



September 11, 2020

Sent via electronic mail

Ms. Therese M. Leone
Deputy Campus Counsel
Office of Legal Affairs
University of California, Berkeley
200 California Hall
Berkeley, CA 94720

Dear Ms. Leone:

I hope and trust that all continues to be well with you during these challenging times. Thank you for working with the U.S. Department of Education (the Department) and the Clery Group to resolve our Campus Crime Program Review of the University of California, Berkeley (Berkeley; the University). The purpose of this notice is to clarify and correct certain statistical errors that appear on page 63 of the Department's September 17, 2019 Final Program Review Determination (FPRD).

As you know, Berkeley contracted with an outside vendor to conduct parts of the file review and statistical analysis. As noted in footnote 35 on page 63 of the FPRD, the Department "substantially relied on Berkeley's file review to determine the number of underreported incidents that were previously excluded from the University's disclosures of crime statistics during the 2012-2016 timeframe." While the file review was found to be in generally good order for most years, further review by the Department and the University determined that the report included certain data errors, including instances where offenses were double counted for calendar year 2016. The parties also determined that some of this discrepant data was carried over to the FPRD.

This letter documents the resolution of certain of these statistical discrepancies that were addressed during settlement discussions related to the program review. The parties agree that the source documents indicate that 34 incidents of Rape were reported to the University during calendar year 2016, as opposed to the 42 incidents originally disclosed by the University or the 51 incidents noted in the file review and the FPRD. Additionally, the parties agree that the number of referrals for drug and liquor law violations were overstated in the file review for calendar year 2016. It appears that the number of incidents in these categories were effectively counted twice. The correct number of liquor law referrals for calendar year 2016 was 395 and the correct number of drug law referrals was 38.

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This letter also serves to reaffirm our agreement to work together going forward to identify and address the causes of other reporting errors, including classification and counting errors, that may have caused inaccuracies in these and other categories of crime over time.

We appreciate Berkeley's efforts to enhance its campus safety, crime prevention, and Clery Act compliance programs and thank you and your team for all that you do in service to students.

Sincerely,

A handwritten signature in blue ink that reads "Lisa C. Bureau". The signature is fluid and cursive, with the first name "Lisa" and last name "Bureau" clearly legible.

Lisa C. Bureau, Acting Director
Clery Group/Partner Enforcement and Consumer Protection
Office of Partner Participation and Oversight

cc: Abigail Ogden

Prepared for:

University of California, Berkeley

OPE ID: 00131200

PRCN: 201440328749

Prepared by:

U.S. Department of Education

Federal Student Aid

Clery Act Compliance Division

Final Program Review Determination

September 17, 2019

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A. The Clery Act and DFSCA

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (*Clery Act*), in §485(f) of the Higher Education Act of 1965, as amended, (HEA), 20 U.S.C. §1092(f), is a Federal consumer protection statute that provides students, parents, employees, prospective students and employees, and the public with important information about public safety issues on America's college campuses. Each domestic institution that participates in the Federal student financial aid programs under Title IV of the HEA must comply with the *Clery Act*. The institution must certify that it will comply with the *Clery Act* as part of its Program Participation Agreement (PPA) to participate in the Title IV, Federal student financial aid programs.

The *Clery Act* requires institutions to produce and distribute an Annual Security Report (ASR) containing its campus crime statistics. Statistics must be included for the most serious crimes against persons and property that occur in buildings or on grounds that are owned or controlled by the institution or recognized student organizations as well as on adjacent and accessible public property. These crimes are deemed to have been reported anytime such an offense is brought to the attention of an institution's campus police or security department, a local or State law enforcement agency of jurisdiction, or another campus security authority (CSA). A CSA is any institutional official who is 1) designated to receive reports of crime and/or student or employee disciplinary infractions, such as Human Resources and Alternative Dispute Resolution professionals and/or 2) an official that has significant responsibilities for student life or activities such as residential life staff, student advocacy and programming offices as well as athletic department officials and coaches.

The ASR also must include several statements of policy, procedures, and programmatic information regarding issues of student safety and crime prevention. The *Clery Act* also requires institutions to maintain a daily crime log that is available for public inspection and to issue timely warnings and emergency notifications to provide up-to-date information about ongoing threats to the health and safety of the campus community. In addition, the *Clery Act* requires institutions to develop emergency response and evacuation plans. Institutions that maintain student residential facilities must develop missing student notification procedures and produce and distribute an Annual Fire Safety Report (AFSR) containing fire statistics and important policy information about safety procedures, fire safety and suppression equipment, and what to do in the case of a fire. Finally, the *Clery Act* amendments that were included in Section 304 of the Violence Against Women Reauthorization Act of 2013 went into effect on July 1, 2015. These provisions are aimed at preventing campus sexual assaults and improving the response to these crimes when they do occur.

The *Clery Act* is based on the premise that students and employees are entitled to accurate and honest information about the realities of crime and other threats to their personal safety and the security of their property. Armed with this knowledge, members of the campus community can make informed decisions about their educational and employment choices and can take an active role in their own personal safety and to secure and protect their personal property. For that reason, the office of Federal Student Aid (FSA) must ensure that the information disclosed in each ASR and AFSR is accurate and complete. FSA uses a multi-faceted approach to ensure that institutions comply with the *Clery Act*, which includes providing technical assistance and training programs and materials as well as monitoring and enforcement through program reviews and complaint resolution.

FSA may initiate a campus crime program review as a result of a complaint or on public reports about crimes and crime reporting and prevention at a particular institution. Program reviews

entail in-depth analysis of campus police and security records and interviews with institutional officials, crime victims, and witnesses. During a program review, an institution's policies and procedures related to campus security matters are also examined to determine if they are accurate and meet the needs of the campus community.

Because more than 90% of campus crimes are alcohol and drug-related, the Secretary of Education has delegated oversight and enforcement responsibilities for the Drug-Free Schools and Communities Act (*DFSCA*), in §120 of the HEA, 20 U.S.C. §1011(i) to FSA. The *DFSCA* requires all institutions of higher education that receive Federal funding to develop and implement a comprehensive drug and alcohol abuse prevention program (DAAPP) and certify to the Secretary that the program is in place. The program must be designed to prevent the unlawful possession, use, and distribution of drugs and alcohol on campus and at recognized events and activities.

On an annual basis, each institution must provide a DAAPP disclosure to all current students (including all students enrolled for any type of academic credit except for continuing education units) and all current employees that explains the educational, disciplinary, health, and legal consequences of illegal drug use and alcohol abuse as well as information about available counseling, treatment, and rehabilitation programs, including those that may permit former students or employees to return following expulsion or firing. The distribution plan must make provisions for providing the DAAPP disclosure annually to students who enroll after the initial distribution and for employees who are hired at different points throughout the year.

Finally, the *DFSCA* requires institutions to conduct a biennial review to determine the effectiveness of its DAAPP to identify areas requiring improvement or modification and to assess the consistency of enforcement actions imposed on students and employees that are found to be in violation of applicable Federal, State, and local drug and alcohol-related statutes or ordinances and/or institutional policies and codes of conduct.

Proper implementation of the *DFSCA* provides students and employees with important information about the detrimental consequences of illicit drug use and alcohol abuse. The conduct of a meaningful biennial review provides the institution with quality information about the effectiveness of its drug and alcohol programs. Any failure to implement these requirements may contribute to increased drug and alcohol abuse on campus as well as an increase in drug and alcohol-related violent crime. The *DFSCA* is monitored and enforced by the U.S. Department of Education (the Department).

B. Institutional Information

University of California, Berkeley
200 California Hall
Berkeley, CA 94720

Institution Type: Public

Highest Level of Offering: Doctoral Degrees

Primary Accreditation Agency: Western Association of Schools and Colleges

Current Student Enrollment: 42,000 (Approx. Fall 2018)

Percentage of Students Receiving Title IV Funds: 36% (Approx. Fall 2018)

Title IV Participation Funding Level:	2017-2018 Award Year
William D. Ford Federal Direct Loan Program (FDLP)	\$ 150,358,357
Federal Pell Grant Program	\$ 43,522,388
Federal Supplemental Educational Opportunity Grant Program	\$ 1,848,053
Federal Work Study Program	\$ 4,652,975
Federal Perkins Loan Program (Perkins)	\$ 186,354
Federal TEACH Grant Program	\$ 18,680
Total	<u>\$200,586,807</u>

FDLP Cohort Default Rates

2015: 2.4%

2014: 2.1%

2013: 2.0%

Perkins Default Rates

June 30, 2017: 3.6%

June 30, 2016: 1.6%

June 30, 2015: 2.1%

Established in 1868, the University of California, Berkeley (Berkeley; the University) is the oldest public institution of higher learning under the University of California system. The University is organized into 14 Colleges and Schools and has more than 150 academic departments offering nearly 300 degree programs. The full-time faculty includes approximately 1,600 members and is supplemented by about 500 adjunct instructors. Berkeley also employs several thousand other staff members. At the time of the site visit, about 0,000 of Berkeley's 40,000 students resided in on-campus student housing facilities. By any measure, the University campus is large both in terms of land mass and the number of community members. Situated in the city core, the Berkeley

campus covers more than 1,200 acres of land. The University also owns or controls several thousand additional acres of land.

The University of California Police Department (UCPD) is responsible for securing the campus on a 24/7/365 basis. At the time of the site visit, Berkeley's UCPD component was comprised of 70 sworn officers, 50 security patrol officers, 55 community service officers, 13 records and dispatch personnel, and 20 civilian staff members. The University has a mutual aid agreement with the City of Berkeley Police Department.

C. Scope of Review

The U.S. Department of Education conducted an on-site Program Review at the University of California-Berkeley from July 7, 2014 through July 11, 2014. The review was conducted by the Clery Act Compliance Division and was led by Ms. Cynthia Floyd-Davis.

The objective of the review was to assess Berkeley's compliance with the *Clery Act* and the *DFSCA*. The review was initiated based on an assessment of a complaint filed by several students. There were four original complainants, including founding members of the campus sexual assault awareness and prevention group, End Rape on Campus (EROC), who were joined by 27 other students, all of whom expressed serious concerns. Specific to the *Clery Act*, the complainants alleged that Berkeley persistently failed to comply with the requirements of the *Clery Act*, especially with regard to the sexual assault prevention and response provisions of 34 C.F.R. §668.46(b)(11), commonly referred to as the Campus Sexual Assault Victim's Bill of Rights. The complaints also raised serious concerns about the Office for the Prevention Harassment and Discrimination (OPHD; Title IX) and the Center for Student Conduct (CSC), which they claim failed to properly investigate and adjudicate claims.

The Department's investigation focused initially and primarily on Berkeley's policies and procedures with regard to the *Clery Act*, although some review of the Title IX process was necessary because the University's policies and procedures created a complex interrelationship between certain aspects of the campus safety operations and Title IX functions. The review also included an examination of Berkeley's Annual Security Reports, Annual Fire Safety Reports, police incident reports, arrest records, student conduct violation records, Title IX's case records, and policies and procedures related to the *Clery Act*. The initial review period called for an assessment of records from the calendar year 2009-2012 time period, although the review period was expanded through the end of calendar year 2016 to further address specific areas of concern that were identified during fieldwork and through the review team's independent research and investigation. Both random and judgmental sampling techniques were used to select records for review. A sub-sample of police incident reports was also cross-checked against the UCPD Daily Crime Log to ensure that crimes occurring within the patrol jurisdiction were properly entered. The Department also examined Berkeley's compliance with the provisions of the *DFSCA*. Several Berkeley students and staff members were interviewed during the course of the review.

Disclaimer:

Although this review was planned and conducted in a thorough manner, neither the review nor this FPRD can be assumed to be all-inclusive. The absence of statements in this report concerning Berkeley's specific practices and procedures must not be construed as acceptance, approval, or endorsement of those specific practices and procedures. Furthermore, it does not relieve the University of its obligation to comply with all of the statutory and regulatory provisions governing Title IV, HEA programs, including the *Clery Act* and the *DFSCA*. Although official positions and offices are mentioned in this document, findings of violation are attributed solely to the University. Berkeley is ultimately responsible for complying with the *Clery Act* and other statutory and regulatory requirements and is responsible for the actions of its employees and agents. References to specific institutional officials are included solely to improve the clarity of the document.

D. Findings and Final Determinations

During the review, several areas noncompliance were identified. Findings of non-compliance are referenced to the applicable statutes and regulations and specify the actions to be taken by Berkeley to bring campus crime reporting policies and procedures into compliance with the *Clery Act* and the Department's regulations. The findings identified in the Department's April 21, 2017, Program Review Report (PRR) appear in italics below. Berkeley submitted its official narrative response, dated August 24, 2017, to the Department. This submission was received on August 28, 2017. A supplement to the initial response dated March 1, 2018, which included the file review report, was received by the Department on March 6, 2018. A summary of Berkeley's response and the Department's Final Determination appear at the end of each finding. Please note that certain non-substantive edits were made to the text of the initial report.

Finding #1: Lack of Administrative Capability

Citation:

To begin and remain eligible to participate in any program authorized under Title IV of the Higher Education Act, as amended, an institution must demonstrate that it is capable of adequately administering the program under the standards established by the Secretary. Among other requirements, the Secretary considers an institution to have administrative capability if it administers the Title IV, HEA programs in accordance with all statutory provisions of, or applicable to, Title IV of HEA, and all applicable regulatory provisions prescribed under that statutory authority. 34 C.F.R. §668.16(a). The Secretary's standards of administrative capability also require that an institution employ "an adequate number of qualified persons" as well as a prescription that regulated activities are undertaken with appropriate "checks and balances in its system of internal controls." 34 C.F.R. §668.16(b)(2); 34 C.F.R. §668(c)(1). An administratively capable institution also "has written procedures for or written information indicating the responsibilities of the various offices with respect to . . . the preparation and submission

of reports to the Secretary.” 34 C.F.R. §668.16(b)(4). These standards apply to all aspects of the Title IV Program regulations, including the Clery Act and the Department’s implementing regulations at 34 C.F.R. §668.46.

Noncompliance:

Berkeley failed to demonstrate the requisite administrative capability expected of a Title IV-participating institution with regard to its compliance with the Clery Act. Specifically, Berkeley did not develop and implement an adequate system of policies, procedures, programs, systems, training, and internal controls to reasonably assure compliance with the requirements of the Clery Act. In other cases, it appears that adequate policies and processes may have been in place but that Berkeley officials did not monitor compliance with them in their areas of responsibility.

The review team also found that several of the University’s ASRs included ambiguous policy statements as to how sexual violence cases would be handled by student and employee conduct authorities. As documented in the report, Berkeley also included a Timely Warning policy in the ASR that did not match the internal policies and procedures of the UCPD that permitted delays in the issuance of such warnings until at least the next business day.

Moreover, our review identified multiple deficiencies in the University’s Daily Crime Logs for the years under review. In ASRs for the years 2010 to 2013, the hate crime statistics disclosed did not reference the category of actual or perceived bias, as required. This and other errors caused Berkeley’s hate crime statistics to be underreported during the 2009-2012 time period. Errors related to application of the geographical definitions were noted in the hate crime disclosures that were included in the 2014 ASR.

Work processes for producing and distributing the ASR and the AFSR were delegated to staff without the required knowledge, experience, and training and were divided among officials in different departments without adequate communication and coordination between these officials. It also appears that there was no substantive process to track progress or verify the accuracy and completeness of disclosures. For example, UCPD officials provided inaccurate information to the Associate Vice Chancellor (AVC) of Business and Administrative Services about the ASR distribution requirement and the institution’s processes for disseminating these reports. More specifically, the UCPD official instructed the AVC to distribute ASRs to University officials in certain departments by October 1 each year; the instruction did not clarify that the distribution process must also include all of the University’s current students and employees. This violation occurred in at least three consecutive years (2010-2012).

Regarding fire safety, Berkeley’s Fire Marshal advised Department officials that the AFSR is linked to the ASR on the University’s Environment Health and Safety (EHS) website. He went on to say that the UCPD Clery Compliance Officer and the webmaster ensure that AFSR and ASR are posted to the University’s website. The Department

tested the University's website and the link on November 6, 2013 and again on May 13, 2014; at neither time was Berkeley's ASR nor AFSR produced and posted as single comprehensive documents or as one consolidated report. The Clery Act requires an institution to prepare, publish and distribute its ASR and AFSR by October 1 each year.

Other factors that contributed to the University's failures can be attributed to a lack of substantive and sustained training. Although institutions are not generally required to train employees or to otherwise provide training opportunities on most areas of the Clery Act, it is very difficult for a large institution to comply without it. At the time of the site-visit for this Program Review, the Title IX Compliance Officer informed the Department that her office had been seriously understaffed for at least four years.¹ She stated that Title IX's investigative functions were conducted by one full-time staff person, and "it was clearly not enough" to have one staff person conducting these investigations. According to her, staffing was at the full-time equivalency (FTE) of 1.5, during the years 2010 to 2012; since that time, the University added three full-time employees to the office. A Matrix of UC Employees Who Held Positions in Title IX showed a staffing pattern that fluctuated between 1.5 and 4.5 FTEs over a span of 5-years, from 2009 to 2014.

Independent of the changes in the staffing pattern, the Title IX Compliance Officer admitted to not knowing at any time the number of open and closed cases. In an effort to further assess Title IX's administration of the Clery Act, the Department requested information concerning caseloads, case tracking, and correspondence from complainants' who were seeking status updates for their cases. University officials informed the Department that the Title IX staff did not have access to an electronic system and the case tracking information was not readily accessible. It was later revealed that the staff had to manually search case files to assess and compile data for the reports. A report of Title IX's caseload and case tracking for the years 2013 to 2014 was produced on July 11, 2014; however, the report for years 2009 to 2012² was not produced until August 29, 2014, one month and 13 days after the request.

In case files regarding the sexual assault allegations of four complainants, Berkeley failed to coordinate the complicated and interrelated work of the several offices, including Title IX and the CSC, that were involved in the investigation and disciplinary proceeding processes. Note the three separate areas of violation that were created by this condition in the handling of a single case: First, in CSC case #13843-26816, Berkeley failed to get the case into the student conduct system because of deficiencies in the complaint intake process. Secondly, the Title IX Compliance Officer failed to provide timely notice to the CSC about the outcomes reached, via the Early Resolution process that was conducted in lieu of a full Title IX investigation. Lastly, CSC failed to provide

¹ FSA rarely comments on an institution's Title IX operations or its compliance with the Title IX requirements, however, as noted in the PRR, Berkeley created a complex and ill-defined system for investigating and adjudicating conduct cases that caused its Title IX and Clery Act processes to become interwoven. As such, it was impossible for the Department to assess the University's Clery compliance program without opining on aspects of its Title IX operation.

² In 2012, complainants #1, #4, #5 and #19 had sexual assault cases pending with the Title IX office.

the accuser and the accused with clear and timely information about the outcomes reached and sanctions imposed in the case.

The following is an excerpt from the University's procedure for responding to allegations of rape or sexual assault:

*"In cases involving a complaint of rape or sexual assault, the investigation of specific allegations will be directed by the Title IX Compliance Officer and conducted by the Center for Student Conduct. The Title IX Compliance Officer will decide whether sexual assault cases should be pursued by the Center for Student Conduct."
Berkeley Campus Code of Student Conduct, pg. 7 (Edited/Modified January 2012)*

The following summary illustrates the systemically flawed processes that were in place during the review period, especially with regard to CSC and Title IX and the interactions between the two offices. Both offices had a significant role in the overall campus safety and student disciplinary operations at Berkeley; however, no process was put in place to ensure essential communication and coordination with the UCPD, other CSAs or the officials primarily responsible for Clery Act compliance. This failure contributed significantly to the numerous and serious violations documented in this report. Berkeley's handling of the sexual assault allegations brought forward by Complainants #1, 4, 5 and 19 support this finding of serious administrative impairment.

CSC Case #13843-26816: *On April 20, 2012, complainants #1, 4, and 5 and 19 collectively met with Berkeley officials from Title IX, CSC, and Gender Equity (Gen Eq) to report they were sexually assaulted by the same student. The sexual assaults against Complainants #1, 4, and 5 occurred during a trip that was sponsored by a recognized student organization in February 2012. Complainant #19 reported that the same student sexually assaulted her on April 6, 2012, after attending a party at an off-campus location.*

During the intake process, the Assistant Dean of Students (ADS) requested the complainants to provide a written account of the reported crimes, if they wanted to pursue a case. Complainant #1 stated that University officials made it clear that this meeting did not "guarantee a report of an investigation." This statement, in and of itself, indicates a violation of the Clery Act because under the law, an incident is deemed to have been reported when it is brought to the attention of a CSA. Nevertheless, no action was taken until the students submitted their statements. Complainant #4 sent her written complaint to ADS on April 24, 2012. Complainant #5 sent her statement to the ADS on April 30, 2012. Complainant #1 submitted her statement on May 15, 2012. All three documents were sent via electronic mail. For reasons that were never clearly explained, the ADS referred only two of these complaints to Title IX for an investigation. Complainant #19 sent an email to the ADS on April 25, stating that it was "emotionally draining to go over the details and write them down."³ She also requested that the ADS and Title IX Coordinator provide "help and advice."

The Department found no evidentiary documentation in the case file that CSC responded to Complainant #19's request. However, on October 1, 2012, the Title IX Coordinator

³ Complainant #19 was too distraught to write an account regarding the alleged assault.

emailed an Assistant CSC Director a summary of her allegations. The Title IX Coordinator claimed that “One indicated [Complainant #19] that she no longer wanted to pursue a complaint.” As noted above, CSC documents examined by the Department indicate that the ADS finally emailed the written accounts from Complainants #4 and #5 to the Assistant CSC Director on May 10, 2012. With regard to Complainant #1, documentation in the CSC case file showed that the ADS emailed the written account of Complainant #1 to an alternate Assistant CSC Director on May 16, 2012; however, the Department found a handwritten note in Title IX’s case file that indicated that Title IX did not receive Complainant #1’s written statement, until November 28, 2012. Complainant #1 told Department officials that that CSC never acknowledged receipt of her statement.

Records acquired by the Department show that Complainant #1 emailed her written statement to CSC on May 15, 2012; however, the Title IX Compliance Officer apparently did not receive the statement until November 28, 2012,⁴ thereby setting back the timeline for resolution several additional months. Berkeley’s internal policy generally calls for a Title IX investigation to be completed within 60 days. However, the Department learned that University failed to consider how its newly created Early Resolution process would interact with the existing Title IX investigations process. Berkeley officials conceded that no mechanism for informing CSC about the status of these parallel processes was put in place. Due to this lack of communication and coordination, the Assistant CSC Director did not know that the Title IX Compliance Officer had opted to use the Early Resolution process until October 1, 2012; some 6 months after the complainants reported multiple sexual assaults. The Early Resolution process yielded a finding that the accused was “more likely than not responsible for violating the campus code of student conduct.”

It is noteworthy that the Title IX Compliance Officer stated that her decision regarding this serial offender was based on the written statements of only two complainants⁵ as well as the “positive impressions” that the accused exhibited during a “developmental conversation” with the Assistant CSC Director, in May 2012. Over and above these concerns, it must be emphasized again that the complainants and the review team raised a specific concern with this process because the Clery Act does not require complainants to write their own reports. Rather, under the Clery Act, an incident of crime is deemed to be “reported” anytime the incident in question is brought to the attention of a CSA. In this process, student complainants were advised that reported incidents would not be pursued (and likely never documented) if the complainant did not document it her or himself.

According to CSC officials, the timeline for the student conduct process begins with the issuance of the Alleged Violation Letter (AVL). Records show that CSC issued an AVL to the accused on October 10, 2012 and issued an Administrative Disposition (AD) to the accused on October 24, 2012. Although the CSC process moved quickly once it finally commenced, it is important to note that little if anything happened in the approximately 6

⁴ A handwritten note in the Title IX case file showed Complainant #1’s written statement about her sexual assault was not received in the Title IX office until November 28, 2012.

⁵ Statements filed by Complainants #4 and 19 were considered as part of the inquiry conducted by Title IX.

months after the complainants met with CSC, Title IX, and GenEq to report serious sexual assault allegations. Although the Clery Act did not require adherence to a specific timeline at that time, these delays and the process problems that contributed to them cause serious concern for the Department.

The Title IX Compliance Officer subsequently released a statement to Complainants #1, #4, and #19 on December 12, 2012, approximately 8 months after the complainants brought forth sexual assault allegations to Title IX, CSC, and GenEq. In relevant part, it read:

"I write to you in reference to sexual harassment concerns that were brought to my attention in April 2012 about unwelcome physical contact by a male student at off campus social events. This matter has been explored and resolved using an early resolution process outline in our campus procedures for responding to sexual harassment complaints. As this matter involved students as the complaining and responding parties, I communicated the outcome of my resolution process to the Center for Student Conduct for review and any decisions about further action under the Student Code of Conduct." Email from Title IX to Complainants #1, #4 and #19, dated December 12, 2012.

On December 17, 2012, approximately 1½ months after the accused was notified of the outcome and sanctions in the Administrative Disposition, CSC emailed each complainant a deficient outcome statement. The statement did not specify the violation(s) for which the accused was found responsible under the Campus Code of Student Conduct, or the actual sanctions that were imposed against the accused. The Department notes that Berkeley classified the complainants' sexual assault allegations as incidents of "Sexual Harassment."

An excerpt of the outcome statement is presented in the paragraph below.

"This email is to follow up on statements that were submitted to Center for Student Conduct regarding unwelcome physical contact by a male student at off campus social events. The information you gave us was submitted to the campus Title IX office, which addresses allegations of sexual harassment pursuant to the University of California Policy on Sexual Harassment. Following the conclusion of the Title IX process, the Center for Student Conduct charged the student, and the student was determined to be in violation of the Campus Code of Student Conduct." Email from CSC to complainants #1, #5 and #19, dated December 17, 2012.

In view of the aforementioned statement, on September 2, 2013, Complainant #1 continued to request information regarding the sanctions that were imposed against her offender, by sending an email to Title IX. CSC responded to Complainant #1's email inquiry and finally provided the sanctions on September 20, 2013. The Department found no evidentiary documentation in the case file that CSC ever informed Complainants #4 and #19 about the specific sanctions imposed against the accused.

