

TOPIC:

Federal Enforcement of Drug-Free Schools Regulations Likely to Increase

INTRODUCTION:

In a modern take on the tree falling in the forest with no one around to hear it, a recent report by the Department of Education's Office of Inspector General ("OIG") raises the question: What happens when a law is passed by Congress, but no one is around to enforce it? The report focuses on the drug and alcohol prevention program requirements in the Higher Education Act ("HEA"), and finds that in the twelve years between 1998 and 2010, the Department performed "no oversight" of whether colleges and universities were complying with these provisions and that the Department's post-2010 procedures still provide no assurance of institutional compliance. This report and the Department's response to it have led some to believe that enforcement of this previously neglected section of the HEA will ramp up in the near future. [\[1\]](#)

For institutions not in compliance, a likely sanction would be the Department's stipulating an agreement designed to bring the institution into full compliance as soon as feasible, though sanctions can be as severe as requiring repayment or loss of federal funds. [\[2\]](#) For that reason, campus counsel and other administrators should review whether their institution is in full compliance with these drug and alcohol prevention requirements.

This NACUANOTE outlines the drug and alcohol prevention requirements in the HEA and its implementing regulations, summarizes the OIG's report findings and the Department's response to that report, and provides resources to help institutions achieve compliance with these regulations and avoid sanctions by the Department of Education. [\[3\]](#)

DISCUSSION:

I. The "Part 86" Drug and Alcohol Abuse Prevention Requirements

The Higher Education Act of 1965 (as amended by the Safe and Drug-Free Schools and Communities Act of 1994) [\[4\]](#) requires that any institute of higher education receiving federal financial aid must adopt and implement a program to prevent the use of illicit drugs and the abuse of alcohol by students and employees. [\[5\]](#) The Department of Education's regulations at 34 C.F.R. Part 86 ("Part 86") implement this provision, requiring that colleges and universities must 1) distribute certain drug and alcohol prevention information to students and employees every year; and 2) conduct a review of their drug and alcohol prevention programs every other year (a "biennial review").

Distribution of Drug and Alcohol Prevention Information. The information must be distributed annually in writing, and at a minimum must include:

- Standards of conduct prohibiting the unlawful possession, use or distribution of illicit drugs and alcohol;
- Local, state and federal laws and sanctions related to illicit drugs and alcohol;
- The health risks associated with the use of illicit drugs and alcohol;
- Any drug or alcohol counseling, treatment, or other programs available to students and employees; and
- The institution's statement that it will impose disciplinary sanctions on students and employees for violations of drug and alcohol standards of conduct, and a description of those sanctions. [\[6\]](#)

The regulations do not specify how this information must be distributed – other than it must be in writing. The Department has noted that some institutions ensure distribution by including the information in required materials such as orientation packets or student handbooks. [\[7\]](#) While the Department has not developed an official policy on whether electronic dissemination of this information satisfies the regulatory requirements, the Department has stated in guidance that institutions using electronic dissemination must be able to provide reasonable assurance to the Department (if audited) that this method ensures distribution to all students and employees. [\[8\]](#) Thus, while emailing the information to each student and employee may be acceptable, merely posting it to a publicly available website without further action to inform students and employees of that site likely would not be.

Biennial Review. The institution must also conduct a biennial review of its drug and alcohol abuse prevention program in order to determine how effective the program is, and whether the institution needs to implement any changes to the program. Among other things, this requires the institution to determine the number of drug and alcohol-related violations and fatalities that occur on campus or as part of any institutional activity, and the number and type of sanctions imposed as a result of those drug and alcohol-related violations and fatalities. Finally, the institution must ensure through its biennial review that any sanctions are consistently enforced. [\[9\]](#) As with the dissemination of drug and alcohol policy information, the Department does not specify exactly how institutions are to structure or perform their biennial reviews, and gives a great deal of latitude to institutions in this area. Examples of publicly available institutional biennial reviews are included in the Resources section of this NACUANOTE.

All institutions participating in financial aid programs under Title IV of the HEA must certify their compliance with Part 86 through their program participation agreements, and the Department is supposed to confirm compliance with these requirements during Title IV program reviews and also as part of Clery Act compliance reviews.

II. The Office of Inspector General's Report and the Department's Response

Concerned that the Department of Education was not sufficiently monitoring compliance with Part 86, former U.S. Senator Chris Dodd and Representative John Larson requested in December 2010 that

the Department's Office of Inspector General conduct a review of the Department's enforcement efforts. On March 14, 2012, the OIG released its final inspection report. [\[10\]](#)

The report determined that the Department's Office of Postsecondary Education – which was responsible for monitoring the drug and alcohol prevention programs from 1998 until 2010 – performed “no oversight activities” of these programs during those twelve years. In June 2010, oversight responsibility was transferred to the Department's Office of Federal Student Aid (“FSA”), but the report nonetheless found that the processes that FSA developed provided “no assurance” that institutions were in compliance with Part 86.

Taking a sample of 28 reviews performed by the FSA at various colleges and universities, the report found that:

- Just 5 of the 28 reviews correctly identified and reported noncompliance with Part 86.
- 4 of the reviews found that the institution was not in compliance, but failed to document that noncompliance in the final report.
- 18 of the reviews concluded that the institutions were in compliance, but lacked documentation supporting that conclusion.
- 10 reviews indicated the FSA reviewers did not fully understand Part 86 because they found compliance despite documentation to the contrary.

