2019

Insights into an Ever-Changing Landscape at the U.S. Department of Education's Office for Civil Rights

RISK MANAGEMENT WEDNESDAYS

Phil Catanzano
February 26, 2019

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Agenda

- Title IX Regulations Update
  - What to expect next in the process?
  - What can the VAWA amendment process teach us?
- Case Processing Manual Changes
  - Changes to 302 process
  - First Amendment considerations
  - Change in appeal process
  - Mass filer provision removed
- Web Accessibility Updates
- Questions on These or Other Topics Welcome!

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Title IX Notice and Comment Process

- Notice and comment process began on Nov. 29
- Federal Register: "agencies will specify a comment period ranging from 30-60 days…but the time period can vary. For complex rulemakings, agencies may provide for longer timer periods, such as 180 days or more. Agencies can also use shorter comment periods when that can be justified." (Emphasis added)
- U.S. Dept. of Education provided 60 days…over the holidays (after mid-term elections)
- Government shutdown caused federal register website to go dark for 2 days; extended 2 days

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Proposed Regulations

On a high level, the Proposed Regulations included the following:

- The U.S. Department of Education claimed that that changes proposed in the 149-page document would save an estimated $286 million to $368 million over the next decade, **while also ensuring "fair, reliable procedures that provide adequate due-process protections for those involved in grievance processes**."
- **A person accused of sexual misconduct would be guaranteed the right to cross-examine the accuser.** The questioning would have to be done in a live hearing by a lawyer or other adviser, but the parties could be in separate rooms, using technology if needed. Obama-era guidance discouraged direct cross-examination because of its potential to re-traumatize victims.
- **Responsibility to investigate would be limited to cases in which there are formal complaints and the alleged incidents happen on campus or within an educational program or activity.** Would not cover behavior happening just off campus.

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Proposed Regulations

- **The definition of sexual harassment colleges are required to act on would be narrower.** The new rules would define sexual harassment to include "*unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity*." The Obama administration defined harassment more broadly as "*unwelcome conduct of a sexual nature*."
- **Institutions would have the option of using a higher standard of proof than "preponderance of the evidence" standard.** Note: 2017 Guidance required consistent standards across processes.
- **Institutions would have more leeway to use mediation and other informal resolution procedures.** The proposed regulations say colleges may opt for an informal resolution at any time, provided that both parties voluntarily agree to it.
- Groups across the spectrum filed comments: **ACE, ACLU, AICUM, BARCC, FIRE, VRLC,** as well as institutions filing separately.

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What Happens Now?

DOE must respond to comments that are relevant and significant:

- "[A]n agency must demonstrate the rationality of its decision-making process by responding to those comments that are *relevant and significant*." Cement Kiln Recyc. Coal. v. E.P.A., 493 F.3d 207, 225 (D.C. Cir. 2007)
- "[C]omments *must be significant enough to step over a threshold requirement of materiality* before any lack of agency response or consideration becomes of concern." Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973)
- "Although the [agency] is not required 'to discuss every item of fact or opinion included in the submissions' it receives in response to a Notice of Proposed Rulemaking…, it *must respond to those 'comments which, if true, ... would require a change in [the] proposed rule*.'" Louisiana Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003).

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But It's a Low Bar for Response

A final rule can be invalidated on the grounds that the agency failed to respond to relevant and significant comments, but it's a low bar.

- The failure to respond to comments is *grounds for reversal only if it reveals that the agency's decision was not based on consideration of the relevant factors.* Am. Min. Cong. v. U.S. E.P.A., 965 F.2d 759, 771 (9th Cir. 1992)
- "We must uphold the [agency's] determinations so long as the *agency engaged in reasoned decisionmaking and its decision is adequately explained and supported by the record*." Clark Cty., Nev. v. F.A.A., 522 F.3d 437, 441 (D.C. Cir. 2008)
- "[T]he key to whether an agency's procedural error in promulgating a rule is harmless error hinges not on whether the same rule would have issued absent the error, *but whether the affected parties had sufficient opportunity to weigh in on the proposed rule*." United States v. Stevenson, 676 F.3d 557, 565 (6th Cir. 2012).