CSC released the following information to Complainant #1 about the sanctions.

"I'm writing in response to the email that you sent on September 2, 2013 to ... [the Title IX Compliance Officer] the Office for Prevention of Harassment and Discrimination. Since the additional questions you raised in your email message involve the outcomes [sanctions] of the Student Conduct process, I can share the following information with you. The student who was the subject of your complaint was placed on Disciplinary

Probation through his graduation date of December 14, 2012. Any further misconduct during the probationary period could have resulted in further disciplinary action including suspension or Dismissal. The Student also engaged in counseling measures intended to address his behavior and prevent any further misconduct. Additionally, the University took prompt and effective steps to ensure that no further incidents of misconduct occurred during Cal in the Capital by implementing specific measures to ensure effective oversight and monitoring for all student behavior during that program.”
Email from CSC to Complainant #1 dated September 20, 2013.

The next matter raises very serious concerns for the Department and lead to the identification of additional deficiencies associated with the intentional and coordinated acts of Berkeley officials that permitted a student accused of and found responsible for multiple acts of sexual violence to attend a summer internship at the UC Washington Center (UCWC) in Washington, DC.

According to documentation secured by the review team, including correspondence related to CSC case file #13843-#26816, the Assistant CSC Director met with the accused on May 14, 2012 to inform him that several women had complained about his behavior. The accused became emotionally distraught, admitted to problems with alcohol, spoke of doing “something foolish,” and referenced that he had been kicked out of a student organization. The Assistant CSC Director then informed him that the University knew of his plan to participate in the “Cal in the Capital” internship program at UCDC, stated that his behavior with the women was unacceptable, and told him that he must not exhibit this behavior at Cal in the Capital. The Assistant Director then told the accused to stay away from alcohol, but, if he did consume alcohol, he was not to be alone with women. The Assistant CSC Director advised the accused to seek help through the Tang Center,⁶ noting that officials there would connect him with other campus resources, if he needed help. Lastly, the Assistant CSC Director informed the accused that their current meeting was not a judicial meeting, but that further action would likely follow. The accused said he would immediately go to the Tang Center for help.

An e-mail, dated May 23, 2012, showed that the accused informed the Assistant CSC Director that the Tang Center had referred him to Counseling and Psychological Services (CPS); and CPS referred him to the Social Services Department. The accused also informed the Assistant CSC Director the he had a meeting with a counselor from Social Services about alcohol, drug use and relationship problems, and both he and the counselor planned to look for counseling services in DC. Email communications show that it was the accused that learned by his own means that UCDC had counseling services and promised the Assistant CSC Director that “I will look into it further once I’m there.” The Department found no correspondence in the case files of Title IX or CSC showing that Berkeley used an evaluative method (such as a report from a licensed mental health professional) to determine whether the accused could safely function and cohabitate alongside other students in UCDC housing in light of his well-documented issues and sexually-violent behavior. In fact, correspondence in the case file showed the Assistant CSC Director simply instructed the accused to conduct himself appropriately and permitted him to attend the internship at UCDC. There is no evidence and Berkeley

⁶ The Tang Center is the University’s student health facility.

officials were unable to provide any assurances that any steps were taken to advise UCDC officials about the dangers posed by this individual's presence and participation in the program. As a practical matter then, the risks posed by the accused's continuing presence on the Berkeley campus were merely transferred to a far less structured environment without any warning to the unwitting students and administrators at the DC location ahead of time. Given the risk posed by his presence, Berkeley officials should have initiated procedures for the issuance of an Emergency Notification to warn campus community at UCDC about this dangerous condition. It is in this context that we note that Complainant #1 reported that she learned of the assailant's participation in the Cal in the Capital program from a Facebook posting.

Approximately five months later, on October 1, 2012, the Title IX Compliance Officer emailed the CSC Director a summary of the campus response to the Cal Dems Sexual Harassment Concerns. Once again, the Assistant CSC Director's decision-making process seemed to have been based almost entirely on the outcome of the "detailed developmental conversation" that she had with the accused on May 14, 2012, and that the "positive impressions of the developmental discussion" were the key factor in her decision to forego a formal investigation and to resolve the complaint via the Early Resolution process. It was also noted that the Title IX Compliance Officer and the Associate Dean of Students from CSC met⁷ with the Cal in the Capitol Program Coordinator. The Program Coordinator informed both that she had "heard rumors of problems with [accused's name redacted] but had no firsthand knowledge." She also stated that most students going to the internship program had already attended GenEq's EmpowerU session regarding conduct expectations and housing arrangements, and all interns would be required to attend a similar meeting at UCDC, on June 11, 2013, prior to the start of the internship program.

A letter in the CSC case file, dated November 26, 2012, from a Washington, DC psychologist attested that the accused attended three counseling sessions at UCDC during summer of 2012. The psychologist asked if the counseling sessions that the accused completed at UCDC could satisfy the counseling sanction that was imposed against him in an AD, dated October 24, 2012. It appears that the University accepted these sessions as satisfactory completion of the counseling requirement.

Supporting documents for this finding consist of: 1) a copy of Berkeley's Administrative Disposition document to the accused, dated October 24, 2012; 2) email from Title IX to CSC, entitled "... Sexual Harassment Concerns," dated October 1, 2012; 3) a written account of a CSC official's "developmental discussion" with the accused, dated May 14, 2012; 4) the Alleged Violation Letter, dated October 10, 2012; 5) a handwritten note showing that Complainant #1's written account was received in Title IX on November 28, 2012, and 6) email from CSC, dated December 12, 2012, that informed the complainants about the Early Resolution process. A copy of a CSC email dated December 17, 2012, to each complainant regarding the outcome statement, and the Administrative Disposition, dated October 24, 2012, also support this finding. Lastly, a copy of the email from CSC,

⁷ The October 1, 2012 email did not indicate the date that the Title IX Compliance Officer and the Associate Dean of Students conducted the meeting with the UCDC Program Coordinator.

dated September 20, 2013, that informed Complainant #1 about the sanctions imposed against the accused supports this finding. It is also supported by a collection of documents from case files and information that University officials from Title IX, CSC and EHS provided during interviews with the Department. Copies of correspondence that complainants provided to the Department also supported this finding. A letter from a psychologist, dated November 26, 2012, is documentation that the accused attended counseling during his 2012 internship in Washington, DC. Policy statements and statistical disclosures that were published in ASRs for years 2009 to 2014, and in AFSRs for years 2010 to 2014 is also confirmation of the finding.

These findings and other areas of concern indicate a general lack of adequate coordination, oversight, and supervision with regard to the University's fulfillment of its campus safety compliance obligations. Cumulatively, they demonstrate a lack of administrative capability. As noted above, these impairments resulted in the University's systemic failure to provide students and employees with important campus crime information and services that are essential to their safety and security.

Required Action:

As a result of these violations, Berkeley is required to take all necessary corrective actions to rectify the violations identified in this Program Review Report and to adequately address the organizational weaknesses that contributed to the violations.

Berkeley must develop and implement a system of checks and balances for its policies and procedures to ensure that these findings do not recur in a subsequent audit or program review.

Berkeley must also review and revise its internal policies and procedures to improve work processes between Title IX and CSC. The revised policies and procedures must include a general timeframe for both Title IX and CSC to complete the Early Resolution process. Furthermore, the internal policies and procedures must ensure that Title IX and CSC written responses are clear-cut and precise to communicate status updates, the outcome and sanctions to complainants and the accused.

A copy of all new and revised policies, procedures, and training materials (with a list of persons that have completed said training) must accompany Berkeley's response to this Program Review Report.

Institutional Response Summary:

In its official response, Berkeley management acknowledged that its past *Clery Act* practices could have been more robust and admitted that those incidents that resulted in the alleged violations of lack of Administrative Capability, would have been handled differently by the University now. Berkeley further stated, that this administrator also had intimate knowledge of the UCPD, the collection of the crime data, had received

extensive *Clery Act* training sessions or webinars during the subject review period and had attended several training sessions on VAWA.

Furthermore, Berkeley affirmed that it had highly trained sworn police officers and campus security authorities who all regularly received training of the *Clery Act* regulations. Berkeley also stated that it has had a full time Title IX Officer on its campus since the 1990s to administer complaints of sexual harassment and sexual violence that had occurred on its campus. Moreover, Berkeley states that it also had the Gender Equity Resource Center that provided support and resources for survivors of sexual assault. Berkeley maintains that the number of qualified campus officials involved in its *Clery Act* compliance enabled the University to meet its *Clery Act* requirements.

Berkeley contended that because the *Clery Handbook* only provided “recommendations-not requirements, Berkeley was not required to have a specified number of required officials to maintain its responses of sexual assault on its campus; the university interpreted the *Clery Act* to not make any mention of a minimum number of required officials. Berkeley also observed that Federal guidance provided for Title IX, suggested that the universities designate at least one employee to maintain its responsibilities under Title IX, a requirement that it had fulfilled during the subject review period.

For all these reasons cited above, Berkeley contended that it had adequate capability for the subject review period of calendar years 2009-2012. Berkeley hopes that based on the totality of its response, coupled with its dedication to completing each of the required actions, the Department will find that it had adequate administrative capability during the time of the subject review period.

With its official response, Berkeley has provided several subsets of each allegation of violations in its attempt to provide clarity to each specific finding. These subsets provide either a specific admission, denial or disagreement, or a noncommittal admission or denial to the Department’s alleged violations of the *Clery Act*. Berkeley’s responses to each subset of violations is as follows:

To begin, the Department determined that Berkeley did not develop and implement adequate systems of policies, procedures, systems, training and internal controls to reasonably assure compliance with the requirements of the *Clery Act*; in places where policies might have been in place, Berkeley administrators did not monitor compliance with them. In response to this determination, although Berkeley admitted that they made mistakes, it did not think that these types of systemic failures amounted to a lack of administrative capability.

Next, the Department determined that several of the University’s ASRs included ambiguous policy statements as to how sexual violence cases would be processed by Student and Employee conduct authorities. Here, Berkeley chose to respectfully disagree with this allegation of violation because it believed that the statements made in its ASRS in question, were clear and unambiguous and tracked the *Clery Act* regulations in place at the time.

With an additional allegation of violation, the Department determined that Berkeley included a Timely Warning policy in its ASR that did not match the internal policies and procedures of the UCPD that permitted delays in the issuance of such warning until at least the next business day. The University disagrees with this finding; Berkeley contends that it never represented in its policy that it would always issue a Timely Warning within 24 hours. Instead, the University stated that its 2013 ASR prudently stated that *"UCPD makes every effort to issue Crime Alerts within 24 hours of the time the crime is reported (by the next business day), however, it sometimes takes longer to confirm all pertinent information."* Berkeley maintains in its response that it complied with this policy.

The Department determined with a successive allegation that multiple deficiencies occurred in the Berkeley Daily Crime logs for the years under review. Specifically, with their ASRs for the years 2010 to 2013, the hate crime statistics disclosed by the University did not reference the category of actual or perceived bias, as required. In consequence this and other errors caused the University's hate crime statistics to be underreported during the subject years of 2009-2012 and as recent as 2014. Although Berkeley acknowledged its failure to accurately report its crime statistics for the specified years, it did not believe that this oversight indicates a lack of administrative capability.

In addition, the Department determined that the work processes of Berkeley used to produce and distribute their ASR and AFSR were delegated to staff without the requisite expertise and training or either shared with departments without adequate communication and coordination. Berkeley disagreed with this allegation and contended that their Clery Coordinator was trained in the review of police reports and the compilation of crime statistics for the ASR.

Following, the Department established that Berkeley had no substantive process to track progress or verify the accuracy and completeness of disclosures. Specifically, UCPD officials provided inaccurate information to the Associate Vice Chancellor of Business and Administrative Services (AVC) regarding the ASR distribution requirement and the institution's processes for disseminating those reports. The erroneous information provided, instructed the AVC to distribute ASRs to only University officials in certain departments by October 1, each year as opposed to all University students and employees. This violation occurred in at least three consecutive years, specifically 2010-2012. The University disagreed with this finding and stated that the University's failure to distribute the ASR to all students in 2010 and 2011 coupled with its failure to distribute the AFSR to all students in the years 2010 to 2013 was a mere oversight and not an indication of their lack of administrative capability.

In addition, the Department established deficiencies in the fire safety policies and procedures, in that the Berkeley Fire Marshall informed the reviewers that although he prepares the AFSR each year, he was never trained in the *Clery Act* fire safety requirements. Further, the Fire Marshall stated that the AFSR was linked to the ASR on the University's website; however, it was apparent that neither the Berkeley ASR nor the

AFSR produced, ever posted as a single comprehensive document. Berkeley does not contest this finding.

During the on-site review, the Department determined that the Berkeley Title IX Compliance Office had been seriously understaffed for several years. The Title IX officer stated that the investigative functions of the office had been conducted by one full-time employee and that, “that was clearly not enough”. In addition, the Title IX officer admitted to not knowing the status of cases, when the Department requested information concerning caseloads, case tracking and correspondence from complainants seeking status updates. Here, Berkeley agreed in part with the Department’s assessment of the deficiencies established with the Title IX Compliance office. Berkeley also agreed that the staffing of the Title IX office during the subject review period of 2009 to 2014 had consistently fluctuated with an average tenure of its Title IX staff during that period of about 1.5 years. However, Berkeley disagreed with the Department’s finding that the Title IX officer did not know the status of the Title IX cases. Berkeley contended that since mid-2013, the office has tracked cases with an electronic spreadsheet that contains a field for *Clery* reportable cases, allowing data to be searched and compiled electronically. The University also contended that the Department might have been referring to its request that the University provide “documents from complainants requesting status updates and outcomes and documents from Title IX responding to those requests”. Further, Berkeley stated that although the office does maintain hardcopy files, that is not their only tracking method. In addition, Berkeley maintained that electronic tracking is not required by the *Clery Act* regulations and had not considered it Congress’ intention to require universities to buy a web-based tracking system like Advocate GME, for which a *Clery Act* module was not even available until recent years, in order to comply with the law.

The Department also established additional deficiencies in the processing of four sexual assault complaints by the Title IX and Center for Student Conduct offices. Specifically, Berkeley failed to coordinate the complicated and interrelated work of these offices; both were involved in the investigation and disciplinary processes. Although Berkeley admitted that its response to those complaints might not have been perfect, it believed that its efforts were coordinated and complied with both the University’s policies at the time and those requirements of the *Clery Act*. Further, Berkeley respectfully disagreed with the Department’s characterization of its actions to coordinate the investigation and disciplinary processes as a failure. The University cited many examples of its efforts to meet with the complainants and provide support for them. In further support of its opposition, Berkeley cited *Karasek v. The Regents of the University of California*, a decision made in favor of the University’s response to Complainant #1 as non-violative of Title IX regulations.

In further regard to the processing of the noted sexual assault complaints, the Department’s focus on CSC case number 13843-26816, the Department established three separate areas of violation. With the first violation, the Department determined that Berkeley failed to enter the case into the student conduct system due to deficiencies of the complaint intake process. Secondly, the Department determined that the Title IX

Officer failed to provide timely notice to the CSC about the outcomes reached, via the Early Resolution process, conducted in lieu of a full Title IX investigation. Lastly, the Department established that the CSC failed to provide the accuse and the accused with clear and timely information about the outcomes reached and sanctions imposed in the case. Here, Berkeley denied the Department's findings and noted that "this is one of hundreds of cases involving allegations of sexual assault that the University has handled over the past five years". Berkeley proffered the following statements to contest the Department's findings. First, Berkeley contended that the University's records indicate that this incident was logged into Advocate GME, the electronic tracking system used by the CSC on February 10, 2012. Secondly, Berkeley argued that the time period of two weeks taken by the Title IX officer to notify the CSC officer of the outcome of this case was sufficient. Further, that the two-week lapse did not amount to lack of capability on the part of the University. Finally, Berkeley disagreed with the Department's finding that it failed to provide the complainant and the respondent with timely information about the outcomes and sanctions imposed. Berkeley asserted that the legal requirements at that time did not require simultaneous notification, hence the University's actions were consistent with the University's policy and the *Clery Act* requirements in effect at that time.

In addition, the Department established that the University's internal policy required that a Title IX investigation be completed within a 60-day timeframe and that the University failed to consider how its newly created Early Resolution process would correlate with the existing Title IX investigations process. Due to failed communications efforts, the CSC director didn't know that the Title IX director had opted to use the Early Resolution process until six months after the complainants had reported their sexual assaults. Here, although Berkeley didn't affirmatively disagree with this finding, it did acknowledge that the Title IX investigation took six months.

Finally, through evaluation of documentation related to CSC case number 13843-26816, the review team determined that the Assistant Director of CSC met with the accused on May 14, 2012. During that meeting, the Assistant Director informed the accused that the University was aware of his plan to participate in an out of state internship scheduled at another university. The Assistant Director advised the accused on how to conduct himself while attending the internship and to seek help for his behavior at a counseling center on that university's campus. Here, although Berkeley didn't contest this finding, it contended that these findings failed to show a violation of the *Clery Act* or a violation of the University's policies. Berkeley further stated that the *Clery Act* did not require universities to use "an evaluative method" to assess the likelihood of recidivism and that the accused was only allowed to participate in the internship after the University received assurances about the program and the accused's conduct. Berkeley asserted that the Assistant CSC Directors informed judgment was not a suggestion of lack of administrative capability by the University.

Final Determination:

In Finding #1, the review team found that during the initial and expanded review periods, Berkeley did not demonstrate minimally-acceptable levels of administrative capability that are required of an institution that participates in the Title IV, HEA, student financial assistance programs with regard to its compliance with the *Clery Act* and the HEA fire safety rules. The Department determined that this condition resulted from a failure to develop, implement, and follow required campus safety, crime prevention, and fire safety policies and procedures and a related failure to operationalize an adequate *Clery Act* compliance program. This finding is supported by the serious and persistent violations that were noted in the PRR and throughout the program review process. In the PRR, the Department identified violations and related weaknesses in Berkeley's campus safety and crime prevention policies, procedures, practices, training programs, and systems. These include: 1) Failure to Issue Timely Warnings and Emergency Notifications; 2) Failure to Develop, Implement, and Adhere to the University's own Sexual Violence Policies and Procedures; 3) Failure to Maintain an Accurate and Complete Daily Crime Log; 4) Failure to Compile and Disclose Accurate, Complete, and Fully Reconciled Crime in its ASRs and Data Submissions to the Department; and, 5) Failure to Produce and Distribute the ASRs and AFSRs and to Include therein Accurate and Complete Informational Disclosures. In addition to the specific findings noted in the PRR, several other areas of concern were noted and discussed with University officials throughout the review process.

The compliance concerns noted during the review period were significant and pervasive enough to call Berkeley's ability and /or willingness to properly administer the Title IV, Federal Student Aid programs into serious question.⁸ To address these administrative impairments, the University was required to review and revise its internal policies and procedures related to its campus safety and *Clery Act* compliance programs, and to develop and implement any new policies and procedures needed to ensure that these violations do not recur.

In its response, Berkeley claimed that the finding was largely predicated on its mishandling of a single case of alleged sexual violence. Simply stated, this was not the case. While that case was a serious case for concern, the Department's findings and observations establish the strong bases for this finding. In this regard, the Department points out that the review team could have cited the University for several additional violations. Instead of running up the findings count, the Department focused on documenting the most serious violations and crafting a remedial action plan that would address as many problems as possible. For example, the Department did not make a separate finding regarding the University's longstanding CSA problems although there was ample evidence for that problem. As an act of comity and with a focus on the most pressing matters, the Department addressed its CSA-related concerns through the remedial action program, including the file review.

⁸ In its response, Berkeley asserted that this finding was grounded primarily in the Department's analysis of a single case. This is simply not true. Instead, this finding is based on the serious findings that the review team documented throughout the investigation and is further supported by the credible claims of complainants and the evidence that they provided to the agency.

Most of these violations were substantive in nature, not merely procedure. Moreover, many of the violations were allowed to persist for an extended period. Berkeley - Findings #2, 4, 5, 6, 7, and 8 of the PRR detail the University's failure to document and disclose important information about serious incidents of crime on its campus and the corresponding failure to respond adequately and warn campus community members about significant and ongoing threats. Finding #3 and one section of Finding #1 address Berkeley's mishandling of alleged sex offenses. While these incidents did not affect a large number of individuals, the impact on the affected students was disconcerting and profound. Violations of this type formed the basis for the required file review that the University was required to conduct as part of its response. That file review clearly exposed the statistical errors and discrepancies which persisted throughout the expanded review period. Those statistical errors and discrepancies had a detrimental impact on the accuracy and completeness of the statistical disclosures that were included in its ASRs, up to and including, at a minimum, the 2017 report. Moreover, the review team determined that these reporting, classification, compilation, and disclosure errors and omissions also cause the University's daily crime logs to be inaccurate and unreliable.

Additionally, the Department also found that the University was slow to develop and deliver structured Clery training to its CSAs during the majority of the review period. By 2015, a more robust training program was implemented, but by then, much of the damage had been done. The lack of training contributed to a range of other problems. While CSA training is not a Title IV requirement *per se*, it is, for all practical purposes, impossible for an institution to fully comply with the *Clery Act* without it. This is especially true for a large and complex institution like Berkeley that is likely to have a relatively high number of CSAs. At a minimum, an institution must have a process for identifying its CSAs. The process of identifying and notifying such officials will typically result in the discovery of more CSAs. That notification and training process not only improves the CSAs' individual performance but typically leads to the identification of weaknesses in the process and can therefore facilitate the development and implementation of process improvements. Such adequate processes were not in place at Berkeley during the majority of the review period and certainly not before the Department commenced its investigation.

Moreover, the review exposed serious weakness in Berkeley's programs and procedures that were intended to address allegations of sexual violence, even under the relatively low standards in place prior to the passage and effective date of the sexual assault prevention and response provisions in Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA). It is in part for this reason that the Department has determined that the complainants in this case were reasonable in their contention and belief that the University's failures in this regard resulted in violations of the *Clery Act*. It is the case that many of the University's actions and failures had an detrimental impact on survivors of sexual violence and that these deficiencies likely acted as a disincentive for victims of sexual violence to come forward, to report these crimes, to seek assistance, accommodations, and services, and to seek redress through the University's disciplinary processes or the criminal justice system.

As noted above and throughout this FPRD, Berkeley did not have an effective communication and coordination strategy to facilitate and enable a minimally acceptable levels of compliance at all points during the review period. The number and extent of the violations identified in the initial report and emphasized and clarified in this FPRD also reinforce the Department's determination that Berkeley failed to establish an adequate system of checks and balances and failed to create an environment of basic internal controls during this time. While some reform efforts were underway as early as 2013, it is evident that the Department's review served as an important catalyst for the most important and ambitious components of the remedial program that were eventually implemented, and that but for the Department's intervention, it is unlikely that the University would have made as much progress as it has in recent years.

The Department carefully examined all available information, including Berkeley's narrative response and supporting documentation. Based on that review and the University's partial admissions and acknowledgements expressed in the response and in direct communications with the review team, the Department has determined that the violations identified in this initial finding are hereby sustained. As detailed above and throughout this report, the University manifestly failed to employ an adequate number of qualified persons or operate within a system of checks and balances and in an environment of internal controls during most of the review period.

In upholding this finding, the Department also notes that its examination also indicated that the identified violations were, for the most part, satisfactorily addressed by Berkeley's responsive documents, including its new and revised internal policies and procedures and other reforms. The Department's investigation indicated that, by early 2018, Berkeley had addressed many of its organizational impairments and strengthened its *Clery Act* compliance program enough to generally demonstrate acceptable levels of administrative capability. This determination is supported by the serious violations that were exposed in this report and highlighted by the file review detailing the failure to disclose accurate and complete crime statistics. Berkeley was able to operationalize an intentional effort to address most of those deficiencies by April 2018. It appears that the remedial actions that were put in place have resulted in process improvements that should result in better operations going forward and should provide reasonable assurances that these types of deficiencies will not recur. In consideration of the assurances proffered by Berkeley, the Department has determined that the remedial action plan meets minimum requirements, and as such, has accepted the University's response and considers this finding to be closed for the purposes of this program review.

Nevertheless, the officials and directors of Berkeley are put on notice that additional work is indicated and that they must continue to develop the institution's campus safety program and take any additional necessary action to fully address the deficiencies and weaknesses identified by the Department, as well as any other deficiencies or weaknesses that were identified by the institution during the preparation of its response, or by any other means. This requirement applies to this Impaired Administrative Capability finding and to all other others noted in the PRR and this FPRD. In this regard, the Department remains concerned about the length of time that it took for Berkeley to submit the

findings of its file review and about the data errors that were identified during the review team's examination of the materials and will continue to assess the University's progress through a post-review monitoring program.

More information about the disposition of the other specific violations is included in the final determinations that follow. Berkeley is reminded that these exceptions constituted 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. An institution's ability and willingness to demonstrate adequate administrative capability is an essential part of participating in the Title IV, HEA, student financial assistance programs. Berkeley has represented that it has brought its overall campus safety operations program into compliance with the *Clery Act* and the HEA fire safety rules as required by its PPA. Nevertheless, Berkeley is advised that such actions cannot and do not diminish the seriousness of these violations nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

Finding #2: Failure to Issue Emergency Notifications

Citation:

The Clery Act and the Department's regulations require that institutions develop, implement, and follow their emergency response and evacuation procedures whenever there is an immediate threat to the health or safety of students or employees on campus. Furthermore, in its ASR, an institution is required to inform its students and employees of its policy concerning emergency response and evacuation procedures. C.F.R. §668.46(g). This statement must include the procedures that the institution will use immediately to notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus. 34 C.F.R. §668.46(g)(1).

In addition, the ASR must include a description of the process that the institution will use to confirm that there is a significant emergency or dangerous situation, determine the appropriate segment or segments of the campus community to receive a notification, and initiate the notification system. 34 C.F.R. §668.46(g)(2)(i-iv).

