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UNDERSTANDING THE DRUG-FREE SCHOOLS AND COMMUNITIES ACT, THEN AND NOW

BRADLEY D. CUSTER, ROBERT T. KENT*

Abstract

Higher education institutions are known to have been lax in their compliance with the Drug-Free Schools and Communities Act Amendments of 1989 (DFSCA), and until recently, the U.S. Department of Education did not seem to notice. Now, the Department regularly investigates colleges and issues hefty fines for violations. No case provides better insights into the pitfalls of DFSCA compliance than the Department's review of Penn State University published in 2016. In this article, we analyze the Penn State and other recent program reviews against the DFSCA's original statute, regulations, Department handbooks, and guidance letters. We find that over time, DFSCA compliance has grown increasingly complex, and the stakes for institutions are higher than ever. To higher education attorneys and administrators, we offer advice on how to improve compliance with the Drug-Free Schools and Communities Act.

I. Introduction

Defining what he called "Compliance U," Peter Lake commented that "higher education has entered an era of rapidly increasing regulatory activity at both the federal and the state levels."¹ In this era of intensified responsibility for federal compliance, administrators struggle to balance the demands of implementing new and longstanding regulations. The Drug-Free Schools and Communities Act of

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1 Peter Lake, *Welcome to Compliance U: The Board's Role in the Regulatory Era*, TRUSTEESHIP, July/Aug. 2013, available at <https://www.agb.org/trusteeship/2013/7/welcome-compliance-u-boards-role-regulatory-era>.

1989 (“DFSCA”)² requires that administrators invest considerable energy in implementing substance abuse prevention programs, distributing written policies, and evaluating program outcomes. Ill enforced, the DFSCA slipped off the radar of many institutions in the decades following its enactment. For those institutions that remained vigilant, few resources exist from which to derive best practices in compliance. Complicating matters, existing interpretations of the law have changed over time. The Department of Education’s recent investigation of Pennsylvania State University provides timely insight into important issues of DFSCA compliance. Penn State, and many others, have been found to violate the DFSCA in the past five years resulting in fines of up to \$35,000³. In this article, we conduct a comparative analysis of primary sources related to the DFSCA to offer higher education practitioners the best available advice on how to comply with the DFSCA.

Practitioners involved in DFSCA compliance understand that it is tedious, often thankless work. Before getting into the technicalities of compliance, we wish to point out one observation. While enforcing drug laws was the original intent of the DFSCA, the Department of Education also recognizes that complying with the DFSCA presents an opportunity to invest in substance abuse prevention efforts. While the former may seem outdated and uninspiring, the latter is important, impactful work. We encourage readers to think about complying with the DFSCA as a means to achieve safer, healthier campuses. Although this shift in thinking may not make any difference in terms of the required tasks for compliance, it may bring clarity and meaning to the work of campus administrators involved in alcohol and drug programming and policy enforcement. In other words, complying with the DFSCA can be about more than compliance itself. As we describe in our recommendations, doing it well can mean implementing strong programs and policies that yield reductions in harmful substance abuse and campus violence.

We begin by providing a historical analysis of the Drug-Free Schools and Communities Act, including a description of the political context from which it came, its path to passage and amendment, and its purpose in U.S. higher education. Next, we review available research and reports that document how institutions have complied with the law and how the U.S. Department of Education has enforced compliance. We then analyze primary sources of information on the DFSCA in search of both the consistent and the varying interpretations of the regulations. Based on the primary sources, and recognizing the high stakes for compliance, we offer recommendations on meeting the Department of Education’s standards for complying with the DFSCA.

2 Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2017).

3 See Michael M. DeBowes, *The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action*, STANLEYCSS.COM (2016), <https://info.stanleycss.com/rs/692-VCY-483/images/Resurgence-of-the-Drug-Free-Schools.pdf?aliId=11153710>.

II. Legislative History

On June 17, 1971, President Richard Nixon declared drug abuse “public enemy number one” in the U.S.⁴ The War on Drugs, as it would be called, was a campaign aimed at eliminating illegal drugs, characterized by “law and order” political rhetoric, federal policy proliferation, intensified and militarized law enforcement, eroded civil liberties, burgeoning prison populations, and international turmoil, costing tens of billions of dollars.⁵ The Anti-Drug Abuse Act of 1986,⁶ sponsored by Texas Democratic Congressman James C. Wright, Jr., and signed into law on October 27, 1986 by President Ronald Reagan, was the most significant War on Drugs legislation of the 1980s. Its purpose was:

To strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.⁷

The legislation established harsh mandatory minimum prison sentences for drug offenders, especially targeting crack cocaine users, and is widely criticized for yielding the disproportionate incarceration of people of color.⁸ It also created the Drug-Free Schools and Communities Act of 1986.⁹ The legislation authors cited that “drug use and alcohol abuse are widespread among the Nation’s students,” and “the use of drugs and the abuse of alcohol by students constitute a grave threat to their physical and mental wellbeing and significantly impede the learning process.”¹⁰ As such, the Act established grant funding for drug prevention and education programs in elementary and secondary schools, community organizations, and colleges. For higher education institutions, funding was allocated “to establish, implement, and expand programs of drug abuse education and prevention (including rehabilitation referral) for students enrolled in colleges and universities,” to research and develop programs for schools, and to train pre-service and in-service school teachers, administrators, and others on delivering model programs.¹¹

4 Richard Nixon, President of the U.S., *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, THE AMERICAN PRESIDENCY PROJECT (June 17, 1971), <http://www.presidency.ucsb.edu/ws/index.php?pid=3047&st=&st1=>.

5 See ALFRED W. MCCOY & ALAN A. BLOCK, *WAR ON DRUGS: STUDIES IN THE FAILURE OF U.S. NARCOTICS POLICY 1-18* (Alfred W. McCoy & Alan A. Block ed. 1992).

6 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-125 (prior to 1988 amendment).

7 *Id.*

8 See Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 *FORDHAM L. REV.* 2531 (2010).

9 Drug-Free Schools and Communities Act of 1986, Pub. L. No. 99-570, §§ 4101-4144, 100 Stat. 3207-125 (prior to 1988 amendment).

10 *Id.* at § 4102.

11 *Id.* at § 4103.

