

Department of Education Issues Draft Regulation Implementing Campus SaVE's Changes to the Clery Act

The Campus Sexual Violence Elimination (SaVE) Act was enacted as part of the Violence Against Women Reauthorization Act of 2013, and its provisions amend various aspects of the Clery Act dealing with campus safety and security procedures and reporting. Every postsecondary institution participating in Title IV financial aid programs is expected to be in compliance with the amendments, which became effective March 7, 2014.

Pending the results of a negotiated rulemaking process to implement these changes, the Department last May issued preliminary guidance stating: “[W]e expect institutions to make good faith effort to comply with the statutory requirements in accordance with the statutory effective date.” Just recently, the Department issued a draft regulation implementing these changes, which was discussed with the members of the negotiating committee on February 24 and 25, 2014. A third round of negotiations is scheduled for March 31-April 1, 2014, so it is likely that the regulations will not be finalized until much later this year. Nevertheless, this draft should be useful to institutions as they finish their preparations to become compliant with Campus SaVE's new requirements. A full text of the draft regulation may be found at: <http://www2.ed.gov/poliwas the subject cy/highered/reg/hearulemaking/2012/vawa-2draftregs.pdf>.

As further explained below, Campus SaVE adds requirements relating to the collection of crime statistics, policies and training aimed at reducing incidents of sexual violence on campus, the rights of victims of sexual violence, and the procedures applicable to student disciplinary proceedings involving allegations of sexual violence.

One of the new requirements is for institutions to add to the list of crime statistics disclosed in their annual security reports incidents of domestic violence, dating violence, sexual assault and stalking that occurred on the institution's Clery geography and were reported to its campus security authorities. Also new is the addition of "national origin" and "gender identity" to the list of categories for which statistics on hate crimes must be reported.

The amendments also require institutions to have a statement of policy in their annual security report that includes:

A statement that the institution prohibits acts of domestic or dating violence, sexual assault and stalking;

The definition of these offenses in the institution's jurisdiction;

The definition of consent in the institution's jurisdiction as it relates to sexual offenses;

"Safe and positive" options a bystander may take to "prevent harm or intervene" in situations of potential sexual violence;

Information to aid in recognizing signs of abusive behavior and to help one avoid being a victim of sexual violence;

Information on the institution's policies and procedures for responding to acts of sexual violence; and

A description of the institution's prevention and awareness programs.

The draft regulation makes clear that the institution is to have both a "primary prevention and awareness program" for new students and employees and an "ongoing prevention and awareness campaign" for all students and employees. Moreover, it goes into some detail in explaining what is meant by a "primary prevention program" and an "awareness program."

The amendments also prescribe certain standards for investigating allegations of sexual violence and conducting student disciplinary proceedings as well as the rights of victims of sexual violence. For the most part, the standards and rights follow the guidance previously given by the Office for Civil Rights, but they are now codified in law. Among the notable additions are that victims must be notified of their rights and options *in writing* and the notification must include the rights of the victim and the responsibility of the institution regarding protective, no-contact, restraining or similar orders issued by a court. Also, the regulation makes clear that both parties to a disciplinary proceeding may have an advisor present to provide support "or counsel" and that the institution may not limit the choice of advisor for either party. Thus, institutions will not be able to prohibit the presence of an attorney in

their proceedings. The draft regulation, however, would still permit institutions to establish limits regarding the extent to which an advisor/counsel may participate in the proceeding.

Other noteworthy information in the draft regulation includes:

Guidance for how to report these new crimes in the annual security report's table of crime statistics;

Guidance for how to record incidents of stalking when multiple acts are involved;

An exception for acts of sexual assault to the FBI hierarchy rule for counting crimes when more than one offense is committed in a single incident; and

Adding options for changes in "transportation" and "working situations" to the changes in academic and living arrangements of which victims of sexual assault must be advised.

What This Means to You

The Department of Education can assess a penalty of up to \$37,500 for each violation of these and other provisions of the Clery Act. Therefore, it is important that institutions use this draft regulation as additional guidance in making good-faith efforts to comply with changes to the Clery Act resulting from Campus SaVE pending the Department's promulgation of its final rule on this matter. We will continue to monitor the Department's actions and will provide additional alerts as developments occur.

Contact Us

If you have questions about this issue or other education issues, contact your Husch Blackwell attorney or any attorney in our Higher Education group.