It must also include a statement that the institution will, without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system, unless issuing a notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency. 34 C.F.R. §668.46(g)(3).

Noncompliance:

Berkeley failed to comply with provisions of the Clery Act that require the issuance of an Emergency Notification (EN) upon confirmation of a dangerous situation that involves an immediate threat to the health or safety of the campus community. This is a two-part violation. First, Berkeley did not issue an EN to warn students and employees at the UCDC campus that a student accused of multiple sexual assaults posed an imminent threat to the safety of the campus community. Secondly, Berkeley 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.

In the first violation, Berkeley officials created a potentially dangerous situation by allowing a student accused of multiple forcible sexual offenses to participate in an internship at the UCDC Campus, in Washington, DC. University officials possessed knowledge that: 1) four students (Complainants #1, #4, #5 and #19) had brought forth allegations of forcible sex offenses; 2) the accused indirectly confessed to committing these crimes; 3) the accused admitted to having problems with alcohol; 4) the sexual assault complaints, although still pending complete investigation by Title IX and CSC, evidenced serious indications that serious violence did, in fact, occur; and, 5) the accused intended to relocate to another Berkeley campus during the summer of 2012. In fact, all interns, including the accused, were expected to arrive at the UCDC campus on June 11, 2012 to attend a mandatory meeting regarding "conduct expectations." However, Berkeley did not stop him from attending the program nor did it issue an EN to warn the students and employees prior to the accused's arrival at UCDC.

In the second case, Berkeley was scheduled to host a speaking engagement on February 1, 2017 by an individual whom some campus and non-campus constituencies found to be offensive. Given the potentially volatile situation, Berkeley coordinated with external agencies, including the Berkeley City Police, and other UCPD detachments to provide an appropriate law enforcement presence at the event. The event was to commence at 8:00pm (PST). According to Berkeley's campus newspaper, The Daily Californian, by 5:30pm, protesters had amassed on the campus, and protests had escalated to the point where individuals "set off fireworks, threw rocks, and bricks and hammered windows. The seriousness of this situation caused the speaker in question to be evacuated from campus at approximately 6:00pm.

Berkeley used both Twitter and Nixle to communicate with the campus community during this incident, although Nixle is the "Emergency Notification" method that is specified in Berkeley's 2016 Annual Security Report (page 5) as the primary communication tool in the event of an immediate threat to the health and safety of the campus community. The University, using the aforementioned Nixle notification system, did not begin to notify the community of any violence until 6:36 p.m. (PST). This was approximately one hour after protests had begun to escalate, 30 minutes after the decision was made to cancel the event amid the violence, and almost 20 minutes after the campus was informed (via Berkeley's Twitter) that the event had been cancelled. The "All Clear" message was sent at 10:52 (PST), over four (4) hours after the original notification was issued. The delay

in sending out an EN to the campus community could have resulted in community members being exposed to a dangerous situation that compromised their safety.

This finding is supported by email, dated October 1, 2012, from the Title IX Compliance Officer, that summarized the campus response to Cal Dems Sexual Harassment Concerns, as well as statements of the Cal in Capitol Program Coordinator and the accused student. Crime statistics that Berkeley submitted online to the Department's Campus Safety and Security Data Analysis Cutting Tool (CSSDACT), and crime statistics published in Berkeley's 2013 ASR (Safety Counts 2013-2014) show UCDC as a separate or a shared campus. A letter from a psychologist, dated November 26, 2012, is documentation that the accused attended counseling during his 2012 internship in Washington, DC. Berkeley's Daily Crime Log (All Calls for Service) and Crime Alert Notices, dated February 1, 2017, also support this finding.

Failure to issue an Emergency Notification upon confirmation that a dangerous situation poses a threat to the campus community deprives students and employees of vital, time-sensitive information, and effectively denies them the opportunity to take adequate steps to provide for their own safety.

Required Action:

Berkeley must consider the range of factors that will influence its process for determining the circumstances under which a notice will be issued, the timing of that notice, and the means/media by which it will be disseminated, and then incorporate this information into its policies and procedures. In its response, the University also must explain how the emergency alert system functions within Berkeley's overall emergency management system and response protocols, as well as its crime prevention and mitigation strategies. The response also must address the University's assessment of the system's effectiveness and outline how that effectiveness is tested. Additionally, Berkeley must implement specific procedures to ensure that the operative facts of an incident, such as dates, times, and geographic locations, are recorded accurately in its incident reports and Daily Crime Logs to ensure that the information contained within these ENs provide useful and reliable information. Finally, Berkeley must provide copies of all new and revised internal and public policies and procedures as part of its response to this Program Review Report.

Institutional Response Summary:

In its official response, the University addressed the finding of Failure to Issue Emergency Notification as two separate types of instances, one being sexual misconduct instances and the second a public speaking event. Berkeley respectfully disagreed with both instances as failures to issue emergency notification, as follows below.

In its official response, the University respectfully disagreed that an emergency notification was called for in the instance of sexual misconduct reported by complainants #1, #4, #5 and #19. Here, the University reasoned that the reported misconduct in those instances, did not involve an immediate threat to the University community. Under the

facts presented in those instances of sexual misconduct, the University explained that it “understood that no emergency notification was necessary in response to the sexual assaults by Complainants #1, #4, #5, and #19, because those incidents—which occurred weeks before they were reported—did not involve immediate threats to the health or safety of students”. Accordingly, Berkeley argued that the Department’s findings did not demonstrate a violation of the Clery Act or the University’s own policy. As such, the following claims were asserted in support of Berkeley’s argument.

- “The Clery Act does not require universities to use “an evaluative method” to assess the likelihood of recidivism;
- Based on the May 14, 2012 meeting, the Assistant CSC Director assessed the respondent’s admissions and the context of the incident, including the shared co-ed hotel room where four students (including the complainants and respondent) shared the same bed. The University believed that it would prevent reoccurrence of the situation by requiring the respondent to seek counseling about his unacceptable behavior, including dealing with any substance abuse problems, and by ensuring the Cal in the Capital Program could monitor his interaction with other students; and
- The Assistant CSC Director allowed the respondent to participate in Cal in the Capital only after receiving the above assurances about the program and the respondent’s conduct, and after ensuring that all Cal in the Capital participants had training on UC policies and how to bring reports forward to the campus. The Assistant CSC Director’s informed judgment does not suggest a lack of administrative capability or Clery Act violation, and notably the respondent did not reoffend.”

For all those reasons stated above, the University noted that issuing an emergency notification could have compromised efforts to assist the complainants, unintentionally disclosed their identities or group membership, and created psychological and social stress for the complainants. Berkeley reasoned that the applicable regulations, cited by the Department in the Program Review Report, provided that an institution should not issue an emergency notification that would “in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency. Further, the University believed that the complainants had expressed a desire to remain anonymous and issuing an emergency notification with any meaningful information about the alleged incidents would have risked exposing their identities. In furtherance of its opposition, Berkeley stated that a very public disclosure of this nature could also have adversely affected the complainants’ willingness to cooperate in the investigation or make use of the resources the University had made available to the complainants. Finally, Berkeley stated that it believed that the restrictions of the Family Educational Rights and Privacy Act (“FERPA”) constrained the University from revealing the alleged respondent’s name; without providing FERPA-protected information, Berkeley believed that the University community could not have made “informed” decisions. Berkeley reasoned that sending an emergency notification without material information in this instance would have risked “inundating

students and employees with messages that may become ineffective”, which the Department had expressly cautioned against.

In conclusion, although Berkeley believed that an emergency notification was unwarranted under that set of circumstances, it stated that it did take immediate actions to protect participants that attended the internship program. Berkeley asserted that the preventative measures taken by the University appeared to work, as the respondent did not to their knowledge commit any further acts of sexual misconduct.

With its official response to the second alleged violation of the emergency notification requirement, Berkeley stated that this violation arose outside the 2009-2013 review period, in February of 2017, and therefore the University was not able to provide any factual information to the Department for this finding. The University contended that its actions were fully consistent with the *Clery Act* and the University’s procedures, which do not mandate any particular communication timing or method. In response to the controversial speaking engagement that occurred on its campus,

Regarding the protest concerning the controversial speaker Milo Yiannopoulos, the University purported that it “took prompt action to issue an emergency notification through its Nixle system as soon as the protesters posed a threat to students and staff (as opposed to simply a threat to police).” More specifically, the University explained that the Interim Vice Chancellor of Student Affairs emailed students and staff a message at 7:58 a.m. on the morning of the speaking engagement, advising that:

“Your safety and well-being are our top priorities. We encourage students who do not wish to participate in or potentially be impacted by the events to consider exploring alternative routes that avoid the Sproul Plaza area. While not an “emergency notification,” this message served to alert the community to the event and reflected the University’s view that although crowds were expected, and controversy was likely there was nothing indicative of the emergency the event would become. In fact, the University’s dedication to the open exchange of ideas as a foundational campus cultural value was expressed in an email to the campus community from Chancellor Dirks, well in advance of the event, on January 26, 2017, at 2:39 p.m.”

See, Appendix ____ Communication Timing, pg. 1.

In addition, the University argued that the Department’s Emergency Notification finding was based on a student newspaper that had published an incorrect timeline of events about the protest. It then proffered UCPD’s reported timeline. An excerpt of that timeline is presented in the outline below.

- *At 5:26 p.m., UCPD estimates crowd size at only 400, which increased to 750 at 5:38 p.m.;*
- **At 5:50 p.m., about 100 masked individuals were observed in the gathered crowd and at 5:58 p.m., this masked group began throw rocks, and fireworks, at the police (not at other protestors) and began to dismantle the police line barricades, ostensibly in an attempt to engage the police in confrontation; [asterisk added for emphasis]*

- At 6:01 p.m., the event was cancelled and at 6:08 p.m., a dispersal order was read to the crowd by UCPD. The police withdrew into the Martin Luther King Student Union to avoid escalating the confrontation. Within two minutes, the masked protesters, known as "black bloc," began to use the police line barricades to smash the windows of the Student Union building in a further attempt to engage the police in confrontation. It is important to note at this point all the violence had been directed at the police and there was no visible threat to the safety of students or employees (about 6:10 p.m.);
- At about 6:18 p.m., officers were ordered to remain within the Student Union building and the crowd was estimated at approximately 1,500 people;
- At 6:26 p.m., UCPD learned that Molotov cocktails were being used by the black bloc, and nine minutes later (6:37 p.m.) the first Nixle message was distributed. In addition to the Nixle message, the University moved swiftly to also leverage its Twitter and other social media tools, activated its Alert and Warning System (AWS), which is a series of sirens around the campus, and used the public address system on an airplane from the California Highway Patrol to alert the campus community of the rapidly evolving situation with announcements to stay away from the area.

To demonstrate compliance with the *Required Actions* that were stipulated in the PRR, Berkeley provided Exhibit 6, its *Policy and Procedures for the Issuance of Emergency Notifications*.

The University asserted that its efforts to notify and inform the campus community fully complied with the requirements of the *Clery Act*. Berkeley reasoned that under this set of circumstances, the *Clery Act* required the University to issue an emergency notification "upon confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus. 20 U.S.C. §1092(f)(1)(J). Berkeley contended that the timeline documented above indicates that the University issued a notification immediately after learning that the protest had become violent with threats to the health or safety of students or employees and therefore the University complied with its obligations under the *Clery Act*.

Final Determination:

Finding #2 cited Berkeley for not issuing an Emergency Notification (EN) on February 1, 2017, upon confirmation of a dangerous situation that involved an immediate threat to the health and safety of students and employees in its campus community. Specifically, the review team found that the University failed to comply with the EN provisions of the *Clery Act* and failed to adhere to its own procedures regarding the issuance of such warnings for the controversial speaking engagement incident on campus. While there is no readily apparent pattern to the Berkeley's actions regarding the issuance of an EN, an evaluation of the events surrounding the incident showed that Berkeley had knowledge and confirmation of a serious and dangerous condition on its campus and failed to issue an EN informing its campus community of the ongoing threat. The Department notes that the University did send out an email the day of the event at 7:58 am advising the

community “if you do not was to be impacted by the events to explore other alternative routes to avoid the Sproul Plaza area,” which the Department and the University agree not an EN.

On that day, in February, at 5:28 pm the UCPD estimated the crowd to be 400 and just 12 minutes later, at 5:38 pm the UCPD estimated had grown to 750 protesters and no EN was issued. Then, at 5:58 pm, the UCPD knew that a group of the protesters wearing mask begun to throw rocks and fireworks. Even, with the dangerous escalation of violence, no EN was issued. At 6:01 pm, the event was cancelled and at 6:08 pm a dispersal order was given by UCPD. An estimated crowd of 1500 people had gathered near the Student Union building, and at 6:26 pm the UCPD learned that Molotov Cocktails were being thrown. It wasn't until 6:37 pm that the University issued an EN. The Department remains concerned that the controversial guest speaking event on campus went from an estimated crowd of several hundred to an event erupting into a violent protest with over 1500 people enraged in riotous behavior involving the throwing of rocks, fireworks, igniting fires, damaging buildings and injuring people and no ENs were issued as the event unfolded and the threat of violence increased.

As a result of the aforementioned violations, the University was required to consider the range of factors that will influence its process for determining the circumstances under which a notice will be issued, the timing of that notice, and the means/media by which it will be disseminated. The University was required to develop and implement policies and procedures for initiating ENs. In addition, it was required to explain how the emergency alert system functions within Berkeley's overall emergency management system and response protocols, as well as its crime prevention and mitigation strategies. Furthermore, Berkeley was to ensure that an evaluative method was in place to test the effectiveness of its EN. It was also required to ensure that its incidents reports and Daily Crime Logs contained all the required data about incidents for which an EN was initiated. A copy of all the new policies and procedures were to accompany the University's response to the PRR.

The Department carefully examined Berkeley's official response and supporting documents. Based on that examination, the Department determined that the University failed to comply with EN provisions of the *Clery Act* and follow its own EN policy. The *Clery Act* requires an institution to immediately notify the campus community upon confirmation of a significant emergency or dangerous situation occurring on the campus that involves an immediate⁹ threat to the health or safety of students or employees. ³⁴ *C.F.R. §668.46(g)(1)*. As it was written, the University's policy and procedures for issuing an EN stated:

“UC Berkeley is committed to ensuring the campus community receives timely, accurate, and useful information in the event of a significant emergency or dangerous situation on campus or in the local area that

⁹ An “immediate” threat in this context includes an imminent or impending threat, such as civil unrest that is approaching, or a riot that is currently occurring on campus.

poses an immediate threat to the health and safety of campus community members." Berkeley's 2017 ASR, pg. 6.

The Department carefully examined the University's narrative response to the PRR and its supporting documentation. Based on that review the violation which cited that the University failed to initiate EN procedures upon confirming that an extremely volatile situation which endangered the safety of the campus community, is sustained.¹⁰

However, the violation which cited that Berkeley failed to issue an EN to warn students and employees at the UCDC Campus that a student accused of multiple sexual assaults posed an imminent threat to the health and safety of the campus community is not sustained.

The Department's has determined based on a review of the University's response and supporting documentation that the identified violations were, for the most part, satisfactorily addressed by the University's revised internal policies and procedures, as explicated in its most recent ASRs. As such, the review team has determined that Berkeley's remedial action plan meets minimum requirements, although it will be subject to additional testing as part of the Department's post-review monitoring program. For these reasons, the Department has accepted Berkeley's response and considers this finding to be closed for program review purposes. Nevertheless, the officers and directors of Berkeley are put on notice that the University must take all additional actions that may be necessary to address the deficiencies and weaknesses identified by the Department, as well as those that were detected during the preparation of the institution's response and as may otherwise be needed to ensure that these violations do not recur.

Berkeley is, once again, reminded that the exceptions identified above constitute serious and persistent violations of the *Clery Act* that, by their nature, cannot be cured. There is no way to truly "correct" a violation of this type once it occurs. Issuance of emergency notifications to advise persons who may be at risk as a result of serious crimes on a school's *Clery* geography is one of the most basic requirements of the *Clery Act* and is fundamental to its campus safety goals. Access to this information permits campus community members and their families to make well-informed decisions about where to study and work and empowers individuals to play more active roles in their own safety and security. Proper policy formation also serves as a guide to institutional officials to ensure that operations are carried out in a manner that will maintain the safety of the campus community to the greatest extent possible. Berkeley asserted that it has taken adequate remedial action to comply with the *Clery Act* as required by its PPA. Nevertheless, the University is advised that such actions cannot and do not diminish the

¹⁰ According to the University's response, UCPD's reported timeline of events about the protest revealed that "At 5:50 p.m. about 100 masked individuals were observed in the gathered crowd and at 5:58 p.m., this masked group began throw rocks, and fireworks, at the police (not at other protestors) and began to dismantle the police line barricades, ostensibly in an attempt to engage the police in confrontation." The Department emphasizes that at this pivotal point in time, the University should have initiated its EN procedures upon confirmation that: 1) a dangerous protest was currently occurring, and 2) it had the potential to threaten the health and safety of students or employees on the campus.

seriousness of these violations nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

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

Citation:

The Clery Act and the Department's regulations requires that an institution's ASR include a detailed statement of policy regarding the procedures that will be used in any campus disciplinary action involving an alleged sex offense. 34 C.F.R. §668.46(b)(11)(vi) specifically requires that this disclosure include the following statement:

Both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense. The outcome of a disciplinary proceeding means only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused; and 34 C.F.R. §668.46(B).

Sanctions the institution may impose following a final determination of an institution disciplinary proceeding regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).

Noncompliance:

Part A.

Berkeley failed to comply with all of the requirements of 34 C.F.R. §668.46(b)(11), commonly referred to as the Campus Sexual Assault Victims' Bill of Rights. Specifically, in Case #13843-#26816, Berkeley did not inform the complainants of the outcome, until after Complainant #1 made three written requests for the status.

Documents in the CSC case file showed that CSC issued an Administrative Disposition on October 24, 2012 informing the accused that he had been found responsible for violating Code 102.14 of Berkeley's Student Conduct - Disorderly or Lewd Conduct. The Administrative Disposition further informed the accused of the: 1) outcome; 2) proposed sanctions; 3) the timetable for completing said sanctions; 4) resource facilities that would aid in the completion of said sanctions; and 5) consequences for failing to complete said sanctions. The case was adjudicated on October 26, 2012.

However, Complainant #1 was still seeking the status of her case on November 6, 2012. In fact, she emailed GenEq for assistance with ascertaining the status of her case from CSC. Excerpts of the email exchanges between Complainant #1 and GenEq is provided in the outline below:

1. November 6, 2012, Complainant #1 sought assistance from Gender Equity with ascertaining the status of her case. November 6, 2012, GenEq responded, "I reached out to Student Conduct and am waiting to hear back."
2. November 15, 2012, Complainant #1 wrote to GenEq again and asked, "Have you by chance heard back?" GenEq did not respond.
3. December 2, 2012, Complainant #1 wrote, "It's been awhile and I'm going to contact them directly otherwise." December 3, 2012, GenEq responded, "Apologies for the delayed reply. I have reached out to Student Conduct and they are aware of your concerns. They are preparing to get back to you soon."

In support of this finding, the Department has retained copies of emails from Complainant #1 to Gender Equity, dated November 6, 2012, November 15, 2012 and December 2, 2012; and the responses to that complainant from Gender Equity dated November 6, 2012 and December 3, 2012. Additionally, the Department has obtained a copy of an email, dated December 7, 2012, from Complainant #1 to a Student Advocate Representative, requesting assistance with getting the status update also supports this finding.

Failure to properly inform the complainant in a case of alleged sexual assault of the outcome and sanctions that were imposed against the offender violates provisions in the Federal Campus Sexual Assault Victims' Bill of Rights and deprives the complainant of important safety information to sustain personal well-being on the campus.

Part B.

Berkeley failed to include a clear statement of policy in the ASR about its process for informing a complainant of the outcome of a campus disciplinary proceeding regarding a sexual assault allegation. In ASRs for 2009 to 2013,¹¹ Berkeley published an ambiguous statement that seems to indicate that information would be disclosed at the discretion of the Dean of Students and only if this official chose to actually impose a sanction against an accused. In this way, the policy suggests that no information would be provided to the accuser if no sanction was issued. We note that several complainants specifically stated that they were not provided with required information about the outcomes reached and sanctions imposed by campus disciplinary officials or that their attempts to acquire such information were delayed, frustrated, or in some cases, denied.

In part, Berkeley's deficient policy states the following:

"If disciplinary sanctions are imposed by the Dean of Students, the student who reports being sexually assaulted is informed of the outcome, and the charged student may appeal the action as set forth in the Campus Code of Student Conduct." Safety Counts Berkeley, pg. 50. [in ASRs for years 2009 to 2014].

¹¹ A non-substantive edit was made. A portion of the sentence which read "In ASRs for 2009 to 2014" has been changed to "In ASRs for 2009 to 2013".

The ambiguity in Berkeley's policy became apparent in Case #s13843 to #26816 which involved reported allegations of sexual assault. The University's initial notification to the complainants did not specify the exact violation for which the offender was found responsible under the Campus Code of Student Conduct, and the sanctions that were imposed against their accused were not mentioned.

This finding is supported by Berkeley's ASRs for years 2009 to 2013.

Failure to disclose a clear statement of policy in ASRs for how the University will inform a complainant of both the outcome and sanctions of a campus disciplinary proceeding involving an alleged sexual assault discourages reporting the crime to campus security authorities.

Required Action:

As a result of these violations, Berkeley must review and revise its policies and procedures related to the implementation of the provisions of 34 C.F.R. §668.46(b)(11), commonly referred to as the Campus Sexual Assault Victim's Bill of Rights. As part of this process, the University must ensure that its procedures provide for simultaneous notification of the complainant and the accused as to the outcomes reached and specific sanctions imposed by a campus disciplinary body in a case of an alleged sex offense.

A copy of all the new policies and procedures must accompany Berkeley's response to this Program Review Report.

Institutional Response Summary:

In their official response, Berkeley management concurred in part with the Department's finding. Specifically, the University agreed "it should have provided more prompt notice of the outcome to the complainants in Case #13843-26816. In addition, the University "believes" that it followed University policy and complied with the *Clery Act*, by issuing notice to the accused on October 26, 2012, and notification to complainants on December 12, 2012. It stated that "For Case #13843-26816, *all notification letters stated the outcome, and the letter to Complainant #1 further stated the sanction imposed.*" [Italicized, Emphasis added.] Regardless of that admission, the University disagreed that "it did not fail to provide the complainant and the respondent¹² with timely information about the outcomes and sanctions."

In addition, the University claimed that certain terminology and provisions in the *Clery Act* presented "doctrinal confusion" that was not addressed, until the Department issued its 2016 Handbook for Campus Safety and Security Reporting. The University also requested that the Department consider the following factors when assessing the "purported violations" that were cited in the finding.

¹² The accused.

- First, the University brought forth an irrelevant argument that claimed, “the legal requirements at the time did not require simultaneous notice, and the University’s actions were consistent with the University’s policy and Clery Act requirements in effect at the time.”
- Secondly, it argued that “there was considerable confusion regarding the notification requirement in or around 2012 when Case #13843-26816 was adjudicated. In this paradigm, it claimed that “universities reasonably believed that that [sic] sharing the outcome of student disciplinary proceedings would violate university policy and FERPA. The 2011 DCL¹³ acknowledged this confusion and clarified the notification requirement.”

In addition, it stated that “the term “disciplinary proceeding” was not defined by the regulations or agency guidance.” The University also conjured that “the application of the Clery Act to cases resolved through the University’s early resolution process, such as Case #13843-26816, was not clear.” Then an assertion was made that “This ambiguity was addressed in the 2016 Clery Handbook, which for the first time defined “disciplinary proceeding” to include “non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, fact-finding investigations, formal or informal meetings, and hearings,” thereby extending to informal resolutions.”

- Lastly, the University argued that the Department of Education Office for Civil Rights’ 2001 Guidance had indicated that: “It has been the Department’s position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that *FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment.*” The University also stated that the a “2011 Dear Colleague Letter referred back to this guidance and suggested that the sanction could be disclosed without violating FERPA but did not conclusively state that the sanction *must* be disclosed.”

Moreover, the University disagreed that it failed to include a clear statement of policy in the ASR about its process for informing a complainant of the outcome of a campus disciplinary proceeding regarding a sexual assault allegation. The University quoted the statement of policy that was disclosed in its ASRs for informing the accused and the accuser of the outcome, and it provided an interpretation of that policy disclosure. Additionally, an assertion was made that the Department’s finding did not consider that the ASR had indicated a source of reference for where to find the “University’s stated policies”, nor did it consider the actual practice for notifying a complainant.

¹³ A Dear Colleague Letter in 2011.

An excerpt of that statement is presented in the paragraph immediately below.

"Prior to the VAWA Amendments in 2013, the Clery Act required that the ASR contain "a clear statement that . . . [b]oth the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense." UC Berkeley's ASRs for 2009 to 2013 unambiguously stated: "If disciplinary sanctions are imposed by the Dean of Students, the student who reports being sexually assaulted is informed of the outcome, and the charged student may appeal the action as set forth in the Campus Code of Student Conduct." The ASRs during this time period incorporated by reference the University's policies, which in turn stated that notice would be given in cases where disciplinary proceedings were commenced but no sanctions were issued. Thus, the Department's suggestion that "no information would be provided to the accuser if no sanction was issued," is not correct because the finding fails to consider the University's stated policies incorporated by reference into the ASR, and also does not consider the University's actual practice of notifying the complainant." Berkeley's Response – pg. 47.

For the "source of reference", the University had proffered page 51 of its ASRs for years 2010, 2011, and 2012 which directed readers to the full text of its stated policy on the *Campus Climate & Compliance Office* website at ccac.berkeley.edu. It also proffered page 4 of the *2010 Berkeley Campus Procedures for Responding to Reports of Sexual Harassment* to demonstrate the actual policy that was developed.

The policy read as follows.

"The complainant and the accused shall be informed promptly in writing when the investigation is completed. The complainant shall be informed if there were findings made that the policy was or was not violated and of actions taken to resolve the complaint, if any, that are directly related to the complainant, such as an order that the accused not contact the complainant." Berkeley's Response – pg. 47; Footnote 71.