Congress, apparently, did not feel the 1986 DFSCA went far enough to address drinking and drug use on college campuses. The 1988 Anti-Drug Abuse Act amendments created the Office of National Drug Control Policy, and in the first National Drug Control Strategy released on September 5, 1989, Director William Bennett criticized higher education institutions, calling for mandated alcohol and drug abuse prevention programs and policies as a condition of receiving federal funding.¹²

Only months after the report's release, Congress amended the 1986 DFSCA to enhance program requirements. The amending bill was authored by California Democratic Congressman Augustus F. Hawkins and was cosponsored by 14 other Democratic Congressmen.¹³ The DFSCA bill, most of which expanded K-12 drug-free programs and funding, contained a section for higher education, titled "Drug-Free Schools and Campuses."¹⁴ The bill saw a speedy enactment; it was introduced on November 8, 1989 and became law on December 12, 1989 with President George H. W. Bush's signature. It amended the Higher Education Act of 1965 by adding section 1213, called "Drug and Alcohol Abuse Prevention." In summary:

[Institutions of higher education] receiving federal funds or financial assistance must develop and implement a program to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees. The program must include annual notification of the following: standards of conduct; a description of sanctions for violating federal, state, and local law and campus policy; a description of health risks associated with [alcohol and other drug] use; a description of treatment options; and a biennial review of the program's effectiveness and the consistency of the enforcement of sanctions.¹⁵

The amended DFSCA requires institutions of higher education (IHEs) to certify their compliance¹⁶ and to take a proactive approach to drug and alcohol education and enforcement, thereby formalizing the responsibility of IHEs to foster the health and safety of college students and employees. Complying with the law ensures that IHEs are controlling illegal alcohol and drug crimes, distributing policies ("annual notification"), providing drug and alcohol abuse prevention programs, and evaluating their programs ("biennial review"). In their handbook on the DFSCA, Carolyn Palmer and Donald Gehring argued IHEs "have an *ethical*

12 U.S. OFFICE OF NATIONAL DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, PUB. NO. 040-000-00542-1, NATIONAL DRUG CONTROL STRATEGY (1989), available at <http://files.eric.ed.gov/fulltext/ED313602.pdf>.

13 Drug-Free Schools and Communities Act of 1989, H.R. 3614, 101st Cong. (1989).

14 *Id.* at § 22.

15 HIGHER EDUCATION CENTER FOR ALCOHOL AND OTHER DRUG ABUSE AND VIOLATION PREVENTION, OFFICE OF SAFE AND DRUG-FREE SCHOOLS, U.S. DEP'T OF EDUC., PUB. NO. ED-04-CO-0137, COMPLYING WITH THE DRUG-FREE SCHOOLS AND CAMPUSES REGULATIONS [EDGAR PART 86]: A GUIDE FOR UNIVERSITY AND COLLEGE ADMINISTRATORS at 3 (2006).

16 Presently, certification of compliance with DFSCA and many other federal regulations is achieved through the Program Participation Agreement, which college presidents sign to receive federal student financial aid. See 20 U.S.C. § 1094 (2017).

and legal obligation to develop and disseminate policies prohibiting the unlawful use, possession and distribution of drugs and alcohol” and to provide treatment and intervention programs to protect the healthy development of college students.¹⁷ Enforced by the U.S. Department of Education (the Department), IHEs face penalties for noncompliance, the most extreme being the forfeiture of federal funding. Although Congress did not specify fines in its list of penalties for noncompliance with the Higher Education Act, the Department has the authority to issue civil monetary penalties to any institution that “has engaged in substantial misrepresentation of the nature of its educational program”¹⁸ In 2018, the Department increased the maximum possible penalty to \$55,907, adjusting for inflation.¹⁹

III. Compliance & Enforcement

Recognizing that IHE federal funding, including student financial aid, is contingent on DFSCA compliance, one might expect a high rate of compliance. However, we next review reports suggesting many IHEs have not complied with the DFSCA over the past nearly 30 years. Then, we examine the evidence that points to an abrupt shift in the enforcement practices of the Department of Education.

A. Compliance

The first evidence of DFSCA non-compliance was documented in news reports in October 1990, which was the original deadline to certify compliance. It was reported that 700 colleges had missed the deadline to send in forms signed by presidents acknowledging the regulations, and some had erroneously sent in forms related to the Drug-Free Workplace Act of 1988.²⁰

Several reports and studies in the past two decades have cast doubt on whether most higher education institutions comply with the DFSCA. In the first DFSCA handbook written for administrators, the results of a survey of 75 campus administrators found only 46% reported full compliance.²¹ Another series of surveys of college administrators at 4-year universities found low rates of alcohol and drug program evaluation.²² In 1994, only 36% of responding institutions (n=211) reported conducting a formal assessment of the effectiveness

17 CAROLYN J. PALMER & DONALD D. GEHRING, A HANDBOOK FOR COMPLYING WITH THE PROGRAM AND REVIEW REQUIREMENTS OF THE 1989 AMENDMENTS TO THE DRUG-FREE SCHOOLS AND COMMUNITIES ACT 3 (Carolyn J. Palmer & Donald D. Gehring ed. 1992) (emphasis added).

18 Program Participation Agreements, 20 U.S.C. § 1094(c)(3)(B) (2017).

19 Adjustment of Civil Monetary Penalties for Inflation, 83 Fed. Reg. 2062 (Jan. 16, 2018) (to be codified at 34 C.F.R. pt. 36).

20 Christopher Meyers, *Ed. Dept. Deluged with Forms on Drug-Abuse Strategies*, CHRON. HIGHER EDUC., (Oct. 11, 1990), <http://www.chronicle.com/article/Ed-Dept-Deluged-With-Forms/86509>.

21 VICTORIA L. GUTHRIE, *Research Implications for Complying with the Drug-Free Amendments*, HANDBOOK FOR COMPLYING WITH THE PROGRAM AND REVIEW REQUIREMENTS OF THE 1989 AMENDMENTS TO THE DRUG-FREE SCHOOLS AND COMMUNITIES ACT 19-32 (Carolyn J. Palmer & Donald D. Gehring eds., 1992).

22 David S. Anderson & Glenn-Milo S. Santos, *Results of the 2015 College Alcohol Survey* (2015), <https://caph.gmu.edu/assets/caph/CollegeAlcoholSurvey2015FinalResults.pdf>.

of its drug and alcohol prevention program.²³ By 2012, that percentage among the same sample of institutions (n=176) rose to 53%, and by 2015, the rate of program evaluation stood at just 54% (n=178).²⁴ While this survey item did not explicitly address DFSCA compliance, evaluating program effectiveness is one of the two required activities of the biennial review. Assuming this sample is representative of U.S. 4-year institutions, as many as half may be noncompliant with DFSCA.

