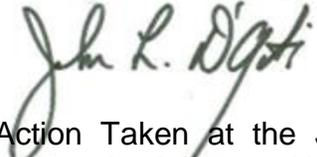




TO: The Honorable the Members of the Board of Regents

FROM: John L. D'Agati 

SUBJECT: Ratification of Action Taken at the July 2017 Regents Meeting to Permanently Adopt a New Part 48 to the Regulations of the Commissioner of Education Related to Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault

DATE: August 31, 2017

AUTHORIZATION(S):



SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents ratify the July 2017 permanent adoption of a new Part 48 of the Regulations of the Commissioner of Education Related to Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault?

Reason(s) for Consideration

Required by State statute (Ch. 76, Laws of 2015).

Proposed Handling

This item is submitted to the Full Board at its September 2017 meeting for ratification of the July 2017 action of the Board of Regents permanently adopting the amendment.

Procedural History

A Notice of Proposed Rule Making was published in the State Register on May 24, 2017. In July 2017, the Board of Regents permanently adopted a new Part 48 of the Regulations of the Commissioner of Education. A copy of the July Regents item is included for your convenience as Attachment A.

Background Information

In July 2017, the Board of Regents permanently adopted a new Part 48 of the Regulations of the Commissioner of Education Related to Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault as required by Chapter 76 of the Laws of 2015. After the adoption of the proposed amendment by the Board of Regents at its July meeting, the Department became aware that one public comment concerning the proposed amendment had been received during the 45-day public comment period required under the State Administrative Procedure Act.¹ The Department reviewed the public comment and prepared an Assessment of Public Comment, which is included as Attachment B. No substantive revisions to the proposed amendment are recommended as a result of the public comment received.

Related Regents Items

May 2017: <http://www.regents.nysed.gov/common/regents/files/517hed1.pdf>

July 2017: <http://www.regents.nysed.gov/common/regents/files/717brca20.pdf>

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That the action taken at the July 2017 Regents meeting to add Part 48 of the Regulations of the Commissioner of Education, effective August 2, 2017, be ratified in all respects.

Timetable for Implementation

The action of the Board of Regents, ratifying the effective date of the adoption of Part 48 of the Regulations of the Commissioner of Education shall take effect immediately.

¹ For a short period of time, and unbeknownst to the Department, the Department experienced technical difficulties whereby incoming emails did not appear in the REGCOMMENTS email box (the depository for email comments on proposed regulations). After the July Regents meeting was held, the Department became aware that a comment had been submitted to the REGCOMMENT email box on the last day of the public comment period. The technical error was subsequently resolved by the Department's Office of Information and Technology Services.



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: The Honorable the Members of the Board of Regents

FROM: John L. D'Agati 

SUBJECT: Proposed Amendment to Add a New Part 48 to the Regulations of the Commissioner of Education Related to Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault

DATE: July 13, 2017

AUTHORIZATION(S): 

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the proposed Part 48 of the Regulations of the Commissioner of Education Related to Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault?

Reason(s) for Consideration

Required by State statute (Ch. 76, Laws of 2015).

Proposed Handling

The proposed amendment is submitted to the Full Board for permanent adoption at the July 2017 Board of Regents meeting (A copy of the proposed amendment is attached).

Procedural History

A Notice of Proposed Rule Making was published in the State Register on May 24, 2017. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

On July 7, 2015, Governor Cuomo signed into law Chapter 76 of the Laws of 2015, Implementation by Colleges and Universities of Sexual Assault, Dating Violence, Domestic Violence and Stalking Prevention and Response Policies and Procedures, known as the “Enough is Enough” statute. This statute requires higher education institutions in New York State to adopt a set of comprehensive procedures and guidelines, including a uniform definition of affirmative consent, a statewide amnesty policy, and expanded access to law enforcement. The statute also requires that institutions annually report aggregate data to the State Education Department concerning reports of domestic violence, dating violence, stalking and sexual assault. The Department was required to create a reporting mechanism for these annual data submissions and to issue regulations, developed in consultation with the higher education sectors, concerning the annual data reports.