Final Determination:

Part A of Finding #3 cited Berkeley for mishandling the allegations of sexual violation documented in Case **#13843-#26816**. Among other issues, Berkeley did not inform the complainants of the outcome until after Complainant #1 made three written requests for the status. Part B of the finding cited that Berkeley failed to include a clear statement of policy in ASRs about its process for informing a complainant of the outcome of a campus disciplinary proceeding regarding a sexual assault allegation.

As a result of the cited violations, Berkeley was required to review and revise its policies and procedures related to the implementation of the provisions of 34 C.F.R. §668.46(b)(11), commonly referred to as the Campus Sexual Assault Victim's Bill of Rights. As part of this process, it was instructed to ensure that its procedures provide for written, simultaneous notification of the complainant and the accused as to the outcomes reached and specific sanctions imposed by a campus disciplinary body in a case of an alleged sex offense. A copy of all the new policies and procedures were to accompany Berkeley's response to this Program Review Report.

The Department carefully examined Berkeley's official response and supporting documents. Based on that examination, all the said violations that were cited in the finding are sustained.

As for Part A of Finding #3, the Department determined that, Berkeley failed to comply with all of the requirements of 34 C.F.R. §668.46(b)(11), commonly referred to as the Campus Sexual Assault Victims' Bill of Rights. This determination is based on the following factors: 1) the University failed to notify Complainants #1, #4, #5, and #19 about the outcome of the campus disciplinary proceeding, and 2) it never advised Complainants #4, #5 and #19 of the sanctions that were imposed. Regulations at 34 C.F.R. §668.46 states that both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense. Whereas, regulations at 34 C.F.R. §668.46(b)(11)(vii) stipulates the outcome of a disciplinary proceeding means only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused. Complainant #1 had requested the status of this case several times and sought the assistance of GenEq and a Student Advocate Representative to receive appropriate information about the status of the proceedings.

Furthermore, the Department dismisses Berkeley's argument that "Neither the Clery Act nor University policy in effect at that time required simultaneous notice." This argument is dismissed on the grounds that "a simultaneous notification" was not a violation that was cited in the finding, rather it was a directive for Berkeley to ensure compliance with the upcoming VAWA regulations, effective July 1, 2015.

Regarding Part B of Finding #3, the Department determined that the University failed to include a clear statement of policy in ASRs, for years 2009 through 2013 about its process for informing a complainant of the outcome of a campus disciplinary proceeding regarding a sexual assault allegation. The basis for this determination is that rather than provide a clear statement, instead the University directed readers of the ASR to a link to access the full text of the policy in another document on the *Campus Climate & Compliance Office* website.

The Department's examination notes that the identified violations were, for the most part, satisfactorily addressed by the University's revised internal policies and procedures, and its most recent ASRs. As such, the review team has determined that Berkeley's remedial action plan meets minimum requirements, although it will be subject to additional testing as part of the Department's post-review monitoring program. For these reasons, the Department has accepted Berkeley's response and considers this finding to be closed for program review purposes. Nevertheless, the officers and directors of Berkeley are put on notice that the University must take all additional actions that may be necessary to address the deficiencies and weaknesses identified by the Department, as well as those that were detected during the preparation of the institution's response and as may otherwise be needed to ensure that these violations do not recur.

Berkeley is, once again, reminded that the exceptions identified above constitute serious and persistent violations of the *Clery Act* that, by their nature, cannot be cured. There is no way to truly “correct” a violation of this type once it occurs. The requirement to produce an ASR that includes all required statements of campus safety and crime prevention policy and procedure is fundamental to the campus safety and crime prevention goals of the *Clery Act*. Access to this information permits campus community members and their families to make well-informed decisions about where to study and work and empowers individuals to play more active roles in their own safety and security. Proper policy formation also serves as a guide to institutional officials to help ensure that operations are carried out in a manner that will maintain the safety of the campus community to the greatest extent possible. Berkeley asserted that it has taken adequate remedial actions, and that, by doing so, has brought its overall campus safety program into compliance with the *Clery Act* as required by the terms and conditions of its PPA. Notwithstanding these actions, the University is advised that its remedial actions cannot and do not diminish the seriousness of these violations, nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

Finding #4: Failure to Comply with Daily Crime Log Requirements

Citation:

The Clery Act and the Department’s regulations require institutions with a police or campus security department to maintain a written, easily understood Daily Crime Log listing all reported crimes that occurred: 1) on campus, including residence halls; 2) in non-campus buildings or on on-campus property; 3) on public property; or 4) within the campus police or security department’s patrol area. This reporting requirement applies to all crimes, not merely those crimes listed in 34 C.F.R. §668.46(c)(1).

The Daily Crime Log must show the following required elements: 1) the date on which the crime was reported; 2) date and time the crime occurred; 3) nature of the crime; 4) general location of the crime, and 5) the disposition of the complaint, if known. An entry or a change in the disposition of a complaint must be recorded within two business days of the information being reported to the campus police or the campus security department. The crime log must be kept up to date and made accessible to any requestor during normal business hours. 34 C.F.R. §668.46(f).

Noncompliance:

Berkeley persistently failed to maintain an accurate and complete Daily Crime Log in accordance with the Clery Act. Berkeley’s crime log entries typically did include categories, such as “Case Number & Classification(s), Synopsis, and Assigned Officer(s).” However, numerous log entries reviewed by the team did not include required fields such as 1) the date on which the crime was reported; 2) date and time that the crime occurred; 3) nature of the crime; 4) general location of the crime, and 5) the disposition of the complaint. Moreover, numerous entries indicated that incidents were

misclassified, including several incidents of Rape and Sexual Assault that were classified as "Suspicious Circumstances."

Berkeley's Crime Log did not clarify whether the recorded dates and times represented when incidents of crime were reported, or when they occurred. On occasion, the crime log omitted the geographic locations of incidents. The improper classifications used to describe the general nature of incidents were of little or no value to any user of the log, thereby undermining the very purpose of this disclosure requirement.

The Department reviewed crime incident reports from UCPD and the Piedmont Police Department (PPD) and concluded that the dates and times recorded in the Crime Log corresponded to the dates and times at which the crimes were reported. The following discrepancies were found in the Daily Crime Log for years 2009 to 2013.

1. UCPD IR #10-03002 - Suspicious Circumstances

Monday, August 9, 2010 at 16:07

General Location: Fenwick Weavers Village;

Disposition: Under Investigation

In the description of UCPD's crime incident report, the alleged crime was described as "penetration with foreign object to heavily intoxicated person, sexual battery," and the crime incident occurred on "July 31, 2010 at 0000." Therefore, "Suspicious Circumstance" is an incorrect classification for the nature of the crime. Furthermore, the crime log entry was missing the date and time at which the crime occurred.

2. UCPD IR #11-00965 - Suspicious Circumstance

Date Reported: Monday, March 8, 2011 at 22:49

General Location: Eucalyptus Grove

Disposition: Under Investigation

According to the crime incident report, the alleged offense was described as "indecent exposure, willful harm to a child, sexual battery, annoying or molesting child." The sexual assault occurred on-campus on Grinnell Path on Tuesday, March 8, 2011, at 22:45. Therefore, "Suspicious Circumstance" is an incorrect classification for the nature of the crime, and the crime log entry was missing the date and time at which the crime occurred.

3. UCPD IR #11-01188 - Suspicious Circumstance

Thursday, March 24, 2011 at 15:13

General Location: None

Disposition: Under Investigation

UCPD's crime incident report revealed that the alleged offense was described as "Oral Copulation-Fraudulent Representation, Sexual Penetration-Fraudulent Representation, Touching Intimate Body Part-Fraudulent Representation, Sexual Relations with Patient, Sexual Contact with Patient." And the rape occurred on-campus at the University Health Center (the Tang Center). Therefore, "Suspicious Circumstance" is an incorrect classification for the nature of the crime. Further, the

crime log entry indicated an inadequate location for where the crime occurred, and the date and time at which the crime occurred had been omitted.

4. UCPD IR #11-3437 - Suspicious Circumstances

Monday, September 5, 2011 at 21:34

General Location: Unit 1

Disposition: Under Investigation

In UCPD's crime incident report, the alleged offense was described as a "sexual assault with intent to commit sexual penetration, sexual battery." It occurred in Deutsch Hall, in an on-campus student residential facility, on August 28, 2011 at 0900. As such, "Suspicious Circumstance" is an incorrect classification for the nature of the crime. Further, the crime log entry reflected an inadequate location for where the crime occurred, and the date and time at which the crime occurred had been omitted.

5. UCPD IR #11-04693 - Suspicious Circumstance

Tuesday, November 15, 2011 at 18:17

General Location: UC Property

Disposition: Under Investigation

Berkeley's the 2nd Platoon Data Tallies, dated Tuesday, November 15, 2011, showed that an officer responded to the Tang Center (the University's health center) in response to an alleged sexual assault that had occurred, on-campus, at the CKC on "the previous Saturday." Therefore, "Suspicious Circumstance" is an incorrect classification for the nature of the crime. Furthermore, the crime log entry showed that the date and time at which the crime had occurred had been omitted.

6. UCPD IR #11-5070 - Victim of Sexual Assault

Saturday, December 10, 2011 at 17:31

General Location: None

Disposition: Under Investigation

According to the incident report, on December 10, 2011 at approximately 2:30, the victim was allegedly raped by an unknown man with a knife on the main campus at the Eucalyptus Grove, south of University Drive and east of the West Crescent. Although the information was noted in the incident report, the crime log did not note the date and time of this crime.

7. UCPD IR #12-2189 - Suspicious Circumstance

Dated Reported: Thursday, April 26, 2012 at 7:58

General Location: UCPD

Disposition: Under Investigation

On February 10, 2012, PPD received a report from a mother, alleging that a man had engaged in sexual intercourse with her minor child. The Berkeley Police Department (BPD) assumed lead of the investigation and notified the UCPD that the crime had occurred on January 27, 2012, in a car, at "signpost #15, Grizzly Peak, Berkeley, CA," within its campus police patrol jurisdiction. The UCPD subsequently generated a crime incident report that classified the offense as "sexual intercourse with a

minor.” “Suspicious Circumstance,” therefore, is an incorrect classification for the nature of this crime. Additionally, the crime log entry was missing the date and time at which the crime occurred.

8. UCPD IR #12-3534 - Victim of Rape

Wednesday, July 25, 2012 at 22:18

General Location: None

Disposition: Under Investigation

UCPD’s crime incident report revealed that an alleged rape had occurred at Wada Hall, in an on-campus student residential facility, on April 13, 2012 at 0010. The incident report number for this crime was out of sequential order (i.e., it has been entered between incident reports #12-03550 and #12-03551). Furthermore, the Crime Log entry was missing the location, date, and time at which the crime occurred.

9. UCPD IR #12-4174 - Victim of Sexual Assault

Friday, August 31, 2012 at 13:50

General Location: UCB Campus; Disposition: Under Investigation

According to UCPD’s incident report, a sexual battery was reported as occurring at on August 31, 2012, at approximately 1451 hours inside Putnam Hall, an on-campus student residential facility. Nevertheless, this and several other crime log entries merely noted that the incident was reported as occurring at a non-specific location, such as the “UCB campus.”¹⁴ This crime log entry was also missing the date and time that the crime occurred.

10. UCPD IR #12-5019 - Victim of Sexual Battery and Theft from her Person

Saturday, October 6, 2012 at 21:39

General Location: Location Crime Occurred: Memorial Stadium Gate 8

Disposition: Under Investigation

A supplemental incident report revealed that the reported crime incident was determined to be unfounded; however, the disposition field was not updated to show that the incident was subsequently unfounded. Furthermore, the crime log entry was not in sequential order, appearing between incident #12-5022 and incident #12-05023. An updated disposition was also not provided for this case, and, the crime log entry did not include the date and time that the crime occurred.

11. UCPD IR #12-5195 - Suspicious Circumstances

Monday, October 15, 2012 at 17:42

General Location: I House

Disposition: Under Investigation

The University’s Health Center reported that the crime was alleged to have been a sexual assault. Therefore, “Suspicious Circumstance” is an incorrect classification

¹⁴ Although the *Clery Act*’s Daily Crime Log requirement permits the use of a “general location,” each entry must provide enough information that would provide a user with actionable information about the site of a crime. While it would not be appropriate to list the specific room number where the incident occurred, overbroad references like the “UCB Campus” provide no useful information or meaningful notice of the type that the log is intended to provide.

for the nature of this crime. Additionally, the crime log entry was missing the date and time at which the crime occurred.

12. UCPD IR #13-03007 - Suspicious Circumstances

Friday, August 9, 2013 at 11:07

General Location: None

Disposition: Under Investigation

UCPD's crime incident report indicated that the victim stated that she had been vaginally penetrated during the incident, which occurred on March 14, 2013, between the hours of 2045 and 1107, near an on-campus bridge in an area known as the Faculty Glade. However, that information was not provided in the Daily Crime Log. As such, "Suspicious Circumstance" is an incorrect classification for the nature of this crime. The crime log entry was also missing the date and time that the crime occurred.

This finding is supported by hardcopies of Berkeley's Daily Activity Log¹⁵ from calendar years 2010 to 2014 that was provided by to the Department by the University.

The Clery Act is intended to ensure that students, employees, and other community stakeholders have timely access to information about criminal offenses on campus and/or in the near-campus community. The crime log provides information to assist the community's members to make decisions regarding their individual safety and security. The crime logs supplement statistical disclosures in the ASR. Failure to comply with the Daily Crime Log requirements deprives the campus community of vital safety and security information and violates the Clery Act.

Required Action:

As a result of these violations, Berkeley is required to review and revise its policies and procedures to ensure compliance with crime log requirements going forward. The revisions must provide for the designation of a capable official who will oversee the proper maintenance of the University's Daily Crime Log.

Berkeley must also ensure its Daily Crime Log is inclusive of all the required elements that are prescribed by the Clery Act. It must review and revise all incorrect entries in its Daily Crime Log for years 2013, 2014, 2015, 2016, and 2017. The process must begin immediately to ensure that students and employees are aware of reported crimes and emergencies that have impacted their campus community. Furthermore, Berkeley must ensure that all aspects of its electronic Daily Crime Log are operational.

A copy of all new and revised policies and procedures and the relevant sections of the revised Daily Crime Log must accompany Berkeley's response to this Program Review Report.

¹⁵ Berkeley's Daily Crime Log.

Institutional Response Summary:

In their official response, Berkeley management conceded that some of its Daily Crime Log entries were missing required information. The University attested that it examined the Daily Crime Log and found reporting errors. It was determined that those reporting errors were caused by UCPD's failure to update its crime log entries after dispatch had obtained additional information, such as the nature of the crime, when it occurred, and the disposition. The University claimed that the deficiencies in the Daily Crime Log did not impact the University's reported crime statistics, and its crime statistics were pulled from police reports that accurately reflected the time and nature of the crimes.

Exhibit 8 was provided to demonstrate that the University immediately enacted a new policy to ensure the accuracy and completeness of its Daily Crime Log.

Final Determination:

Finding #4 cited Berkeley for persistently failing to maintain accurate and complete daily crime logs, in accordance with the *Clery Act*. During the program review, the Department reviewed a sample of entries in Berkeley's crime logs from 2009 – 2013 and found that the University routinely failed to comply with the *Clery Act*. The University provided the Department's review team with copies of its Daily Crime Log with log entries that did not include required fields, such as: 1) the date on which the crime was reported; 2) date and time that the crime occurred; 3) nature of the crime; 4) general location of the crime, and 5) the disposition of the complaint. The Department noted that recorded information for the nature of the crime was often misclassified, and several incidents of Rape and Sexual Assault were classified as "Suspicious Circumstance."

As a result of those violations, Berkeley was required to review and revise its policies and procedures to ensure compliance with crime log requirements going forward and designate a capable official to oversee the revisions and the proper maintenance of the University's Daily Crime Log. It was required to ensure that its Daily Crime Log includes all the required elements that are prescribed by the *Clery Act*. The University was also instructed to review and revise all incorrect entries in its Daily Crime Log for the years 2013 through 2017. Those processes were to begin immediately. Furthermore, Berkeley was required to ensure that all aspects of its electronic Daily Crime Log were operational.

The Department carefully examined all available information, including Berkeley's narrative response and supporting documentation. Based on that examination, and the University's admissions, the violations identified in the finding are sustained.

Furthermore, the Department remains concerned that the persistent errors in DCL with respect to the classification, disposition and location of crimes were a contributing factor in the University's inaccurate reporting of its statistics. The Department's concerns are also noted in Finding #7, Failure to Compile and Disclose Accurate and Complete Crime Statistics. This concern is clearly documented and bolstered by the University's own file

review which identified numerous misclassifications and underreporting of crimes (see Finding #7 for additional detail).

The Department's examination also determined that the identified violations were, for the most part, satisfactorily addressed by Berkeley's responsive documents, including its new and revised policies and procedures to produce complete and accurate crime log entries. On this basis, the Department has determined that the University's corrective action plan meets minimum requirements and, for these reasons, has accepted the response and considers this finding to be closed for the purposes of this Program Review. Nevertheless, the officials and directors at Berkeley must take all other action that may be necessary to address the deficiencies identified by the Department as well as any additional deficiencies and weakness that were detected during the preparation of Berkeley's response, and /or as may be needed to otherwise ensure that these violations do not recur.

Berkeley is, once again, reminded that 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. The establishment and maintenance of an accurate, complete, and accessible daily crime log is an essential part of *Clery Act* compliance and serves the transparency goals of the law. Any failure in this regard deprives students and employees of timely access to up-to-date campus safety information to which they are entitled. Berkeley asserted that it has taken adequate remedial actions and that, by doing so, it is now in compliance with the *HEA* and the *Clery Act* as required by its PPA. Nevertheless, Berkeley is advised that its remedial actions cannot and do not diminish the seriousness of these violations, nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

Finding #5: Failure to Issue Timely Warnings in Accordance with Federal Regulations

Citation:

The Clery Act and the Department's regulations require institutions to issue Timely Warnings to the entire campus community to inform students and employees about Clery-reportable crimes that constitute ongoing threats to students and employees. See §485(f)(3) of the HEA. These warnings must be issued to the campus community in any case where an incident of crime listed in 34 C.F.R. §668.46(c)(1) and/or (c)(3) that represents a threat to students or employees is reported to a CSA. 34 C.F.R. §668.46(e).

Noncompliance:

Berkeley failed to comply with Timely Warning provisions of the Clery Act. This is a two-part regulation. Specifically, Berkeley did not provide documentation that it considers when issuing Timely Warnings for reported crimes that represent serious or continuing threats to the campus community. In addition, Berkeley failed to implement

adequate internal policies and procedures for the issuance of the Timely Warnings. These violations have existed for at least three consecutive years, from 2010 to 2012.

Berkeley provided the Department with copies of alert notices that were distributed to its campus community, the corresponding crime incident reports, and its internal policy and procedures for issuing Timely Warnings. In the documents, the Department found University officials disregarded the Clery Act requirement that mandated an institution alert the campus community to all Clery crimes in a manner that is timely and will aid in the prevention of similar crimes.

Berkeley's internal policy and procedures entitled Crime Alerts (Timely Warnings) stated that "UCPD's interpretation of a timely manner is the next business day." In light of that, Berkeley's alert notices showed alerts were issued in excess of two or more days of crimes being reported; even when incidents or crimes were reported on the same date that they occurred. Therefore, Berkeley failed to follow its own internal policy and procedures in relation to the Clery Act.

A selected group of Berkeley's Crime Alert notices and their corresponding crime incidents reports are summarized in the paragraphs below to illustrate these Timely Warning violations:

Crime Alert notice #10-111810-81 and UCPD's crime incidents reports #10-3924, 10-4195, 10-4414, #10-4554, and #10-4757 confirmed that five burglaries were reported on different dates during the months of September, October, and November 2010. All of the burglaries were similar in nature and occurred at the same apartment complex. Four of the burglaries occurred while apartment units were occupied, imposing serious threats to students and employees in the campus community.

Berkeley did not issue Timely Warning for these burglaries until the fifth incident was reported to UCPD. Information about each burglary was then compiled into one Crime Alert notice, and, on November 18, 2010, disseminated to the campus community in a manner that was untimely. A Timely Warning should have been issued for each of the reported burglaries once pertinent information became available for each reported crime incident, since each posed a serious threat to both students and employees. The determination for issuing the Timely Warning should not have been delayed until the fifth reported incident.

A summary of UCPD's crime incident reports about these burglaries is presented in the section below:

- **UCPD IR #10-3924 - Burglary:** *On Tuesday, September 28, 2010, between the hours of 0200 and 0320, an apartment unit at the University Albany Village was burglarized, reportedly while the resident was in the kitchen, washing dishes. The burglar removed a screen from an unlocked window ground floor apartment, reached-in, stole items from a desk in close proximity, and fled the scene. A wallet, the student's identification card, money, a driver's license, as well as*

credit and debits cards were stolen and a one-dollar purchase was made on a card.

The crime was reported to UCPD on Tuesday, September 28, 2010, at 0342 hours. University officials did not disseminate the warning to the campus community until 52 days after it was reported.

- **UCPD IR #10-4195 - Burglary:** *On Wednesday, October 13, 2010, between the hours of 0530 and 0715, another apartment was burglarized at the University Albany Village. In this incident, two adults and two young children were in the apartment sleeping. Again, a burglar gained access to a ground floor apartment by removing a screen to window that was slightly open. Small items and \$70 in cash were stolen. The suspect absconded through the front door, leaving it ajar.*

UCPD received a report about the crime on Wednesday, October 13, 2010, at 0728 hours. The warning was issued 37 days after the crime was reported to UCPD.

- **UCPD IR #10-4414 - Burglary:** *On Monday, October 25, 2010, between the hours of 0330 and 0750, a burglary occurred in an apartment unit at University Albany Village while the occupants were sleeping. The burglar entered the apartment through an unlocked sliding glass door in the kitchen, stole a laptop computer from the table, and exited the apartment through the same door.*

The crime was reported to the UCPD on Monday, October 25, 2010, at 1522 hours, the same day that the crime occurred. Berkeley issued an alert some 25 days after the incident was reported.

- **UCPD IR #10-4554 - Burglary:** *On Thursday, November 5, 2010, between 0900 and 1300 hours, a ground floor apartment unit at the University Albany Village was burglarized while the residence was unoccupied. Entry was gained through a sliding glass patio door that may have been unlocked, and the burglar prowled the bedrooms and living room. Electronics were stolen. The suspect possibly left through the sliding glass door.*

This crime was reported to UCPD on Thursday, November 5, 2010, at 1355 hours. The University issued a warning 4 days later.

- **UCPD IR #10-4757 - Burglary:** *On or about Monday, November 15, 2010, to Tuesday, November 16, 2010, between 2300 and 0600 hours, another burglary occurred in an apartment unit at the University Albany Village. Occupants were not in the apartment unit at the time that this crime occurred. The burglar entered the apartment unit through an unlocked front door and took small items.*

The crime was reported to UCPD on Wednesday, November 16, 2010, at 1550 hours. University officials issued the warning on November 18, 2010, two days after the crime was reported.

Likewise, Crime Alerts #11-040311-17, #11-040311-18, #11-040811-19, and UCPD's crime incident reports #11-01367, #11-01424, and #11-01421 revealed sexual assaults were reported in April 2011. There were similarities in the nature of these crimes as they occurred in vicinity of the Valley Life Science Building.

The following paragraphs present a summary of the aforementioned crime incident reports, the dates on which Berkeley issued Timely Warnings to its campus community.

- **UCPD IR #11-01367 - Sexual Battery:** *On Sunday, April 3, 2011, at approximately 2300 hours, an alleged sexual assault occurred on Frank Schlessinger Road, near the Hellman tennis courts. An unknown man walked past the victim, grabbed her right buttock, and smiled. The assailant ran eastbound of Frank Schlessinger Road, toward Haas Pavilion, until he was out of sight.*

In this case, the victim reported the crime to UCPD on Monday, April 4, 2011, at 1330 hours, the day after it occurred. Berkeley made the decision to issue a warning for this incident on April 5, 2011.

However, Berkeley did not issue a warning in a manner that was timely for a similar reported crime incident described in the paragraph immediately below:

- **UCPD IR #11-01421 - Sexual Battery:** *On Thursday, April 7, 2011, at approximately 2250 hours, a sexual assault occurred, on-campus, on the East side of the Valley Life Science Building and California Hall. An unknown man grabbed a student's buttock while she walked on a pathway near the Valley Life Science Building and California Hall. She asked what he was doing; he smiled and mumbled, "I just want to touch." The unknown man quickly absconded, on campus, towards Dwinelle Hall.*

The alleged victim reported the crime on that same day, April 7, 2011, at 2320. University officials did not issue a warning until April 11, 2011, approximately four days after that report, violating UCPD's internal policy of issuing Timely Warnings by the next business day. The nature of the crime was serious and similar to UCPD's crime incident report #11-01367, referenced above. The assailant was last seen walking towards another location on-campus. On these facts, it is reasonable to conclude that this incident posed a serious and foreseeable ongoing threat to the campus community. It also must be noted that the eventual issuance of a warning not only violated the Clery Act but also violated the University's policy that improperly allowed for the delay of warnings until the next day.

- **UCPD IR #11-01424 - Assault with the Intent to Commit Oral Copulation, Robbery, Kidnapping, False Imprisonment and Sexual Battery:** On Friday, April 7, 2011, at approximately 045 hours, a sexual assault occurred, on-campus, in the area of Haviland Grove. An unknown man followed a student as she walked the pathway of Haviland Grove after leaving the Valley Life Science Building. He placed his arm around the victim's mouth, led the victim toward a wood bench, slammed her head into a tree, robbed her, demanded sexual favors, and walked away northbound in a shadowy wood area.