A recent study of DFSCA compliance at Michigan's 28 community colleges found only two colleges satisfied the minimum requirements for the biennial review, annual notification, and alcohol and drug prevention program.²⁵ Twenty-one colleges were partially compliant, and five were found to be noncompliant.²⁶ In particular, most of the Michigan community colleges failed to conduct a substantive biennial review and offered weak prevention programs.²⁷ Finally, the most complete evidence of widespread noncompliance comes from a review of 263 Final Program Review Determinations; between January 2014 and September 2015, 57 institutions were found in violation of the DFSCA, but the review did not explain the reasons for the violations.²⁸ Together, these findings from various reports and studies spanning most of the law's history suggest that many, if not most, institutions have long failed to comply with DFSCA. Noncompliance may have gone unnoticed for the first two decades of DFSCA implementation, but as discussed next, the Department has taken a new approach to DFSCA enforcement.

B. Enforcement

According to the 1990 regulations, "The Secretary [of Education] annually reviews a representative sample of IHE drug prevention programs,"²⁹ but it is not clear if or how the Department has conducted these annual reviews. During the Obama Administration, the Department expressed a renewed commitment to enforcing the DFSCA. In a 2011 "Dear Colleague" letter to IHE administrators, the Department, in partnership with the Office of the National Drug Control Policy, reminded IHEs of their obligations under the DFSCA and acknowledged the Department would enhance monitoring of IHE compliance with DFSCA regulations.³⁰ Soon after, a 2012 Office of Inspector General report regarding the

23 *Id.*

24 *Id.*

25 Bradley D. Custer, *Drug-Free Schools and Communities Act Compliance at Michigan Community Colleges*, 42 COMMUNITY COL. J. RES. & PRAC. 258 (2018), <http://DX.DOI.ORG/10.1080/10668926.2017.1285731>.

26 *Id.* According to Custer, partially compliant meant that a college met the minimum requirements for one or two (but not all three) of the mandates (i.e., annual notification, biennial review, drug-prevention program). Non-compliant meant that a college achieved none of the three. This classifying framework (i.e., compliant, partially compliant, non-compliant) was a useful scheme for academic analysis, but it is not likely how the Department analyzes compliance. Rather, the Department simply identifies violations.

27 *Id.*

28 DeBowes, *supra* note 3.

29 Drug and Alcohol Abuse Prevention, 34 C.F.R. § 86.101 (2017).

30 Letter from Arne Duncan, Sec'y, U.S. Dept. of Ed., R. Gil Kerlikowske, Dir., Off. of Natl. Drug Control Policy, to Inst. of Higher Ed. Administrators, *2011 National Drug Control Strategy for*

Department's enforcement of the DFSCA found that the Department had not performed any oversight of IHE DFSCA compliance between 1998 and 2010 and provided ineffective oversight between 2010 and 2012.³¹ In an attachment to the inspection report, the Federal Student Aid Chief Operating Officer expressed an intent to amend IHE DFSCA review procedures to provide training for DFSCA program reviewers, require complete documentation of IHE DFSCA compliance reviews, require program reviewers to document DFSCA non-compliance within program review reports, and assure that the Department monitors all IHEs covered by the DFSCA.³²

The shift in enforcement practices appears to have directly led to an increase in findings of violations. As mentioned above, a recent report found 57 cases of DFSCA violations in letters issued by the Department to colleges under investigation, and many of the violations resulted in fines ranging from \$10,000 to \$35,000.³³ In 2017 alone, the Department issued nine more letters to colleges resulting in a combined \$190,000 in fines for DFSCA violations, though no letters have yet been released in 2018.³⁴ Given this evidence of institutional non-compliance paired with enhanced federal enforcement, there is a clear need to offer campus administrators and attorneys information on how to comply with the DFSCA. We respond to that need by analyzing the DFSCA over time, which provides readers with a historical understanding of the DFSCA as well as an explanation of current compliance standards.

IV. Methods

Previous widespread noncompliance paired with sudden changes in enforcement create a pressing need to better understand the DFSCA. We analyze the DFSCA by comparing primary sources spanning nearly 30 years: the 1989 statute,³⁵ the 1990 entry in the Federal Register,³⁶ the 1990 federal regulations,³⁷ the 1997 administrative handbook,³⁸ the 2006 administrative handbook,³⁹ the 2016

Inst. of Higher Ed. (Sept. 23, 2011) (copy on file with Obama White House Archives).

31 Letter from Wanda A. Scott, Asst. Inspector Gen., U.S. Dept. of Ed. Office of Inspector Gen., to James W. Runcie, Chief Operating Officer, U.S. Dept. of Ed., Federal Student Aid, *Institution of Higher Education Compliance with Drug and Alcohol Abuse Prevention Program Requirements*, 3-5 (Mar. 14, 2012), available at <https://www2.ed.gov/about/offices/list/oig/aireports/i1310002.pdf>.

32 *See id.* at attachment 2.

33 *See* DeBowes, *supra* note 3.

34 Letters published on U.S. Department of Education website: <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports>.

35 Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2017).

36 Drug-Free Schools and Campuses Regulations, 55 Fed. Reg. 33581 (Aug. 1, 1990) (to be codified at 34 C.F.R. pt. 86).

37 Drug and Alcohol Abuse Prevention, 34 C.F.R. pt. 86 (2017).

38 U.S. DEP'T OF EDUC., PUB. NO. ED/OPE97-2, COMPLYING WITH THE DRUG-FREE SCHOOLS AND CAMPUSES REGULATIONS [EDGAR PART 86]: A GUIDE FOR UNIVERSITY AND COLLEGE ADMINISTRATORS (1997).

39 U.S. DEP'T OF EDUC., PUB. NO. ED-04-CO-0137, COMPLYING WITH THE DRUG-FREE SCHOOLS AND CAMPUSES REGULATIONS [EDGAR PART 86]: A GUIDE FOR UNIVERSITY AND COLLEGE ADMINISTRATORS (2006).

Penn State University investigation letter,⁴⁰ and the nine program review letters published in 2017.⁴¹ These sources were selected because they were authored by federal agencies, and each provides direct insight into contemporary interpretations of the DFSCA at different times. After carefully studying each document, we analyzed their suggestions for compliance with each of the DFSCA's requirements. Some elements have held constant across these sources over time, but other elements appear to have evolved, which may lead to confusion among practitioners when implementing the regulations. We pay attention to these changes in our analysis of what the DFSCA aims to achieve and how colleges can fully comply. To begin, we provide a description of each source.