Education Law §6449, as added by Chapter 76 of the Law of 2015, delineates the following specific data elements that are required to be reported to the Department:

- a. The number of such incidents that were reported to the Title IX Coordinator.
- b. Of those incidents in paragraph a, the number of reporting individuals who sought the institution's judicial or conduct process.
- c. Of those reporting individuals in paragraph b, the number of cases processed through the institution's judicial or conduct process.
- d. Of those cases in paragraph c, the number of respondents who were found responsible through the institution's judicial or conduct process.
- e. Of those cases in paragraph c, the number of respondents who were found not responsible through the institution's judicial or conduct process.
- f. A description of the final sanctions imposed by the institution for each incident for which a respondent was found responsible, as provided in paragraph d, through the institution's judicial or conduct process.
- g. The number of cases in the institution's judicial or conduct process that were closed prior to a final determination after the respondent withdrew from the institution and declined to complete the disciplinary process.
- h. The number of cases in the institution's judicial or conduct process that were closed because the complaint was withdrawn by the reporting individual prior to a final determination.

In December 2016, the Department circulated a discussion draft of the regulations and convened a meeting of representatives of the four higher education

sectors and the New York State Office of Campus Safety to discuss the regulations. During that meeting, and in subsequent email communications with the sector representatives, several suggestions were made for definitions and clarifications that would provide consistency and accuracy in reporting. Many of those suggestions were incorporated into the proposed regulations attached to this item. An additional suggestion from the sector representatives was that the timeline for submission of the annual data reports required by the “Enough is Enough” statute should align with the existing timeline for institutions to submit data required by the federal “Clery Act” under Title IX of federal statute, which are required by October 1st of each year. Consistent with that suggestion, institutions would be required to collect the required “Enough is Enough” data from January 1 – December 31 of each calendar year, beginning with 2018, and submit the required data reports to the Department no later than October 1st of the next year. The first institutional data reports would be required to be submitted to the Department by October 1, 2019. After the submission of the first institutional data reports, the statute also requires the Department to issue a report to the Governor and the Legislature regarding the data collected by the Department.

The Office of Higher Education is working with staff in the Office of Information Technology Services (ITS) to develop an electronic data reporting system for the annual “Enough is Enough” data reports.

Related Regents Items

May 2017: <http://www.regents.nysed.gov/common/regents/files/517hed1.pdf>

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That Part 48 of the Regulations of the Commissioner of Education be amended as submitted, effective August 2, 2017.

Timetable for Implementation

Following the 45-day public comment period required under the State Administrative Procedure Act, the Department received no comments on the proposed amendment. If adopted at the July Regents meeting, the proposed amendment will become effective on August 2, 2017.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305 and 6439 through 6449, as added by Chapter 76 of the Laws of 2015.

A new Part 48, is added to the Regulations of the Commissioner of Education, effective September 27, 2017, to read as follows:

Part 48

Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault

§48.1 Definitions. For purposes of this Part:

(a) Accused shall mean a person accused of a violation who has not yet entered an institution's judicial or conduct process.

(b) Domestic violence, dating violence, stalking and sexual assault shall be defined by each institution in its code of conduct in a manner consistent with applicable federal definitions.

(c) Incident shall mean an incident of domestic violence, dating violence, stalking or sexual assault, where the reporting individual and/or the accused were subject to the code of conduct at the time of the incident.

(d) Institution shall mean any college or university chartered by the Board of Regents or incorporated by special act of the Legislature and that maintains a campus in New York.

(e) Reporting individual shall encompass the terms victim, survivor, complainant, claimant, witness with victim status, and any other term used by an institution to reference an individual who brings forth a report of a violation.

(f) Respondent shall mean a person accused of a violation who has entered an

institution's judicial or conduct process.

(g) Title IX coordinator shall mean the Title IX Coordinator and/or his or her designee or designees.

(h) On campus shall be defined as campus is defined in the Higher Education Act (Clery Act), 20 U.S.C. §1092(f)(6)(A)(ii).

(i) Off campus shall be defined as any location not included in the definition of on campus.

§48.2 Annual Aggregate Data Reporting.

On or before October 1, 2019, and by October 1 of each subsequent year thereafter, institutions shall report to the Department the following information concerning incidents that were reported during the prior calendar year in a form and manner prescribed by the Commissioner:

(a) the following numbers of incidents reported to the Title IX Coordinator (which shall be established based upon the number of reporting individuals, not by the number of the accused or respondents):

(1) the number of incidents that occurred on campus;

(2) the number of incidents that occurred off campus; and

(3) the total of incidents in (1) and (2) above.

(i) of those incidents reported in paragraph (a)(3) of this subdivision:

(a) the number of incidents that the Title IX Coordinator is aware of, that were reported to law enforcement, which shall include, but not be limited to, the State Police;

(b) the number of incidents reported to campus police/campus security/campus public safety; and

(c) the number of incidents that the Title IX Coordinator is aware of, for which the

reporting individual requested referral to additional services through the institution, including counseling, mental health, medical or legal services, whether those services were provided on-campus or through outside service providers.