The sexual assault was reported to UCPD that same day, Friday, April 7, 2011 at 0133 hours. But the Warning was issued to the campus community on April 11, 2011, approximately four days after that report. In this instance, UCPD did not comply with a provision of the Clery Act that requires an institution to issue a Timely Warning once pertinent information becomes available; and oddly, it also failed to follow its own deficient internal policy of issuing Timely Warnings by the next business day.¹⁶

This finding is supported by the UCPD's policy and procedures in its Crime Alert (Timely Warning) document. Additional supporting documents include Crime Alert notices #10-111810-81, #11-040311-18 and #12-050412-31 that Berkeley provided, as well as crime incident report #10-3924, #10-4195, #10-4414, #10-4554, #10-4757, and #11-01421.

Failure to issue Timely Warnings of serious and on-going threats deprives students and employees of vital, time-sensitive information and effectively denies them the opportunity to take adequate steps to provide for their own safety.

Required Action:

As a result of these violations, Berkeley must develop and implement policies and procedures in accordance with 34 C.F.R. §668.46(e) to thoroughly assess whether reported incidents of Clery crimes pose a serious or ongoing threat to the campus for the issuance of Timely Warnings. The new policy and procedures must include measures for considering the issuance of Timely Warnings as soon as pertinent information becomes available about crimes that have occurred imposing a serious or a continuing threat to the campus community, rather than the "next business day."

A copy of all revised policy statements also must be submitted with the University's response to this Program Review Report.

¹⁶ This finding had incorrectly cited April 7, 2011 as the occurrence date of the reported crime for UCPD #01424. Consideration was given to Berkeley's response below, as well as its assessment of the TW violation. See, the Department's *Final Determination* for Finding #5.

Institutional Response Summary:

In their official response, Berkeley management concurred partly with the violations in Finding #5. The University agreed that “it should have realized that a string of burglaries¹⁷ at the University’s Albany Village over the course of three months were connected to one another and potentially posed a threat to residents there, and thus, should have issued a timely notice more quickly than it did.” Regardless of that admission, the University argued that, “UC did not represent in its policy that it would always issue a Timely Warning within 24 hours. Rather, the 2013 ASR prudently stated that “UCPD *makes every effort* to issue Crime Alerts within 24 hours of the time the crime is reported (by the next business day), *however, it sometimes takes longer to confirm all pertinent information*,”¹⁹ and UC Berkeley complied with this policy.” In addition, the University disagreed that TWs were issued improperly for UCPD IR #01421 and #01424. The University stated that it appears the Department was referring to its updated crime alert notices, not the initial crime alert notices that were issued for both reported crimes.¹⁸

Copies of the initial crime alert notices for UCPD IRs #11-01421 and #11-01424 were provided and compared against the updated crime alert notices. See the Department’s Final Determination for Finding #5.

A copy of the University’s new “*Policy and Procedure for the Issuance of Timely Warnings*” was provided in Exhibit 7.

Final Determination:

Finding #5 cited Berkeley for not complying with the Timely Warning provisions of the *Clery Act*. This was a two-part violation. First, Berkeley failed to issue Timely Warnings in response to certain Clery-reportable crimes that may have posed a significant or ongoing threat to members of the campus community. The University also did not develop and implement an adequate policy statements regarding the issuance of Timely Warnings.¹⁹ Finally, as part of the policy violation, the review team noted that during the period of the program review, Berkeley failed to include an adequate informational disclosure about its Timely Warning procedures in its ASRs.

As a result of these violations, Berkeley was required to develop and implement policies and procedures in accordance with 34 C.F.R. §668.46(e) to thoroughly assess whether reported incidents of Clery crimes pose a serious or ongoing threat to the campus for the issuance of TWs. The new policy and procedures were to include measures for

¹⁷ Five burglaries, UCPD IRs #10-3924, 10-4195, 10-4414, #10-4554, and #10-4757.

¹⁸ The Department points out that the University did not provide a copy of the initial crime alert notices for UCPD IR #11-01421 and #11-01424, until it had responded to the violations cited in Finding #5.

¹⁹ Considerations for a TW must be decided on a case-by-case basis in light of all the facts surrounding a crime, including factors, such as: 1) the nature of the crime; 2) the continuing danger to the campus, and 3) the possible risk of compromising law enforcement efforts.

considering the issuance of TWs as soon as pertinent information becomes available about crimes that have occurred imposing a serious or a continuing threat to the campus community, rather than the “next business day.” Berkeley was also instructed to provide a copy of its revised policy statements with its response to this Program Review Report. In its response, the University disagreed with the finding and asserted that enhanced policies and procedures were developed and implemented to expedite and improve the issuance of time warnings and emergency notifications to the campus community.

As noted above, the Department’s PRR required Berkeley to conduct a file review to identify any other cases where a time warning was required but not issued. The results of the file review and institutional self-study uncovered additional crimes that required the issuance of a timely warning during the 2012-2016 time period.²⁰ The Department’s review of the records provided by the University officials resulted in the identification of at least **78** incidents where a timely warning was required, but not issued. The bullet points below are organized by calendar year and provide additional details about the violations identified by the University during the file review:

- In **2012**, Berkeley failed to issue time warnings in response to at least **40** Clery-reportable crimes that posed a significant or ongoing threat. These offenses were reported directly to the UCPD. The incidents at issue included one Rape, two Fondling incidents, three Robberies, one Aggravated Assault and 33 Burglaries.²¹
- In **2013**, Berkeley failed to issue time warnings in response to at least **eight** Clery-reportable crimes that posed a significant or ongoing threat. These offenses were reported directly to the UCPD. The incidents at issue included two Robberies, four Burglaries, and two Arsons.²²

²⁰ The Department substantially relied on Berkeley’s reconstructed file review to determine the number of timely warning violations that occurred in the 2012-2016 timeframe. However, given the lingering concerns about the University’s administrative weaknesses and the challenges in identifying and examining case records, the Department has substantial reason to believe that other violations may have occurred during and after the file review period. In fact, the Department notes that Berkeley engaged a well-known consulting firm with demonstrated expertise in the field to conduct much of the analysis and that firm was not able to determine the necessity for a file review in certain cases because of the poor quality of records, or in some cases, the absence of certain records. Notwithstanding these ongoing concerns, the Department will recognize these findings as representing the minimum levels of noncompliance that occurred during the review period. Berkeley must take care to provide reasonable assurance that such violations will not continue. Compliance with the Department’s requirements and the institution’s own timely warning and emergency notification procedures will be a focus of the Department’s ongoing monitoring program.

²¹ Berkeley also identified one incident of Domestic Violence as requiring a Timely Warning, however, the Department does not consider this to be a violation because this offense was not a Clery-reportable crime in 2012.

²² The Department must note that Berkeley persistently failed to issue crime alerts in a manner that was reasonable, timely, and calculated to prevent the occurrence of the same or similar crimes. For example, the file review results from 2013 show delayed warnings of four days in one case and seven days in another in response to Robberies on Clery Geography. Additionally, Berkeley also identified one incident of Stalking as requiring a Timely Warning, however, the Department does not consider this to be a violation because this offense was not a Clery-reportable crime in 2013.

- In **2014**, Berkeley failed to issue time warnings in response to at least **seven** Clery-reportable crimes that posed a significant or ongoing threat. These offenses were reported directly to the UCPD. The incidents at issue included one Rape, five Burglaries, and one Hate Crime (Intimidation).²³
- In **2015**, Berkeley failed to issue time warnings in response to at least **19** Clery-reportable crimes that posed a significant or ongoing threat. These offenses were reported directly to the UCPD. The incidents at issue included two Rapes, three Fondling incidents, one Robbery, 11 Burglaries, and two Motor Vehicle Thefts.
- In **2016**, Berkeley failed to issue time warnings in response to at least **four** Clery-reportable crimes that posed a significant or ongoing threat. These offenses were reported directly to the UCPD. The incidents at issue included one Fondling incident, two Robberies, and one Burglary.²⁴

As noted in Footnotes #33 and 34, the file review identified numerous cases where Berkeley delayed the issuance of Timely Warnings for more than 24 hours, in violation of its own already noncompliant policy. In some cases, alerts were issued as many seven or eight days after receiving a report of a Clery incident that occurred on Clery Geography and may have posed a significant or ongoing threat. Given the specific circumstances surrounding many of these crimes, the Department has determined that the University's delays subjected the campus community to discernible ongoing risks in contravention of the law. In other cases, warnings were delayed because incident that were reported to CSAS other than the UCPD were not evaluated in a timely manner to determine if a warning or other notice was needed.

²³ Here, the Department must also note that the well-respected consultant that was retained to assist Berkeley with the file review was not able to determine the need for a Timely Warning for certain incidents, primarily due to the lack of operative case facts and/or the unavailability of records. In these cases, the notes in the relevant field in the file review report states "Consider TW." One of the directives of the file requirement was to make these determinations. At least 11 offenses were tagged in this way, including one Rape, two Fondling cases, one Robbery, and seven Burglaries. The note section of the file review report includes the following narrative: "Victim was approached from behind while on campus by an unknown suspect. Suspect placed a hard metal object into the back of the victim and demanded he give up his money. Suspect took the victim's wallet." On these facts, the need for a Timely Warning seem to be evident. Once again in 2014, Berkeley delayed the issuance of warnings even when reported crimes required timely action to warn. For example, in one small sample of incidents, the review team identified four Robberies where crime alerts were not issued until three days after the report was received by the UCPD. Finally, Berkeley identified one incident of Domestic Violence as requiring a Timely Warning, however, again in this case, the Department does not consider this to be a violation because this offense was not a Clery-reportable crime in 2014, as compliance with the VAWA requirements was not mandatory until July 1, 2015.

²⁴ The same types of issues were noted for 2015 and 2016 as well. For example, the file review reports for 2015 and 2016 identified 10 and six incidents respectively as possibly requiring a Timely Warning. These offenses included seven Rapes over this two-year period.

The Department carefully examined Berkeley's official response and supporting documents. Based on that examination, the violations noted in the initial finding are sustained. At a minimum, Berkeley violated the Timely Warning requirement when it failed to issue alerts in response to the five burglaries documented in UCPD incident reports #10-3924, #10-4195, #10-4414, #10-4554, and #10-4757, and for three sexual assaults documented in UCPD incident reports #11-01367, #11-01421, and #11-01424. The University also failed to issue required Timely Warnings in response to the 78 incidents identified in the file reviews. Additionally, Berkeley, as noted, failed to develop and implement a compliant timely warning procedure, which contributed to these violations.

In upholding this finding, the Department notes that the driver for timely warning is now and has always been a Clery-reportable crime that may pose a significant or ongoing threat. Additionally, the Department has always assessed compliance with the timeliness prong based on a reasonable person standard, meaning would a reasonable person with the appropriate training and experience ascertained that a reportable incident may pose a significant or ongoing threat. Another key consideration requires an assessment as to whether the advisory was issued in a manner that was reasonably calculated to advise campus community members about an ongoing threat and in so doing, make it less likely that other similar crimes would occur.

The Department's assessment of these factors is not controlled completely by the language in an institution's published policy or its internal procedures. In this regard, the Department reminds the University and all practitioners that blanket policy statement indicating that timely warnings will usually be issued "within 24-48 hours" following a report will typically not be found acceptable. This does not mean that every timely warning must be issued within some static timeframe. Instead, an institution's policy and procedures on the topic should require some basic analysis of the report itself and result in the dissemination of a clear warning that provides actual notice of the potential threat and instructions on how to stay safe as soon as it can practically be sent.

To facilitate the evaluation and issuance process, the Department recommends the use of basic matrix or rubric to guide institutional officials as they contemplate the need to warn the campus community. As noted in the 2011 edition of the Department's "Handbook for Campus Safety and Security Reporting," the *Clery Act* requires an institution to alert its students and employees "in a manner that is timely" about reports of crimes that pose a serious or ongoing threat to campus community and will aid in the prevention of similar crimes from occurring. The Department has very purposely refrained from trying to define what "timely" will mean in every circumstance. Instead, the circumstances themselves set the standard and, in essence, dictate when a warning must be sent. The review team's examination of the institution's response material indicated that the changes to its internal policies and procedures should result in the issuance of faster, and more informative notices going forward. For these reasons, the Department has accepted Berkeley's response and considers this finding to be closed for the purposes of this program review. The University must continue to improve its timely warning and

emergency notification processes to provide reasonable assurance that this finding will not recur.

Berkeley is reminded that 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. Issuance of timely warnings and emergency notifications to advise persons who may be at risk as a result of serious crimes or other dangerous conditions are among the most important requirements of the *Clery Act* and are fundamental to the law’s campus safety goals. The ongoing notification requirements of the *Clery Act*, timely warnings, emergency notifications, and crime log data provide vitally important up-to-date information that supplements the longitudinal statistical data that must be included in the ASR and the Department’s online campus crime statistics database (CSSDACT). Berkeley asserted that it has taken adequate remedial action to comply with the *Clery Act* as required by its PPA. Nevertheless, the University is advised that such actions cannot and do not diminish the seriousness of these violations nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

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

Citation:

The Clery Act and the Department’s regulations require that all institutions that receive Title IV, HEA funds must, by October 1 of each year, produce a comprehensive ASR that contains, at a minimum, all of the statistical and policy elements described in 34 C.F.R. §668.46(b), and distribute it to all current students and employees.

An institution must disclose, by category of prejudice, the following crimes reported to the local police agencies or to a campus security authority that manifest evidence that the victim was intentionally selected because of the victim’s actual or perceived race, gender, gender identity, religion, sexual orientation, ethnicity, National origin, or disability. The offenses include: any crime reported pursuant to 34 C.F.R. §§668.46(c)(1)(i) through (vii); and the crimes of larceny-theft, simply assault, intimidation, and destruction of property/damage/vandalism of property. 34 C.F.R. §668.46(c)(1)(iii).

Noncompliance:

Berkeley failed to compile and disclose accurate and complete statistical data for reported incidents of Hate Crimes in accordance with Federal regulations. In ASRs for the years 2011²⁵ to 2013, Berkeley disclosed Hate Crime statistics without indicating the types of criminal offenses that were associated with the actual or perceived biases that were reported. The omitted statistical data caused the Hate Crime statistics in ASRs for calendar years 2010 to 2013 to go uncounted.

²⁵ The Department made a non-substantive edit to the text. A portion of the sentence should have read “In ASRs for years 2011 to 2013”, rather than “In ASRs for years 2010 to 2013”.

*The following hate crimes that occurred on Berkeley's Clery-geography were uncoun-
ted in the ASRs for calendar years 2010 to 2013:*

- **UCPD IR #10-00229** -- *On Wednesday, January 20, 2010, an employee working in the University-controlled Kaiser Building, reported that she had retrieved a recorded phone message on Tuesday, January 19, 2010 that threatened to sexually assault her, and used derogatory language to describe her perceived Mexican ethnicity as well as her sexuality. The victim reported being offended and frightened. The crime was not included in the audit trail; this should have been counted as one (1) hate crime of intimidation non-campus property during calendar year 2010 with a perceived ethnic and one gender bias.*
- **UCPD IR #10-01474** -- *On Wednesday, April 14, 2010, a female reported to a UCPD officer that she received a threatening email at her "residence" an on-campus dormitory, from an anonymous person. The anonymous person threatened to place a gun to the victim's head if she attended a divestment bill meeting, because the victim allegedly called herself a "Jew." The victim informed UCPD that she is a Christian and not Jewish; and, the threat did not deter her from attending the meeting. The crime was not included in the audit trail. This should have been counted as one (1) hate crime of intimidation, on-campus property and in an on-campus student residential facility, during calendar year 2010, manifested by a perceived religious bias.*
- **UCPD IR #11-04818** -- *On November 22, 2011, a student reported three incidents, one of which was a hate crime, occurring on October 11, 2011, in an on-campus student residential facility at Cunningham Hall. The following are details included in the incident report:*
 - *On October 11, 2011, photographs of men with exposed genitalia that had apparently been cut out of magazines were displayed on the victim's door. Said photos were accompanied by messages that read: "Flamin [name redacted] loves men," and "[name redacted] likes the big boys and guys who are black below the waist." According to the police incident report, the Resident Assistant was informed of the incident.*

This incident was not included on the audit trail. It should have been counted as one (1) hate crime of vandalism, in an on-campus student residential facility and on-campus property, during calendar year 2011, that were manifested by actual or perceived sexual orientation bias.

The Department must also note that the Hate Crime statistics included in the 2014 ASR for calendar year 2013 was presented in narrative format without any reference to the following required information: 1) the type of offense; 2) the actual or perceived bias; 3) the geographic location of the incident; 4) and the total number of incidents reported for

each type of offense associated with the bias. In addition, the narrative did not include Hate Crime statistics for calendar years 2011 or 2012.

Note this excerpt from the 2014 ASR:

"UC Berkeley is reporting 9 Clery reportable hate crimes which occurred in 2013. UCPD reported a total of seven. Five were biased towards ethnicity/race and included an assault with a deadly weapon, a battery, offensive words in public and two vandalisms. Two were biased against sexual orientation and included a battery of vandalism. Campus Security Authorities reported two hate crimes. A religion biased vandalism and an ethnicity biased battery." 2014 ASR

Supporting documents for this finding consist of statistical disclosures in ASRs regarding Hate Crimes for calendar years 2010, 2011, 2012, and 2013, as well as all incident reports from UCPD regarding hate crimes.

Accurate and complete statistical disclosures for reported incidents of Hate Crimes inform students and employees about serious offenses that occur in their campus community.

Required Action:

As a result of this violation, Berkeley must develop and implement policies and procedures to ensure that hate crimes statistics are disclosed in ASRs in accordance with the Clery Act. The policies and procedures must include examples of crime incident reports, formatted tables with the statistics for the types of criminal offenses, the actual or perceived bias, and geographic locations for where for crimes occurred.

As an alternative style of reporting Hate Crimes, Berkeley must include in its policies and procedures examples of narratives for reporting its Hate Crime statistics in the "caveats" section of the report.

The University must also appoint a person with the requisite knowledge, experience, and authority to oversee the compilation and disclosure of its campus crime statistics.

Development of new policies and procedures to ensure the accurate and complete disclosure of crime statistics, including Hate Crimes and VAWA statistics in its ASRs must be put in place immediately. A copy of all new and revised new policies and procedures and information regarding the training of staff with Clery Act responsibilities must accompany Berkeley's response to this Program Review Report.

Institutional Response Summary:

In their official response, Berkeley management registered their disagreement with most of the violations cited in the finding. More specifically, the University stated that it “believes” that its Hate Crime reporting complied with the *Clery Act*, except for certain deficiencies that were found with reporting hate crimes in its 2014 ASR. The University agreed that its 2014 ASR failed to include: 1) the location of the offense, and 2) data for Hate Crime reporting for calendar years 2011 and 2012. An explanation was provided, claiming that those “omissions occurred because it tried a narrative, as opposed to tabular, format for presenting hate crime statistics in its ASR”. An assertion was also made that “*other required elements*, including the category of prejudice and type of offense” were included. [Italicized for emphasis.]

In addition, it argued that page 38 of its ASRs for years 2010, 2011 and 2013, and page 39 of its 2012 ASR showed a “break down [of] reported hate crimes by disability, ethnicity/race, gender, religion, and sexual orientation,” as stipulated by the *Clery Act* and the Department’s guidance.

Regarding its audit trails, the University disagreed that hate crimes for incident reports #10-00229, #10-01474 and #11-04818 were not included in its audit trails. Copies of the audit trails for calendar years 2010 and 2011, and a copy of the 2012 ASR with the corresponding statistical data were provided as documented evidence that those reported hate crimes were included in its audit trails.

Exhibit 10 was provided to demonstrate that the University had addressed Hate Crimes disclosures in its new “Policy and Associated Procedures for Collecting, Classifying, Counting and Publishing Clery Act Crime Data and Fire Safety Data.”

Exhibit 12 was provided to show documented evidence of past and ongoing training for classifying and counting Clery crimes.

Final Determination:

Finding #6 cited Berkeley for its failure to compile and disclose accurate and complete statistical data in its ASRs for reported incidents of Hate Crimes, in accordance with Federal regulations.

As a result of the violations, Berkeley was required to develop and implement policies and procedures to ensure that hate crimes statistics are disclosed in ASRs in accordance with the *Clery Act*. The University’s policies and procedures were to include examples of crime incident reports, formatted tables with statistics for the types of criminal offenses, the actual or perceived bias, and geographic locations for where for crimes occurred. It was also instructed to include in its policies and procedures examples of narratives for reporting its Hate Crime statistics in the “caveats” section of the report. In addition, it was instructed to assign a person with the requisite knowledge, experience, and authority to oversee the compilation and disclosure of its campus crime statistics.

Copies of the new and revised policies and procedures and information regarding the training of staff with *Clery Act* responsibilities were to accompany the University's response to this Program Review Report. In their response, Berkeley management challenged most aspects of the Department's finding, arguing that most of the required data was included somewhere in the ASRs, for each year through 2013. The University did concede that certain hate crimes were not disclosed in the 2014 ASR. Those specific offenses and the overall effect these omissions had on the accuracy and completeness of the institution's crime statistics are detailed in the Final Determination for Finding #7.

The Department carefully reviewed all information, including Berkeley's response and its supporting documentation. Based on that review and the University's partial admissions, the violations cited in the finding are sustained. The Department determined, and the file review has confirmed, that Berkeley failed to disclose accurate, complete, and fully reconciled Hate Crime statistics during the review period. Some of these errors appear to have been accidental and can be attributed to the University's attempt to use a narrative disclosure approach as opposed to the more standard tabular format. The use of a narrative or a caveat is an acceptable way of disclosing hate crime data, however, it is important to review the text for accuracy and completeness prior to publication. These types of checks and balances are essential to an institution's ability to demonstrate acceptable levels of administrative capability.

As noted, the following conditions were noted in the PRR and are confirmed in this FPRD:

- None of the Hate Crime disclosures that were included in the ASRs for calendar years 2011-2013 identified the type(s) of criminal offense that was reported. The tabular report only indicated the category of bias, thereby resulting in the underreporting of multiple criminal incidents during the 2010-2013 timeframe.
- The narrative Hate Crime disclosures in the 2014 ASR failed to identify the category of offense and the category of Clery Geography for calendar year 2013²⁶. Furthermore, no Hate Crime Statistics were disclosed in this ASR for calendar years 2011 and 2012.

²⁶ The *Clery Act* requires an institution to disclose for the three most recent years, Hate Crime Statistics in ASRs by category of prejudice. Hate Crime Statistics must include the number of crimes reported to the local police agencies or to a campus security authority that manifest evidence that the victim was intentionally selected, because of the victim's actual or perceived race, gender, gender identity, religion, sexual orientation, ethnicity, National origin, or disability. The *Clery Act* prescribed categories of criminal offenses that an institution must disclose in the Hate Crime Statistics, such as: Criminal Homicide: Murder and Non-negligent Manslaughter, and Manslaughter by Negligence; Sexual Assault: Rape, Fondling, Incest and Statutory Rape; Robbery; Aggravated Assault; Burglary; Motor Vehicle Theft; and Arson. 34 C.F.R. §§668.46(c)(1)(i) through (vii). In addition to all criminal offenses mentioned in this paragraph, Hate Crimes are also reported for incidents of larceny-theft, simply assault, intimidation, and destruction of property/damage/vandalism of property. 34 C.F.R. §668.46(c)(1)(iii).

Notwithstanding these violations, the review team's examination also indicated that the identified deficiencies were, for the most part, satisfactorily addressed by the University's revised internal policies and procedures, and its most recent ASRs. As such, the Department has determined that Berkeley's remedial action plan meets minimum requirements and for that reason, has accepted the University's response and considers this finding to be closed for program review purposes. Nevertheless, the officers and directors of Berkeley officials are put on notice that the University must take all additional actions that may be necessary to address the deficiencies and weaknesses identified by the Department, as well as those that were detected during the preparation of the institution's response and as may otherwise be needed to ensure that these violations do not recur. Please be advised that the accuracy and completeness of Berkeley's crime statistics will be a central focus area of the Department's post-review monitoring program.

Berkeley is, once again, reminded that the exceptions identified above constituted serious and persistent violations of the *Clery Act* that, by their nature, cannot be cured. There is no way to truly "correct" a violation of this type once it occurs. The compilation and disclosure of accurate and complete crime statistics is among the most basic requirements of the *Clery Act* and is fundamental to its campus safety goals. Access to this information permits campus community members and their families to make well-informed decisions about where to study and work and empowers individuals to play a more active role in their own safety and security. Berkeley asserted that it has taken adequate remedial actions, and that, by doing so, has brought its overall campus safety program into compliance with the *Clery Act* as required by the terms and conditions of its PPA. Notwithstanding these actions, the University is advised that its remedial actions cannot and do not diminish the seriousness of these violations, nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

Finding #7: Failure to Compile and Disclose Accurate and Complete Crime Statistics

Citation:

The Clery Act and the Department's regulations require that institutions participating in the Title IV, HEA programs compile and disclose crime statistics for the three most recent calendar years concerning occurrences on campus, in or on non-campus buildings or property, and on public property of the following that are reported to police agencies or to a campus security authority: Criminal Homicide, Manslaughter, Forcible and Non-Forcible Sex Offenses, Robbery, Aggravated Assault, Burglary, Motor Vehicle Theft, and Arson. In addition, institutions must disclose arrests for liquor law violations, drug law violations, and illegal weapons possession. 34 C.F.R. §668.46(c)(1)(viii). The Department's regulations also require that, for Clery Act reporting purposes, participating institutions must compile crime statistics using the definitions of crimes provided in Appendix A to Subpart D of the Department's General Provisions Regulations. 34 C.F.R. §668.46(c)(7).

In addition, the law requires that all Part I offenses, as well as the crimes of Larceny-Theft, Simple Assault, Intimidation, and Destruction/Damage/Vandalism of Property, and all other offenses resulting in bodily harm that manifest evidence that a victim was intentionally targeted due in some part to a perpetrator's bias against members in certain suspect classifications must be reported as Hate Crimes. The six covered categories of bias are: race, gender, religion, sexual orientation, ethnicity or National origin, and disability. The victim's selection may be based on actual or perceived bias. 34 C.F.R. §668.46(c)(3).