A. 1989 Statute

As described above, the text of the 1989 amendments constitute what is now known as the DFSCA.⁴² In the session law, the text pertaining to higher education appears at Section 22 under the title "Drug-Free Schools and Campuses."⁴³

B. 1990 Federal Register

Under the title "Drug-Free Schools and Campuses Regulations," the DFSCA regulations were first published in the *Federal Register* on August 16, 1990, after going through the rulemaking and public comment process beginning on April 24, 1990.⁴⁴ The rules and regulations define the purpose of the law, responsibilities of IHEs, procedures for sanctioning IHEs for violations, and appeals procedures.⁴⁵ The *Federal Register* entry also contains responses to public comments, including a useful explanation of the differences between the DFSCA and the Drug-Free Workplace Act of 1988 and why the certifications for the two laws could not be conveniently consolidated.⁴⁶

C. 1990 Federal Regulations

The finalized regulations are codified in the Education Department General Administrative Guidelines ("EDGAR") and took effect on October 1, 1990.⁴⁷ Since implementation, the regulations have only been amended once. The Improving America's Schools Act of 1994 removed language from the DFSCA regulations that

40 Letter from James L. Moore, III, Sen. Advisor, Clery Act Compliance Team, to Eric J. Barron, Pres., Pa. St. U. (Nov. 3, 2016), (OPE-ID 00332900), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PSCFPRD10327991.pdf>.

41 We thank a reviewer for alerting us to these newly published letters, and we encourage readers to monitor the Department's website as they continue to publish new ones, *see supra* note 34.

42 Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2017).

43 Drug-Free Schools and Communities Act of 1989, Pub. L. No. 101-226, 103 Stat. 1938.

44 Drug-Free Schools and Campuses Regulations, 55 Fed. Reg. 33581 (Aug. 1, 1990) (to be codified at 34 C.F.R. pt. 86).

45 *Id.* at § 86.1 *et seq.*

46 *See supra* note 44 at 33592-33593 ("Relationship to Drug-Free Workplace and Other Certifications").

47 *See supra* note 37.

applied to “state educational agencies” and “local education agencies,” leaving the DFSCA to apply only to higher education institutions.⁴⁸

D. 1997 Handbook

Noting that some time had passed for colleges to get experience with DFSCA compliance, the staff of the Department’s Higher Education Center for Alcohol and Other Drug Prevention—established in 1993 and defunded in 2012—produced a nearly 40-page handbook for administrators.⁴⁹ The front half contained information on the DFSCA and recommendations for complying with the certification, annual notification, and biennial review requirements. The back half contained an appendix with compliance checklists and sample text for the annual notification.

E. 2006 Handbook

Nine years later, the handbook was revised and expanded by 20 pages.⁵⁰ The 2006 handbook includes much of the same content with updated recommendations based on new technological methods for distributing the annual notification and new resources for conducting the biennial review. The appendix is expanded with the inclusion of the full text of the federal regulations, a model policy, and additional compliance checklists. There are also notable changes from the 1997 handbook that have important practical significance, described below, which handbook author Dr. Beth DeRicco attributed to evolving interpretations of the law.⁵¹ This handbook remains the primary source of guidance for administrators today.

F. 2016 Penn State Letters

In early November 2011, just days after Pennsylvania State University (PSU) assistant football coach Jerry Sandusky, athletic director Timothy Curley, and vice president Gary Schultz were served with felony charges related to Sandusky’s sex crimes, the Clery Act Compliance Team initiated an investigation into PSU’s compliance with the Clery Act⁵² and DFSCA.⁵³ After a nearly two-year investigation of PSU’s policies, programs, and campus environment from 1998-2011, the Department uncovered eleven “serious findings of noncompliance,”⁵⁴ resulting in

48 Drug and Alcohol Abuse Prevention, 61 Fed. Reg. 66225 (Dec. 17, 1996) (to be codified at 34 C.F.R. pt. 86).

49 See supra note 38.

50 See supra note 39.

51 Personal Communication, Mar. 22, 2017 (interview notes on file with first author).

52 The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, passed in 1990, 20 USC § 1092(f), requires IHEs to collect information on campus crime activity, describe campus crime prevention mechanisms, and publish an annual report describing the same. Known as the Clery Act, it has become a staple of IHE regulatory compliance.

53 See supra note 40.

54 *Id.* at 16.

a historic fine of \$2,397,500.⁵⁵ Of the eleven findings, one addressed violations of DFSCA, which carried a fine of \$27,500.⁵⁶

The results of the investigation are documented in two letters: the Final Program Review Determination (FPRD) letter to PSU President Eric Barron dated November 3, 2016 authored by James L. Moore, III of the Clery Compliance Team⁵⁷ and the accompanying fine letter authored by Susan D. Crim of the Federal Student Aid Enforcement Unit.⁵⁸ The FPRD letter opens with a review of the Clery Act and DFSCA, followed by a brief description of institutional characteristics. Next comes a summary of the events related to the Sandusky case and a detailed accounting of the football program's influence on institutional policy and politics, especially as seen in the cases of student-athletes being shielded from the university's disciplinary process. The subsequent 145 pages address ten major violations of the Clery Act, and the eleventh finding, DFSCA violations, begins on page 164.⁵⁹ The 13 pages covering DFSCA provide important insight into contemporary interpretations of the DFSCA. No other investigative report has provided such rich guidance about how the Department enforces the DFSCA. Thus, we examine this report closely and draw from it practical recommendations on improving compliance with the DFSCA.

G. 2017 Letters

In the wake of the PSU investigation, the Department issued Final Program Review Determination letters to at least nine other higher education institutions.⁶⁰ Though we draw most of our insights from the PSU case, there are several important points that we highlight from these newest letters, including the letters for University of Jamestown,⁶¹ Occidental College,⁶² and Cottey College.⁶³

55 Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Eric J. Barron, Pres., Pa. St. U. (Nov. 3, 2016), (OPE-ID 00332900), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PennStateFineLetter.pdf>.

56 *Id.* at 34.

57 *See supra* note 40.

58 *See supra* note 55.

59 *See supra* note 40 at 164.

60 None have yet been issued in 2018. *See supra* note 34.

61 Letter from James L. Moore, III, Sen. Advisor, Clery Act Compliance Division, to Robert S. Badal, Pres., Univ. Jamestown (Dec. 20, 2016), (OPE-ID 00299000), <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports#uofj>.

62 Letter from Candace R. McLaren, Dir., Clery Act Compliance Division, to Jonathan Veitch, Pres., Occidental Col. (Aug. 11, 2017), (OPE-ID 00124900), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/Occidental_College_8_11_17_FPRD_Redacted.pdf.

63 Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Jann Weitzel, Pres., Cottey Col. (June 13, 2017), (OPE-ID 00245800), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/0261_001.pdf.