(b) of those incidents reported in subdivision (a) (3) of this section,

(1) the number of incidents for which the reporting individual sought the institution's judicial or conduct process (which includes incidents for which a reporting individual made a request, in writing or orally, to engage the judicial or conduct process, whether an investigator or hearing model, and those incidents where, pursuant to section 6446(4) of the Education Law, the institution made a determination to pursue the judicial or conduct process without the consent of the reporting individual); and

(2) the number of incidents that are not included in (b)(1) of this section, including those for which there was no institutional jurisdiction over the accused or respondent, and those incidents for which the judicial or conduct process could not otherwise go forward.

(3) the number of incidents for which the reporting individual sought an order of "no contact" with the respondent(s), and the number of "no contact" orders issued.

(c) of those incidents reported in subdivision (b)(1) of this section, the number of cases processed through the institution's judicial or conduct process, (which process shall commence upon a respondent's receipt of a notice of charges pursuant to section 6444(5)(b) of the Education Law);

(d) of those cases in subdivision (c) of this section, the number of respondents who were found responsible through the institution's judicial or conduct process after all levels of appeal were exhausted, which number shall include those cases in which the respondent accepted responsibility at any point in the process;

(e) of those cases in subdivision (c) of this section, the number of respondents who were found not responsible through the institution's judicial or conduct process, or whose

finding of responsibility was overturned on appeal;

(f) a description of the final sanctions imposed by the institution for each incident for which a respondent was found responsible for sexual assault, dating violence, domestic violence or stalking, as provided in subdivision (d) of this section, through the institution's judicial or conduct process, which shall be defined as:

(1) the number of respondents found responsible who were expelled/dismissed from the institution;

(2) the number of respondents found responsible who were suspended from the institution;

(3) the number of respondents found responsible who received sanctions other than expulsion/dismissal or suspension;

(4) the number of respondents found responsible who received a notation added to their official transcript noting a violation of the institutions' code of conduct; and

(5) the number of respondents found responsible who received a notation added to their official transcript noting withdrawal from the institution with conduct charges pending.

(g) the number of cases in the institution's judicial or conduct process that were closed prior to a final determination after the respondent withdrew from the institution and declined to complete the disciplinary process; and

(h) the number of cases in the institution's judicial or conduct process that were closed because the complaint was withdrawn by the reporting individual prior to a final determination or an informal resolution was reached. Such number shall include all cases, regardless of the stage at which the reporting individual withdrew the complaint or the informal resolution was reached.

(i) Additional training information. Institutions may additionally report the number of trainings held by the institution, the number of staff trained, and the number of students

trained during the reporting period.

Attachment B

ASSESSMENT OF PUBLIC COMMENT

8 NYCRR §48

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on May 24, 2017, the State Education Department (SED) received the following comments from one commenter:

1. COMMENT:

Section 48.2(a)(i)(a-c). This section of the proposed regulations is referenced nowhere in the authorizing statute (Article 129-B) nor was it contained in the original proposed regulations by the Department. Inclusion of these requirements is beyond the scope of the legislation and would create an undue recordkeeping burden on colleges and universities.

Moreover, the information sought is not easily defined. Recording the exact time at which law enforcement is notified versus when the Title IX Coordinator is notified can become clouded. In addition, inclusion of this provision could create a situation on campus where college staff members, particularly during off-hours, are debating whom to notify first rather than attend to the needs of students. Ultimately this could do a disservice to a student in distress and lead to less timely notification to law enforcement.

Finally, the data collected for 48.2(a)(i)(c) may not be an accurate reflection of services being utilized by a reporting individual. In many circumstances, colleges and

universities automatically refer reporting individuals to the services outlined in this section, therefore the reporting individual does not need to request such services which makes collection of this data not valuable.

The commenter recommends that this section not be included in the final regulations due to administrative overreach and the incomplete and questionable value of that data that would be collected. Resources expended to respond to this section could better be spent ensuring responsiveness to students.

DEPARTMENT RESPONSE:

The Department believes that including this information in the annual aggregate data reports is consistent with the legislative intent of the statute and will provide information that will help to inform practices and policies on campuses designed to prevent incidents of domestic violence, dating violence, stalking and sexual assault, as well as assist institutions in developing policies and practices designed to facilitate the reporting of such incidents that do take place and the provision of services to reporting individuals. There is no requirement that an institution track the time of notification to law enforcement or to the Title IX Coordinator, or that the Title IX Coordinator know or report whether a report to law enforcement was made prior to or after a report was made to the Title IX Coordinator. No regulatory revision is necessary.