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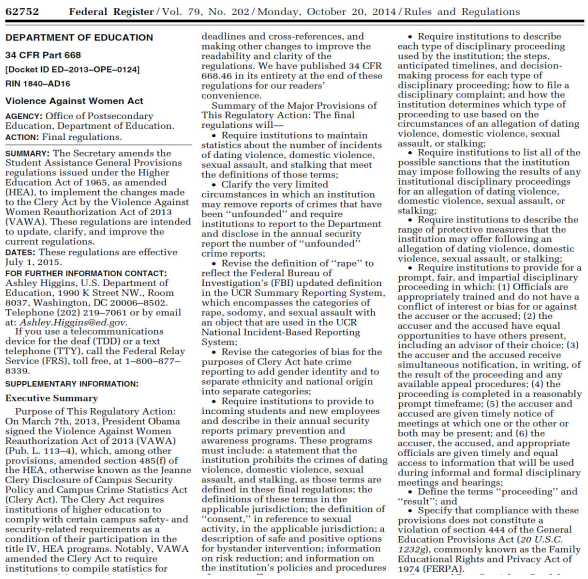
What did the VAWA Amendment Look Like?



62752 Federal Register / Vol. 79, No. 202 / Monday, October 20, 2014 / Rules and Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 668

[Docket ID ED–2013–OPE–0124]

RIN 1840–AD16

Violence Against Women Act

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations issued under the Higher Education Act of 1965, as amended (HEA), to implement the changes made to the Clery Act by the Violence Against Women Reauthorization Act of 2013 (VAWA). These regulations are intended to update, clarify, and improve the current regulations.

DATES: These regulations are effective July 1, 2015.

FOR FURTHER INFORMATION CONTACT: Ashley Higgins, U.S. Department of Education, 1990 K Street NW., Room 8037, Washington, DC 20006–8502. Telephone [202] 219–7061 or by email at: *Ashley.Higgins@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action: On March 7th, 2013, President Obama signed the Violence Against Women Reauthorization Act of 2013 (VAWA) (Pub. L. 113–4), which, among other provisions, amended section 485(f) of the HEA, otherwise known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). The Clery Act requires institutions of higher education to comply with certain campus safety- and security-related requirements as a condition of their participation in the title IV, HEA programs. Notably, VAWA amended the Clery Act to require institutions to compile statistics for deadlines and cross-references, and making other changes to improve the readability and clarity of the regulations. We have published 34 CFR 668.46 in its entirety at the end of these regulations for our readers' convenience.

Summary of the Major Provisions of This Regulatory Action: The final regulations will—

- Require institutions to maintain statistics about the number of incidents of dating violence, domestic violence, sexual assault, and stalking that meet the definitions of those terms;
- Clarify the very limited circumstances in which an institution may remove reports of crimes that have been ''unfounded'' and require institutions to report to the Department and disclose in the annual security report the number of ''unfounded'' crime reports;
- Revise the definition of ''rape'' to reflect the Federal Bureau of Investigation's (FBI) updated definition in the UCR Summary Reporting System, which encompasses the categories of rape, sodomy, and sexual assault with an object that are used in the UCR National Incident-Based Reporting System;
- Revise the categories of bias for the purposes of Clery Act hate crime reporting to add gender identity and to separate ethnicity and national origin into separate categories;
- Require institutions to provide to incoming students and new employees and describe in their annual security reports primary prevention and awareness programs. These programs must include: a statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking, as those terms are defined in these final regulations; the definitions of these terms in the applicable jurisdiction; the definition of ''consent,'' in reference to sexual activity, in the applicable jurisdiction; a description of safe and positive options for bystander intervention; information on risk reduction; and information on the institution's policies and procedures
- Require institutions to describe each type of disciplinary proceeding used by the institution; the steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding; how to file a disciplinary complaint; and how the institution determines which type of proceeding to use based on the circumstances of an allegation of dating violence, domestic violence, sexual assault, or stalking;
- Require institutions to list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceedings for an allegation of dating violence, domestic violence, sexual assault, or stalking;
- Require institutions to describe the range of protective measures that the institution may offer following an allegation of dating violence, domestic violence, sexual assault, or stalking;
- Require institutions to provide for a prompt, fair, and impartial disciplinary proceeding in which: (1) Officials are appropriately trained and do not have a conflict of interest or bias for or against the accuser or the accused; (2) the accuser and the accused have equal opportunities to have others present, including an advisor of their choice; (3) the accuser and the accused receive simultaneous notification, in writing, of the result of the proceeding and any available appeal procedures; (4) the proceeding is completed in a reasonably prompt timeframe; (5) the accuser and accused are given timely notice of meetings at which one or the other or both may be present; and (6) the accuser, the accused, and appropriate officials are given timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings;
- Define the terms ''proceeding'' and ''result''; and
- Specify that compliance with these provisions does not constitute a violation of section 444 of the General Education Provisions Act (*20 U.S.C. 1232g*), commonly known as the Family Educational Rights and Privacy Act of 1974 (FERPA).