V. Tracing Changes in the DFSCA

In this section, we examine how the critical elements of the DFSCA are described across the sources, making special note of instances when rules (or interpretations of the rules) were changed, expanded, deleted, or when they were in conflict. For each subject, we move chronologically through the source materials, starting with the statute and ending with the recent program review letters.

A. Annual Notification

The annual notification of policies is a familiar feature of federal statutes in higher education,⁶⁴ but each has different requirements. Under DFSCA, institutions must deliver written information about their alcohol and drug policies and programs to each employee and student. While the content requirements of the DFSCA annual notification have remained stable over time, it appears there are differing interpretations regarding to whom, how, and how often the materials should be distributed.

1. Content

Arguably, the most prescriptive component of the 1989 statute is the content requirements of the annual notification, including:

(A) standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities; (B) a description of the applicable legal sanctions under local, State, or Federal [sic] law for the unlawful possession or distribution of illicit drugs and alcohol; (C) a description of the health risks associated with the use of illicit drugs and the abuse of alcohol; (D) a description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and (E) a clear statement that the institution will impose sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph [(A) of this section].⁶⁵

In the *Federal Register* entry and in both the 1997 and 2006 handbooks, descriptions of the five required components are provided as well as sample policy language. Despite there being no observed changes across the sources, PSU reportedly omitted two of these required elements from its annual notification.⁶⁶ PSU did not provide a description of legal sanctions between 1998 and 2010 and did not provide a description of the health risks of alcohol abuse in 2010.⁶⁷ Other

64 See Family Educational Rights of Privacy Act of 1974, 20 U.S.C. § 1232g (2017); Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. § 1092(f) (2017).

65 20 U.S.C. § 1011i(a)(1) (2017).

66 See supra note 40.

67 *Id.*

institutions have also been found in violation for omitting required statements.⁶⁸ IHEs must be careful to provide complete information on each of the required points. In addition, all the required elements must be published in “a single, fully-compliant document,”⁶⁹ indicating that institutions cannot satisfy the notification requirements through piecemeal policy distributions.

2. Recipients

Interpretations of who must receive the notification have differed across sources. First, the 1990 regulations state that the written annual notification must be delivered: “to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student’s program of study.”⁷⁰ This definition is particularly important for community colleges and other institutions that offer a wide array of courses. Further, public comment led the Department to clarify in the *Federal Register* that:

An IHE must distribute the materials each year to each student and employee, not just to new students and employees. If new students enroll or new employees are hired after the initial distribution in the academic year, these students and employees must also receive the materials.⁷¹

The 1997 handbook reiterated this point.⁷² Importantly, this means that IHEs are responsible for not only an annual notification but also for notifying each new employee and student, which is not an explicit requirement in the law or the regulations. Curiously, this statement was removed from the 2006 handbook, and there is no other reference to notifying new students and employees in it. It is not clear why this change occurred, but findings from the PSU case indicate that the Department followed the 1997 handbook’s guidance on this point.

In addition to the errors in content, PSU was found to have inadequately distributed the annual notification. Specifically, it did not ensure that all students and employees received the materials. PSU erroneously merged its DFSCA annual notification into its Annual Security Report (ASR) under the Clery Act, which follows a different distribution schedule. As such, the notification was only sent once per calendar year. The Department found this to be inadequate because any new student or employee who arrived at PSU after the annual distribution of the ASR in October did not receive the DFSCA notification. Further, the Department described hypothetical scenarios in which new students, adjunct instructors, or visiting professors came to campus in the summer term. These individuals, who may not have returned to PSU after summer term, would have never received the DFSCA notification, which constitutes the violation. The Department argued that

68 For example, the University of Jamestown excluded descriptions of legal sanctions, health risks, and counseling programs from its notification materials. *See supra* note 61.

69 *Id.* at 39.

70 34 C.F.R. § 86.100.

71 *See supra* note 44 at 33595.

72 *See supra* note 38 at 11.

by not delivering the required information to them, PSU left these individuals vulnerable to drug policy violations because they were not yet familiar with PSU's policies. As a result, PSU was required to:

Develop and implement procedures for ensuring that the required DFSCA materials are distributed to every current student who is enrolled for academic credit as well as every employee of Penn State. Penn State must make provisions for providing a copy of the drug and alcohol prevention program to students who enroll after the initial distribution and for employees who are hired at different times throughout the year.⁷³

Though PSU claimed only a small number of new students enrolled in the summer, the reality is that most institutions of all types now accept new and transfer students throughout the year, not to mention the continuous hiring of employees. IHEs must develop strategies for distributing the notification to all new students and employees—at any point in the year—in addition to the distribution of the notification once per year thereafter.

3. *Methods for Distribution*

Distribution of the notification has been one of the most debated issues of DFSCA compliance. First, the statute only states that the required materials must be distributed to students and employees.⁷⁴ In the regulations, the Department added the words *in writing*, to which “numerous IHEs protested” pointing out “the phrase ‘in writing’ does not appear in the Act.”⁷⁵ In response, it was explained: “the Secretary believes that in order to ensure that each student has access to and can refer to the required materials, they must be in writing.”⁷⁶ Thus, the issue of the medium for distribution—via written materials—was settled early on. This means, for example, that information about alcohol and drugs presented orally at new student orientation cannot suffice as the DFSCA annual notification.

The method for distributing the notifications has evolved with technological advances. Sending the materials in the mail or including them with other required handouts in new student or employee orientations were commonly employed early methods, but even in the 1997 handbook, email was acknowledged as a feasible option.⁷⁷ The 2006 handbook, however, took a more cautious approach to email:

The Department of Education has not developed official policy on allowing electronic dissemination in fulfillment of the requirement that IHEs must distribute their [alcohol and other drug] annual notification in writing. That is not to say that colleges and universities cannot use electronic dissemination, however; if they choose to do so, they must ensure they can provide reasonable assurance to the Department (if audited) that

73 See supra note 40 at 169.

74 20 U.S.C. § 1011i(a) (2017).

75 See supra note 44 at 33595.

76 *Id.*

77 See supra note 38 at 11.

this method of dissemination ensures distribution to all students and employees.⁷⁸

Though the PSU letter did not address the email issue, a letter to Occidental College in 2017 did:⁷⁹

An institution may distribute the annual disclosure by electronic mail if it wishes to do so. The method for such a distribution would require the institution to post program materials on its website and then send an e-mail message to each mandatory recipient that includes a direct link to the document.⁸⁰

This statement by the Department may be the first to provide clear instructions on how to use email to deliver the annual notification.

