPHICS

In addition to the deficiencies that the Department has enumerated we also evaluated the what other factors may influence the Department to sustain a finding of Clery Act violations against an institution.

Program Review initiation

While a Clery focused Program Review can be initiated based on complaints received or other reasons the Department has to question an institution’s compliance, of the findings from Program Reviews conducted between 2013 and 2019 only fifteen percent were as the



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result of a Clery focused audit. The remainder of the findings were initiated through the Department's regular Program Review process and resulted from a Program Review by the Department's School Participation Office looking at all aspects of an institution's FSA compliance.

Based on this, an institution is much more likely to receive findings of noncompliance with elements of the Clery Act if the institution is selected by the Department for a Program Review. The Department tells us that:

Based on 20 U.S.C. 1099c-1 (a)(2)³ (The Secretary) shall give priority for program review to institutions of higher education that are institutions with-

- *High cohort default rate or dollar volume of default (25%+)*
- *Significant fluctuations in Federal Pell Grant or loan volume*
- *Reported deficiencies or financial aid concerns by the state or accrediting agency*
- *High annual dropout rates, or*
- *Any other institution the Department determines may pose significant risk of failure to comply with administrative capability or financial responsibility requirements*

Any institution that meets one or more of these criteria should consider itself under increased risk of receiving a Program Review from the Department, and with 30% of the institutions receiving a program review over the past three years having been found to be in violation of at least some elements of the Clery Act the institution should expect any gaps in its Clery compliance program to be exposed and result in findings in the Final Program Review.

Type of institution

Our review did not indicate that that any one type or size of institution was any more or less likely to receive Clery Act compliance related findings if subjected to a Program Review.

The only differences in types of institutions receiving findings can be accounted for based on the type of institution's likelihood to be subject of a Program Review. Institutions across the spectrum of public, private; non-degree granting, two-year, four year; for profit, and non-profit; urban, suburban, or rural have all been issued Clery related findings. Institutional size does not appear to be a factor either as there have been findings issued to schools with less than one hundred and with more than 50,000 students.

³ <https://www.ccsfaa.org/assets/docs/UnderstandingProgramReviews.pdf>





One thing that is of note is that the Department may hold large public institutions to a slightly higher standard when determining fine amounts. All of the fines above or approaching one million dollars were issued to large public institutions:

- 2019 - University of North Carolina – Chapel Hill (\$1,500,000)
- 2018 - Michigan State University (\$4,500,000)
- 2017 - University of Montana (\$966,614)
- 2016 - Penn State University (\$2,397,500)

While the largest fines have been issued to institutions that likely have sufficient endowments to make payment without putting the institution's future in jeopardy, it does not mean that smaller schools are exempt from receiving fines well into the six figures.

- In 2017 the University of Jamestown, a 4-year private, not for profit institution, with eleven hundred students, located in Jamestown, North Dakota was assessed a fine for \$210,000 based on Clery Act findings.
- In 2018 Green River College, a 4-year public institution, with around 8,000 students, located in Auburn, Washington was fined \$574,000 for their failures under the Clery Act.
- In 2017 The University of St. Thomas, a 4-year private, not for profit institution, with eleven hundred students, with approximately 3,500 students, located in Houston, Texas was fined \$172,000.

The St. Thomas Program Review is of note as it is an excellent example of the Department's stance that Clery Act noncompliance is not something that can be "corrected" after it occurs. While the Final Program Review was issued in 2017 based on issues identified with the institution's ASRs published between 2010 and 2015, the Department notes that the institution's 2016 ASR does contain all of the required elements and is complaint, but because the prior years were not compliant it is immaterial that the institution had already addressed the issue prior to issuance of the Final Program Review.

For smaller institution such as these, these fines combined with the cost of corrective action can have a significant negative effect on their finances.



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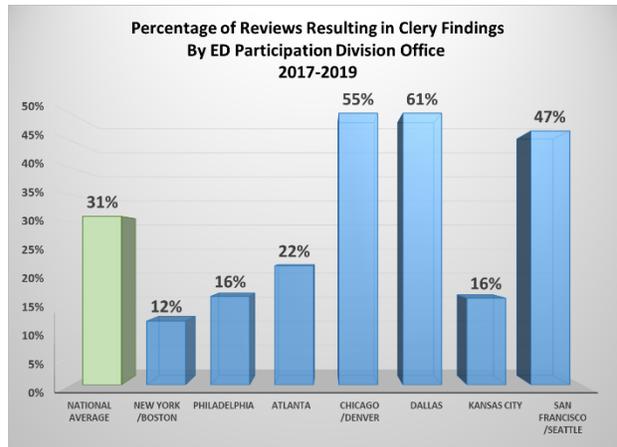
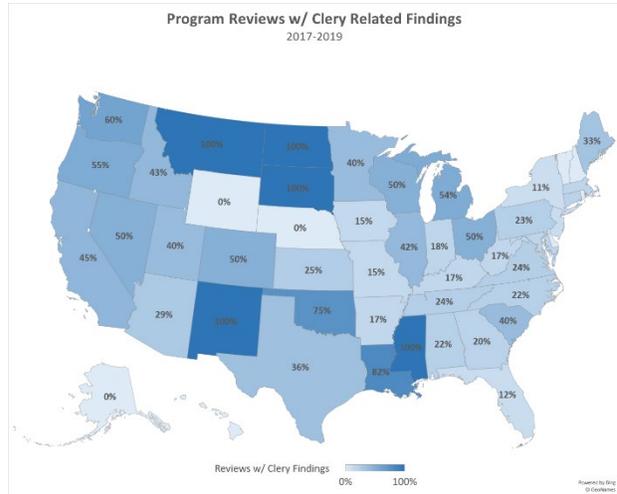
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Geographic location

Our analysis surprisingly revealed significant geographic discrepancies in the rates at which Program Reviews resulted in Clery related findings. While we cannot be certain if these discrepancies are the result of better Clery Act compliance in some regions of the country, differing practices in how Program Reviews are conducted by different Department of Education School Participation Division Offices, or some other factor; we feel that it is worth noting.

Institutions located in Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Louisiana, Minnesota, Michigan, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Wyoming, Washington, or Wisconsin, and served by the Chicago/Denver, Dallas, or San Francisco/Seattle were cited for Clery Act findings at a significantly higher rate (39% versus 18%) than institutions located in the territories served by the other four School Participation Division Offices. As illustrated by the included graphics, these results become even more pronounced (55% versus 14%) when we look at only the last three years (2017-2019) of data.



CONCLUSIONS

While Clery Act compliance is an increasing focus of Department of Education Program Reviews, an institution can make significant strides toward compliance by ensuring that development of Clery Act compliance process is a coordinated effort involving all appropriate stakeholders within the institution.

If have any questions or would like a copy of the source data used to compile this report for your own analysis, please reach out to us using the contact information below.



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