These figures are notable not just for the apparent lack of effective oversight by the Department, but because they indicate that at least 9 – and perhaps more – of the 28 institutions reviewed were not in compliance with the drug and alcohol prevention provisions of the HEA and Part 86.

In light of these findings, the Office of Federal Student Aid responded to the Office of Inspector General, stating that FSA recognizes the serious health and safety threats posed by drug and alcohol abuse on campuses, understands and appreciates the importance of effective monitoring and enforcement of Part 86, and will continue to improve and refine its oversight procedures. [\[11\]](#) FSA noted that it has developed a corrective action plan to quickly implement the recommendations contained in the OIG's report by the end of the current fiscal year. This plan includes:

- Amending and clarifying FSA's procedures to ensure that its reviewers adequately document their review of the institution's compliance with Part 86;
- Providing refresher training to FSA reviewers on Part 86 requirements to include the new review procedures;
- Ensuring that all cases of noncompliance are identified in program review reports; and
- Selecting a sample of institutions that receive federal funds but do not participate in Title IV programs, and reviewing them for compliance with Part 86 requirements.

III. Ensuring Compliance with the Part 86 Requirements

While many institutions with robust compliance procedures in place have no doubt been meeting their Part 86 obligations, the report raises the possibility that a significant number of institutions have not, and will need to review their policies and procedures.

Helpfully, the U.S. Department of Education's Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention has created a comprehensive resource, *Complying with the Drug-Free Schools and Campuses Regulations: A Guide for University and College Administrators*. [\[12\]](#) The Handbook – which can be found in the “Resources” section below – provides 50 pages of guidance, best practices, forms and checklists regarding how to distribute the annual notification, and how to structure and execute the required biennial review of an institution's drug and alcohol abuse prevention program. The Handbook makes clear that campuses are given latitude regarding how they disseminate drug and alcohol prevention information and what form their biennial reviews take, in order to accommodate varying campus types, sizes, and cultures.

CONCLUSION:

While the drug and alcohol prevention program requirements in the Higher Education Act have long been neglected during Department of Education reviews, the Department has stated in no uncertain terms that it will be amending its training programs and procedures to ensure that Department reviewers enforce Part 86 going forward. Campus counsel and other administrators should therefore review the resources below to ensure their institutions are in full compliance with these requirements before their next review, keeping in mind that there are many different ways to achieve compliance in the manner that best suits the institution.

FOOTNOTES:

FN1. See Sara Lipka, *Education Department's Report on Alcohol and Drugs May Prompt Crackdown*, THE CHRONICLE OF HIGHER EDUCATION (April 11, 2012).

FN2. See 34 C.F.R. Part 86.300.

FN3. It should be noted that the Clery Act (20 U.S.C. §1092(f); 34 C.F.R. §668.46, 668.41) also requires that institutions include in their annual Clery report all arrests or referrals for alcohol and drug law violations; policies regarding the possession, use and sale of alcohol and illicit drugs; policies on enforcement of federal and state drug laws; and a description of any drug or alcohol abuse education programs as required under the Higher Education Act. State laws can also impose requirements upon institutions to have drug and alcohol policies, so counsel should be alert to those as well.

FN4. See 20 U.S.C. § 1011i.

FN5. See § 120(a)(1) and (2) of Title I of the HEA.

FN6. See 34 C.F.R. § 86.100.

FN7. See U.S. Department of Education, Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, [*Complying with the Drug-Free Schools and Campuses Regulations: A Guide for University and College Administrators*](#) (2006), at pp. 9-10.

FN8. *Id.*

FN9. See 34 C.F.R. § 86.100; § 120(a)(1) and (2) of Title I of the HEA.

FN110. [Department of Education Inspector General Report on the Department of Education's Process for Ensuring Compliance by Institutions of Higher Education with the Drug and Alcohol Prevention Programs \(ED-OIG/113L0002\) \(and FSA's Response\)](#)

FN111. [Department of Education Inspector General Report on the Department of Education's Process for Ensuring Compliance by Institutions of Higher Education with the Drug and Alcohol Prevention Programs \(ED-OIG/113L0002\) \(and FSA's Response\)](#), at Attachment 2.

FN112. U.S. Department of Education, Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, [*Complying with the Drug-Free Schools and Campuses Regulations: A Guide for University and College Administrators*](#) (2006).

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RESOURCES:

- [20 U.S.C. § 1011i – Drug and Alcohol Abuse Prevention](#)
- [34 C.F.R. Part 86 – Drug and Alcohol Abuse Prevention Regulations](#)
- [Department of Education Inspector General Report on the Department of Education's Process for Ensuring Compliance by Institutions of Higher Education with the Drug and Alcohol Prevention Programs \(ED-OIG/113L0002\) \(and FSA's Response\)](#)
- [U.S. Department of Education, Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, *Complying with the Drug Free Schools and Campuses Regulations: A Guide for University and College Administrators* \(2006\).](#)
- [Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention Website](#)

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