A related subject of confusion is what it means to “ensure” distribution to students and employees—“ensure” being a term used repeatedly in both handbooks.⁸¹ It was acknowledged that while IHEs must ensure that students and employees *receive* the notification, IHEs do not have to ensure that recipients *read* the materials. Instead, both handbooks offer advice on how to encourage students and employees to read the policy notice. Nowhere in the PSU letters did the Department require that PSU ensure that recipients read the notification. What is clear, however, is that IHEs must actively distribute the notification in some form such that each person receives the policies. Institutions cannot use a passive approach in assuming that all students or employees will seek to find the information of their own volition. As the 1997 handbook states: “The Department of Education has stated that merely making the materials available to those who wish to take them does not satisfy the requirements of the Regulations.”⁸² Therefore, IHEs cannot satisfy the distribution requirements by putting the notification on websites,⁸³ bulletin boards, or in handbooks,⁸⁴ alone.

B. Biennial Review

The biennial review constitutes the largest administrative task for IHEs. Generally, it entails a review of policies and programs every two years, and as shown next, the Department has expressed increasingly high expectations for the quality of biennial review reports.

78 See supra note 39 at 10.

79 See supra note 62.

80 *Id* at 52.

81 See supra notes 38 & 39.

82 See supra note 38 at 11.

83 “Cotter College posted the DAAPP on its website, but did not ensure that it was actively provided to all of its students and employees...” See supra note 63, at 3.

84 “While Jamestown chose to embed portions indicative of DAAPP disclosures in student and staff handbooks, this decision failed to meet the Federal requirement...” See supra note 61 at 39.

1. Content

The biennial review is a mandated evaluation process that requires IHEs to track the drug-related violations that occur on campus and to study the effectiveness of its programs. The DFSCA statute requires that each IHE conduct a biennial review to:

- (A) determine the program’s effectiveness and implement changes to the program if the changes are needed;
- (B) determine the number of drug and alcohol-related violations and fatalities that—
 - (i) occur on the institution’s campus ... or as part of any of the institution’s activities; and (ii) are reported to campus officials;
- (C) determine the number and type of sanctions ... that are imposed by the institution as a result of drug and alcohol-related violations and fatalities on the institution’s campus or as part of any of the institution’s activities; and
- (D) ensure that the sanctions ... are consistently enforced.⁸⁵

Paragraphs (A) and (D) are original to the 1989 statute, but (B) and (C) were added by the 2008 Higher Education Opportunity Act,⁸⁶ which was after the 2006 handbook was published. The federal regulations were never updated with this amendment,⁸⁷ so no guidance has been promulgated for (B) and (C).

Concerning paragraph (A), on the definition of effectiveness, the Federal Register entry states: “the Secretary does not specify particular criteria or measures to gauge program effectiveness beyond requiring that evaluations of program effectiveness do not rely solely on anecdotal observations.”⁸⁸ While the 1997 handbook reiterates this point and encourages IHEs to determine their own measures for evaluating program effectiveness,⁸⁹ the 2006 handbook offers specific standards. The handbook outlines “principles of effectiveness” established in 1998 by the Department’s Office of Safe and Drug-Free Schools.⁹⁰ These principles are considerably more specific and increase the level of sophistication required of an IHE’s program:

- Design programs based on a thorough needs assessment of objective data.
- Establish a set of measurable goals and objectives linked to identified needs.
- Implement prevention activities that research or evaluation have shown to be effective in preventing high-risk drinking or violent behavior.

85 20 U.S.C. § 1011i(a)(2) (2017).

86 Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, 122 Stat. 3093.

87 34 C.F.R. § 86.100 (b) (2017).

88 *See supra* note 44 at 33597 (“Meaning of ‘Effectiveness’”).

89 *See supra* note 38 at 15.

90 *See supra* note 39 at 19.

- Use evaluation results to refine, improve, and strengthen the program and refine goals and objectives as appropriate.⁹¹

The Department seemed to follow these more stringent guidelines in its review of PSU. Though PSU submitted some documentation of its programs, including compliance checklists, the Department concluded the university “did not conduct a single biennial review that meets the requirements of the regulations.”⁹² The required action statement for PSU reflects the need for rigorous evaluation and data collection methods:

Conduct a biennial review to measure the effectiveness of its drug and alcohol prevention programs. Penn State must describe the research methods and data analysis tools that will be used to determine the effectiveness of the program as well as the responsible official or office that will conduct the review. The biennial report must address how Penn State University will ensure consistency of its enforcement of its disciplinary sanctions.⁹³

Paragraph (A) also requires institutions to implement changes based on the results of the program evaluation. Thus, the evaluation is not a passive task that can be completed, documented, and shelved. Rather, the strengths, weaknesses, and recommendations for changes should be described in the biennial report.⁹⁴ Over the following two years, administrators should then implement the program and policy recommendations and highlight improvements in the next biennial report.

The newer requirements of paragraphs (B) and (C) require the collection of statistics. IHEs must track the number of alcohol or drug related fatalities and document it in the biennial report. In addition, IHEs must track all employee and student disciplinary incidents related to alcohol or drug policy violations, such that the number and type of sanctions administered in response to those violations or fatalities can be documented in the biennial report.

Finally, regarding paragraph (D), ensuring that sanctions against policy violators are consistently enforced is arguably the clearest signature of the policy’s original intent. In the spirit of cracking down on drug crimes, IHEs must “treat similarly situated offenders in a similar manner,”⁹⁵ suggesting that two employees, or two students, of similar status at a university should receive similar sanctions for similar policy violations. It is, therefore, the task of the program evaluators to collect the necessary data that would reveal any disparities in the consistency of sanctions enforcement. Post-enactment guidance is short on details regarding how IHEs can measure enforcement consistency. The 1997 and 2006 handbooks designate less than one half page on the subject, giving divergent examples that range from a detailed case-by-case analysis to a broad report documenting

91 *Id.*

92 *See supra* note 40 at 168.

93 *Id.* at 169.

94 *See supra* note 39 at 16.

95 *See supra* note 44 at 33597.

departmental IHE efforts, staff levels of expertise, and an accounting of percentages of time and budget the IHE spent on enforcement.⁹⁶

In addition to the four objectives of the biennial review stated in the regulations, the handbooks suggest that a “thorough” report should also contain several other elements,⁹⁷ which are reflected in the Department’s instructions for PSU:

[T]he University must ensure that its next biennial review is a comprehensive and substantive assessment of the [Drug and Alcohol Abuse Prevention Program’s]⁹⁸ effectiveness. The review must include an evaluation of the *goals and objectives* of Penn State’s substance abuse programs. University officials must also carefully consider the *strengths and weaknesses* of the program as well as the efficacy of the policies and procedures that underlie it. Care must be taken to ensure that the review process does not become a conclusory ratification of existing policy. The content of Penn State’s reports must be *sufficiently detailed* and all findings and recommendations must be supported by *valid evidence*.⁹⁹

In summary, the biennial review is a complex program evaluation process requiring considerable data collection efforts and careful evaluation of outcomes. Over time, the sources seem to show growing expectations for the quality of biennial reviews.

