

LEGAL UPDATES

PUBLISHED: OCTOBER 29, 2012

The Clery Act: “Deeper Pockets” May Be Needed To Pay Future Violations of Its Disclosure Requirements

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) was enacted to improve campus safety by requiring postsecondary educational institutions that participate in federal student aid programs to promulgate and follow certain safety related policies and procedures. Colleges and universities are required to maintain a public crime log and fire log (if the campus offers residential housing) and to publish these statistics and the institution’s policies in an annual security report. The crime statistics included in the report must incorporate all reports over the most recent three year period of specified offenses that occurred on campus, on public property within or immediately adjacent to the campus and in or on non-campus buildings or property owned or controlled by the institution. This information must also be submitted to the U.S. Department of Education by October 1 each year. The Clery Act authorizes the secretary of the U.S. Department of Education to impose fines for violations of these requirements.

Two related developments over the past few months significantly increase the potential financial consequences to an institution that fails to comply with the various requirements of the Clery Act. Effective October 1, 2012, using the authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, the secretary of education increased the maximum fine that can be assessed for a Clery Act violation from \$27,500 to \$35,000.

This increase has added significance when considered in light of a decision by Education Secretary Arne Duncan this past June. At issue was an appeal by the Office of Federal Student Aid (FSA) of an initial decision by an administrative law judge (ALJ) regarding a fine against a Texas university that had failed to provide complete and accurate campus crime information in its annual report.

The ALJ had reduced the amount of the fine from \$137,500 to \$27,500 by reclassifying the university's numerous crime reporting failures as the filing of a single erroneous report. Secretary Duncan addressed whether the statutory authority to impose up to a maximum fine for "each violation" of the Clery Act precluded the ALJ from substantially reducing the fine in the manner he did. Duncan resolved this issue with the following explanation: "Given the statutory mandate authorizing a civil penalty for each violation or misrepresentation of any provision of the [Clery Act], it follows that evidence showing that [the university] failed to include specific criminal offenses in its crime report should result in the imposition of a fine calculated on the basis of each missing criminal offense." Duncan also rejected the ALJ's reason for mitigating the size of the fine, stating, "Neither a misunderstanding of the law, nor [the university's] purported lack of intent to violate the law is relevant to this case." Because the FSA had itself limited the potential size of the penalty by grouping several offenses together when it assessed the initial \$137,500 fine, the case was remanded to the FSA "for recalculation of the appropriate fine for the remaining 70 violations of the Clery Act."

What This Means to You

Complaints filed by students, faculty or staff who may believe that the institution is not meeting the requirements of the Clery Act may result in investigations for non-compliance. However, the U.S. Department of Education has also started conducting random audits to ensure that institutions are in compliance. Therefore, it is essential that institutions carefully prepare their annual security report to complete accuracy. Otherwise, they may be subject to heavy penalties for violations of the Clery Act and neither lack of knowledge as to the requirements nor a good faith effort to comply will shield institutions from fines if deficiencies are discovered. This applies not only to the various crime and fire statistics that must be reported but also to the various statements of policy that institutions must maintain to comply with the Clery Act. A good resource with detailed guidance on compliance is contained in the Department of Education's Handbook for Campus Safety and Security Reporting, which may be found at: www2.ed.gov/admins/lead/safety/handbook.pdf.

If your institution is interested in auditing its annual security report to verify compliance or needs assistance in understanding the various statistics and policies that are to be included in it, we would be glad to assist you.

Contact Info

If you have questions, please contact your Husch Blackwell attorney, Joe Cornelison at 816.983.8280 or Hayley Hanson at 816.983.8377.

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