



April 12, 2021

Sent via Electronic Mail

Ms. Sara L. Trower
Associate General Counsel
Arizona State University
Email: sara.trower@asu.edu

Dear Ms. Trower,

I hope all continues to be well with you and yours during these challenging times. As you know, on June 22, 2020, Ms. Laura Dunn of the L.L. Dunn Law Firm, PLLC filed a Complaint with the Clery Group of the Partner Enforcement and Consumer Protection Directorate of the U.S. Department of Education (the Department). The complaint was filed on behalf of her client, Ms. (b)(6) and alleged that Arizona State University (ASU; the University) violated key provisions of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (*Clery Act*) and the Department's implementing regulations, specifically 34 C.F.R. §§ 668.46(b)(11) and (k). These regulations incorporate the amendments to the *Clery Act* included in Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA).

Specifically, the Complaint raised serious concerns about ASU's handling of several aspects of a disciplinary matter involving Ms. (b)(6). Among other allegations, the Complaint claimed that ASU: 1) failed to provide a prompt, fair, and impartial disciplinary process in response to a report of alleged sexual violence; 2) failed to articulate a clear rationale for unexplained and unwarranted delays in the disciplinary process and in the production of relevant information, including a police report and a report prepared by a Sexual Assault Nurse Examiner, to the Title IX investigator; and, 3) failed to provide written information about the Complainant's rights and options, available accommodations and protective measures, and clear instructions on how to secure such assistance. The Complaint also asserted that no timely warning was issued in response to the reported offense even though the underlying incident may have posed a significant or ongoing threat to the campus community. Additionally, and of special concern to the Department, the Complainant represented that upon conclusion of the investigation and hearing processes, the University attempted to place conditions on the continued participation of the Complainant's advisor of choice and on the Complainant's right to access to written information regarding the determinations reached by the disciplinary body. Finally, it was alleged that the written notice that was eventually provided did not include a rationale for the determination or information about the student's right to an appeal.

The purpose of this letter is to inform your office that the Clery Group has completed its assessment, to serve notice of the outcome of the assessment, and to advise the University of actions that must be taken to address certain violations and other areas of concern.

When the Department receives a complaint of this type, we carefully consider the allegations, gather documentary evidence, and utilize other investigative and research methods to evaluate

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case facts and determine an appropriate course of action. In this case, we reviewed the police report filed by the Complainant with the ASU Police Department, the University's policies and procedures, and correspondences between the University's Office of Student Rights and Responsibilities, other institutional officials, the Complainant, and her attorney/advisor.

Based on that review and after careful consideration, the Department has determined that the University violated the *Clery Act* by attempting to place conditions on the participation of the Complainant's advisor and on the Complainant's access to information about the determinations of the disciplinary body. In support of these determinations, the Department notes that the *Clery Act*, at 20 U.S.C. §1092(f)(8)(B)(iv)(III) and the Department's regulations at 34 C.F.R. §668.46(k)(2)(v), specifically require that the accuser and accused be simultaneously informed, in writing, of the outcome of any disciplinary hearing arising from an allegation of sexual violence or a VAWA offense. In this instance, ASU advised the Complainant that she must send an email to request information about the results of the disciplinary hearing and that she was required to attend a meeting to receive this information. When the Complainant asserted her rights to receive the results of that determination in writing, ASU officials and its General Counsel required her to sign a non-disclosure agreement. After many communications between the Complainant and University officials, the Complainant received the results of the hearing. Once the written information was released, it was clear that the written notification failed to provide a clear rationale for the outcomes reached by the disciplinary body or any information about the student's right to appeal, even though the University's policies permit such an appeal.

During the assessment process, the Department carefully reviewed the Complaint, and, without making determinations with respect to each of the allegations, notes the following:

- 1) The University cannot place conditions of any kind on a victim of an alleged sexual assault or their advisor, including the execution of a non-disclosure agreement, as a pre-condition to full participation in the disciplinary process or to access to simultaneous written notification of the outcomes of a disciplinary proceeding, including the rationale for the determination and information about any sanctions imposed and the individual's right to appeal.
- 2) The exemptions to the Family Educational Rights and Privacy Act (FERPA) referenced in the University's response to the Complainant have no bearing in this matter. Federal regulations at 34 C.F.R. Part 99, with regard to "prior consent" and disclosures to "a victim of an alleged perpetrator of a crime of violence" are simply not at issue here, precisely because the disclosure may only "include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense." The rules go on to say that an institution may disclose "the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed." These rules do not, in any regard, preclude or limit the institution's obligation to provide the required notifications in writing and do not support the application of any preconditions to a party's access to this information, such as a requirement to enter into a non-disclosure agreement.
- 3) The *Clery Act* requires that parties be provided information about the results of any institutional disciplinary proceeding that arises from an allegation of sexual violence or

VAWA offense. The law further requires that this information be provided to the accuser and the accused at the same time and in writing. Furthermore, the written notice of the results must include the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding, any change to the results and when the results become final. 34 C.F.R. § 668.46(k)(2).

This determination finds that the University's actions resulted in serious violations of the *Clery Act* as detailed in this letter. ASU must immediately terminate these practices and eliminate any policy, procedure, or practice that requires a party in a disciplinary case involving an alleged act of sexual violence or VAWA offense to request a copy of a determination of a disciplinary body, requires a party to be physically present to obtain the results of a disciplinary hearing, or requires a party to execute a non-disclosure agreement to obtain the results of a disciplinary hearing. In reaching these determinations, the Department notes that its positions are not, in any respect, new. To the contrary, these conclusions are grounded in the applicable statutes and regulations and are also consistent with longstanding guidance that is reflected in published determinations dating back to at least 2004¹. The University is also reminded that the rights afforded by FERPA and the exemptions to it included in the *Clery Act* exist for the benefit of the student and that the authority and responsibility for enforcing FERPA rests with the Department.