2. Records

After an IHE conducts its biennial review, it must produce a record of its findings. There has been debate over whether this record must be in the form of a report. Though neither the statute nor the regulations contain the word “report,” the term “biennial report” was introduced and used throughout both handbooks. Furthermore, the Department declared in the PSU letter: “The IHE must prepare a report of findings and maintain its biennial review report and supporting materials and make them available to the Department upon request.”¹⁰⁰ It seems, therefore, that IHEs must create a written report of the biennial review findings.

96 See supra note 39 at 19.

97 See supra note 38 at 14.

98 “DAAPP” (Drug and Alcohol Abuse Prevention Program) is the Department’s short-hand term for an institution’s alcohol and drug policies and programs. In the Department’s language, the DAAPP is what must be evaluated for effectiveness every two years, and the DAAPP must be distributed to all students and employees annually. The full term comes from the DFSCA statute, though the Department appears to have begun using the acronym in its letters to colleges around 2013. See Letter from Douglas Parrott, Dir., School Participation Div., Fed. Stud. Aid., to Sylvia Jenkins, Pres., Moraine Valley Com. Col. (Dec. 6, 2013), (OPE-ID 00769200), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/MoraineValleyCC_IL_007692_12_06_2013_FPRD.pdf.

99 See supra note 40 at 175 (emphasis added).

100 *Id.* at 164.

How long an IHE must maintain that record is the subject of some confusion. The statute makes no mention of records retention, but the regulations state that an IHE must maintain its records of the annual notification, the biennial review report, and “any other records reasonably related to the IHE’s compliance with the [DFSCA]”¹⁰¹ “for three years after the fiscal year in which the record was created.”¹⁰²

In its investigation of PSU, the Department requested copies of biennial reports dating back to 1998. When the Department determined that none of the documents provided by PSU were sufficient, PSU cited the three-year records retention policy and asserted “that it was only responsible for records from 2008 to 2010.”¹⁰³ Calling this assertion “incorrect,” the Department cited the DFSCA regulation that states:

If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.¹⁰⁴

This response, though, is somewhat puzzling. If IHEs are only required to maintain records for three years, how can the Department in 2011 have expected PSU to have kept records dating back to 1998? Apparently, PSU “informed the Department in 2011 that it possessed records from the early 1990’s and provided some data back to the 1980’s.”¹⁰⁵ This admission appears to have made PSU accountable for its biennial review reports for the entire period of review, despite the records retention policy.

C. Purpose

A final subject of analysis relates less to compliance tasks and more to variation in expressions of the DFSCA’s purpose. As described in the legislative history section, the DFSCA was one of many federal policies that sought to crack down on illegal drugs—in this case, on college campuses. The 1989 amendments were triggered by the Bush Administration’s accusation that “most colleges pay lip service to the war on drugs,”¹⁰⁶ thus asserting: “The thirteen million students at our institutions of higher learning should know...that society will not tolerate the use of drugs.”¹⁰⁷

101 34 C.F.R. § 86.103(b)(1)(ii) (2017).

102 34 C.F.R. § 86.103(b)(1) (2017).

103 *See supra* note 40 at 171.

104 34 C.F.R. § 86.103(b)(2) (2017).

105 *See supra* note 40 at 171.

106 *See supra* note 12 at 52.

107 *Id.*

The drug-war language all but disappeared in the handbooks, opting instead for a broader approach to the DFSCA: “Complying with the spirit, and not just the letter, of the law provides significant benefits for the school and its students.”¹⁰⁸ The 2006 handbook conspicuously presents the DFSCA not as anti-drug crime policy but instead as substance abuse intervention policy by “recognizing the serious effects of [alcohol and other drug] abuse on the academic performance and, more generally, on the well-being of [IHE] students.”¹⁰⁹ While both the anti-crime and pro-wellness missions of DFSCA can coexist, the difference in tone is striking.

A final expression of purpose in the PSU letter adds a contemporary flavor to the DFSCA. The concluding paragraph on the section about noncompliance contains a poignant assertion about the relevance of DFSCA in today’s higher education environment:

Failure to comply with the DFSCA’s [drug and alcohol abuse prevention program] requirements deprives students and employees of important information regarding the educational, disciplinary, health, and legal consequences of illegal drug use and alcohol abuse. Failure to comply with the biennial review requirements also deprives the institution of important information about the effectiveness of its own drug and alcohol programs. Such failures may contribute to increased drug and alcohol abuse as well as an increase in drug and alcohol-related violent crime.¹¹⁰

Reading between the lines, “alcohol-related violent crime” appears to be a reference to the burgeoning sexual assault crisis in higher education. Though no supporting evidence is cited, this statement suggests that when IHEs fail to comply with the DFSCA, the unintended consequence may be an increase in sexual assaults. Compliance with the DFSCA, therefore, may no longer be just about curbing drug crimes; it may be also about preventing sexual violence.

VI. Compliance

This comparative analysis of sources on the Drug-Free Schools and Communities Act between 1989 and the present revealed shifts over time in the interpretation of the law’s requirements for higher education institutions. These shifts have immediate practical implications for the campus administrators responsible for implementing the DFSCA, especially given the most substantive guidance from the case of PSU. An updated compliance manual from the Department of Education is greatly needed, which we hope is a near-future possibility. In the meantime, we offer the following recommendations on complying with the DFSCA:

108 *See supra* note 38 at 1.

109 *See supra* note 39 at 1.