Noncompliance:

Berkeley failed to prepare and publish crime statistics in accordance with the Clery Act. Specifically, the University has prepared and published incomprehensible crime statistics in its ASRs for at least five years, from 2009 to 2013. A compilation of crime statistics was published without totals, using unclear and confusing labeling, such as: "Offenses Reported to Police (University and City)" and "Unverified Offenses Reported to Other Campus Officials." This manner of reporting required consumers who reviewed the crime statistics tables to align columns of so-called verified and unverified statistics, and to compute the total number of incidents that were reported for each offense category, geographic location and calendar year themselves.

Berkeley's ASRs for calendar years 2009 to 2013 support this finding.

Any failure to compile accurate and complete crime statistics and to properly disclose them in a clear manner and easy-to-read format causes confusion for users of the data and deprives campus community members and other stakeholders of important campus safety information to which they are entitled.

Required Action:

As a result of these violations, Berkeley must develop and implement internal policies and procedures for disclosing crimes statistics in ASRs in accordance with the Clery Act and the Department's implementing regulations. The policies and procedures must include examples of formatted tables and required labeling in columns in an easy-to-read format for disclosing the statistics for reported incidents of Clery crimes.

As part its response, Berkeley must address each of the misclassifications, underreporting, and potential underreporting exceptions noted in this finding of noncompliance and all others identified in this report. In addition, the University must conduct a file review of relevant records to identify and correct errors in its campus crime statistics for calendar years 2012 through, and including, the end of calendar year 2016.

Berkeley must take the following actions as part of the file review process:

- *Conduct a full examination of all relevant records to identify and correct all errors in its crime statistics. The University must examine all institutional records regarding incidents of crime reported to security-related officials and offices, any offices that students and employees are directed to report matters of crime or conduct and disciplinary matters such as the CSC, Title IX, Human Resources, or any other CSA. Similarly, Berkeley must contact all local enforcement agencies to request necessary records to ensure that all incidents of Clery-reportable crimes were identified and correctly classified. Once compiled, errors in past crime statistics disclosures must be corrected. Any corrections to the Department's online campus security database or to subsequent ASRs must contain a caveat explaining those corrections.*

The University must also ensure that crimes reported to a local police agency or any CSAs that manifest evidence the victim was intentionally selected because of the perpetrator's bias against the victim are disclosed in the statistics as hate crimes. Similarly, all incidents of crime reported that meet the criteria for the VAWA offenses of Dating Violence, Domestic Violence, and Stalking must be identified and disclosed accordingly. The purpose of this exercise is to identify all incidents of crime reported that should have been included in the annual disclosure of campus crime statistics in the University's ASRs and in its submissions to the Department's online campus crime statistics database for calendar years 2012 through 2016.²⁷ As part of its response, Berkeley must also verify that the crime statistics for all Clery-reportable incidents were categorized and disclosed in accordance with the geographical classifications defined in 34 C.F.R. § 668.46(c)(4).

- *Query the UCPD's RMS and CAD database or any other records management systems (including e-mail), electronic or hardcopy, that were or are currently used by any CSA to identify any information that is housed in such systems but that did not result in the completion of an incident report or other record that would normally be evaluated for possible inclusion in the compilation of crime statistics included in the ASR and that were reported to the Department.*
- *Construct clear audit trails to substantiate the accuracy and completeness of its revised crime statistics for calendar years 2012 through 2016. The audit trails must support the corrected crime statistics for all Clery-reportable crime classifications including Part I Offenses, hate crimes, VAWA offenses, drug law violations, liquor law violations, and illegal weapons possession arrests and disciplinary referrals. The audit trail is required to ensure that revised statistics*

²⁷ Although the calendar year 2016 data is not yet public, Berkeley will be required to include its calendar year 2016 crime statistics in the 2017 ASR. Calendar year 2016 is included in this file review as a means of providing reasonable assurance that the statistical data to be included in the 2017 report will be accurate and complete.

are supported with source materials. The audit trail must provide incident report numbers associated with each crime classification, and crime statistics must separate incidents by Clery geography for each calendar year.²⁸ As part of this process, the University must prepare a summary report (in spreadsheet format) that captures the results of the file review. Each entry must include a short narrative that explains the findings of the file review and a summary report in spreadsheet format that includes the following fields: incident report number, original classification, corrected classification, the institution's assessment of whether or not a Timely Warning or Emergency Notification was required, and whether or not an appropriate alert was issued, whether or not the incident was entered on the Daily Crime Log, and, if so, what classification(s) was/were used.

- *Review and revise its existing policies, procedures, internal controls, and training programs to ensure that all incidents of crime reported to the UCPD or other CSAs and local law enforcement agencies are properly classified in accordance with the definitions in Appendix A to Subpart D of 34 C.F.R. Part 668 and are included in its ASR statistical disclosures and in the data submitted to the CSSDACT.*
- *Develop and implement any new policies and procedures that may be needed to ensure that all crimes reported are correctly classified according to the applicable regulatory definitions so that these violations will not recur.*

Please be advised that the University will be required to present the corrected crime statistics and or any omitted or inadequate statements of policy, procedure, or programs in a revised 2016 ASR or in the 2017 report due October 1, 2017. The Department will advise which of these options is most appropriate after the response is received and analyzed.

A copy of all new and revised policies and procedures must accompany Berkeley's response to this Program Review Report.

Institutional Response Summary:

In their official response, Berkeley management concurred with some components of the finding and sought to explain how some of its policies, procedures, and practices meet Federal requirements. Specifically, Berkeley agreed that "crimes tables in the ASRs from 2009 to 2013 could have been less complicated". However, Berkeley "believes" that crime statistics in its ASRs complied with *Clery Act* regulations at 34 C.F.R § 668.46(c) and the Department's guidance in the "Clery Handbook,"²⁹ in Chapter 9. Berkeley

²⁸ The Department emphasizes that reporting for non-campus geography includes buildings that are owned or controlled by recognized student organizations, including but not limited to fraternities and sororities.

²⁹ U.S. Department of Education, The Handbook for Campus Safety and Security and Reporting.

argued that neither the *Clery Act* nor the Clery handbook required “any prescribed format for how your table or tables should look.”³⁰

The University explained that crime statistics were reported in ASRs for years 2009 to 2013 under the column entitled *Unverified Offenses Reported to Other Campus Officials*, because “that category was UCPD’s attempt to acknowledge that many incidents are not reported to UCPD but may be disclosed to other CSAs.” It was further explained that “The Clery Act and Department’s guidance recognize that not all crimes reported to CSAs will be investigated by law enforcement. The University had hoped that separating UCPD-investigated and uninvestigated crimes would further the Clery Act’s objectives by providing a more accurate depiction of criminal activity.” The University declared that it has worked to “steadily improve the format and content of its ASRs over the past several years,” and significant enhancements were made in 2014.

The University stated that remedial action was taken to comply with the requirements that were put forth in the Program Review Report, by performing an audit of its crime statistics for calendar years 2012 through 2016.

Copies of Berkeley’s new and revised policies and procedures for collecting, classifying, counting and disclosing campus crime and fire statistics are codified in Exhibits 9 through 11. The File Review Report identified errors, omissions, and other reporting discrepancies in the University’s statistical disclosures for Calendar Years 2012 - 2016.

Final Determination:

Finding #7 cited Berkeley for its persistent failure to compile and disclose accurate and complete campus crime statistics in its ASRs for calendar years 2009 - 2012, as outlined in the Noncompliance section above. Several contributing factors were identified, including a lack of basic policy and procedure, poor report writing practices, inadequate supervisory control of the report writing and approval process, inadequate internal controls over the statistical compilation process, nonexistent staff training (prior to the review team’s site visit in 2014), weak managerial practices, serious system deficiencies, inadequate communication and coordination between key University offices and external law enforcement agencies, and basic unchecked human error, among other areas of concern. In the initial file sample, the Department identified several errors in UCPD incident reports that directly contributed to the University’s failure to compile and disclose accurate, complete, and fully reconciled crime statistics during the review period. The errors identified in the initial file samples caused serious deficiencies in the Berkeley’s ASRs through at least 2015.

The review team also noticed that the UCPD commonly used unclear, confusing, and ill-defined incident classifications, such as “Offenses Reported to Police (University and City)” and “Unverified Offenses Reported to Other Campus Officials.” Similar inconsistencies were observed in the classifications used by other CSA offices across the University.

³⁰ Crime Statistics Tables.

As a result of these violations, Berkeley was required to take all necessary steps to revise its crime data in advance of finalizing its next ASR. As part of this process, the University was required to conduct a full file review of all incidents of crime that were reported to the institution (inclusive of all CSA reports and incidents reported to local law enforcement agencies) during calendar years 2012 - 2016.

As noted in the Final Determination for Finding #1, the file review process was complicated by serious defects in the University's processes for documenting incidents of crime and misconduct. Additional errors in the file review results were generally attributed to other longstanding weaknesses in the University's policies, procedures, staff training, and systems. As a result, it is now clear that Berkeley did not review the entire universe of reported incidents, as clearly directed in the "Required Actions" section of this finding. The University was also required to evaluate whether or not a Timely Warning or Emergency Notification was needed and whether any such alert was issued. Not all of these evaluations occurred.

Notwithstanding these challenges and deficiencies, Berkeley's file review essentially accomplished the objective of the required action. In all, the study identified Clery-reportable incidents that were reported to UCPD or other CSAs but were not included in the University's crime statistics (in the ASRs or in the responses to the Department's annual surveys) during the file review period.³¹ The results of the file review are summarized in the charts below.³²

Calendar Year 2012 Statistics			
All Geographies	Original Statistical Disclosures in ASR	Underreports Identified in File Review	Revised Crime Statistics
Robbery	51	+5	56
Aggravated Assault	10	+8	18
Burglary	96	+26	122
Illegal Weapons Referrals	2	+1	3

³¹ The Department has not cited Berkeley for "overreports" that were noted during the fieldwork or the file review. The agency emphasizes the importance of ensuring that all statistical disclosures are accurate and complete. Overreports can cause confusion and unwarranted concern among campus community members. At the same time, the Department is especially concerned about the myriad detrimental effects of underreporting that have been well-documented in the agency's PRRs and FPRDs over many years.

³² Berkeley must include accurate, complete, and fully reconciled crime statistics in its 2019 ASR for calendar years 2014, 2015, 2016, 2017, and 2018. The statistical data for 2014 and 2015 may be presented as part of the statistical grid or in caveats and notes to the report.

Calendar Year 2013 Statistics

All Geographies	Original Statistical Disclosures in ASR	Underreports Identified in File Review	Revised Crime Statistics
Murder and Non- Negligent Manslaughter	0	+1	1
Robbery	58	+4	62
Motor Vehicle Theft	41	+1	42
Arson	6	+3	9
Liquor Law Referrals	18	+237	255

Calendar Year 2014 Statistics³³

All Geographies	Original Statistical Disclosures in ASR	Underreports Identified in File Review	Revised Crime Statistics
Robbery	45	+1	46
Aggravated Assault	14	+6	20
Burglary	72	+14	86
Drug Abuse Arrests	115	+17	132
Liquor Law Referrals	13	+396	409

Calendar Year 2015 Statistics

All Geographies	Original Statistical Disclosures in ASR	Underreports Identified in File Review	Revised Crime Statistics
Rape	17	+5	22
Fondling	28	+5	33
Robbery	36	+5	41
Aggravated Assault	16	+1	17
Burglary	54	+5	59
Domestic Violence	13	+2	15
Dating Violence	10	+6	16
Drug Arrests	85	+19	104
Liquor Law Referrals	10	+331	341
Drug Abuse Referrals	68	+12	80

³³ The file review identified two underreports in the VAWA categories, specifically an incident of Dating Violence and an incident of Domestic Violence, however, because disclosure of VAWA offenses was not mandatory in 2014, the Department did not include those incidents in this chart and will the CACD's fine referral will not recommend any civil penalties for these omissions.

Calendar Year 2016 Statistics			
All Geographies	Original Statistical Disclosures in ASR	Underreports Identified in File Review	Revised Crime Statistics
Rape	42	+9	51
Fondling	20	+3	23
Robbery	36	+4	40
Burglary	52	+6	58
Domestic Violence	12	+1	13
Dating Violence	16	+6	22
Drug Abuse Arrests	79	+8	87
Liquor Law Referrals	393	+389	782
Drug Abuse Referrals	35	+39	74
Illegal Weapons Referrals	1	+1	2

Once again, the Department must reiterate that the substantive and procedural errors identified in the PRR and the additional violations that were exposed through the file reviews resulted in significant and compounding *Clery Act* violations over the course of nearly a decade. At various points during that time, University officials were told or otherwise became aware of material defects in its crime statistics, including instances of under and overreporting, and failed to make necessary corrections. It is in this context that the Department must note that the omission of a single incident of crime from an institution's ASR or its data submissions to the Department necessarily results in multiple years of underreporting. For example, in the chart above, the University's own file review determined that the institution failed to disclose five rapes that were reported in 2015. While the chart could be read as indicating that crimes were only omitted from the institution's 2016 ASR, they were actually omitted in the 2016, 2017 and 2018 ASRs because any *Clery*-reportable offense from 2015 were to be included in the statistical disclosures in the next three ASRs.

The Department carefully examined the University's narrative response and supporting documentation, including its file review report. Based on the review team's analysis and the University's admissions, each element of the initial finding is hereby sustained. Berkeley's self-audit of statistical data found numerous errors. Crime statistics were underreported in ASR for years 2009 through 2017.³⁴ Although the above charts only provided statistical errors for calendar years 2012 through 2016, the noted errors and the organizational weaknesses that gave rise to them date back at least as far as 2006 and persisted at least through 2016.³⁵

³⁴ The Department acknowledges that Berkeley produced a revised 2017 ASR dated April 3, 2018.

³⁵ The Department substantially relied on Berkeley's file review to determine the number of underreported incidents that were previously excluded from the University's disclosures of crime statistics during the 2012-2016 timeframe. However, given the lingering concerns about the University's administrative weaknesses, the Department has substantial reason to believe that other violations may have occurred during and after the file review period. Notwithstanding these ongoing concerns, the Department will recognize these findings as representing the minimum levels of noncompliance that occurred during the review period and base any sanctions on these representations. Going forward, Berkeley must take care to provide reasonable assurance that such violations will not continue. Compliance with the Department's

Notwithstanding these serious violations, the review team's examination also indicated that the University has, for the most part, adequately addressed these violations through its new and revised internal policies, procedures, training programs, and system reforms. For example, Berkeley claimed that it developed and implemented new systems to manage the reporting process within its Student Conduct, Residential Life, and Sexual Violence and Harassment Prevention programs. The University has also engaged in an ambitious effort to employ and empower staff in key offices, has deployed technology to better document incidents and facilitate appropriate follow-up, and has enhanced its policies, procedures, and internal controls across the enterprise. By 2018, it appears that these efforts began to yield tangible improvements. For these reasons, the Department has accepted the University's response and considers this finding to be closed for the purposes of this program review. Nevertheless, the University officials and directors, including the institution's Clery Compliance Officer and Police Records Manager, are advised that they must take any additional actions that may be necessary to address the deficiencies and weaknesses identified by the Department, as well as those that were detected during the preparation of the University's response to the Department's report and/or as may otherwise be needed to ensure that these violations do not recur.

Berkeley is reminded that the exceptions identified above constituted 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. The disclosure of accurate, complete, and fully reconciled campus crime statistics in the ASR and in its reporting to the CSSDACT is fundamental to the goals of the *Clery Act*. Access to this information permits campus community members and their families to make well-informed decisions about where to study and work and empowers individuals to play more active roles in their own safety and security. Errors and omissions in an institution's statistical disclosures of the type documented in the finding and the University's own file review serve as further indicia of the administrative impairments that plagued the institution during most of the review period. The failure to accurately disclose incidents of crime that were reported directly to the UCPD and other CSAs raised a special concern for the Department. Student complainants raised this concern as well. Failures of this type always call an institution's ability and/or willingness to properly administer the Title IV, student financial aid programs into serious question. At this point, Berkeley management has asserted that the institution has effectively brought its overall campus safety operations program into compliance with the *Clery Act* as required by its PPA. Nevertheless, the University is advised that such actions cannot and do not diminish the seriousness of these violations, nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

requirements and the institution's policies and procedures related to the writing and approval of incident reports, the classification and counting of reported offenses, and the compilation and disclosure of crime statistics will be a central focus of the Department's ongoing monitoring program.

Finding #8: Reporting Discrepancies between Crime Statistics Published in the ASR and Data Submitted to the Crime Statistics Database

Citation:

The Clery Act and the Department's regulations require Title IV participating institutions to compile, publish, and distribute statistics concerning the occurrence on campus of the following crimes: Criminal Homicide, Manslaughter, Forcible and Non-Forcible Sex Offenses, Robbery, Aggravated Assault, Burglary, Motor Vehicle Theft, and Arson. In addition, institutions are required to disclose arrests and disciplinary referrals involving violations of Federal or State drug, liquor and weapons laws. 34 C.F.R. §668.46(c)(1). For Clery Act reporting purposes, participating institutions must classify incidents of crime based on the definitions in Appendix A to Subpart D of Section 668 of the General Provisions Regulations. 34 C.F.R. §668.46(c)(7). Each participating institution must also submit its crime statistics to the Department for inclusion in the Office of Postsecondary Education's (OPE) online campus crime statistics database. 34 C.F.R. §668.41(e)(5).

The Clery Act also requires that all Part I offenses, as well as the crimes of Larceny-Theft, Simple Assault, Intimidation, and Destruction/Damage/Vandalism of Property, and all other offenses resulting in bodily harm that manifest evidence that a victim was intentionally targeted due in some part to a perpetrator's bias against members in certain suspect classifications, be reported as Hate Crimes. The six covered categories of bias are: race, gender, religion, sexual orientation, ethnicity or National origin, and disability. The victim's selection may be based on actual or perceived bias. 34 C.F.R. §668.46(c)(3).

Noncompliance:

Berkeley failed to submit accurate crime statistics to the OPE online campus crime statistics database. Specifically, crime statistics that Berkeley submitted online to OPE did not match statistical data that the University published in its ASRs for the same offense types, geographic locations and calendar years.

Institutions must be able to demonstrate the accuracy and completeness of their crime statistics with suitable documentation. For this purpose, Berkeley uses audit trails to compile and tally all of its Clery-reportable crimes that are reported to the campus police, local law enforcement agencies and other CSAs. The audit trails identify the incident report number, the offense category, geographic location and calendar year for each Clery-reportable crime.

The Department's review team compared Berkeley's audit trails against the crime statistics that were electronically submitted to OPE and those that were published in the ASRs. Discrepancies were found.

A selected group of those crime reporting discrepancies are described in the paragraphs and tables below.

In Table 1, Berkeley's 2012 ASR showed 31 Forcible Sex Offenses, on-campus, during calendar year 2011. However, in 2012, the University reported, online to OPE, that 30 Forcible Sex Offenses occurred on-campus property that same calendar year. And yet again, Berkeley's 2011 audit trail showed 24 Forcible Sex Offenses on-campus property.

Forcible Sex Offenses On-Campus Calendar Year (CY) 2011	CY 2011 Data Reported in 2012 ASR	CY 2011 Data Reported to OPE in 2012	CY 2011 Berkeley's Audit Trail
	31	30	24

Table 1

In Table 2, the 2013 ASR showed 68 Burglaries on-campus property in calendar year 2011. However, in 2013, Berkeley's online submission to OPE indicated that 69 burglaries had occurred on-campus property during calendar year 2011. And then, in the University's audit trail for calendar year 2011, 40 Burglaries were reported as having occurred on-campus during that same time period.

Burglaries On-Campus Calendar Year (CY) 2011	CY 2011 Data Reported in 2013 ASR	CY 2011 Data Reported to OPE in 2013	CY 2011 Berkeley's Audit Trail
	68	69	40

Table 2

Similarly, Table 3 shows that Berkeley's 2013 ASR indicated that 288 Liquor Law Violations (LLVs) occurred on-campus during calendar year 2011. Yet, that same year, the University made an online submission to OPE that revealed 289 campus disciplinary referrals involved LLVs for the same geographic location and calendar year. Despite those numbers, Berkeley's 2011 audit trail showed 119 campus disciplinary referrals involved LLVs on-campus property.

Referrals for Liquor Law Violations On-campus Property Calendar Year (CY) 2011	CY 2011 Data Reported in 2013 ASR	CY 2011 Data Reported to OPE in 2013	CY 2011 Berkeley's Audit Trail
	288	289	119

Table 3

This finding is supported by Berkeley's 2011 audit trail, crime statistics that were submitted online to OPE during reportable years 2012 and 2013, and statistical data that was published in the 2012 and 2013 ASRs for calendar years 2011.

Failure to classify and disclose incidents of crime reported in an accurate and consistent manner violates the HEA and the Department's regulations, confuses users of the ASR and the Department's campus crime database, and deprives the campus community and the public of vitally important crime information.

Required Action:

As a result of these violations, Berkeley is required to review and improve its policies, procedures, internal controls, and training programs to ensure that all incidents of Clery crimes reported to the campus police, local police, or non-law enforcement campus security authorities are disclosed in the same manner as are the crimes statistics submitted online to OPE and published in ASRs.

A copy of the revised policies and procedures must accompany the University's response to this Program Review Report.

All statistical data for the years 2010 to present must be confirmed and edited as necessary to ensure consistency for the aforementioned years.

Furthermore, Berkeley must ensure that all statistical data is accurate and complete for all Clery-reportable incidents. Such data must be organized and disclosed by offense classification, Clery Geography category, and by calendar year. The University will be required to include the data in a revised ASR. Corrections to Berkeley's CSSDACT data submissions will also be required.

Institutional Response Summary:

In their official response, Berkeley management acknowledged that the institution made some clerical errors in its past disclosures of Clery Act crime statistics. It claimed those clerical errors were simply typographical mistakes, not intentional attempts to underreport crimes. The University declared that "it has addressed this and other oversights by implementing stringent checks and balances and ensuring two-person verification for both the AFSSR statistical disclosure and the CSSDACT submission."

The University agreed that its 2012 ASR for Forcible Sex Offenses and Liquor Law Violations contained clerical errors. It stated that the other findings appeared to be misunderstandings of the data and audit trail.

In addition, the University acknowledged that "the discrepancy between 31 forcible sex offenses in the 2012 ASR and 30 forcible sex offenses reported to OPE is a result of a clerical error." It stated that the discrepancy was still being determined, and a supplement to this response may be provided, after the outcome of its ongoing file review audit. Regarding the audit trail, it explained that the number "24" in the audit trail appears to be the number of Forcible Sex Offenses that were reported to the *police*, and that number was listed as such in the 2012 ASR. [italicized for emphasis.]

However, the University disagreed with the finding that had cited its 2013 ASR showed 68 Burglaries on campus property in calendar year 2011, and its online submission to OPE had indicated that 69 burglaries had occurred in that same geographic location and calendar year. Copies of the University's 2013 ASR, its online submission to OPE and the audit trail were provided to demonstrate that there were 40 on-campus burglaries in 2011.

Lastly, Berkeley agreed there was a discrepancy between the 288 LLVs in the 2013 ASR and the 289 LLVs for referrals reported to OPE. It stated that a clerical error was the cause. The University is still determining the cause of the discrepancy and may supplement this response based on the outcome of its ongoing audit. Berkeley provided a copy of its 2013 ASR to demonstrate that the "119" number in the audit trail appears to be the number of arrests for LLVs, rather than referrals for LLVs that occurred on campus property during calendar year 2011.

Berkeley attested that its policies were reviewed, and several new procedures were implemented to ensure the accuracy of its crime data. Copies of the newly implemented procedures were provided in Exhibits 8-11.

Final Determination:

Finding #8 cited Berkeley for its failure to submit accurate crime statistics to the Department's online campus crime statistics database. Specifically, the review team observed that the statistics that the University submitted online to OPE did not match statistical data that was included in its ASRs for the same offense types, geographic locations and calendar years during the review period. The specific discrepancies are listed in the charts in the Noncompliance section above.

As a result of these violations, Berkeley was required to respond to each identified exception, and take all necessary corrective actions to address the deficiencies and the organizational/process weaknesses that contributed to them. Berkeley was also required to develop a comprehensive system of policy, procedure, and systems improvements to ensure that the University's crime statistics are compiled and disclosed in an accurate, complete, and fully reconciled manner going forward. In its response, Berkeley concurred with the finding, described its remedial actions, and submitted documentation in support of its claims.

The Department carefully examined all available information, including Berkeley's narrative response and supporting documentation. Based on that review, and the University's admissions, the violations identified in the initial finding are sustained, except for the violation associated with the reporting of crime statistics for burglaries on campus property for calendar year 2011. An exception was also provided for the statement in the finding which indicated that "119" was listed on the 2011 audit trail as the number of campus disciplinary referrals for LLVs that occurred on campus property.

This examination also indicated that the identified violations were, for the most part, satisfactorily addressed by Berkeley updated policies and procedures. As such, the Department has determined that the University's corrective action plan meets minimum requirements and, for these reasons, has accepted Berkeley's response and considers this finding to be closed for the purposes of this Program Review. Notwithstanding this action, the Directors and officials of Berkeley are advised that they must take any other action that may be needed to address the deficiencies identified by the Department, as well as any additional deficiencies and weaknesses that were detected during the

preparation of Berkeley's response, and/or as may be needed to otherwise ensure that these violations do not recur.

Once again, Berkeley is reminded that the exceptions identified above constitute serious and persistent 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. The compilation and dissemination of accurate, complete, and fully reconciled crime statistics are among the most basic requirements of the *Clery Act* and are fundamental to its campus safety goals. The University asserted that it has taken adequate remedial actions, and that, by doing so, is now in compliance with the *Clery Act*'s provisions as required by its PPA. Nevertheless, Berkeley is advised that its remedial actions, whether already completed or planned for the future, cannot and do not diminish the seriousness of these violations, nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

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

Citation:

The Clery Act and the Department's regulations require that all institutions that receive Title IV, HEA funds must, by October 1 of each year, publish and distribute to its current students and employees, a comprehensive Annual Security Report (ASR) that contains, at a minimum, all of the statistical and policy elements enumerated in 34 C.F.R. §668.46(b). With the exception of certain drug and alcohol prevention program information, cross-referencing to other publications is not sufficient to meet the publication and distribution requirements. §485(f) of the HEA; 34 C.F.R. §668.46(b).