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Lessons Learned from VAWA Amendment

- VAWA: **2,200** public comments, plus a submitted petition with **3,600 signatures** expressing support for VAWA Amendments
- Title IX: **104,367** public comments. (*Note difference between static federal register site and www.regulations.gov.)
- Comments ranged from the substantive to the personal:
  - Many comments discussed definition of sexual harassment, limitations on campus geography, and the live hearing and cross-examination requirements.
  - "In particular, I am concerned about the rule saying that survivors must talk to specific employees and if they do not go to the certain employees about what they went through, then the school does not have to take action on the issue… If this is enacted, then it can be very difficult for survivors to get the help and justice that they deserve."
  - "If you are not concerned about victims, [Betsy] why not put yourself on equal footing of students by dismissing all your security detail?"
  - "**** you, Betsy!" (Many creative variations.)

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Lessons Learned from VAWA Amendment

- VAWA: comment period opened on June 20, 2014; closed on July 21, 2014 (1 month!); government responded by October 20, 2014 (2 months); regulations effective July 1, 2015, approximately 9 months later (and before a new academic year began).
- Title IX: comments responded to by ????; effective date uncertain. This is where the Administration's actions provide insight:
  - Refusal to accord this issue "complex rulemaking" status; counterpoint: 2 months provided doubled VAWA notice and comment period, but…
  - Bigger changes: VAWA largely applied in a relatively confined space, *i.e.*, additional process for four categories of offenses; new Title IX guidance is arguably a much bigger change.
  - Prior Trump Administration guidance given in September…*after* institutional policies and handbooks are completed and less than a month before Annual Safety and Security Reports due. (To be fair, VAWA was tied more closely to grant years.)
  - Political calendar…

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In the Meantime…

- Title IX and its existing regulations at 34 C.F.R. 106.
- VAWA/Clery Act: Certain cases (sexual assault, domestic violence, stalking, relationship violence) have heightened procedures. Right to advisors, synchronicity in notification, sharing of exact outcome including sanction. This is official regulation; not DCL.
- 2001 Revised Sexual Harassment Guidance: prompt and equitable process, discusses FERPA, discusses the First Amendment, etc.
- OCR's September 2017 Notice and Q&A: focused on flexibility for institutions but also the notions of due process and fairness.
- Challenges persist:
  - Uncertainty grasped at by anyone who doesn't like result of process, complainant or respondent = potentially more litigation not accounted for in government touted "savings"…
  - Lack of clarity for many institutional stakeholders…

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Case Processing Manual Changes

New Section 109 solely focused on the First Amendment to the U.S. Constitution:

- "OCR interprets its statutes and regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. OCR will not interpret any statute or regulation to impinge upon rights protected under the First Amendment or to require [educational institutions] to encroach upon such protected rights."
- Could have substantial impact in cases alleging inappropriate speech that could create a hostile environment on the bases of race, sex or disability, for example. Given the U.S. Supreme Court's historic and broad interpretation of protected "speech" to also include nonspoken forms of speech, such as publishing or demonstrative speech, this provision may also present further considerations for institutions internally reviewing such allegations as they arise.
- Favored issue of new OCR head, Ken Marcus

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Case Processing Manual Changes

Clarity around the Section 302 affirmative response process:

- In the past, 302 resolutions = abbreviated investigation, resolution agreement and much shorter letter of finding to encourage affirmative resolution.
- CPM revisions make clear that 302 resolutions will now include a "summary of the investigation, *including an analysis of the evidence obtained to date and the identified concern(s) that support the need for the provisions of the agreement*." (Emphasis added.)
- Could impact an institution's strategic decision regarding whether and when to request a 302 resolution.

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Case Processing Manual Changes

New appeal provisions in Section 307:

- The revised CPM has added an explicit section on appeals. While this section largely mirrors the language that was traditionally added at the end of OCR's resolution letters, there is one important difference: notice to institutions.
- Revised CPM now states that "OCR will forward a copy of the complainant's appeal form or written statement" to the institution. The institution then "has the option to submit to OCR a response to the complainant's appeal" within 14 days.
- Under past versions of the CPM, OCR would determine the validity of the complainant's appeal without necessarily notifying the institution that it was doing so.