2. COMMENT:

Section 48.2(a)(i) and 48.2(b). Wording is inconsistent between these two parts with (a)(i) reading “of those incidents reported in paragraph (a)(3) of this subdivision”

and (b) reading “of those incidents reported in subdivision (a)(3) of this section” [emphasis added]. It appears the wording is inconsistent and should be corrected.

DEPARTMENT RESPONSE:

The Department agrees with this comment and will make the technical change requested.

3. COMMENT:

Section 48.2(b). The data requested by this section could get overly granular, especially at more suburban and rural colleges and universities with smaller populations, leading to the possibility of potential exposure of parties involved. The commenter urges the Department to exercise extreme caution when handling this information and deciding what to make public in its report to the Executive and Legislature. As always, student safety and privacy should be at the forefront of any decision made.

DEPARTMENT RESPONSE:

The Department agrees with this comment and has processes and procedures in place to ensure that all information and data reported is done in accordance with all applicable privacy laws and regulations. No regulatory revision is necessary.

4. COMMENT:

Section 48.2(b)(3). This requirement for schools to report the number of times a reporting individual sought a “no contact” order by the school is above and beyond the language and scope of the statute. The final legislation that was voted on by the Legislature came after exhaustive deliberations and consultations with a multitude of organizations, including all sectors of higher education, culminating in a detailed piece of legislation with myriad implementation and reporting requirements. To include requirements that go beyond the scope of legislative intent and the actual statute itself leads to legislating via the regulatory process. Accordingly, the commenter urges this part of the proposed regulation be struck.

DEPARTMENT RESPONSE:

The Department believes that including this information in the annual aggregate data reports is consistent with the legislative intent of the statute and will provide information that will help to inform practices and policies on campuses designed to prevent incidents of domestic violence, dating violence, stalking and sexual assault. No regulatory revision is necessary.

5. COMMENT:

Section 48.2(f). As the commenter suggested earlier for section 48.2(b), the exhaustive data requested by this section could get overly granular, especially at smaller colleges and universities, leading to the possibility of exposure of parties involved. The commenter urges the Department to exercise extreme caution when handling this information.

DEPARTMENT RESPONSE:

The Department agrees with this comment and has processes and procedures in place to ensure that all information and data reported is done in accordance with all applicable privacy laws and regulations. No regulatory revision is necessary.

6. COMMENT:

Section 48.2(f)(1-5) and (h). The commenter recommends that the Department combine these categories into one: “cases not closed” and include a drop down menu of choices from which the school can choose.

DEPARTMENT RESPONSE:

The Department will consider this recommendation as it completes the creation of the data reporting system. No regulatory revision is necessary.

7. COMMENT:

Section 48.2(i). The commenter recommends that this part not be included in the final regulations because it goes beyond the statutory language. Additionally, as written this section is subjective and provides no context for the information that may be given. Qualitative responses allow for more discussion and context. For example, a school may have two trainings each year, but those trainings could be for one week each and encompass the entire campus community. The result would be a school reporting two trainings per year but without context it could give the appearance that the school is not taking training seriously.

Responding quickly and appropriately to potential cases of sexual assault is of paramount importance. If the data requested in the proposed regulations, particularly those not contemplated in statute, cannot be shown to demonstrably improve campus safety, the commenter urges they be dropped from the final regulations. Time spent collecting data of questionable value could better be spent serving student needs.

DEPARTMENT RESPONSE:

Whether or not to report information concerning trainings held by an institution is up to each institution and is not required by this section. Institutions can opt not to respond to this section. No regulatory revision is necessary.

8. COMMENT

Responding quickly and appropriately to potential cases of sexual assault is of paramount importance. If the data requested in the proposed regulations, particularly those not contemplated in statute, cannot be shown to demonstrably improve campus safety, the commenter urges they be dropped from the final regulations. Time spent collecting data of questionable value could better be spent serving student needs.

DEPARTMENT RESPONSE:

The Department believes that the information required by this regulation to be included in the annual data reports is consistent with the legislative intent of the statute and will provide information that will help to inform practices and policies on campuses designed to prevent incidents of domestic violence, dating violence, stalking and sexual assault, as well as assist institutions in developing policies and practices designed to facilitate the reporting of such incidents that do take place and the provision of services to reporting individuals. No regulatory revision is necessary.