



## **Clery Act Reminder – Why the Penn State Scandal Matters to the Academy**

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The U.S. Department of Education has announced that it will conduct an investigation into whether Penn State University failed to comply with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act in regard to allegations of sexual misconduct on campus by a former Penn State football coach. While it is premature at this point to reach any final conclusions, the evidence to date, particularly as described in the grand jury investigation, raises extremely grave concerns about what Penn State administrators and staff may have failed to do in response to reports of alleged inappropriate sexual conduct.

In addition to significant civil liability that may flow from their inaction, the DOE announcement raises the specter that Penn State could be fined for violating the Clery Act. Under that Act, Title VI funding could also be implicated. Specifically, the DOE investigation could find that school officials, including head football coach Joe Paterno, failed to assure that the Penn State security department crime log referenced the suspected criminal activity in question.

Depending on what it uncovers, the investigation could conclude that Penn State had an obligation to make a report of the suspected conduct to the campus community. These may be its duties under the Clery Act. This is to be differentiated from a review as to whether mandatory crime reporting responsibilities were violated. Such is a matter for state law and the Clery Act does not, as currently drafted, specifically require the reporting of crimes to public officials or security personnel.

In light of the startling developments at Penn State, this article serves as a brief review of Clery Act requirements and what lessons the Academy can derive from the Penn State scandal.

### **Brief Summary of the Clery Act: Answers to Common Questions**

*What schools must comply with the Clery Act?*

Under the Clery Act, all postsecondary institutions, public and private, receiving federal financial assistance are covered. Since virtually every postsecondary institution receives some form of federal assistance, the Clery Act applies to virtually every college and university in the country.

*What does the Clery Act require?*

While the specific requirements of the Clery Act are extensive and beyond the scope of this article, there are three primary obligations colleges and universities have under the Act.

First, they are required to publish and make available to the U.S. Department of Education an annual report disclosing the number of “reported” criminal offenses on campus, as well as certain adjacent public areas and off-campus facilities. This publication must also contain additional information such as a listing of any policies that encourage accurate and prompt reporting of a crime to campus police and law enforcement agencies and campus security policies and procedures. Second, each school must maintain

and keep a daily campus police or security department crime log. This log must be maintained in an easily understood fashion and must be “open to public inspection” during normal business hours. The daily crime log entries must contain the nature of the reported crime, the date and time of the reported crime, the location of the crime and the disposition of the reported crime, if known. Finally, colleges and universities are required to provide “timely reports” to the campus community on crimes considered to be an ongoing threat to other students and employees. While the Act does not define “timely,” notice to the community of a threat or security concern should most likely not exceed 24 hours after it is first reported.

For additional information on the specific and extensive obligations and requirements under the Clery Act, download and review a copy of [“The Handbook for Campus Safety and Security Reporting,”](#) which is offered for free on the U.S. Department of Education website.

#### *What types of crimes must be reported?*

Statistics must be maintained for the following alleged crimes and violations: (1) criminal homicide, separated between murder/non-negligent homicide and negligent homicide, (2) sex offenses, (3) robbery, (4) aggravated assault, (5) burglary, (6) motor vehicle theft and (7) arson. Further, where an arrest or disciplinary referral is made, the school must also report the statistics concerning liquor law violations, drug law violations and illegal weapons possession. The crimes must also be broken down based on where they occurred.

#### *Who must report crimes under the Act?*

The Clery Act requires that campus security personnel and any “official of an institution who has significant responsibility for student and campus activities” confirm that a suspected crime is reported for purposes of inclusion on the criminal blotter and

the DOE report. Pursuant to applicable federal regulations, the reporting requirement extends to such positions as residence hall directors, faculty advisors, student advisors, higher-level administrators and athletic coaches.

#### *When does a crime become reportable under the Act?*

Significantly, the Clery Act requires the disclosure of statistics from reports of “alleged” criminal incidences, which is significantly more expansive than reports of actual criminal conduct. Therefore, the alleged crime must be included in the campus security report, regardless of whether it is prosecuted by local law enforcement officials, campus security, or a similar agency.

#### *Are there any exceptions to the Clery Act reporting requirements?*

The Clery Act exempts from its reporting requirement “pastoral or professional counselors” receiving reports about crimes disclosed in confidence. To qualify under this exemption, the person must provide counseling as part of his or her official duties at the school and be functioning within the scope of his or her professional license or certification at the time of learning of the crime.

#### *What are the penalties for noncompliance?*

An institution that does not comply with the Clery Act, either by underreporting, failing to disclose reported crimes or otherwise providing inaccurate or misleading information, can be fined up to \$27,500 per violation and can lose federal funding.

## Practical Guidance for Colleges and Universities

If the allegations against Penn State are deemed by Pennsylvania state court to be true, Penn State coaches and administrators could be found guilty in failing to fulfill their reporting obligations under the federal law, particularly if it is determined that the allegations of sexual misconduct were known and went unreported to security personnel and/or local law enforcement.

In the end, the events in Happy Valley serve to remind every institute of higher education of its legal obligations under the Clery Act. In light of the foregoing, and if you have not done so already, we recommend the following steps be taken immediately to comply with the Clery Act, to increase the chances that crimes are “reported” and properly handled and to decrease the likelihood that allegations, such as the ones that are currently rocking Penn State, will occur at your institution.

- Establish a close relationship with your local law enforcement agency so that information related to criminal activity can quickly and easily be exchanged and/or disseminated. This can also be invaluable in properly responding to security threats on campus.
- Establish and implement initial and annual training to all university employees about the university’s obligations under the Clery Act, including what is a “reportable” crime and with whom such information needs to be shared.
- Consider including an introduction to the Clery Act and the necessary reporting requirements and applicable policies to freshman during orientation. This can increase the chances that criminal activity is reported and properly handled.
- Designate an individual to coordinate and oversee the school’s compliance with the Clery Act. This can operate as a “checks and balances” system for campus security or whatever department is responsible for maintaining the daily crime log and/or the annual report.
- Provide frequent training to those personnel responsible for preparing the daily crime log and the annual report to DOE, including training on what information is required to be maintained, what access right the public may have to such information, and how to deal with requests for information.
- Regularly audit and/or review the daily crime log to ensure that the information required to be maintained under the Clery Act is being gathered.
- Develop threat assessment teams to properly respond and provide notice to the college community regarding threats to the community. This should include setting up protocols and procedures for responding to significant emergency situations.
- Develop an emergency notification system on campus that can transmit information across the campus in the event of an emergency. This could include a system whereby emergency messages are sent by campus email, text messaging, loud speaker, etc.
- Establish appropriate record retention guidelines to ensure that all necessary documents related to reported criminal activity is maintained and/or preserved.
- Ensure that any Student or Faculty Handbooks distributed to the campus community explain Clery Act obligations and provide clear instructions on what is a reportable crime and how and when a crime should be reported.
- Review and ensure that all campus security policies and procedures are clearly written, easily understood and well-distributed to the campus community.

*E. Jason Tremblay is a member of the Higher Education Law Group at Arnstein & Lehr LLP, <http://legalnews.arnstein.com/higher-education>. The firm can assist with any questions regarding any aspect of the Clery Act, including how to properly comply with it. Tremblay can be reached at 312-876-6676.*