The ASR must be published and actively distributed as a single document. Acceptable means of delivery include U.S. Mail, hand delivery or campus mail distribution to the individual, or posting on the institution's website. If the institution chooses to distribute its report by posting to an internet or intranet site, the institution must, by October 1 of each year, distribute a notice to all students and employees that includes a statement of the report's availability, its exact electronic address, a description of its contents, and an advisement that a paper copy will be provided upon request. 34 C.F.R. §668.41(e)(1). These regulations also require institutions to provide a notice containing this information to all prospective students and employees. This notice must also advise interested parties of their right to request a paper copy of the ASR and to have it furnished upon request. 34 C.F.R. §668.41(e)(4).

The ASR must include statistics for incidents of crimes reported during the three most recent calendar years. The covered categories include criminal homicide (murder and non-negligent manslaughter), forcible and non-forcible sex offenses, robbery, aggravated assaults, burglary, motor vehicle theft, and arson. Statistics for certain hate crimes, as well as arrest and disciplinary referral statistics for violations of certain laws pertaining to illegal drugs, illegal usage of controlled substances, liquor, and weapons, also must be disclosed in the ASR. These crime statistics must be published for the following

geographical categories: 1) on campus; 2) on-campus student residential facilities; 3) certain non-campus buildings and property; and 4) certain adjacent and accessible public property. 34 C.F.R. §668.46(c)(1).

The ASR also must include several policy statements. These disclosures are intended to inform the campus community about the institution's security policies, procedures, and the availability of programs and resources, as well as channels whereby victims of crime may seek recourse. In general, these policies include topics such as the law enforcement authority and practices of campus police and security forces, incident reporting procedures for students and employees, and policies that govern the preparation of the report itself. Institutions are also required to disclose alcohol and drug policies and educational programs. Policies pertaining to sexual assault education, prevention, and adjudication must also be disclosed. Institutions also must provide detailed policies on the issuance of Timely Warnings, Emergency Notifications, and evacuation procedures. All required statistics and policies must be included in the ASR. §485(f) of the HEA; 34 C.F.R. §668.46(b).

Noncompliance:

There are two parts to this finding.

Part A.

Berkeley failed to produce and distribute an ASR as a single comprehensive document in 2013 by the October 1 deadline. In addition, Berkeley failed to notify to its prospective students and prospective employees about the availability of this report.

During routine testing, the review team examined the University's website on November 6, 2013 to locate the 2013 ASR and to ensure that the link to the report was operable. The team noted that Berkeley did not produce a comprehensive ASR (all required content included between a properly-titled front and back cover), and, instead, merely posted a cover page of its 2013 ASR with segments of the report embedded in multiple links, distributing the notice of availability about the report to all of its current students and employees at <http://safetycounts.berkeley.edu>. The Department subsequently contacted UCPD and informed the Captain of Field Operations that the ASR was not posted on the University's website as a single complete document for students and employees to access.

On May 13, 2014, the Department revisited the website at <http://safetycounts.berkeley.edu> and found portions of the ASR posted to multiple links. However, this time, a new link had been added, entitled "Get a print copy!" Upon clicking this new link, users of the site were taken to another webpage at <http://safetycounts.berkeley.edu/content/get-print-copy> with two additional links entitled, "Get a print copy!" and "You may also download the 60 page PDF of the

printed book here.” Both links were inoperable and did not take users of the website to an accurate and complete ASR.

During the site visit, the review team informed UCPD’s Police Chief that the 2013 ASR was not posted on the University’s Internet site as a comprehensive single document. The Chief said, “I did not like the way it was laid out. The entire document had been up. The full report had been posted 3-4 months ago.” In a subsequent interview, Berkeley’s Clery Compliance Officer said that “links in the Annual Security [ASR] and Fire Safety [AFSR] were not working.” She further explained, “There was a technical issue for a short time and then it was resolved.”

Regarding the required notification of prospective students and employees about the ASR, Berkeley also failed to distribute a conspicuous notice. The Department searched for the notice about the report in the University’s General Catalog, the admissions and housing webpages, employment applications, and the human resources website and found none. Moreover, University officials were not able to direct the team to any such disclosure.

This finding is supported by the following: 1) Multiple inoperable links to the 2013 ASR and other required disclosures on Berkeley’s official website; 2) An email, dated September 25, 2013, from the Vice Chancellor of Business and Administrative Services (B&AS); 3) Interviews with the Chief of Police and the Clery Compliance Officer at UCPD Berkeley, regarding the posting of the ASR; 4) The section of the Undergraduate Admissions website entitled, Freshmen Applicant, Transfer Applicant, and International Applicant; 5) the University of California Berkeley General Catalog - Courses and Curricula for academic years 2011-2013; and 6) Berkeley’s website, entitled, Living at Cal 2013-2014, Berkeley Housing at www.housing.berkeley.edu/livingatcal/safety.html.

Part B.

Berkeley failed to distribute ASRs to all its current students by the prescribed Federal deadline date of October 1 each year. Specifically, the University distributed the notice of availability about its 2010, 2011 and 2012 ASRs solely to its “staff, all academic titles, deans, directors, department chairs and senior administrative officers” and did not include all of its current students in the annual distribution processes.

Copies of the notice of availability from the Vice Chancellor of B&AS, dated September 30, 2010, September 29, 2011, and September 28, 2012, were retained by the Department as supporting documents for this finding.

Failure to produce an accurate and complete ASR, to actively distribute such a report to enrolled students and current employees, and to actively notify prospective students and employees in accordance with the Department’s regulations deprives campus community members and other stakeholders of important campus safety information to which they are entitled.

Required Action:

As a result of these violations, Berkeley must review and revise its internal policy and procedures related to the production and distribution of its ASR. Going forward, the University must also take steps to ensure that the ASR and AFSR are produced as comprehensive documents, are properly titled, and are materially complete. The University must ensure that the reports are actively distributed to all enrolled students and current employees, and that all prospective students and employees are actively notified about the availability of these reports. Steps must be taken to ensure that the notice to prospective members of the campus community includes a summary of the ASR's contents and instructions on how to obtain a copy of the report.

A copy of any revised publications, forms, and webpages containing the required notification statement must be submitted with Berkeley's response to this Program Review Report.

Institutional Response Summary:

In their official response, Berkeley management claimed that “the hard-copy version of its 2013 ASR was produced and distributed as a single comprehensive document. The 2013 ASR was also available online, with each section posted under a separate hyperlink.” However, Berkeley explained that “UCPD had followed the advice of its then-marketing director who believed the report would be more easily digestible in this format and understood that this format was not precluded by the Clery Act or regulations. The University acknowledges that this format was not ideal and, for that reason, reposted the 2013 ASR as a single hyperlink in mid-2014.”

Additionally, the University did not state whether it failed to distribute a conspicuous notice about the ASRs to prospective students and employees. Berkeley simply advised the Department where its ASRs “are made available” to prospective students and employees on its admissions website at (<http://admissions.berkeley.edu/behealthy>) and on its employment website at (<http://jobs.berkeley.edu/>).

In Part B of this finding, Berkeley advised the Department that notices for “all ASRs during the review period³⁶ were sent, prior to October 1st, to all students, faculty and employees of the University, with the exception of the 2010 and 2011 ASRs which inadvertently omitted students from the distribution.” Berkeley claimed that the noncompliance was “an administrative oversight, not the result of inadequate capacity or lack of understanding of distribution requirements.”

The University attested that all of the required actions were completed as stipulated in the PRR.

³⁶ In this paradigm, the review period is specifically for ASRs for years 2010, 2011 and 2012.

A “flat file” summary of the distribution was provided in the University response. Copies of the notices of availability about the 2010, 2011 and 2012 ASRs were provided in Exhibit 14.

Final Determination:

Finding #9 cited Berkeley for repeated failures to comply with the ASR active distribution and notification requirements, as outlined in the Noncompliance section above. In Part A, the review team cited the University for not producing and distributing the 2013 ASR as a single comprehensive document by the October 1 deadline. Berkeley also failed to actively notify to its prospective students and prospective employees about the availability of the 2013 report. In Part B, the review team cited Berkeley for not actively distributing its 2010, 2011, and 2012 to enrolled students by October 1 each year. The review team observed that the University addressed the notice to certain categories of employees. This notice was then only sent to “staff, all academic titles, deans, directors, department chairs and senior administrative officers,” with the result that enrolled students were not included in the annual distribution.

To address these deficiencies, the University was required to review and revise its existing policies and procedures related to production and distribution of its future ASRs and implement new policies and procedures, as needed, to provide reasonable assurance that these violations will not recur. The new processes must also provide for the active notification of prospective students and employees. The notice must include a summary of the ASR’s contents and instructions on how to obtain a copy of the report. A copy of any revised publications, forms, and webpages containing the required notification statement were to accompany Berkeley’s response to this Program Review Report. In its response, the University partially concurred with this finding and characterized the noncompliance as an “administrative oversight.” Berkeley also described the remedial actions that it had taken and submitted documentation in support of its claims.

The Department carefully examined all available information, including Berkeley’s narrative response and supporting documentation. Based on that review and the University’s partial admissions, the Department has determined that the violations identified in the initial finding are sustained, with the exception of the element that cited the institution for not distributing the 2012 ASR to current students by the regulatory deadline.³⁷ The Department’s examination also indicated that the identified violations were, for the most part, satisfactory addressed by the University’s responsive documents, including its new and revised internal policies and procedures. As such, the Department has determined that Berkeley’s remedial action plan meets minimum requirements, and, for that reason, has accepted the response and considers this finding to be closed for the purposes of this Program Review. Nevertheless, the officials and directors of Berkeley must take all other action that may be necessary to address the deficiencies identified by the Department, as well as any additional deficiencies and weakness that were detected

³⁷ As part of its response, Berkeley submitted a copy of a second notice regarding the 2012 ASR. Per these records, this notice was distributed to “students” on September 28, 2012 at 04:10:45 p.m.

during the preparation of Berkeley's response, and /or as may be needed to otherwise ensure that these violations do not recur.

Berkeley is, once again, reminded that the exceptions identified above constituted serious violations of the *Clery Act* that, by their nature, and cannot be cured. There is no way to truly "correct" violations of this type once they occur. The University asserted that it has taken adequate remedial actions and, that by doing so, is now in compliance with the *Clery Act* as required by its PPA. The production and timely distribution of an accurate and complete ASR are among the most basic requirements of the *Clery Act* and are fundamental to its campus safety goals. As such, Berkeley officials must understand that any failure to publish and distribute an accurate and complete ASR deprives students and employees of important campus safety information to which they are entitled. For these reasons, the University is advised that its remedial actions cannot and do not diminish the seriousness of these violations nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

Finding #10: Omitted and/or Inadequate ASR and AFSR Information Disclosures

Citation:

The Clery Act and the Department's regulations require institutions to include several policy statements in their ASRs. These disclosures are intended to inform the campus community about the institution's security policies and procedures, and the availability of programs and resources as well as channels for victims of crime to seek recourse. In general, these policies include topics such as the law enforcement authority and practices of campus police and security forces, incident reporting procedures for students and employees, and policies that govern the preparation of the report itself. Institutions are required to disclose their drug and alcohol education and prevention programs. Policies pertaining to sexual assault education, prevention, and adjudication and policies governing the issuance of Timely Warnings and ENs must be disclosed in detail. The institution must include the policies and crime statistics in a single comprehensive document, the ASR. With the exception of certain drug and alcohol program information, cross-referencing to other publications is not sufficient to meet the publication and distribution requirements of the Act. §485(f) of the HEA; 34 C.F.R. §668.46(b); 34 C.F.R. §668.41(e).

Federal regulations require any institution that provides any on-campus housing to develop and implement policies and procedures that it will enforce when a student who resides in those on-campus housing facilities is determined missing, and to publish these policies in its ASR. The policies must include statements that identify the individual or organizations to which students, employees or other individuals should report when a student has been missing for 24 hours and require that any missing student report be referred to the institution's police or security department or local law enforcement. In addition, students who reside in on-campus housing must be informed of the option to identify a contact person who will be informed in the event that they are missing, that

their contact information will be registered confidentially, and for students who are under 18 years of age, a statement that their custodial parent will be notified. The policy must indicate that, in all instances, law enforcement will be notified. It must also state that, for any member of the campus community who is reported or deemed to be missing, his/her contact person will be notified within 24 hours of that realization; if they are under 18, their custodial parent will be notified; and that in all instances, law enforcement will be notified within 24 hours. 34 C.F.R. §668.46(h).

Federal regulations require institutions that provide on campus housing to publish AFSRs that include fire statistics for each on-campus student housing facility for the previous three years. The statistics must include the number of fires, the cause of each fire, the number of persons who received fire-related injuries, the number of deaths caused by fires, as well as the value of any property damage caused by fire. The report must additionally contain, at a minimum, a description of the fire safety system in each housing facility, the number of fire drills held during the previous year, and the institution's policies and procedures pertaining to fire safety. The policy statements must address any rules regarding electrical appliances, smoking, and open flames in student housing, and provide the procedures that students and employees should use in the case of a fire, along with procedures for evacuation during a fire. Statements must include any policies regarding fire safety education and training programs provided to students and employees, and any plans for future improvements in fire safety. In addition, an institution that provides on-campus housing must maintain a fire log, which must record the reporting of a fire by date, the nature of that fire, and the general location of the incident. Entries in the fire log are required to be made within two business days of the incident, and, for the previous 60 days, the fire log must be made available to the public for inspection. 20 U.S.C §1092; 34 C.F.R. §668.49.

An institution may choose to publish its fire safety report with its ASR concurrently and may do so if the title of the report clearly states that the report contains both the ASR and the AFSR. If an institution chooses to publish the AFSR separately from the ASR, it must include information in each of the two reports about how to directly access the other. 34 C.F.R. §668.41(e)(6).

Noncompliance:

Berkeley failed to disclose in its ASRs and AFSRs statements of policy and procedure, as required by the Clery Act and the HEA fire safety rules. Specifically, Berkeley's ASRs and AFSRs for reporting years 2009 through 2014 included inadequate or omitted disclosures concerning required policy, procedures, and programming information for campus safety and security and fire safety. In the report documents pertaining to each of the above-referenced years, Berkeley averaged at least five disclosure violations with respect to policy, procedure, and programming information.

The University's persistent failure to develop and disclose required statements of policy and procedures in its ASRs and AFSRs is indicative of Berkeley's inability or unwillingness to properly administer the Clery Act and the HEA fire safety rules.

The University's missing and inaccurate, and deficient policy and procedure disclosures are outlined below:

2014 ASR/AFSR - Omitted/Inadequate Disclosures

- 1. Failure to provide crime statistics for Hate Crimes for calendar years 2011 and 2012.*** *The University failed to report, by category of prejudice, crimes reported to local police agencies or to a campus security authority that manifested evidence that the victim was intentionally selected because of an actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability. Now amended to include gender identity and national origin. 34 C.F.R. §668.46(c)(3).*
- 2. Failure to provide crimes by location for Hate Crimes for calendar years 2011 through 2013.*** *The University did not provide a geographic breakdown of the Hate Crime statistics. 34 C.F.R. §668.46(c)(4).*
- 3. Failure to provide accurate student housing facility fire safety systems information.***
The University failed to provide accurate and consistent data about fire safety systems for on-campus student residential facilities. The 2010 and 2011 AFSRs showed that CKC Buildings #12, #16, and #17 were comprised of full sprinkler systems; however, the 2012 and 2013 AFSRs showed that CKC Building #12 had a partial sprinkler system of 35%, and that CKC Buildings #16 and #17 did not have sprinkler systems at all. There was no explanation provided for these changes in status. 34 C.F.R. §668.49(b)(2).

2013/AFSR - Omitted/Inadequate Disclosures

- 1. Failure to provide accurate information concerning the preservation of evidence after a sexual assault.*** *The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).*
- 2. Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense.*** *The University failed to provide accurate and clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).*
- 3. Failure to provide an accurate and full explanation of available sanctions for a final determination.*** *The University failed to provide the full range and definition of available sanctions for a final determination regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).*

4. **Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation.** The University failed to provide a list of titles of the persons or organizations responsible for carrying out the actions associated with the issuance of emergency responses and/or evacuation. 34 C.F.R. §668.46(g)(4).
5. **Failure to provide a policy statement for the notification of local law enforcement within 24 hours of a determination that a student is missing.** The University failed to provide the statement that the local law enforcement agency will be notified within 24 hours of a determination that a student is missing. 34 C.F.R. §668.46(h)(1)(vi).
6. **Failure to provide accurate student housing facility fire safety systems information.** The University failed to provide consistent and accurate data for student housing facility fire safety systems. The 2010 and 2011 AFSRs reflected that CKC Building 12, 16, and 17 contained full sprinkler systems. However, the 2012 AFSRs reflect that CKC Building 12 only has a partial sprinkler system of 35%, and that CKC Buildings 16 and 17 do not have any sprinkler systems at all. No explanation for these changes was provided.³⁸ 34 C.F.R. §668.49(b)(2).

2012/AFSR - Omitted/Inadequate Disclosures

1. **Failure to provide accurate information concerning the preservation of evidence after a sexual assault.** The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).
2. **Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense.** The University failed to provide accurate and clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).
3. **Failure to provide an accurate and full explanation of available sanctions for a final determination.** The University failed to provide the full range and definition of available sanctions for a final determination regarding rape, acquaintance rape, or other forcible of non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).
4. **Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation.** The University failed to provide a list of titles of the persons or organizations responsible for

³⁸ The Clery Act's fire safety requirements do not require the installation or maintenance of any specific fire detection or suppression equipment; however, institutions are required to include accurate and transparent information in the AFSR about the presence and functionality of any such equipment that is used in student residential facilities.

carrying out the actions associated with the issuance of emergency response and/or evacuation. 34 C.F.R. §668.46(g)(4).

- 5. Failure to provide a policy statement for the notification of local law enforcement within 24 hours of a determination that a student is missing.** *The University failed to provide a statement that the local law enforcement agency will be notified within 24 hours of a determination that a student is missing. 34 C.F.R. §668.46(h)(1)(vi).*

2011/AFSR - Omitted/Inadequate Disclosures

- 1. Failure to provide accurate information concerning the preservation of evidence after a sexual assault.** *The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).*
- 2. Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense.** *The University failed to provide accurate and clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).*
- 3. Failure to provide an accurate and full explanation of available sanctions for a final determination.** *The University failed to provide the full range and definition of available sanctions for a final determination regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).*
- 4. Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation.** *The University failed to provide a list of titles of the persons or organizations responsible for carrying out the actions associated with the issuance of emergency response and/or evacuation. 34 C.F.R. §668.46(g)(4).*
- 5. Failure to provide a policy statement for the notification of local law enforcement within 24 hours of a determination that a student is missing.** *The University failed to provide a statement that the local law enforcement agency will be notified within 24 hours of a determination that a student is missing. 34 C.F.R. §668.46(h)(1)(vi).*

2010ASR/AFSR - Omitted/Inadequate Disclosures

- 1. Failure to provide accurate information concerning the preservation of evidence after a sexual assault.** *The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and*

referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).

2. **Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense.** The University failed to provide accurate and clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).
3. **Failure to provide an accurate and full explanation of sanctions for a final determination.** The University failed to provide the full range and definition of sanctions for a final determination regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).
4. **Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation.** The University failed to provide a list of titles of the persons or organizations responsible for carrying out the actions associated with the issuance of emergency response and/or evacuation. 34 C.F.R. §668.46(g)(4).

This finding is supported by Berkeley's ASRs and AFSRs for calendar years 2010-2014.

The Clery Act is a consumer information initiative based on the premise that students and employees are entitled to accurate and complete information about campus safety and crime prevention matters. The wide and transparent disclosure of this information is essential to the goals of the law and allows the campus community to be more fully informed and actively provide for their own safety. Any failure in this area deprives the campus community of vital campus safety information and effectively negates the intent of the Act.

Required Action:

As a result of these violations, Berkeley is required to take all necessary corrective actions to cure this violation and all others identified in this Program Review Report. Specifically, the University is required to review and revise its current policies and procedures that govern the production of the ASR and AFSR and to then develop and implement additional internal guidance as needed to provide reasonable assurance that these violations will not recur. As part of this process, Berkeley must establish processes that will ensure the development, implementation, and disclosure of accurate and complete campus safety, crime prevention, and fire safety policies and procedures.

Moreover, Berkeley must conduct an internal review of its 2015 and 2016 ASRs and AFSRs to identify all omitted and inadequate disclosures, with a special focus on the VAWA provisions. Once all deficiencies are identified, the institution must use this information to produce a revised 2016 ASR and AFSR (or a suitable combined report). A copy of the draft report must accompany the University's response to this Program Review Report.

Based on an evaluation of all available information, including Berkeley's response, the Department will determine if additional actions will be required to address this violation. The Department will advise the University accordingly in the FPRD.

Institutional Response Summary:

In their official response, Berkeley management registered their disagreement with most aspects of the finding. Specifically, the University asserted that it "believes that its ASRs contained nearly all the required disclosures". In addition, the University stated that in responding to this finding, it has pointed out "the pages of its ASRs that contain the necessary statements of policy and procedure."

Final Determination:

Finding #10 cited Berkeley failed to disclose in its ASRs and AFSRs statements of policy and procedure, as required by the *Clery Act*. Specifically, the University's ASRs/AFSRs for reporting years 2009 through 2014 revealed inadequate or omitted disclosures concerning required policy, procedures, and programming information for campus safety and security and fire safety.

As a result of violations, the University was required to review and revise its policies and procedures that governed the production and distribution of the ASR/AFSR. It was also required to develop and implement additional internal guidance as needed to provide reasonable assurance that all campus safety operations will be carried out in accordance with Federal regulations going forward. The University was then required to produce a revised 2016 ASR/AFSR and distribute the reports, as required by the *Clery Act*. In addition, copies of the new and revised policies and procedures were to accompany the University's response to this Program Review Report.

In their response, Berkeley management challenged most aspects of the Department's finding, arguing that most of the required statements of policy and procedure are in the ASRs. The University acknowledged that the ASRs do not parrot the exact regulatory language, however the University understood these variations to be acceptable.

The Department carefully reviewed all information, including Berkeley's response and its supporting documentation. In addition, the Department notes that in Finding #6, the University has admitted that certain hate crimes were not disclosed in the 2014 ASR. Based on that review and the University's partial admissions, the violations cited in the finding are sustained. However, as a result of the Department's analysis of the response and a reexamination of certain sections of the ASRs/AFSRs, the review team did identify a few instances where the original disclosure met minimum requirements that were in place at the time and as such, those elements of the larger finding are set aside. In upholding the finding, the Department emphasizes that the *Clery Act* requires institutions to include all required disclosures in a single document. The Department must note that several of the policy, procedural and programmatic statements that were omitted or

otherwise found to be inadequate in Berkeley's ASRs/AFSRs requires a detailed, multi-part disclosure. If all components of a required disclosure are not included in the ASR/AFSR, that disclosure is, by definition, deficient. Nevertheless, the Department acknowledges that in certain cases, Berkeley did include at least some of the required content for a particular disclosure in its ASRs/AFSRs. That fact will be taken into account in the event that an administrative action is initiated.

2014 ASR/AFSR - Omitted/Inadequate Disclosures

Violations Cited in the PRR:

1. *Failure to provide crime statistics for Hate Crimes for calendar years 2011 and 2012. The University failed to report, by category of prejudice, crimes reported to local police agencies or to a campus security authority that manifested evidence that the victim was intentionally selected because of an actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability. Now amended to include gender identity and national origin. 34 C.F.R. §668.46(c)(3).*

Berkeley's Response (Summary): As a response to #1 in this section, the University noted that this same violation was cited in Finding #6. It stated that violation was caused by a "technical oversight that occurred as the University was changing its process for developing the ASR and the format for the report."

Department's Determination: Based on the University's response to #1 in this section, this component of the finding is sustained.

2. *Failure to provide crimes by location for Hate Crimes for calendar years 2011 through 2013. The University did not provide a geographic breakdown of the Hate Crime statistics. 34 C.F.R. §668.46(c)(4).*

Berkeley's Response (Summary): As a response to #2 in this section, the University noted that this same violation was cited in Finding #6. It stated that violation was caused by a "technical oversight that occurred as the University was changing its process for developing the ASR and the format for the report."

Department's Determination: Based on the University's response to item #2 in this section and the University admissions regarding Finding #6, this component of the finding is sustained.

3. *Failure to provide accurate student housing facility fire safety systems information. The University failed to provide accurate and consistent data about fire safety systems for on-campus student residential facilities. The 2010 and 2011 AFSRs showed that CKC Buildings #12, #16, and #17 were comprised of full sprinkler systems; however, the 2012 and 2013 AFSRs showed that CKC Building #12 had a partial sprinkler system of 35%, and that CKC Buildings #16 and #17*

did not have sprinkler systems at all. There was no explanation provided for these changes in status. 34 C.F.R. §668.49(b)(2).

Berkeley's Response (Summary): As a response to #3 in this section, the University agreed with the violation that was cited. The University explained that the CKC Building #12 had a partial sprinkler system (35%) and CKC Buildings #16 and #17 did not have sprinkler systems. It stated that, "The information reported incorrectly in the 2010 and 2011 AFSRs and, when the University uncovered the error, was corrected in the 2012 and 2013 reports."

Department's Determination: Based on the University's response, this component of the finding is sustained.

2013/AFSR - Omitted/Inadequate Disclosures

1. *Failure to provide accurate information concerning the preservation of evidence after a sexual assault. The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).*

Berkeley's Response (Summary): The University disagreed with the violation that was cited in the finding, and stated the required information was provided on page 48 of the 2013 ASR.

Department's Determination: After further review, this component of the finding is not sustained.