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Case Processing Manual Changes

Finally, the "frequent flyer" provision has been removed:

- March 2018: CPM included Section 108(t), which stated that OCR could dismiss a complaint if it was a "continuation of a pattern of complaints previously filed with OCR by an individual or group against multiple recipients" that, "viewed as a whole, places an unreasonable burden on OCR's resources."
- May 2018: National Federation for the Blind, NAACP, and Council for Parent Advocates and Attorneys sued Department of Education, Betsy DeVos and Candice Jackson over March 2018 changes.
- November 2018: Section 108(t) removed and OCR begins process of re-opening certain cases closed under that provision as complaints or "directed investigations."

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What's Happening with Web Accessibility?

Listening session in December of 2018:

- Still no specific technical requirements for web accessibility compliance under Section 504 or the ADA.
- No clarity with regard to universal tools or assessment benchmarks, but WCAG still most feasible option…but with focus on "access" or "equally effective access."
- Little consistency across OCR offices, but seeking to improve.
- Concerns raised about lack of interactive process opportunity.
- Previous comments by higher education community focused on high priority dynamic content, not 100% accessibility (some technical experts claim 100% accessibility is virtually impossible).
- Notion of a "web accessibility coordinator" raised.
- Sledgehammer approach not working at most institutions.
- "Benefits" of technical assistance…

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What Happens Next?

- Directed investigations already beginning in waves. Unclear what that will look like…
- Factors used by OCR in resolution agreements as focus for determining compliance:
  - Web accessibility policy that identifies technical standards appropriate to the complaint and content at issue
  - Designated web accessibility coordinator or other appropriate oversight
  - Procurement processes
  - Training
  - Audit program
  - Complaint/reporting mechanism

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Self-Assessment Questions

- What is your "website?" More than just www.Institution.edu?
- What happens to archived material? How is it designated?
- Who has responsibility for adding content to the website? Have they been trained on website accessibility?
- Are there policies in place regarding what can be added to a website? Do any of these policies or guidelines address accessibility for people with disabilities?
- Do people with disabilities have a way to report features or content that are inaccessible? Is there a system for following up on such reports?
- Which programs and services are provided online and through distance learning, including those provided through third-party vendors? Are they accessible?

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Pro-Active Steps

- Conduct your own website audit
  - Run website through several accessibility checkers.
  - Check several "layers" deep; don't just look at the home page) and try different functions (*e.g.*, course registration).
- Develop policies that work for your institution and your digital footprint
- Provide appropriate training to various community members, e.g., content developers v. faculty v. others…
- Make sure barrier reporting is simple and straightforward…and checked!
- Select commercial and open source applications with accessibility in mind (including CMS/LMS options).
- Including accessibility requirement as part of contracts with vendors and other content providers. Create procurement policies to make sure this happens consistently.

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Questions/Contact

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About the Presenter and Moderator

Presenter: Phil Catanzano, Senior Counsel, Holland & Knight, LLP

Phil Catanzano is senior counsel at Holland & Knight, LLP, a position he has held since 2015. Prior to joining Holland & Knight, Phil was an attorney at the U.S. Department of Education's Office for Civil Rights for almost a decade, and he also practiced intellectual property law at a large law firm for several years. A primary aspect of Phil's practice is representing institutions involved in investigations or compliance reviews with federal regulators from the U.S. Department of Education and U.S. Department of Justice. Phil has extensive experience in advising clients with regard to Title IX issues on campus, as well as issues impacting individuals with disabilities, including accommodations, physical accessibility, and digital accessibility. Phil also provides training and consultation to institutions on a range of issues. Phil also teaches higher education law at Boston College's Law School and Harvard University's Graduate School of Education and, using this experience, often shares with audiences the practical challenges and benefits of creating an accessible learning environment.

Moderator: Brian Burns Director of Compliance and Risk Management Wentworth Institute of Technology

Brian Burns is currently the director of compliance and risk management at Wentworth Institute of Technology. Brian's career in higher education spans more than 30 years. He began his career on the business side of the house, where he held roles managing budgets, real estate and contracts. He transitioned into risk management in 2003, assuming the dual role of director of risk management / assistant university counsel. His other experience includes directing a division that included internal audit, compliance, risk management and environmental health and safety. Brian holds a BS in Marketing and Management from Northeastern University's D'Amore McKim School of Business and earned his JD from Suffolk University.

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