The Department is notifying ASU of these determinations now and without comment concerning certain other matters raised in this Complaint so that the University can initiate immediate remedial action. As noted above, ASU must immediately cease the noncompliant practices identified above and develop and implement new policies and procedures that align with the requirements of the *Clery Act* and the Department's regulations. Immediately upon completion, the University must include accurate and complete information about the University's new and revised policies and procedures related to the investigation and adjudication of alleged acts of sexual violence in a revised version of its 2020 ASR. The revised report must be actively distributed to all enrolled students and current employees within three days of publication. A copy of the revised ASR and credible proof of distribution must be transmitted to Ms. Janet Pearlman via electronic mail on the same day the revised report is distributed to campus community members. These actions must be accomplished by the close of business on Monday, May 17, 2021. Until the ASR is revised and distributed, ASU must also provide a copy of the current conduct code and associated policies and procedures with appropriate edits and explanations to complainants at the time a complaint is filed, and to the respondent at the time that notice of the charges is served.

As noted throughout, this letter is not all-inclusive with respect to the issues raised in the Complaint. The absence of statements in this letter concerning specific practices and procedures or certain allegations in the Complaint must not and cannot be construed as acceptance, approval, or endorsement of those specific practices and procedures. Furthermore, nothing in this letter relieves the University of its obligation to take all necessary action to ensure compliance with all of the statutory or regulatory provisions governing the Title IV, HEA programs, including the *Clery Act* and its implementing regulations, and the terms and conditions of its Program Participation Agreement.

¹ See Final Determinations issued to Georgetown University on July 16, 2004 and to the University of Virginia on November 3, 2008. Documents are posted at <https://studentaid.gov/data-center/school/clery-act-reports>.

It is imperative that ASU ensure that all aspects of the disciplinary processes are carried out in a prompt, fair, and impartial manner going forward. Doing so will eliminate unnecessary delays in the process and will help to ensure that the rights of parties are not compromised by the process itself or by other factors beyond the parties' control. Additionally, the Department reminds ASU that all current and future student and employee conduct investigations and hearings must be conducted in full compliance with the *Clery Act* and in accordance with the policies, procedures, programs, and the other terms and conditions set forth in the University's ASR.

The Department considers this Complaint to now be closed, subject to ASU's submission of the requested documentation. Our office stands ready to answer questions and provide appropriate assistance to University officials as they work to enhance the institution's campus safety and crime prevention policies and procedures and its *Clery Act* compliance program. In support of those efforts, the Department offers the following recommendations for the University's consideration as it reviews and revises its policies and procedures to ensure a prompt, fair, and impartial process for all parties and to help ensure future compliance:

- 1) Take all complaints seriously and observe published timeframes to ensure that cases proceed in a timely and orderly manner from initial report to final resolution;
- 2) Ensure that appropriate accommodations, protective measures, and other services are available to parties, especially survivors of sexual violence, and that parties know how to access such resources;
- 3) Be intentional about establishing policies and procedures that provide for equitable treatment of all parties by ensuring that a factual basis is established for all questioning by investigators, advisors, and hearing officials, that such questioning is carried out in an appropriate manner, and that all material that is submitted as evidence is relevant and not likely to result in unfair prejudice against a party;
- 4) Make sure that parties are notified of the policies, procedures, and practices that will govern all aspects of their case from initial report to final resolution;
- 5) Establish systems that provide for the effective custody and control of all case records in a manner that will facilitate the timely production of such records to investigators, hearing bodies, and to the parties in a case well in advance of all meetings and proceedings and in a manner that will enable parties to file substantive appeals and/or well-documented complaints with oversight agencies, including the Department;
- 6) Maintain the integrity of the disciplinary process by ensuring consistent application of the rules and procedures and ensure that such processes are not altered or misapplied during an open case; and,
- 7) Actively communicate all changes to policies and procedures to the campus community by revising the ASR and actively distributing the revised report to enrolled students and current employees. Also, make sure that parties who are not

ASU students or employees are provided with a copy of the applicable policies and procedures at the time a complaint is filed, or a notice of charges is served.

Because of the consequences of a serious compliance failure, the Department strongly recommends that ASU officials re-examine the University's campus safety policies and procedures on a regular basis to ensure that they continue to reflect current institutional practices and are compliant with Federal requirements. The Department provides a number of *Clery Act* training resources. ASU officials can access these materials at <http://www2.ed.gov/admins/lead/safety/campus.html> and <https://fsatraining.ed.gov/>. The *Clery Act* regulations can be found at 34 C.F.R. §§ 668.14, 668.41, and 668.46.

We remind ASU that Section 304 of VAWA amended the *Clery Act* to require institutions to compile and disclose statistics for incidents of domestic violence, dating violence, sexual assault, and stalking and to include information about their policies, procedures, and programs to prevent and respond to sexual violence in their ASRs. In light of the specific issues raised by this Complaint, the University is advised to ensure that it is in full compliance with the VAWA provisions, which went into effect on July 1, 2015. ASU officials may view the text of the Final Rule at: <http://ifap.ed.gov/fregisters/attachments/FR102014FinalRuleViolenceAgainstWomenAct.pdf>

The Department thanks you for your prompt attention to this important matter. The Clery Group will continue to monitor ASU's progress and will conduct additional compliance activities, as needed, to confirm remediation and evaluate the institution's compliance going forward. Please direct your questions to Ms. Janet Pearlman on 202-377-4845 or at janet.pearlman@ed.gov.

Sincerely,

James L. Moore, III

James L. Moore, III
Senior Advisor, Clery Act Compliance and Campus Safety Operations
U.S. Department of Education