2. *Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense. The University failed to provide accurate and clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).*

Berkeley's Response (Summary): The University disagreed with the violation that was cited for #2. The University claimed that Page 50 of the 2013 ASR included a statement that both the accuser and accused must be informed of the outcome of any disciplinary proceeding brought alleging a sex offense, as further addressed in its response to Finding #6 of the PRR.

Department's Determination: The Department reviewed the referenced section of the ASR and determined that the content was inaccurate and unclear and not useful for consumer information and protection purposes. As such, this component of the finding is sustained.

In Finding #3 of this PRR, *Failure to Comply with the University's Sexual Violence Policies and Procedures*, the Department had determined that Berkeley failed to include a clear statement of policy in its ASRs for years 2009 through 2014 about its

process for informing a complainant of the outcome of a campus disciplinary proceeding regarding a sexual assault allegation. The Department upholds that determination.

3. *Failure to provide an accurate and full explanation of available sanctions for a final determination. The University failed to provide the full range and definition of available sanctions for a final determination regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding.

Department's Determination: Upon further review, the Department determined that the 2013 ASR contained minimally acceptable information. Therefore, this element of this finding is not sustained.

4. *Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation. The University failed to provide a list of titles of the persons or organizations responsible for carrying out the actions associated with the issuance of emergency responses and/or evacuation. 34 C.F.R. §668.46(g)(4).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. The regulation specifically requires an organization to identify "the person or organizations responsible..." for the actions of the institution. The University specifically cited page 5 of the 2013 ASR which describes the University's emergency response systems, including the alerting and warning service WarnMe and explains, "...from UCPD, Office of Emergency Management and Public Affairs can communicate via WarnMe."

Department's Determination: The Department reviewed the relevant sections of the University's ASR determined that the informational statement did not specify persons or offices that were responsible for carrying out the actions, other than through veiled innuendos. Even though, after close review, the Department can understand how the references can be construed as minimally acceptable information, but only through additional explanation as provided in Berkeley's response. For these reasons, this component of the finding is sustained.

5. *Failure to provide a policy statement for the notification of local law enforcement within 24 hours of a determination that a student is missing. The University failed to provide the statement that the local law enforcement agency will be notified within 24 hours of a determination that a student is missing. 34 C.F.R. §668.46(h)(1)(vi).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. The Department closely reviewed Berkeley's response to include the noted references to "immediate" and "prompt" in response to a missing student, page 30, 2013 ASR. The Department, students, and parents/guardians would expect any institution to respond immediately and/or promptly to the report of a missing student. However, there is to be included in the policy or procedures that the must respond no later than 24 hours upon notified. Furthermore, Berkeley referenced, "For those residential students who are under the age of 18 and not emancipated, their parents or guardian must be notified of the concern."

Department's Determination: The Department considered the University's response and determined the relevant section of the ASR did not clearly state that the initial notification must occur within 24 hours of the institution becoming informed that a student has gone missing. As such, this component of the finding is sustained.

6. *Failure to provide accurate student housing facility fire safety systems information. The University failed to provide consistent and accurate data for student housing facility fire safety systems. The 2010 and 2011 AFSRs reflected that CKC Building 12, 16, and 17 contained full sprinkler systems. However, the 2012 AFSRs reflect that CKC Building 12 only has a partial sprinkler system of 35%, and that CKC Buildings 16 and 17 do not have any sprinkler systems at all. No explanation for these changes was provided. 34 C.F.R. §668.49(b)(2).*

Berkeley's Response (Summary): Berkeley concurred with this finding.

Department's Determination: This component of the finding is sustained.

2012 ASR/AFSR - Omitted/Inadequate Disclosures

1. *Failure to provide accurate information concerning the preservation of evidence after a sexual assault. The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).*

Berkeley's Response (Summary): Berkeley disagreed with this finding stating the required information was provided on page 48 of the 2012 ASR. A careful examination revealed that Berkeley stated, "the importance of preserving evidence and that the individual will be assisted providing the victim reports to the police, medical examiner, or other CSA."

Department's Determination: However, the institution neglected to provide information on what evidence is or the importance of preserving evidence after a sexual attack and how to preserve said evidence. As such, this component of the finding is sustained.

2. *Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense. The University failed to provide accurate and clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. However, critical to developing the policy and procedure is the information must be accurate and clear. In the case of Berkeley's 2012 ASR page 50, the information is unclear and requires the reader to have a basic understanding of the Federal Regulation in order to determine the similarities and differences between the rights of the accuser and the rights of the accused.

Department's Determination: The review team's examination of the relevant material showed that the content was scant and ambiguous at best. For these reasons, this component of the finding is sustained.

3. *Failure to provide an accurate and full explanation of available sanctions for a final determination. The University failed to provide the full range and definition of available sanctions for a final determination regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding.

Department's Determination: Upon further review, the Department determined that the 2012 ASR contained minimally acceptable information. Therefore, this element of this finding is not sustained.

4. *Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation. The University failed to provide a list of titles of the persons or organizations responsible for carrying out the actions associated with the issuance of emergency response and/or evacuation. 34 C.F.R. §668.46(g)(4).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. The regulation specifically requires an organization to identify "the person or organizations responsible..." for the actions of the institution. The University specifically cited, "...from UCPD, Office of Emergency Management and Public Affairs can communicate via WarnMe."

Department's Determination: The Department reviewed the ASR content and the University's response. Together, these publications provide enough information to constitute a minimally compliant policy statement. Of course, the ASR must contain accurate and complete information about emergency evacuation and response and

generally cannot rely on other publications to meet the disclosure requirements. For these reasons, the component of the finding related to the 2012 ASR is sustained.

5. *Failure to provide a policy statement for the notification of local law enforcement within 24 hours of a determination that a student is missing. The University failed to provide a statement that the local law enforcement agency will be notified within 24 hours of a determination that a student is missing. 34 C.F.R. §668.46(h)(1)(vi).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. The Department closely reviewed Berkeley's response to include the noted references to "immediate" and "prompt" in response to a missing student, page 30, 2012 ASR. The Department, students, and parents/guardians would expect any institution to respond immediately and/or promptly to the report of a missing student. However, there is to be included in the policy or procedures that the must respond no later than 24 hours upon notified. Furthermore, Berkeley referenced, "For those residential students who are under the age of 18 and not emancipated, their parents or guardian must be notified of the concern."

Department's Determination: The review team's examination showed that the statement in the ASR did not clearly articulate the institution's reporting procedures that will be activated within 24 hours of a student being reported as missing. As such, this component of the finding is sustained.

2011 ASR/AFSR - Omitted/Inadequate Disclosures

1. *Failure to provide accurate information concerning the preservation of evidence after a sexual assault. The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).*

Berkeley's Response (Summary): Berkeley disagreed with this finding stating the required information was provided on page 49 of the 2011 ASR.

Department's Determination: A careful examination revealed that Berkeley stated the importance of preserving evidence and that the individual will be assisted providing the victim reports to the police, medical examiner, or other CSA. However, the institution neglects to provide information on what evidence is or the importance of how to preserve it until reporting the incident, i.e., do not bath, wash, discard clothing, etc.³⁹ Therefore, this finding is sustained.

2. *Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense. The University failed to provide accurate and*

³⁹ U.S. Department of Education, "The Handbook for Campus Safety and Security Reporting" February 2011, Chapter 8, pages 141-145.

clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding and indicates the required information is on page 50 of the 2011 ASR.

Department's Determination: The information in the ASR is unclear and would require the reader to have a more sophisticated understanding of the law than can be reasonably expected of a reasonable campus community member in terms of understanding the rights of the parties in a case of alleged sexual violence. For these reasons, this component of the finding is sustained.

3. *Failure to provide an accurate and full explanation of available sanctions for a final determination. The University failed to provide the full range and definition of available sanctions for a final determination regarding rape, acquaintance rape, or other forcible of non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding and claimed that the required information was in the ASR.

Department's Determination: The review team reexamined the noted section. Based on that review, this component of the finding is not sustained.

4. *Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation. The University failed to provide a list of titles of the persons or organizations responsible for carrying out the actions associated with the issuance of emergency response and/or evacuation. 34 C.F.R. §668.46(g)(4).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. The regulation specifically requires an organization to identify "the person or organizations responsible..." for the actions of the institution. The University specifically cited, "...from UCPD, Office of Emergency Management and Public Affairs can communicate via WarnMe."

Department's Determination: The University must be specific in explaining its processes, policies, and procedures. The review team acknowledges that some of the required information was included and also accepts that some institutional officials could have construed the disclosure as being minimally adequate, however, serious defects remain. The revised information included in the response is in fact adequate. For these reasons, this component of the finding is sustained with regard to the 2011 ASR.

5. *Failure to provide a policy statement for the notification of local law enforcement within 24 hours of a determination that a student is missing. The University failed to provide a statement that the local law enforcement agency will be notified within 24 hours of a determination that a student is missing. 34 C.F.R. §668.46(h)(1)(vi).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. The Department closely reviewed Berkeley's response to include the noted references to "immediate" and "prompt" in response to a missing student, page 30, 2011 ASR. The Department, students, and parents/guardians would expect any institution to respond immediately and/or promptly to the report of a missing student. However, there is to be included in the policy or procedures that the must respond no later than 24 hours upon notified. Furthermore, Berkeley referenced, "For those residential students who are under the age of 18 and not emancipated, their parents or guardian must be notified of the concern."

Department's Determination: Federal regulations require that the procedure specifically state that notifications will be made within 24 hours of the institution being informed that a student is missing. The disclosure did not include this essential information. Therefore, this component of finding is sustained.

2010ASR/AFSR - Omitted/Inadequate Disclosures

1. *Failure to provide accurate information concerning the preservation of evidence after a sexual assault. The University failed to provide an accurate policy statement for the preservation of evidence after a sexual assault and referred readers to an appendix that was not provided at the end of the ASR. 34 C.F.R. §668.46(b)(11)(ii).*

Berkeley's Response (Summary): Berkeley disagreed with this finding stating the required information was provided on page 49 of the 2010 ASR.

Department's Determination: A careful review of the ASR showed that Berkeley did include information on the importance of preserving evidence and that the University will assist victims in the reporting of incidents to the police, medical examiner, or other CSA. However, the institution did not provide information about how to preserve evidence until they report an incident, including the importance of not bathing, washing or discarding clothing, etc.⁴⁰ Therefore, this component of the finding is sustained.

⁴⁰ U.S. Department of Education, "The Handbook for Campus Safety and Security Reporting" February 2011, Chapter 8, pages 141-145.

2. *Failure to provide an accurate policy statement for campus disciplinary action in cases of an alleged sexual offense. The University failed to provide accurate and clear information concerning the rights of both the accused and accuser in the case of an alleged sexual offense. 34 C.F.R. §668.46(b)(11)(vi)(A) and (B).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding.

Department's Determination: The University must be specific in explaining its processes, policies, and procedures. The review team acknowledges that some of the required information was included and also accepts that some institutional officials could have construed the disclosure as being minimally adequate, however, serious defects remain. The revised information included in the response is in fact adequate. For these reasons, this component of the finding is sustained with regard to the 2011 ASR.

3. *Failure to provide an accurate and full explanation of available sanctions for a final determination. The University failed to provide the full range and definition of available sanctions for a final determination regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses. 34 C.F.R. §668.46(b)(11)(vii).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding.

Department's Determination: Upon further review, the Department determined that the 2010 ASR contained minimally acceptable information. Therefore, this component of the finding is not sustained.

4. *Failure to provide a policy statement concerning the persons or organization for the issuance of an emergency response and/or evacuation. The University failed to provide a list of titles of the persons or organizations responsible for carrying out the actions associated with the issuance of emergency response and/or evacuation. 34 C.F.R. §668.46(g)(4).*

Berkeley's Response (Summary): Berkeley disagreed with this element of the finding. The regulation specifically requires an organization to identify "the person or organizations responsible..." for the actions of the institution. The University specifically cited, "...from UCPD, Office of Emergency Management and Public Affairs can communicate via WarnMe."

Department's Determination: The University must be specific in explaining its processes, policies, and procedures. The review team acknowledges that some of the required information was included and also accepts that some institutional officials, including emergency managers, could have construed the disclosure as being

minimally adequate, however, serious defects remain. The revised information included in the response is in fact adequate. For these reasons, this component of the finding is sustained with regard to the 2011 ASR.

The Department carefully reviewed all available information including Berkeley's narrative responses and supporting documentation. Based on that review, the component violations noted in the initial finding are sustained, with the exceptions that were duly noted above. The review team also determined that the identified violations were, for the most part, satisfactorily addressed by Berkeley's responsive documents, including the 2018 ASR and the University's new and revised internal policies and procedures. After years of deficiencies, Berkeley's claims and its intentional remedial efforts should result in sustained improvements. As such, the Department has determined that the University's remedial action plan meets minimum requirements and, for these reasons, has accepted the response and considers this finding to be closed for the purposes of this Program Review. Nevertheless, the officials and directors of Berkeley are put on notice that they must continue to develop the University's campus safety program and take any additional necessary action to fully address the deficiencies and weaknesses identified by the Department as well as any other deficiencies or weaknesses that were identified by the institution during the preparation of its response, or by any other means.

Berkeley is reminded yet again that the exceptions identified constitute serious and persistent violations of the *Clery Act* that by their nature cannot be cured. There is no way to truly "correct" a violation of this type once it occurs. The requirement to produce an ASR that includes all required statements of campus safety and crime prevention policy and procedure is fundamental to the campus safety and crime prevention goals of the *Clery Act*. Access to this information permits campus community members and their families to make well-informed decisions about where to study and work and empowers individuals to play a more active role in their own safety and security. Proper policy formation also serves as a guide to institutional officials to help ensure that operations are carried out in a manner that will maintain the safety of the campus community to the greatest extent possible. Berkeley has stated that it has brought its overall campus safety operations program into compliance with the *Clery Act* as required by its PPA. Nevertheless, Berkeley is advised that such actions cannot and do not diminish the seriousness of these violations nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result

Finding #11: Failure to Distribute the Annual Fire Safety Report in Accordance with Federal Regulations

Citation:

As of October 1, 2010, the HEA and the Department's regulations require institutions that maintain any on-campus student housing facilities to produce and distribute an AFSR each calendar year by October 1 that contains, at minimum, the following information:

- 1. the fire statistics described in 34 C.F.R. §668.49(c);*
- 2. a description of each on-campus student residential facility fire safety system;*
- 3. the number of fire drills held during the calendar year;*
- 4. the institution's policies or rules on portable electrical appliances, smoking, and open flames in a student residential facility;*
- 5. the institution's procedures for student housing evacuation in the case of a fire;*
- 6. the policies regarding fire safety education and training programs that describe the procedures for students and employees to follow in case of a fire;*
- 7. a list of the titles of each person or organization for students and employees to report that a fire occurred; and*
- 8. plans for future improvements in fire safety, if deemed necessary by the institution. 34 C.F.R. §668.49(b).*

Furthermore, Federal regulations at 34 C.F.R. §668.49(a) stipulate that an institution must report by October 1 each year fire statistics for each on-campus student residential facility for the three most recent calendar years for which data is available, concerning:

- 1. The number of fires and the cause of each fire;*
- 2. The number of persons who received fire-related injuries that resulted in treatment at a medical facility, including at an on-campus health center;*
- 3. The number of deaths related to a fire; and*
- 4. The value of the property damage caused by a fire.*

Also, an institution may publish its AFSR concurrently with its ASR only if the title of the report clearly states that the report contains both the annual security report and the AFSR. If an institution chooses to publish the AFSR separately from the ASR, it must include information in each of the two reports about how to directly access the other. 34 C.F.R. §668.41(e)(6).

The Department's regulations also require participating institutions to actively distribute the report to enrolled students and current employees. Institutions also must actively notify prospective students and employees about the AFSR's availability and provide a summary of its contents, and its exact electronic address if posted to a website. This notice must also advise interested parties about how they may obtain a paper copy of the report. 34 C.F.R. §668.41(e)(4).

Noncompliance:

Berkeley failed to distribute its AFSR in accordance with Federal regulations. Specifically, the University did not properly produce the AFSR as a comprehensive document and also failed to actively distribute the report to all of its current students and employees. The violation has existed since the inception of the AFSR requirement, starting in October 2010. More specifically, Berkeley distributed the notice of availability solely to a select group of staff members. Additionally, the notice used to transmit the reports for 2010-2014 were distributed after the October 1 due date. For example, the 2011 AFSR was not posted on the University's website, a necessary precursor to the eventual distribution, until October 5, 2011, four dates after the deadline. Notices concerning the AFSRs for 2010 through 2014 also showed required information was often omitted, and the distribution messages that were emailed to department heads did not include required information. Excerpts from the deficient notices are presented below:

- 2010 AFSR -- *"Attached for your use is the final 2009 [sic] Annual Fire Safety Report that has been published on the EHS Web Page. Thanks for your help."*
- 2011 AFSR -- *"Attached is the Annual Fire Safety Report for Calendar Year 2010 [sic] as required by the Department of Education's Higher Education Opportunity Act for your use. For all reports prepared to date, they can be found in the following link: <http://www.ehs.berkeley.edu/fp/328-fire-safety-report.html>. Should you have any questions, please feel free to contact me."* Distributed October 5, 2011.
- 2012 AFSR -- *"Attached is the UC Berkeley 2011 [sic] Annual Fire Safety Report for you use. It has been posted online as required by the Department of Education."*
- 2013 AFSR -- *"Attached is a copy of the 2012 [sic] Annual Fire Safety Report for your facility (RSSP, International House, Berkeley Student Co-op, UC Washington DC) has [sic] been published as required by the Department of Education. Thank you for submitting the data. The report can be found online: <http://www.ehs.berkeley.edu/fp/328-fire-safety-reports.html>. Should you have any questions, please feel free to contact me."* Distributed October 3, 2013.
- 2014 AFSR -- *"Attached is a copy of the 2013 [sic] Annual Fire Safety Report for your facility (RSSP, International House, Berkeley Student Co-op, UC Washington DC) has [sic] been published as required by the Department of Education. Thank you for submitting the data. The report can be found online: <http://www.ehs.berkeley.edu/fp/328-fire-safety-reports.html>. Should you have any questions, please feel free to contact me."*

Lastly, our examination of documents acquired during the review also indicates that Berkeley did not actively notify prospective students and employees about the availability of AFSRs in the required manner during the entirety of the program review period. This component of the finding is supported by copies of the notices that were disseminated during the 2010-2014 time period. These notices were only sent to a select group of Berkeley staff members by the Campus Fire Marshal. The University's database logging

module also indicates that the documents were not posted on the official website in a timely manner.

Failure to actively distribute the AFSR to enrolled students and current employees and to actively notify prospective students and employees of its availability deprives interested campus community members of important fire safety information to which they are entitled and violates Federal law.

Required Action:

As a result of these violations, Berkeley must develop and implement policies and procedures that will ensure that future AFSRs are produced and distributed in accordance with the HEA fire safety rules. Furthermore, the University must also ensure that all persons with responsibilities for any aspect of the production or distribution of these reports fully understand the regulatory deadlines and program requirements. A copy of the newly developed policy and procedures and a list of all staff who received any relevant training must accompany Berkeley's response to this Program Review Report.

Institutional Response Summary:

In their official response, Berkeley management acknowledged that the University did not distribute its AFSRs for the years 2010 to 2013 to all students and employees, as prescribed in the HEA. The University stated that it published an AFSR by the October 1 deadline date for each year under this review. It also stated that the AFSR's availability was only referenced in the notices of availability about the ASR for those years; that reference had indicated that, "The Annual Fire Safety Report is available at: [http://ehs.berkeley.edu/fire- prevention/annual-campus-fire-report](http://ehs.berkeley.edu/fire-prevention/annual-campus-fire-report) (<http://ehs.berkeley.edu/fire- prevention/annual-campus-fire-report>)."

Exhibit 14 showed notices of availability about the ASR for years 2010 through 2013. It did not include a description of the AFSR's contents and information about how to obtain a paper copy of that report.

Berkeley also stated that its 2017 ASR and AFSR will be published as a single, comprehensive report. Exhibit 11 was also provided to demonstrate that the University had revised policies and procedures for publishing and distributing the AFSR stated that it developed a new *Policy and Procedure for the Timely Distribution of the Annual Fire Safety and Security Report*.

Final Determination:

Finding #11 cited Berkeley for multiple violations of the HEA fire safety rules and the Department's regulations, as outlined in the Noncompliance section above. Specifically, the review team found that the University failed to distribute the AFSR for years 2010 through 2014 to all of its current students and employees by the Federally prescribed October 1 deadline. As a result of these violations, Berkeley was required to develop and

implement policies and procedures that will ensure that subsequent issues of the AFSRs are produced and distributed in accordance with the HEA. The University was also required to ensure that all persons with responsibilities for any aspect of the production or distribution of these reports fully understand the regulatory deadlines and program requirements. With its response, Berkeley was required to provide a copy of the newly developed policies and procedures and a list of all staff who received any relevant training. In its response, the University conceded that the AFSRs for 2010-2013 were not distributed properly. However, the institution claimed that the reports for calendar years 2014-2016 were actively distributed as comprehensive publications to required recipients by October 1 of each year.

The Department carefully examined Berkeley's narrative response and supporting documentation. Based on that review and the University's partial admissions, the violations identified in the initial finding are sustained. The review team's examination also showed that the identified violations were, for the most part, satisfactorily addressed by the University's new and revised internal policies and procedures regarding compliance with the AFSR active distribution and notification requirements. Starting in 2017, the institution stated that it produced a combined ASR/AFSR for the first time and that the report was posted to its official website, a necessary precursor to properly disseminating reports via electronic mail, as called for by its procedures. As such, the Department has determined that Berkeley's remedial action plan meets minimum requirements, and for that reason, has accepted the University's response and considers this finding to be closed for purposes of this program review. Nevertheless, the officials and directors of Berkeley, are advised that they must take any additional actions that may be necessary to address the deficiencies and weaknesses identified by the Department as well as those that were detected during the preparation of the University's response to the Department's report and/or as may otherwise be needed to ensure that these violations do not recur.

Berkeley yet again is reminded that this exception constituted a serious violation of the HEA fire safety rules that by its nature cannot be cured. There is no way to truly "correct" a violation of this type once it occurs. Berkeley asserted that it has taken adequate remedial actions and, that by doing so, is now in compliance with the HEA as required by its PPA. The production and timely distribution of an accurate and complete AFSR are among the most basic requirements of the HEA fire safety rules and are fundamental to its campus safety goals. As such, Berkeley officials must understand that any failure to publish and distribute an accurate and complete AFSR deprives students and employees of important campus fire safety information to which they are entitled. For these reasons, the University is advised that its remedial actions cannot and do not diminish the seriousness of these violations nor do they eliminate the possibility that the Department will impose an adverse administrative action and/or require additional corrective actions as a result.

Summation:

The Department's objective in conducting this and all campus crime program reviews is to improve the safety of America's college campuses. The development and implementation of a substantive remedial action plan is the first step to moving Berkeley toward full compliance with the *Clery Act* and the HEA fire safety rules as soon as possible.

In their official response and supplemental productions, Berkeley management asserted that its remedial actions, inclusive of its new and revised internal policies and procedures, will facilitate the institution's efforts to get into full compliance with the *Clery Act*, the HEA fire safety requirements, and the *DFSCA*.

The violations identified throughout the review process triggered a special concern for the Department. Compliance with the *Clery Act*, the HEA fire safety requirements, and the *DFSCA* are an essential part of effective campus safety, crime prevention, and substance abuse prevention programs. Access to accurate, complete, and transparent disclosures of safety information help students, employees, and other stakeholders to make well-informed decisions about where to study, work, and live. The transparency created by these disclosures also empowers campus community members to play more active roles in their own safety and security. Berkeley asserted that it has taken adequate remedial actions and that, by doing so, it is now in compliance with the *Clery Act* and the HEA fire safety requirements, as required by its PPA. Nevertheless, Berkeley officials must understand that the violations documented here deprived students, employees, parents, the media, and other interested parties of access to important campus safety, crime prevention, fire safety, and substance abuse prevention information to which they are entitled. For these reasons, the University is, once again, advised that its remedial actions cannot and do not diminish the seriousness of these violations, nor do they eliminate the possibility that the Department may require additional actions as a result.

Given the serious consequences of a compliance failure, the Department also strongly recommends that Berkeley officials re-examine its campus safety, substance abuse prevention, fire safety, and general Title IV policies and procedures on an annual basis to ensure that they continue to reflect current institutional practices and are compliant with Federal requirements. To that end, University officials are encouraged to consult the Department's "Handbook for Campus Safety and Security Reporting" (2016) as a reference guide on *Clery Act* compliance. The Handbook is online at: www2.ed.gov/admins/lead/safety/handbook.pdf. The Department also provides a number of other *Clery Act* training resources. Berkeley officials can access these materials at: www2.ed.gov/admins/lead/safety/campus.html. The Department's regulations governing the *Clery Act* can be found at 34 C.F.R. §§ 668.14, 668.41, and 668.46. The HEA fire safety rule appear at 34 C.F.R. § 668.49. The *DFSCA* regulations can be found in Part 86 of the Department's General Administrative Regulations.

Finally, Berkeley management are strongly advised to take immediate action to ensure that the University is in full compliance with Section 304 of the Violence Against

Women Reauthorization Act of 2013 (VAWA). VAWA amended the *Clery Act* to require institutions to compile and disclose statistics for incidents of sexual assault, dating violence, domestic violence, and stalking. VAWA also requires institutions to include new policy, procedural, and programmatic disclosures regarding sexual assault prevention and response in its ASRs. Because the Department issued Final Rules regarding the VAWA amendments on October 20, 2014, these regulations went into effect on July 1, 2015, per the Department's Master Calendar. Because of the timing of the initial site visit and the initial time periods under review, the University's early VAWA compliance was not a major focus area of this investigation. Compliance with these requirements will be a primary focus area of the Department's post-review monitoring. Berkeley officials may access the text of the Final Rule at:

<http://ifap.ed.gov/fregisters/attachments/FR102014FinalRuleViolenceAgainstWomenAct.pdf>