

Department of Education Issues Final Regulations on Campus Sex Offense Reporting and Training, While Leaving Some Key Issues Unresolved

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On Monday, the Department of Education published final regulations on how colleges and universities should prevent, report, and respond to sexual offenses on campus. These regulations interpret changes recently made by Congress to the Jeanne Clery Disclosure of Campus Crimes Statistics Act, which require colleges and universities to compile and disclose statistics for incidents of dating violence, domestic violence, sexual assault, and stalking.

The regulations apply to all colleges and universities that participate in federal financial aid programs. Even though the regulations will formally take effect on July 1, 2015, schools were earlier instructed to make a good-faith effort to include statistics for dating violence, domestic violence, sexual assault, and stalking in their annual security reports for 2013, which were due on October 1, 2014. While these statistics do not need to be revised to reflect the final regulations, schools must act quickly to ensure compliance. Annual security reports for 2014 must contain complete and accurate disclosures because they will be due after the regulations have gone into effect.

The Clery Act regulations reinforce trends evident in earlier Department of Education guidance. First, they strongly emphasize training. Colleges and universities must offer comprehensive trainings to new students and also provide ongoing programming on sexual assault prevention and awareness to both students and employees. The training must include a statement that the school prohibits “the crimes of dating violence, domestic violence, sexual assault, and stalking”; define those terms as they are used “in the applicable jurisdiction”; provide a definition of consent; provide options for bystander intervention; contain information on risk reduction; and detail the school’s procedures for handling reported offenses. The school must also ensure that personnel who conduct disciplinary proceedings are trained annually on issues related to dating violence, domestic violence, sexual assault, stalking, as well as on “how to conduct investigations and hearings in a way that protect the safety of victims.”

Second, the regulations expand protections based on gender identity and national origin. In April 2014, the Office of Civil Rights released guidance stating that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.” The Clery Act regulations continue this trend by including gender identity within the categories of victims for which hate crimes must be reported. Colleges and universities should expect the Department of Education to continue to emphasize training and student protections based on gender identity in future guidance.

The regulations are also notable for issues that they fail to resolve. Even though they require that colleges and universities train students and employees on the definition of “consent,” the Department of Education decided not to include such a definition in its own regulations. The Department explained this omission by stating that “we were not convinced that it would be helpful to institutions in complying with the Clery Act.” At the same time, it asserted that a definition proposed in earlier draft language (defining “consent” as “the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter”) is a “valid starting point for other efforts,” and it promised to provide additional guidance on this issue “where possible.”

Similarly, even though the regulations require colleges and universities to describe in their annual security reports the standard of evidence – e.g., preponderance, clear and convincing, beyond a reasonable doubt – that is applied during institutional disciplinary proceedings involving alleged sex offenses, the regulations do not specify what that burden of proof should be. The Department did indicate, however, that schools that use a preponderance of the evidence standard “can comply with both title IX and the Clery Act.”

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