110 *See supra* note 40 at 169. This statement has become a boilerplate that the Department commonly inserts in its program review letters, including those of Occidental College, South Carolina State University, University of Jamestown, and University of St. Thomas, all published in 2017, available at <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports>

1. Writing a complete notification that contains descriptions of the required components is the first step in improving compliance. This information, as suggested in the handbooks, should be easy to read, informative, and engaging to encourage readership. To avoid conflating the Clery Act's Annual Security Report with the DFSCA's annual notification, institutions should create separate, complete notifications.¹¹¹ The annual notification content should be included in the biennial review, either as part of the text of the report or as an appendix.¹¹²
2. Once the content is written, a plan is needed for distributing the notification. This plan must ensure that all new employees and students receive the notification at the point they join a campus, followed by annual distribution thereafter. Following the PSU case, the annual notification should be distributed separately from and on a different schedule than the Clery Act Annual Security Report. The problem of annual notification delivery is a technical one, and campuses are encouraged to consult with information technology professionals for electronic messaging solutions. For example, an institution might deliver the initial notification to all new employees automatically via email upon the creation of their institutional email account, at any time during the year. Then, another email might be sent to all employees on a selected date once per year to serve as the subsequent annual notification. For students, a new student might receive the initial notification email automatically after enrolling in courses for the first time in a given academic year. This ensures that students who enroll throughout the year get the notification. At the beginning of the next academic year, the process begins again, and any student, new or returning, would receive the notification upon enrolling. The simpler option may be to send the notice to all students at the beginning of every semester, though this is not required and risks deluging students with emails. Whatever the method, a detailed description of distribution methods should be included in the biennial review.¹¹³

111 The Clery Act (*see supra* note 52) also requires that a description of alcohol or drug abuse education programs be provided in the Annual Security Report. The Clery Act handbook states that institutions can cross-reference their DFSCA materials for this section of the Annual Security Report. In practical terms, this likely means that institutions may copy the description of programs from the DFSCA annual notification into the Annual Security Report, assuming the description meets the standards of both laws. It does *not* mean that a description of alcohol and drug programs in the Annual Security Report will satisfy the DFSCA's notification requirements for that element. *See* U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, 2016 EDITION AT 7-8 (2016), <http://www2.ed.gov/admins/lead/safety/handbook.pdf>.

112 *See supra* note 39 at 16.

113 *Id.* In addition, a reviewer wondered about whether institutions should keep track of the lists of individuals to whom the annual notification emails were sent. This point has not been addressed in previous guidance materials or program review letters. Perhaps saving the email lists and comparing them to lists of registered students and employees is an efficient and precise way for the biennial reviewers to determine whether everyone received the annual notification. After all, as the reviewer pointed out, an all-college listserv likely changes daily as employees and students come and go. This is an issue that deserves some thought, and to reiterate, whatever methods are chosen should be documented in the biennial report.

3. The biennial review is a complex research task that requires considerable planning. As recommended in the handbooks, assembling a committee of qualified campus professionals may be the best way to accomplish the task. An interdisciplinary committee ensures a mixture of expertise in handling complex compliance tasks, including writing policies, distributing policies, implementing effective alcohol and drug programs, conducting evaluations, and ensuring legal compliance. Campus administrators would likely benefit from enlisting the support of faculty from the fields of public policy, health sciences, or behavioral sciences to lead the evaluations of programs and sanctions enforcement. Improving the quality of the biennial review entails: collecting better data on sanctions administered to employee and student offenders; conducting a more thorough inventory of programs and policies; designing rigorous evaluations that yield evidence of program outcomes; thoroughly analyzing the strengths and weaknesses of programs and policies; and committing to implementing the recommended changes.
4. After conducting the biennial review, a comprehensive, written report on the findings should be prepared, dated,¹¹⁴ and signed by the institution's president. It should be made readily available to auditors from the Department of Education and to any person who requests to see it.¹¹⁵ The report should be kept at least three years, but it may be wise to maintain the record longer.¹¹⁶ Though not required by law, posting the report on an institutional website demonstrates institutional transparency.
5. As campuses struggle to manage the increasingly complex task of Title IX compliance, an opportunity for cross-campus collaboration is presented. If improved compliance with the DFSCA is one solution to reducing campus sex crimes, the merger of Title IX and DFSCA compliance efforts could be beneficial. Title IX coordinators and DFSCA administrators should work together to find policy and program solutions that fulfil both purposes. For example, the implementation of evidence-based alcohol and drug prevention programs that reduce substance-involved perpetration and victimization is an accomplishment for both camps.

114 See supra note 40 at 168.

115 34 C.F.R. § 86.103(a) (2017).

116 We hesitate to give definitive advice on whether to keep the biennial review report for longer than three years. There are many overlapping issues that should be considered. First, institutions may be subject to institutional or state records retention policies that compel the maintenance of the biennial report for longer than three years. Second, in the spirit of continuous improvement, biennial reports are historical records that can be used in future reports when considering longitudinal trends and progress. On the other hand, an institution may not want to keep the reports longer than required if they contain evidence of non-compliance for which they may be found in violation. Campus attorneys must think through these issues, and others, when deciding for how long to keep the biennial report.

VII. Limitations

This paper addresses in detail several of the major requirements for DFSCA compliance, but it did not, however, present all of them. Readers are encouraged to learn more about program certification, drug and alcohol abuse prevention program requirements, penalties for violations, and the administrative procedures for appealing penalties. The analysis presented above relies on the primary sources, other sources, and the authors' professional experience working with DFSCA compliance. The advice presented should not be construed as legal advice, and readers should consult their institution's legal counsel when making decisions about how to comply with the DFSCA. Finally, this analysis is limited by time and context. If the Department of Education continues its pace of investigating institutions for DFSCA compliance, each new decision letter could offer new guidance that affects the conclusions drawn in this paper. Readers should carefully watch how the new administration handles DFSCA enforcement.

VIII. Conclusion

The Drug-Free Schools and Communities Act of 1989 requires higher education institutions to implement and evaluate a drug and alcohol abuse prevention program. Many institutions do not comply with the federal statute, reports show, but the U.S. Department of Education has recently engaged in increased enforcement efforts. No case provides more timely insight into this topic than the investigation of Pennsylvania State University. For higher education administrators, it is time to learn more about the DFSCA and to improve compliance.

In this paper, we conducted a comparative content analysis of DFSCA sources to understand how interpretations of the original statute evolved over time. Specifically, we found conspicuous shifts in expressions of the statute's purpose – from drug war policy to substance abuse intervention policy. Regarding the annual notification, we uncovered debates about who must receive the notification, when they must receive it, and how it should be distributed. Regarding the biennial review, we found burgeoning expectations for the quality of the program evaluation and written report. Taken together, the misunderstandings resulting from these ever-changing interpretations might help to explain why so many colleges are shown to be noncompliant.

This analysis offers a then and now perspective on the Drug-Free Schools and Communities Act, which has gone largely unstudied in the legal and higher education literatures. For the campus professionals who must implement its requirements, we recommended compliance strategies based on the most defensible position of the available sources. Interpretations of the law have changed and will continue to change, and higher education practitioners must stay current on how each subsequent U.S. Department of Education chooses to enforce it.